

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 1526 OF 1995

IN THE MATTER OF:

Sunil Kumar Das and another

....Petitioners

-Vs-

Sudhangshu Bimal Das and others

....Opposite Parties

Mr. Surojit Bhattacharjee, Adv. with

Mr. Saleh Mahmood Naheed, Adv.

... For the petitioners

Mr. Tabarak Hussain, Sr. Adv. with

Ms. Urmee Rahman, Adv.

...For the opposite parties

Heard on: **20.06.2023, 08.11.2023 & 05.12.2023**

And

Judgment on: **The 7th March, 2024**

Present:

Mamnoon Rahman, J:

In an application under section 115(1) of the Code of Civil Procedure, 1908 rule was issued calling upon the opposite parties No. 1-5 to show cause as to why the impugned judgment and decree dated 09.08.1994 passed by the then Subordinate Judge, 2nd Commercial Court, Chittagong in Other Appeal No. 669 of 1991 dismissing the appeal and affirming the judgment and decree dated 29.10.1991 and 05.01.1991 passed by the Assistant Judge, Rauzan in Other Suit No. 04 of 1990 dismissing the suit should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The short facts relevant for disposal of this rule, is that, the petitioners and the predecessor of the opposite parties No. 4 and 5, Prem Nath Das as plaintiffs instituted Other Suit No. 04 of 1990 in the court of Assistant Judge, Rauzan, Chittagong on 02.01.1990 against the opposite parties No. 1-5 herein impleading them as defendants praying for declaration of title by way of inheritance and for a declaration that the P.S. and B.S. records are incorrect and plaintiffs' title is not affected by the same. The case of the plaintiffs-petitioners, in short, is that, the suit land originally belonged to Ram Kumar Das and R.S. khatian in respect thereof was correctly prepared and finally published in his name. Ram Kumar Das died leaving behind 3 sons namely, Prem Nath Das (plaintiff No. 1), Pran Krishna Das and Ramesh Chandra Das. Pran Krishna died leaving behind two sons: the plaintiffs No. 2 and 3. Ramesh Chandra died leaving behind only son Himangshu Chandra Das, who relinquished his 1/3rd share in the suit land in favour of the plaintiffs and has been living at Mirzapur, Police Station Hathazari, Chittagong. In this way the plaintiffs acquired right, title and interest in the suit land and they have been possessing the same constructing dwelling houses thereon. The father of the plaintiffs No. 2 and 3 died when they were minors and as such plaintiff No. 2 had to work as a servant under different persons. Sumati Das, the father of the defendants No. 2 and 3 engaged plaintiff No. 2 in a shop at Fakirhat as a servant on the basis of nominal monthly salary. The plaintiff No. 3 also took service in a paper shop under Nishi Chandra at Kaptai. Sumati Das and Nishi Chandra used to look after

plaintiffs No. 2 and 3 and also their properties. While doing so they managed to record the properties in their names. Later, on the plaintiffs after collecting certified copies of the P.S. and B.S. khatians came to know that the record regarding the suit land were wrongly prepared in the names of the defendants. Thereafter, they requested the defendants to make the record correct but they refused to do so. Hence the suit.

The defendants No. 1 and 3 contested the suit by filing a joint written statement denying all the material allegations made in the plaint.

The case of the defendants-opposite parties runs as follows:

“The suit land originally belonged to Ram Kumar Das, who mortgaged the same to Surjamoni Das by the registered deed dated 01.04.1915. Since Ram Kumar Das failed to redeem the mortgage, the land was put to auction sale as per the terms and conditions and Surjamoni purchased the same. While in possession, he transferred the said land in the name of his wife Goyeswari and she transferred the same to her only daughter’s son Kali Kinkor Das by the registered deed of gift dated 18.01.1944. Thereafter, two sons of Kali Kinkor i.e. the defendant No. 1 Sudhangshu Bimal Das and father of defendants No. 2 and 3 Sumati Das, mutated their names in the khatian. The P.S. khatian was wrongly prepared in the name of Pran Krishna and as such the defendants filed objection under Section 19(1) and the objection was allowed on contest and P.S. record was finally prepared in their names and they are possessing the land by

paying regular rents and the subsequent B.S. record has also been prepared in the names of the defendants. They are peacefully possessing the land for beyond period of limitation. The defendants permitted the plaintiffs for living temporarily on 12 sataks of land out of the suit land after the independence of Bangladesh. The plaintiffs are permissive occupiers in the suit land under the defendants. They had no right, title and interest in the suit land. The plaintiffs are not entitled to get the reliefs as prayed for in the suit. The suit is also barred by limitation and is liable to be dismissed”.

