

Present:

Justice Fatema Najib

Civil Revision No. 1537 of 2014

Jogesh Chandra Das being dead his heirs

1(a) Sourav Dash and others

.....petitioners

-Versus-

Chaitanya Charan Das being dead his heirs

1(a) Chandan Das and others

.....Opposite Parties

Mr. Chowdhury Murshed Kamal Tipu, Advocate

..... For the petitioners

Mr. Tabarak Hussain with

Ms. Urmeem Rahman, Advocates

..... For the opposite-parties

Heard on: 22.01.2023, 26.02.2023 and 27.02.2023

Judgment on: 03.05.2023

Fatema Najib, J:

This Rule was issued on 21.04.2014 calling upon the opposite party Nos. 1-4 to show cause as to why the judgment and decree dated 14.07.2013 passed by the learned Joint District Judge, 2nd Court, Moulvibazar in Title Appeal No. 92 of 2006 allowing the appeal and reversing the judgment and decree dated 17.07.2006 passed by the learned Senior Assistant Judge, Rajnagar, Moulvibazar in Title Suit No. 29 of 2004 decreeing the suit should not be set aside and/ or such other or

further order or orders passed as to this court may seem fit and proper.

The petitioner No. 1 namely, Jotindara Dash, the predecessor of the petitioner Nos. 2 and 3, the petitioner Nos. 4-7 as plaintiffs instituted Title Suit No. 29 of 2004 in the Court of Assistant Judge, Rajnagar, Moulovibazar impleading the opposite party Nos. 1-4 as principal defendants and the opposite party No. 5 as proforma defendant No. 5 praying for khass possession by ascertaining title usufructuary mortgage.

The case of the plaintiffs in brief, are that, the land measuring an area of .15 decimals of land appertaining to SA Khatian No. 610, SA plot No. 413 belonged to Zamini Mohon Dash who mortgaged the same to Chandi Charon Dash in the year of 1969 for a period of 5 years by receiving Taka 600/- giving promise to redeem and handover the said land within the month of April, 1974. The further case of the plaintiffs are that the land measuring an area of .27 decimals of land appertaining to SA Khatian No. 610, SA Plot No. 415 was also belonged to Zamini Mohon Dash who mortgaged the same to Chandi Charon Dash in the year of 1973 for a period of 6 years by receiving Taka 1100/- with condition to handover the same within the stipulated period. Chandi Charon (the predecessor of the defendants) did not handover the aforesaid lands to Zamini

Mohon Dash within the stipulated period. After demise of Zamini Mohon Dash his son Jogodish Chandra Dash filed a suit No. 7 of 1980 in the village court on 21.07.1980 against Chandi Choran, the predecessor of the defendants. The said suit was allowed against Chandi Charon Dash. Against the said judgment, Chandi Charon filed Miscellaneous Appeal No. 01 of 1980 which was dismissed for default by order dated 12.05.1983. The defendants or their predecessor did not handover the possession of suit land to the plaintiffs. In the meantime Jogodish Chandra Das died. The defendants have no right to possess the suit land after 1974 and 1979. The plaintiffs requested the defendants on 25th Chaitra 1410 BS to return back the possession of suit land to the plaintiffs. But the defendants refused. Then the plaintiffs filed the suit.

The defendant No. 1 contested the suit by filing a written statement contending, inter alia, that the suit land along with other lands belonged to Sharat Chandra Dash and others and accordingly SA Khatian No. 610 was recorded. Subsequently, Sarath Chandra Das and Zamini Mohon Das sold the suit land to the defendant No. 1 by way of saf Kabla deed No. 1928 dated 25.04.1968. The defendant No. 1 has been possessing the suit land by cultivating paddy for long years. The suit land was recorded in RS Khatian No. 998 in Plot Nos. 1316, 1319, 1320

in the name of the defendant No. 1. The defendant's purchased deed was damaged by termite due to which certified copy of the said deed has been kept with the defendant No. 1. The defendant No. 1 has been possessing the suit land since 25.04.1968. With these averments the defendant No. 1 prayed to dismiss the suit.

