

4 SCOB [2015] HCD 52

**High Court Division
(Civil Revisional Jurisdiction)**

Civil Revision No. 2485 of 2009
Md. Shajahan Bhuiyan and others
..... Petitioners.

Versus.

Md. Nurul Alam and others
.....Opposite parties.

Mr. Md. Anowar Hossain, Advocate.
..... For the petitioners.
Mr. Khair Ezaz Masud, Advocate.
.... For the opposite parties.

Heard on: 1.9.14, 3.9.14, 15.9.14,
16.9.14,21.9.14, 10.11.14, 12.11.14,
2.12.14 and 7.12.2014.

Judgment on: 30.3.2015.

Present:
Mr. Justice Md. Emdadul Huq

**State Acquisition and Tenancy Act 1950
Section 86 :**

Section 86 of the Act, 1950 clearly provides that a land that has diluvated before the of P.O No. 135 of 1972 (i.e. after April 1956) or that will diluvate in future shall vest in the Government. It follows that irrespective of what ever title or right was acquired by Oli Ullah from the D.S. recorded tenant Zinnat Ali by virtue of the unregistered patta dated 28.1.1931 (Exhibit-ka) and the three rent receipts for the years 1341 to 1362 D.S (Exhibit-Ga-series) it had extinguished as a result of diluvion that took place some time before 1965 i.e. before the Diara Map. It follows that the Government has acquired lawful right to lease out the land that was earlier recorded as D.S. plot No.1657 and 1658. ... (Para 48)

Judgment

Md. Emdadul Huq, J:

1. The Rule issued in this Civil Revision is about sustainability of the judgment and decree dated 14.06.2009 by which the learned Special District Judge, being the Nari-0-Shishu Nirjatan Daman Tribunal, Judge, Noakhali allowed Title Appeal No.57 of 2007 and thereby decreed Title Suit No. 30 of 1996 on reversing the judgment of dismissal dated 17.01.2007 passed by the learned Senior Assistant Judge, Hatiya, Noakhali in the said suit.

2. **Plaintiffs' Case:** The plaintiffs filed the above noted Title Suit for the following four relieves:

(1) declaration of their title to the suit land comprising being 3 (three) parcels of land each measuring 1.50 acres i.e. a total of 4.50 acres as described in item Nos. 1, 2 and 3 of the Ka schedule to the plaint;

(2) declaration that the decree obtained by Oli Ullah, the predecessor of defendants Nos.1-8 in Title Suit No.210 of 1983 of the Court of Munsif, Hatiya, Nokhalia, is illegal and not binding upon the plaintiffs;

(3) declaration that mutation khatian No.398 obtained by the said Oli Ullah in respect of 7.31 acres of land including the suit land as part of Block Dag Nos. 4261 and 4262 is illegal and not binding upon the plaintiffs;

(4) declaration that the suit land recorded in the Diara Survey as being part of the Bora Dail Mouja appertaining to khas khatian No.1 comprising Block Dag Nos. 4261 measuring 48 decimals and Block Dag No.4261 measuring 4.02 acres in the name of defendant No.11, being the Government, is illegal.

3. The plaintiffs claim that item Nos. 1 and 2 of the suit land measuring $2 \times 1.500 = 3.00$ acres is part of District Settlement (D.S) plot No.1657 and 1656 appertaining to D.S. Khatian No.368 of the Mouja Burir Char under P.S. Hatya, District Noakhali.

4. The said D.S. recorded plots and surrounding plots diluvated as a result of cyclonic erosion and subsequently reappeared. So, in the Diara Survey operation of 1969-70, the suit land along with other lands was correctly recorded as part of Block Dag No. 4261 and 4262 in the Khas Khatian No.1 in the name of the Government. However the Mouja was wrongly shown as Bora Dail. In fact this land forms part of Burir Char Mouja.

5. The plaintiffs, as landless people, applied for permanent lease of the khas land in the year 1978-79. The Government functionaries prepared a Khas Mohal Map (K.M Map) of the two Block Dags and identified these Block Dags as land of Mouja Burir Char and divided the Block Dags into a number of smaller plots. Out of these smaller plots, the suit land was identified as Khas Mohal Plot Nos. 21153, 21154 and 21154/1, each measuring 1.50 acres. These three new plots were allotted to plaintiff Nos. 10 and 11 and to the predecessor of plaintiff Nos.1-9 for lease.