The defendants No. 1-3 and the plaintiff No. 1 Prem Nath Das (predecessor of the opposite parties No. 4-5) filed before the trial court a *solenama* dated 16.01.1991 executed between them affirming the defendants’ title and possession over the suit land upon denying the plaint case. By the order dated 28.10.1991 the Assistant Judge, Rauzan, Chattagong accepted the *solenama* upon hearing the parties and made the *solenama* as part of the decree.

Thereafter, on the prayer of the plaintiffs No. 2 and 3, the plaintiffs No. 1 Prem Nath Das was transformed as pro-forma defendant No. 6, by the order No. 32 dated 14.09.1991 passed by the Senior Assistant Judge, Rauzan. This pro-forma defendant No. 6 contested the suit by filing a written statement supporting the defendants’ case. In his written statement he also stated that, plaintiffs No 2-3 obtained his signature in the plaint as plaintiff No. 1 upon misrepresentation and

deceiving him. Their title over the suit land has been extinguished long ago by way of the auction sale. Plaintiffs No. 2-3 are not in possession of the suit land; however they are living on 6 gonda land as permissive possessors of the defendants. It has been further stated that he is sound both physically and mentally and executed the *solenama* without being influenced by anyone.

During trial both the parties adduced evidences both oral and documentary. The trial court proceeded with the suit and framed as many as five issues. The court below after hearing the parties, considering the facts and circumstances, provisions of law, material on records, evidences both oral and documentary dismissed the suit . Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the trial court the present petitioners-plaintiffs moved before the District Judge, Chittagong by way of appeal being Other Appeal No. 669 of 1991 and the same was heard and disposed of vide the impugned judgment and decree dismissing the appeal and thereby affirming the judgment and decree passed by the trial court.

The plaintiffs No. 2 and 3 (now deceased) filed the instant civil revision before this court and obtained the present rule.

Opposite Parties contested the rule upon entering appearance.

Mr. Surojit Bhattacharjee the learned counsel appearing on behalf of the petitioner submits that both the courts below without applying their judicial mind and without considering the facts and circumstances and the case of the plaintiffs and defendants *side by side* most illegally and in

an arbitrary manner passed the impugned judgment and decree occasioning failure of justice which requires interference by this court. He submits that the courts below committed an error of law and facts as well failed to consider the case of the plaintiffs and defendants *side by side* and thus the courts by misinterpreting the facts and misconstruing the relevant provisions law and in an arbitrary manner came to a conclusion against the plaintiffs occasioning failure of justice. He further submits that the trial court framed no issue as to whether auction of the mortgage property, as alleged by the defendants, was held or not; whereas this was the crux issue to be decided by the courts below. The defendants could not produce any scrap of paper in support of their case rather they claimed that all the relevant documents of the auction sale went missing but the trial court as well as the appellate court below disregarded the defendants' onus of proving those documents and believed the story of the auction purchase by the defendants, which has caused failure of justice. The learned counsel further submits that the alleged auction sale was said to have held in the middle of 1916 but the subsequent P.S. khatian was prepared in the name of Pran Krishna, son the original owner Ram Kumar Das, which indicates that no auction sale was actually held nor there was any delivery of possession following the auction sale. Therefore, transfer of the property by the auction purchaser Surjamoni Das to his wife by an unregistered deed is not lawful and as such the subsequent transfer to the defendants bears no value in the eye of law and as such the defendants-opposite parties have no right, title

and interest over the suit land. Referring to the Hindu Law of Dayabhaga School, the learned counsel submits that, as per this law a widow cannot in any case dispose of her husband's property by a deed of gift. Both the courts below erred in law for arriving at the finding that the defendants acquired title in the suit land by deed of gift dated 18.01.1994 executed by Gayeshwari, wife of Surjamoni. He further submits that no case of adverse possession by defendant was made out in the written statement or in their evidence; however the courts below have made a gratuitous finding of adverse possession of the defendants in the suit land which has resulted in an error in the impugned decisions. He submits that the defendants claimed that the plaintiffs were permissive possessor under them but no document has been produced to prove giving permission; the D.W. 1 in his deposition said that his brother, mother, wife and his elder brother's wife were present at the time of giving permission to the plaintiffs but they have not been examined. All other D.W.s were also silent on this point. Both the courts below committed error of law in not arriving at the finding that the case of permissive possession claimed by the defendants has not been proved. Mr. Surojeet Bhattacharjee referred to the law which provides that the Revenue Officer can change the entry in record of rights under two circumstance: (i) where the heirs of the recorded tenants want their names to be mutated and (ii) on the basis of transfer by recorded tenant if the transferee wants it. He submits that in the present case both are wanting. The courts below committed error of law in not holding that the defendants corrected their names in the record