In the suit the plaintiffs examined 5 PWs and documents produced which were marked as exhibits- 1-5 (Kha). The defendant No. 1 examined 2 DWs and documents produced were marked as exhibits- Ka-Kha. In appeal certified copy of deed No. 1928 dated 25.04.1968 was marked as exhibit-I.

On considering the oral and documentary evidences the trial court decreed the suit vide judgment and decree dated 17.07.2006 holding that the plaintiffs proved that their predecessor has mortgaged the suit land to the defendant's predecessor.

Being aggrieved by and dissatisfied with the judgment and decree dated 17.07.2006 the defendant No. 1 preferred Title Appeal No. 92 of 2006 before District Judge, Moulavibazar which was subsequently transferred to Joint District Judge, 2nd Court, Moulavibazar. Learned Joint District Judge, 2nd Court, Moulavibazar allowed the appeal on the ground that as per section 95 of the State Acquisition and

Tenancy Act a raiyat can under no circumstances enter into any form of usufructuary mortgage other than complete usufructuary mortgage and that mortgage shall be limited to a maximum period of seven years, the said usufructuary mortgage must be registered but as claimed by the plaintiffs their mortgage deed is not registered, so the said mortgage is void. Learned appeal court below further opined that as per section 95 of State Acquisition and Tenancy Act that if any mortgagee prevents the redemption of a usufructuary mortgage or refuses to restore any land to the mortgagor may apply to the Sub-Divisional Magistrate or to any officer authorized in this behalf by the Government for such redemption or restoration. But in the present case the plaintiffs filed a suit for redemption in village court which is beyond jurisdiction. So, the decree passed by village court and the appeal court below are irrelevant and not considerable in the eye of law. The defendant No. 1 proved his title deed in accordance of law, so, the defendant No. 1's title is proved over the suit land.

Feeling aggrieved, the plaintiffs filed this revisional application.

Mr. Chowdhury Murshed Kamal Tipu, learned Advocate appearing on behalf of the petitioners submits that Zamini Mohon Das (predecessor of the plaintiffs) mortgaged 0.27 acres

from suit plot No. 415 to Chandi Charon Das, the predecessor of the defendant in the year 1973 for a period of 6 years. The said Zamini Mohon Das mortgaged 0.15 acres to the same person in the year 1969 for a period of 5 years. Both mortgage were made orally. In this context he contended since the valuation of both lands are less than Taka 100/-, so registration was not required in accordance of law. He further submits that the conditions were embodied that before the expiry of period specified, the possession of those lands to be handed over to the mortgagor. In this context he argued that since the mortgagee did not handover the possession of those lands within the specified period, the mortgagee filed a Suit No. 07 of 1980 for redemption in the village court against the mortgagee and obtained decree. Then the mortgagee filed appeal before 1st Munsif, Moulvibazar which was dismissed for default against which no legal step has been taken by the mortgagee, so, the decree obtained by the mortgagor is still in existence. He next submits the defendant failed to prove that genuineness of the alleged certified copy of Kabala No. 1928 dated 25.04.1968. He then submits learned appeal court below upon an erroneous view allowed the appeal and set aside the judgment and decree without reversing the findings given by the trial court and thus

learned appeal court below has committed error of law resulting in an error in the decision occasioning failure of justice.

Mr. Tabarak Hussain, learned Advocate appearing for the opposite parties submits that no averment has been stated that alleged mortgage were made orally or in writing. No script of paper has been submitted in support of mortgage. He further submits that any form of usufructuary mortgage other than complete usufructuary mortgage must be registered as per section 95 of State Acquisition and Tenancy Act, 1950, but as claimed by the plaintiffs that their deed were not registered deed, so the said mortgage is void. He next submits that as per section 95 of the said Act if any mortgagee prevents the redemption of a usufructuary mortgage or refuses to restore any land, the mortgagor may apply to Sub-Divisional Magistrate or to any officer authorized in this behalf by averment. But in the present case the plaintiffs predecessor filed a suit for redemption before village court which is beyond jurisdiction and the judgment passed by village court can not be taken into consideration. He then submits that the defendants submitted their title deed in appeal court below which was marked as exhibit-I and the defendant proved their title in accordance of law. With these submissions he prayed to discharge the Rule.