6. The Revenue Department officials dealt with the lease matter in three different files opened in 1978-79, and allowed the lease prayers of the said three applicants who finally executed three separate registered kobuliats on the same date 28.06.1979. Thereafter three new khatians were opened in the names of the said three lessees for the said three new plots. Plaintiffs have paid rent for the suit land and have been in possession thereof.

7. However the defendants disclosed that their predecessor Oli Ullah had obtained a decree in respect of the suit land. So, on 06.11.1995, plaintiffs obtained certified copies of the decree and also of the disputed khatian No.398 opened on the basis of the said decree.

8. In the said suit, defendants' predecessor Oli Ullah claimed to be a tenant under the D.S. tenant Zinnat Ali for 7.31 acres of the land of D.S. plot No. 1657 and 1658 appertaining to D.S. Khatian No. 368 by virtue of an unregistered patta dated 28.01.1931. But the interest of the D.S tenant and also of the said under tenant Oli Ullah had extinguished because of the diluvion and the land had vested in the Government.

9. Oli Ullah did not implead the plaintiffs in that suit and suppressed the fact of diluvion and fraudulently obtained the decree. Hence the present suit.

Case of defendants No.1-10:

10. These defendants, in their joint written statement, deny plaintiffs' right, title and possession. They contend that the suit is not maintainable, that it is barred by limitation and it also suffers from the defect of party.

11. The defendants claim that the D.S. recorded tenant Zinnat Ali executed an un-registered patta dated 28.1.1931 on receiving a salami of Tk.70/- and settled D.S plot No.1657 measuring 7.19 acres and plot No.1658 measuring 12 decimals i.e. a total of 7.31 acres to Oliullah being the predecessor of the defendants.

12. The said D.S. recoded land diluvated as a result of river erosion but title of the D.S. tenant and also of Oli Ullah was never lost. But, in the Diara Jariap, the said D.S. recorded land was wrongly shown as part of Block Dag Nos.4262 and 4261 and both these two plots were included in Mouja Bora Dail. The draft khatian for both the plots were recorded in the name of Oli Ullah, but the final khatian was wrongly prepared in the name of the Government as khas khatian No.1.

13. So Oli Ullah filed Title suit No.210 of 1983 against the Government and obtained an ex-parte decree. Thereafter Oli Ullah obtained Mutation Khatian No.398 for his 7.31 acres and the Government functionarises have identified the said 7.31 acres as 7 sub-plots under the said two Block Dags.

14. Defendants Nos.1-8, being the children of Oli Ullah, sold the said 7.31 acres to defendants No.9-10 by registered kabala dated 25.10.1995 and the leters as purchasers, have been possessing that land through bargadars.

Case of Government functionaries (defendant Nos. 11, 12 and 13):

15. The Government of Bangladesh, represented by the Deputy Commissioner, Noakhali and two other Revenue Officers, in their joint written statement, contend that there is no official record to ascertain asto whether the suit land is identical with the land of D.S. plot Nos. 1656 and 1657 or asto whether these plots ever diluvated.

16. They further contend that in the last Diara Survery the suit land along with other lands was correctly recorded as the khas land of the Government in khatian No.1 and that the suit land has been leased out to the plaintiffs after preparation of Khas Mohal Naksha in respect of the two Block Dag Nos.4261 and 4262 and the three new plot numbers as mentioned in the schedule to the plaint have been identified in the Map prepared under Khas Mohal Survey.

17. However these defendants admit that Oli Ullah, being the predecessor of defendant Nos.1-8, obtained an ex-parte decree in Title Suit No.210 of 1983 and that pursuant to the said decree the Revenue office opened Mutation Khatin No.398 for 7.31 acres out of the land of the two Block Dag Nos. 4262 and 4261.

18. Proceeding and decisions of the courts below: The trial court framed 5 issues on (1) maintainability of the suit, (2) limitation, (3) defect of party, (4) plaintiffs' right, title and possession over the suit land and (5) the relieves prayed for by the plaintiffs.