by way of a fraudulent mutation case. He finally submits that from the B.S. khatian it appears that two houses are situated on the suit land. The defendants stated that the plaintiffs living there with their permission but the record does not show that the plaintiffs are permissive possessors. Moreover, B.S. khatian has been challenged in this suit and it will either stand or fail on the basis of the previous documents and evidence of possession. The courts below therefore committed error of law resulting in an error in the decision occasioning failure of justice in not finding that the P.S. and B.S. khatian are the cause of action of the suit and where khatians are under investigation in a case presumptive value cannot be ascribed to the same. In support of his submission the learned counsel for the petitioners referred to decisions as reported in **39 DLR 290** and **42 DLR AD 154**.

On the other hand, Mr. Tabarak Hussain, the learned senior counsel, with Ms. Urmee Rahman, Advocate appearing on behalf of the opposite parties submits that, both the courts below dismissed the suit upon proper appreciation of facts as well as law. It is a well-established principle that, when the concurrent finding of fact arrived at by the courts below are supported by evidence on record and there being no error of law involving the case *i.e.* there is no misreading and non-consideration of material evidence on record, there is no scope for interference in revision under section 115 (1) of the Code of Civil Procedure. He further submits that it is also an established legal principle that a plaintiff has to prove his own case by producing evidence; he

cannot merely rely on the weakness of the defendants. In the present case the plaintiffs hopelessly failed to prove their title and possession over the suit land. They could not produce a piece of document to establish their possession and both the courts below concurrently came to the similar finding. That being so, the plaintiffs cannot make out a case out of the defendants' failure to produce related documents regarding auction sale. Mr. Hussain raised an argument that the suit is not maintainable in its present form. During final hearing stage of trial, the plaintiffs No. 2 and 3 transposed the plaintiff No. 1 as the defendant No. 6 and amended the plaint by praying for declaration of title regarding the land excluding his share because the plaintiff No. 1 executed a *solenama* with the defendants admitting their title and possession over the suit land. However, the plaintiffs failed to prove their allegation that the defendant No. 6 (originally plaintiff No. 1) and the defendants No. 1-3 executed the *solenama* in connivance with each other and it is a paper transaction. This *solenama* was accepted by the trial court upon hearing both the parties and was made part of the decree. Plaintiffs did not challenge this order of the court. In these circumstances, the plaintiffs' case is not maintainable since one of the heirs of the original owner does not claim title over the suit land; rather he admits the auction sale and defendants' title and possession over the suit land. Mr. Tabarak Hussain submits that, defendants-opposite parties have been able to prove their possession by producing rent receipts and the khatians are also in their names, which have been marked as exhibits.