Heard the learned Advocates of the respective parties. Examined the evidences oral and documentary and materials on record.

The plaintiffs claimed that the suit land belonged to Zamini Mohon Das. On the other hand the defendants claimed the suit land belonged to Sarath Chandra Das, Zamini Mohon Das and others. The plaintiffs did not submit any document to prove their assertion. But the defendants submitted certified copy of SA Khatian No. 610 which was marked as exhibit Ka. On perusal of the aforesaid document it appears the suit land along with other lands belonged to Sarath Chandra Das, Zamini Mohon Das and others.

On plain reading of the plaint it does not show that Zamini Mohon Das mortgaged the suit land to Chandi Charan Das verbally or in writing.

It is contended by the plaintiffs that within the stipulated period, Chandi Charan, the predecessor of the defendants did not hand over the possession to Zamini Mohon Das, the predecessor of the plaintiff and as a result Jogitish Chandra Das filed a suit for redemption in the village court against Chandi Charan Das. Subsequently, the suit was decreed and against which appeal was filed but same was dismissed for default. On the other hand the defendants contended that Sarat Chandra and

Zamini Mohon Das got the suit land who sold the same by way of saf kabla deed No. 1928 dated 25.04.1968 to the defendant No. 1.

Now the question is, whether the village court have jurisdiction to try the case for redemption of mortgage property?

To determine this question, I like to quote the schedule of village court in respect of civil suits that shall be triable by village court which reads as under:

“PART II
Civil Suits

Suit for the recovery of money due on contracts, receipts of other documents. Suit for the recovery of movable property, or for the value thereof.

Suit for the recovery of possession of immovable property within one year of dispossession.

Suit for compensation for wrongfully taking or damaging movable property. Suit for damages by cattle trespass”

When the amount claimed or the price of movable property, or the value of immovable property involved does not exceed one thousand Taka.

So upon carefully reading the aforesaid schedule the village court have no jurisdiction to try the case for redemption of mortgaged property. The appeal court below in its findings opined that the village court tried the case for redemption in respect of suit land was beyond its jurisdiction. I find learned appeal court committed no error of law in giving findings that the village court had tried beyond its jurisdiction.

In order to appreciate the submissions advanced by the learned Advocates, now I can quote section 95 of State Acquisition and Tenancy Act, 1950.

“95 Limitation on mortgage or raiyati holdings-

1) Notwithstanding anything contained in any other law for the time being in force a raiyat shall not enter into any form of usufructuary mortgage other than a complete usufructuary mortgage in respect of his holding or of a portion or share thereof, and every such complete usufructuary mortgage shall be subject to the same limitations as are imposed by section 90 on a transfer of the holding of a raiyat or of any share or portion thereof; and the period for which such complete usufructuary mortgage may

be entered into by any raiyat shall not exceed, by any agreement express or implied, seven years:

Provided that any such usufructuary mortgage may be redeemed at any time before the expiry of the said period, on payment of an amount which shall bear the same proportion to the total consideration money received by the mortgagor, as the unexpired period bears to the total period for which the mortgage had been entered into.

2) Every such complete usufructuary mortgage shall be registered under the Registration Act, 1908.

3) If any usufructuary mortgage entered into by raiyat does not fulfil any of the conditions specified in sub-section (1) or is not registered as required under sub-section (2) it shall be void.

4) Notwithstanding anything contained in any other law for the time being in force, if any mortgagee prevents the redemption of a usufructuary mortgage under the proviso to sub-section (1) or refuses to restore any

land covered by a usufructuary mortgage after the expiry of the period of such mortgage, the mortgagor may apply to the Sub-divisional Magistrate or to any officer authorized in this behalf by the Government, for such redemption or restoration and, on such application and, in the case of redemption, also on payment by the applicant of the amount due to the mortgagee under the said proviso, the Sub-divisional Magistrate or the officer so authorized shall pass an order directing the mortgagee to restore possession of the mortgaged land to the applicant and to deliver up to the applicant all documents in his possession or power relating to the mortgaged land by such date as may be fixed in the order.