19. At the trial, the plaintiffs produced oral and documentary evidence through 3 (three) witnesses. Their documents were marked as exhibit-1 to 9, Exhibit-10 (series), Exhibit-11 (series) and Exhibit-12.

20. Defendants Nos.11-13, the Government functionaries, produced only oral evidence through a single witness D.W.1 being an employee of the Revenue Department.

21. Defendants Nos. 9 and 10 produced oral and documentary evidence through 5 witnesses (D.W.2-6). Their documents were marked as Exhibit-L, M, N (ϕϕ S), O (ϕϕ S), P, Q (ϕϕ S), R, S (ϕϕ S), T (ϕϕ S).

22. Upon consideration of the evidence on record, the trial court delivered **its first judgment dated 17.01.2004 and decreed the suit**. Against that judgment the defendants Nos.9 and 10 preferred Title Appeal No. 28 of 2004 in which the learned Joint District Judge, by **his judgment dated 16.07.2005 recorded a finding that the suit land had diluvald and reappeared. However the said court set aside the judgment of the trial court and sent the original suit back on remand with specific direction to cause a local investigation** for the purpose of ascertaining the identity of the suit land with the D.S. recorded land.

23. Accordingly local investigation was held by a Civil Court Commissioner (P.W.4) who submitted his report along with a sketch map and proved the same as Exhibit-X.

24. Thereafter the trial court delivered its **second judgment dated 17.01.2007 and dismissed the suit** against which the plaintiffs preferred an appeal and after contested hearing the impugned judgment of reversal was passed which is under challenge in this Revision.

25. **Deliberation at the hearing in Revision:** Mr. Md. Anowar Hossain, the learned Advocate for the petitioner-defendants, submits that the predecessor of the defendants Oli Ullah obtained an ex parte decree in Title Suit No.210 of 1983 with regard to his title and that the defendant Nos.9 and 10, as his successor-in-interest, proved their title in the instant suit by producing all the title documents, namely the D.S. khatian, the unregistered patta dated 28.01.1931 executed by D.S. tenant Zinnat Ali, the rent receipts showing payment of rent by Oli Ullah to the D.S. tenant and other subsequent documents.

26. Mr. Hossain, the learned Advocate, next submits that the said ex-parte decree was passed by a competent court against the Government and the decree has not been set aside by a competent Court and therefore it is binding on the plaintiffs as the lessees under the Government.

27. Mr. Hossain, the learned Advocate, next submits that the lease documents of the plaintiffs were executed on the basis of a Khas Mohal Map allegedly prepared by the Government functionaries without following the legal procedure as laid down in the State Acquisition Rules 1955 and the Land Survey Act, 1877 which require that the draft map must be published for inspection and objection of the people, but the same has not been so published and therefore the leases granted to the plaintiffs on the basis of the said Khas Mahal Map are illegal.

28. Mr. Hossain, the learned Advocate lastly submits that the appellate court failed to consider the above legal and factual aspects and the material documentary evidence and therefore the impugned Judgment and decree is liable to be set aside.

29. **In reply** Mr. Khair Ezaz Masud, the learned Advocate for the opposite party-plaintiffs, submits that the two vital issues in the instant case are (1) whether the suit land ever diluvald and re-appeared and whether the same has vested in the Government and (2)

whether the ex-parte decree obtained by the defendants predecessor Oli Ullah is binding upon the plaintiffs.

30. Mr. Masud, the learned Advocate, next submits that in the first time appeal being Title Appeal No. 28 of 2004 the appellate court in its judgment dated 16.07.2005 recorded a clear finding that the suit land firstly diluvated and then re-appeared and that in the Diara Jariap the Government functionaries identified the suit land and other lands as part of two larger plots being Block Dag Nos. 4161 and 4162 and neither of the parties challenged that finding in a Revision and therefore the trial court was bound by that finding but the trial court failed to consider this legal aspect.