Furthermore, two witnesses of the plaintiffs admitted possession of the defendants in the suit land. P.W. 2 and 3 admitted defendants' possession in examination in chief, plaintiffs declared the P.W. 3 as hostile witness for admitting defendants' possession but failed to shift him from his position by cross examining him. Therefore, the possession of the defendants in the suit land is proved beyond doubt. Mr. Hussain also submits that the appellate court below rightly observed that the plaintiffs did not challenge the B.S. khatian which has been prepared in the names of the defendants and as such they have admitted the defendants' possession for at least 20 years. Mr. Hussain brought to the attention of this court that while discussing about the plaintiffs' claim of wrong recording the trial court held that, “যদিও বাদীগণ অতিসাধারণভাবে অভিযোগ তুলেছিলেন যে, নালিশা জমা নিয়ে তৈরী পি,এস ও বি,এস জরিপভুল, কিন্তু সন্তোষজনক আদৌ কোন সার্য প্রমান দিয়ে তাদের এহেন অভিযোগ প্রমানে ব্যর্থ হয়েছেন। ... স্বত্বদখলহীন প্রাণ কৃষ্ণের নামে তৈরী অসুদ্ধ বেআইনী পি.এস জরিপের বিরুদ্ধে ১ নংবিবাদী ও তার ভ্রাতাসুমতি দাশই.বি.এস.এ এন্ড টি এষ্টের ১৯(১) ধারামতে ২১১/৬০ নং আপত্তি কেস দায়ের করলে প্রাণ কৃষ্ণের নাম পি.এস রেকর্ড কর্তন কওে আইনগতভাবে ১নং বিবাদী ও সুমতি দাশের নামে পি.এস. রেকর্ড তৈরী করা হয়। ... উলেখ্য যে, এই আপত্তি মামলার সময় প্রাণ কৃষ্ণ জীবিত ছিলেন, কিন্তু তিনি আদৌ আপত্তি করেন নাই।”The appellate court also held that, “বাদী আপীল্যান্টেগণের বক্তব্য মতে যদি আর এস মালিককে নোটিশ না দিয়া পি.এস মালিককে নোটিশ না দিয়া আর এস খতিয়ান সংশোধন করিয়া পি.এস. খতিয়ান হইয়া থাকে তবে উক্ত পি.এস খতিয়ানের বিরুদ্ধে বাদী-আপীল্যান্টগণ অদ্যাবধি নালিশী অত্র মোকদ্দমায় কোন প্রতিকার প্রার্থনা করেন নাই। তাহা ছাড়া বি.এস খতিয়ান বাদীগণের জানামতেই ১ হইতে ৩ নং বিবাদীগণের নামে হইয়াছে।”Thus, Mr. Hussain submits that, it appears that both the courts

below concurrently held that the plaintiffs failed to prove the plaint case in respect of their allegation regarding wrong recording. In respect of the possession, Mr. Hussain referred to the finding of the trial court, which held that, “তথাপি তাদের দাখিলী ১৯১৫ সন থেকে শুরু কওে বর্তমান বছর পর্যন্ত বহু রেজিঃকৃত ও অরেজিস্ট্রিকৃত দলিলপত্র মৌখিক সাক্ষ্য প্রমাণ ও অবস্থানগত (circumstantial) সাক্ষ্য প্রমাণ তথা ১নং বাদীর ও ৬নং বিবাদীর স্বীকারোক্তি নালিশী ভূমিতে ১-৩ নং বিবাদীর নিরংকুশ স্বত্ব দখল প্রমাণ করেছে।” The appellate court below held that “সুতরাং পর্যালোচনায় ভূমিতে ১ হইতে ৩নং বিবাদীর রেসপন্ডেন্টগণের সুদীর্ঘ বৎসরের স্বত্ব দখল প্রমাণিত হইয়াছে। পরান্তরে বাদী আপীল্যান্টপৰ নিম্নদালতে সাক্ষ্য ও দালিলিক প্রমাণাদি ধরেনাঃ ভূমিতে ওয়ারিশক্রমে তাহাদের স্বত্ব দখল প্রমাণসম্পূর্ণ ভাবে ব্যর্থ হইয়াছেন যাহা নিম্ন আদালত তাহার রায়ে পুঙ্খানুপুঙ্খভাবে ও সুন্দর ও সাবলীলভাবে পৃথক পৃথকভাবে ব্যক্ত করিয়াছে।” Mr. Hussain submits that, by these findings both the courts below concurrently found that the plaintiffs failed to prove their title and possession in respect of the suit land. In support of his contention learned senior counsel Mr. Tabarak Hussain relied on the decisions reported in **41 DLR (AD) 3, 18 BLD 455, 3 BLC 6, 6 BLC (AD) 41, 15 MLR (AD) 17, 30 DLR (AD) 81.**

I have perused the impugned judgment and decree passed by both the courts below, revisional application, grounds taken thereon as well as L.C. Records, provisions of law and decisions as referred to by the parties. I have heard the learned Advocates for the both the parties.