5) If the mortgagee does not restore possession of the mortgaged land to the mortgagor by the date fixed under subsection (4), the Sub-Divisional Magistrate or any Officer authorized in this behalf by the

Government shall, on application made by the mortgagor, put the applicant in possession of such land by evicting the mortgagee therefrom and may, for such eviction, use or cause to be used such force as may be necessary.”

It appears from the aforesaid sections that:

- i) A raiyat can under no circumstances into any form of usufructuary mortgage other than complete usufructuary mortgage,
- ii) That mortgage shall be limited to a maximum period of 7 years for realization of the mortgagee's dues,
- iii) The document must be registered,
- iv) After the completion of 7 years the land shall revert back to the mortgagor,
- v) If any mortgagee is unwilling the redemption of a usufructuary mortgage or obstructs such recovery of possession, mortgagor may apply to a Sub-Divisional Magistrate or to any officer authorized by the Government.

In the present case no script of paper in respect of mortgage has been submitted by the plaintiffs. As observed

above that the predecessor of the plaintiffs filed a case for redemption in village court beyond jurisdiction. Learned appeal court below in its judgment clearly found that since the predecessor of the plaintiffs filed a case in a village court beyond jurisdiction, so the decree passed by village court is irrelevant and not considerable in the eye of law. I am of the view that nothing wrong observation has been given by appeal court below that committed error of law.

Perused the deed No. 1928 dated 25.04.1968 (Exhibit-I) on which based the defendant No. 1 claimed the suit land. It is pertinent to note that in appeal the defendant No. 1 submitted the said document. In written statement it has been stated that the original deed was damaged by termite. On perusal of the said deed it appears the schedule of the said deed stated that- “
 মৌজা পাঁচগাঁও জে.এল নং ৫৪, খতিয়ান নং ১৫৮/২ দাগ নং ৪১৩ চারশত তের।
 ১। উঃ বারিভ চক্রবর্তী গং জামিনী ঘোষ পুঃ চন্ডি প্রসাদ দাশ পঃ গোপাট এহাতে আমন
 রকম মোঃ, ১৫ শতক। পঃ মৌজাল জে. এল নং খতিয়ান নং ঐ দাগ নং ৪১৫ চারশত
 পনের। ২। উঃ, দঃ, পুঃ চন্ডি প্রসাদ দাস প, প্রসাদ দাস হাতে আমন রকম মোঃ, ২৯
 শতক .৪২ শতক.....” whereupon SA Khtian No. 610 was not mentioned but the name of giver and receiver do tally with the statements made in the plaint. In the instant case the volume was required to be produced before court. Though the said deed

was marked in appeal without raising objection by the plaintiff. Since the khatian no of the deed do not tally with the khatian no. mentioned in schedule to plaint, in this respect the volume should have required to be produce. In the case of Suva Rani Guha –vs- Abdul Awal Mia, reported in 47 DLR (AD)-45 it has been held- a certified copy of the registered document becomes admissible in proof of the existence condition and contents of the original document under provision of section 57(5) of the Registration Act, but the contents of the documents may not be conclusive evidence. So, I am of the view that learned Appeal Court below in its findings opined that the defendant got title on the basis of deed (Exhibit-1) is wrong, thus the appeal court below committed error of law in giving findings that the defendant No. 1 has acquired title on suit land. From the plaint it appears the predecessor of the defendant had been possessing the suit land since 1969 and 1973 respectively and then the defendants have been possessing the same as successive heirs.

Having regard to facts and circumstances, I am of the view that the plaintiffs have not proved title on suit land by dint of decree passed by village court. On the other hand the defendant also did not prove title on suit land by way of saf kabala deed No. 1928 dated 25.04.1968, but the defendant No.

I proved his possession on suit land since 1969 and 1973 respectively.

Since the plaintiffs failed to prove their title through mortgage deed, so the ownership of the suit land was remained with original owner Sarath Chandra Nath, Zamini Mohon Das and others.

In view of the above, I find no merit in this Rule.

In the result, this Rule is discharged without any order as to costs. The impugned judgment and decree dated 14.07.2013 passed by the learned Joint District Judge, 2nd Court, Moulvibazar in Title Appeal No. 92 of 2006 is hereby affirmed.

Send down the lower Court records along with a copy of this judgment at once.