31. Mr. Masud, the learned Advocate next submits that the appellate court, in the said Judgment dated 16.07.2005, recorded further finding with regard to the necessity of ascertaining the point as to whether the land of the said two Block Dags are identical with the D.S. plot Nos. 1657 and 1658 as claimed by the defendants and accordingly directed local investigation and the same has been done by the Civil Court Commissioner with a finding that the suit land is identical with the D.S. plot Nos. 1657 and 1658 which have merged with the land of the said Block Dag Nos. 4261 and 4262.

32. Mr. Masud, the learned Advocate, next submits that since the D.S. plot Nos. 1657 and 1658 as claimed by the defendants had diluvated, it has vested with the Government by virtue of the amended section 86 of the State Acquisition and Tenancy Act 1950 (**the SAT Act, 1950**) and the Government has legal authority to lease out the same and accordingly the plaintiffs lawfully acquired their title by virtue of the lease deeds in 1978-1979.

33. Mr. Masud, the learned Advocate submits that the Government functionaries prepared Khas Mohal Map not under the general provisions of the Lands Survey Act, 1877 but under the instructions contained in Estate Manual and that the said Map was confined only to the plot already recorded in the name of the Government under the general survey operation called Diara Survey and there was no legal necessity to invite objection for preparing such Khas Mohal Map.

34. Mr. Masud, the learned Advocate, next submits that the defendants' predecessor obtained the disputed ex-parte decree in Title Suit No. 210 of 1983 without impleading the plaintiffs as parties, although the plaintiffs had acquired title before institution of the suit and therefore the decree is not binding upon the plaintiffs.

35. Mr. Masud, the learned Advocate lastly submits that the plaintiffs could prove their title and possession by producing sufficient oral and documentary evidence and that the appellate court legally passed the impugned judgment and decree and therefore the Rule should be discharged.

36. **Findings and decision in Revision:** This Revision arose from a Judgment of reversal. So I have carefully perused all the materials on record and considered the grounds taken by the petitioners and the submission made by the learned Advocates for both sides.

37. It appears that the first vital fact-in-issue is whether the suit land ever diluvated and re-appeared and whether it vested in the Government as claimed by the plaintiffs.

38. On the question of diluvion and re-appearance of the suit land the defendants in their written statement of the present suit, stated in para-13 that “নালিশী জমি নদী সিকস্তি। নালিশী জমিতে সাবেক মালিকদের স্বত্ব কখনো eð qu e¼C”

39. The record of Title Suit No.210 of 1983 instituted by defendants' predecessor Oli Ullah was called for. The plaint of this suit shows that Oli Ullah, as the plaintiff had clearly admitted that the suit land had diluvated and re-appeared. He has stated as follows:

“1362 হইতে পলাশী নদীতীরে সেরেস্তায় খাজনাদি আদায়ে দাখিলা প্রাপ্তে মালিক দখলকার থাকারস্থায় নদীভাঙনে সিকস্তি হইয়া পুনঃ ১৩৬৮ বাং সনে পরোক্ষি হইয়া ধীরে ধীরে ইহা ১৩৭৬/১৩৭৭ বাং সনে চাষোপযোগী হয়”

40. Thus it is evident that the defendants and also their predecessor admitted the fact that the land of D.S. plot Nos. 1657 and 1658 diluvated.

41. Material evidence on record namely, the D.S. khatian (Exhibit-Ka), the D.S. Map and Diara Maps (Exhibit-Gha and Gha(1)) produced by the defendants and from the sketch map (Exhibit-X) prepared by the Civil Court Commissioner (P.W.4) and the information slip (Exhibit-9) issued by the District Record Room reveal the following scenario:

- (a) D.S. plot Nos. 1656, 1657 and 1658 were recorded as the land of Mouja Burir Char and these three plots were located in the contiguous coast of the sea and the indenting canal at the time of preparation of the D.S. Map in 1932-1934.
- (b) The site of those three D.S. plots and the surrounding plots diluvated and re-appeared and the Diara Map was prepared in 1965-70 identifying the entire area as block Dag Nos. 4261 and 4262. However these two Block Dags were shown as part of Mouja Bora Dail and not of Mouja Burir Char as shown in the D.S. Map.
- (c) The land of D.S plot Nos. 1657 and 1658 of Mouja Burir Char as claimed by the defendants was recorded in khas khatian No.1 of the Governemnt.
- (d) The Diara Map was prepared under section 144 of the SAT Act, 1950 and the Land Survey Act, 1877 after publication of Notification dated 12.12.1968 issued under the SAT At Act, 1950 as specifically certified in the body of the Map.