On perusal of the same, it transpires that plaintiffs-petitioners filed the instant suit for declaration of title by way of inheritance and that the P.S. and B.S. records are incorrect and plaintiffs’ title is not affected by

the same. Admittedly the original record was in the name of Ram Kumar Das, the predecessor of the plaintiffs and the subsequent records *i.e.* the P.S. and B.S. record have been prepared in the names of the defendants. It appears from the record that original plaintiff No. 1, Prem Nath executed a *solenama* with the defendants No. 1-3 admitting the defendants' case and their possession as well as title over the suit land upon stating that ownership of the original recorded owner Ram Kumar was extinguished as a result of the auction sale. This *solenama* was accepted by the trial court on contest and was made part of the decree; however the plaintiffs did not challenge this order rather they transposed the plaintiff No. 1 as defendant No. 6. This defendant No. 6 contested the suit by filing written statement. Therefore, the question arose whether the suit can be maintainable in this form when the co-sharer of 1/3rd share of the suit land does not claim the same. It is on record that Prem Nath, one of the sons of the original recorded owner Ram Kumar, admits the auction and the other son Pran Krishna also did not deny the auction during his lifetime. Though the P.S. record was initially prepared in the name of Pran Krishna, it was corrected upon the objection case filed under Section 19(1) by the defendants. The learned senior counsel for the opposite parties took this court through the lower court record and brought to the attention of this court Exhibit Uma- certified copies of the application and order sheet of the objection case No. 211 of 1960. It transpires from the order sheet that notice was duly served upon Pran Krishna and the order was duly passed correcting the names. From the

Exhibit Gha, it transpires that Pran Krishna died on 16.12.64; however he did not challenge the correction of record during his lifetime. Plaintiffs No. 2 and 3 are the sons of Pran Krishna, who have instituted this suit after long 27 years from the death of their father. Therefore, this court is of the view that where the sons of the original recorded owner admits the fact of auction and abstain from challenging the defendants possession and title, the claim of the plaintiffs No. 2-3 for declaration of title regarding 2/3rd shares of the suit land is not maintainable and also hopelessly barred by limitation.

The claim of possession of the suit land by the plaintiffs has been discussed thoroughly by both the courts below upon considering the material evidence on record and arrived at the finding that the plaintiffs failed to prove their title as well as possession over the suit land. The learned counsel for the petitioner could not point out any misreading or non-consideration in the said findings of the courts. Admittedly, the revision is being preferred against the concurrent finding of facts and law arrived at by the courts below. It is now well settled proposition of law that concurrent finding of facts cannot be overturned unless and until the petitioner-applicant shown cogent reason as much as the question of law and factual aspects misinterpreted by the trial court ultimately causing failure of justice in the adjudication of the real question in controversy.

The learned counsel for the petitioner mainly pressed his argument challenging the auction sale, which is the foundation of the defendants'

title. He submits that the defendants failed to produce any document in support of the auction. No corresponding volume was called for to verify the fact of auction and the defendants also failed to prove the fact that the original documents of auction got lost although both the courts below believed them. Upon going through the judgments of the courts below it appears that both the courts below arrived at the finding that the defendants were able to prove their claim of title and possession by producing a series of documents starting from the certified copy of the mortgage deed dated 01.04.1915 to a number of registered and unregistered deeds and documents as well as oral evidence in support thereof. Keeping this aside, this has to be borne in mind that the plaintiffs have filed the suit for declaration of title and onus is upon them to prove their case, which they have failed by producing any cogent evidence. They also failed to prove their wild allegation that the order passed in objection case No. 211/60 correcting the record of right was a collusive one. Plaintiffs further failed to establish the fact that the *solenama* executed between the plaintiff No. 1 and defendants No. 1-3 is a paper transaction. Learned counsel for the petitioner put forward his argument by shifting the onus of proof upon the defendants; however it is the cardinal principle of law that the plaintiff must prove his case independently and he is not to rely on the weakness or defects of defendant's case.

Considering the above, I am of the opinion that both the courts below upon meticulous discussion of the material evidence on the record

rightly arrived at the finding that the plaintiffs have failed to prove their title as well as possession over the suit land. Moreover, the suit is not maintainable in its present form and also barred by limitation. Therefore, both the courts below committed no illegality in dismissing the suit against the plaintiffs and as such those require no interference by this court. Hence, I find no substance in this rule.

Accordingly, the instant rule is discharged without any order as to cost. The impugned judgment and decree passed by the courts below are hereby affirmed and the Other Suit No. 04 of 1990 of the Court of Assistant Judge, Rauzan, Chittagong stand dismissed.

Send down the L.C. Records to the concerned court below with a copy of judgment at once.

(Mamnoon Rahman, J.)

Emdad. B.O.