42. The diluvion situation is further proved by D.W.2 aged 72 years old. He deposed as the attorney of defendant Nos. 9 and 10 and stated that both the MRR khatian and Diara Khatian were prepared in the name of Government. But he is silent about the time of re-appearance of the land. Other D.W's are also silent about re-appearance or the time thereof.

43. The information slip (Exhibit-9) produced by the plaintiffs states that the MRR Khatian was prepared in the name of the Government in respect of D.S. plot Nos. 1657 and 1658.

44. Thus the averment made by the predecessor of the defendants Oli Ullah in the earlier suit and the documentary evidence available in the instant suit jointly prove that the land of D.S plot No.1657 and 1658 diluvated before preparation of the MRR Khatian and it reappeared some time before the Diara Survey Map prepared in 1965-70.

45. However the plaintiffs or the defendants could not produce any credible evidence to prove the exact time of diluvion or re-appearance of the land after diluvion.

46. The plaintiffs have filed three rent receipts, Exhibits-Ga series, indicating payment of rent by Oli Ullah to Zinnat Ali for the years 1341 B.S. 1341-1348 B.S. and 1359 to 1362 B.S. These rent receipts are not consistent with the admitted diluvion situation and in the absence of any supporting evidence by the heirs Oli Ullah or of Zinnat Ali or other competent witness these rent receipts by themselves do not establish the fact of re-appearance of the land in 1341 B.S. or of continuity of the tenancy of Oli Ullah under Zinnat Ali.

47. The admitted fact of diluvion of the D.S. plots Nos. 1657 and 1658 attracts the self operative application of section 86 of the SAT Act, 1950 which was inserted by P.O. 135 of 1972 with retrospective effect i.e. from the commencement of the SAT Act, 1950 (*vide Abdul Mannan vs Kulada Ranjan Manali-31 DLR (AD) page-195*). It is noted that the SAT Act, 1950 came into force in the Noakhali district in April 1956 (*vide Obaidul Haq chowdury the Sate Acquisition and Tenancy Act, 1950 DLR publication 2001, page-21*).

48. Section 86 of the Act, 1950 clearly provides that a land that has diluvated before the of P.O No. 135 of 1972 (i.e. after April 1956) or that will diluvate in future shall vest in the Government. It follows that irrespective of what ever title or right was acquired by Oli Ullah from the D.S. recorded tenant Zinnat Ali by virtue of the unregistered patta dated 28.1.1931 (Exhibit-ka) and the three rent receipts for the years 1341 to 1362 D.S (Exhibit-Ga-series) it had extinguished as a result of diluvion that took place some time before 1965 i.e. before the Diara Map. It follows that the Government has acquired lawful right to lease out the land that was earlier recorded as D.S. plot No.1657 and 1658.

49. With regard to the identity of the said two D.S. plots the Civil Court Commissioner (P.W.4) has submitted his report dated 10.04.2006 (Exhibit-X) with a clear finding that the land of the two D.S plots have merged with the two Block Dags being Diara plot Nos. Nos.4261 and 4262. He also identified the suit land measuring m4.50 acres out of 7.19 acres of D.S. plot Nos. 1657 with the three new plot Nos. being 21153, 21154 and 21154/1 as in the subsequent Khas Mahal Plots.

50. The report dated 10.04.2006 submitted by the Commissioner was accepted by the trial court by its order dated 28.09.2006 after hearing both sides and it was never challenged by the defendants.

51. It is in evidence that the plaintiffs were given permanent settlement of the land by the Government out of the Block Dag Nos.4261 and 4262 in the year 1978-79 by the three lease document (Exhibit-1-3) for the lands of three Khas Mohal plot Nos. 21153, 21154 and 21154/1 of Mouja Burir Char It follows that the plaintiffs were necessary parties in Title Suit No.210 of 1983 which was instituted by Olli Ullah in 1983 claiming 7.31 acres of land of D.S. plot No. 1657 and 1658 corresponding to Block Dag Nos. 4261 and 4262. Because the plaintiffs were already in the scenario as lessees since 1978-79. But the suit was filed only against the Government. So the decree passed in that suit is not binding upon the plaintiffs so far their interest is concerned.

52. With regard to possession, the plaintiffs have adduced oral and documentary evidence. They have produced their lease documents (Exhibits-1-3) and their mutation documents (Exhibit-4-6) showing opening of the new khatians in 1979 and the rent receipts

Exhibit-10(series) showing payment of rent from 1979 to 1984. The plaintiffs have also produced two local witnesses being a resident living in suit village and another person P.w.3. Both of them supported possession of the plaintiffs.

53. The defendants Nos.9 and 10 appeared in the scenario only in 1995 by virtue of a kabala dated 25.10.1995 (Exhibit-R) executed by the defendants Nos.1-8. These purchasers (defendants No.9 and 10) did not personally appear in court nor did they produce any of their vendors as witness. However their attorney deposed on their behalf as D.W.2. Defendants also produced three bargardars (D.W.3-5) and another witness (D.W.6) being a local resident. These witnesses (D.W.3-6) stated only about the possession of the defendants Nos. 9 and 10, and they are totally silent about the possession of the defendant Nos. 1-8 being the vendors or of Oli Ullah.

54. The appellate court has independently discussed and assessed the oral and documentary evidence produced by both sides and also considered the finding earlier recorded by the appellate court in the 1st Judgment dated 16-07-2005 in the first time appeal being Title Appeal No. 28 of 2004 by which the original suit was sent back on remand.

55. The appellate court disbelieved the possession of the defendants over the suit land and believed that of the plaintiffs. I agree with the findings of the appellate court.

56. The appellate court correctly found that in the earlier T.S. No. 210 of 1983, the present plaintiffs as lessees under the Government since 1978-1979 were necessary parties, but they were not made parties and therefore the ex parte decree passed therein will not affect plaintiffs title to the suit land.

57. With regard to the legality of the Khas Mohal Naksha, I agree with Mr. Khair Ejaj Masud the learned Advocate for the plaintiff-opposite parties, that it was legally prepared by the Government functionaries for leasing out the khas land of the Government to the plaintiffs. This map relates only to the khas land which was already lawfully recorded in the finally published Diara khatian in the name of the Government. So it was not necessary to invite objection as in case of a map generally prepared for the purpose of preparation of record of right under the Land Survey Act, 1877 read with section 144 of SAT Act, 1950 and the SAT Rules, 1955.

58. In view of the above I hold that plaintiffs have been able to prove their right, title and possession over the suit land measuring 4.50 acres. They could also prove their claim with regard to the ex-parte decree and the Mutation opened in the name of the defendants predecessor Oli Ullah. However that decree is binding on the government but excluding the land of the plaintiffs.

59. The trial court misread the direction of the appellate court as recorded in the judgment dated 16.07.2005 passed in the first time Title Appeal No. 28 of 2004 and erroneously found that “*there was neither scope nor justification of obtaining settlement of the suit land by the plaintiffs in the year 1979.....*”. The trial court without properly considering the pleadings as a whole and the evidence on record and erroneously found that (the Government) “*defendant Nos. 11-13 have specifically denied such alluvion and diluvion of the suit land*”.

60. The trial court also failed to consider that the plaintiffs were necessary parties to the earlier suit, but not made parties and therefore the decree passed therein does not bind the

plaintiffs so far the suit land is concerned. The trial court erroneously found that the failure of the government to challenge the exparte decree against the government will affect plaintiffs right.

61. The appellate court correctly found that the land in question diluvated and re-appeared and thus vested in the Government and subsequently it was lawfully leased out to the plaintiffs. I agree with the findings and decision of the appellate court on other issues and hold that the impugned judgment and decree is sustainable.

62. The Rule issued in this Civil Revision has no merit.

63. In the result, the Rule is discharged.

64. No order as to costs.

65. Send down the lower court records with a copy of the judgment and order to the courts below.