

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashefa Hussain

Civil Revision No. 5318 of 1998

Md. Abdus Sobhan

.....petitioner

-Versus-

Md. Arfanullah and others

----- Opposite parties.

Mr. Mansur Habib, Advocate with

Ms. Shimul Sultana, Advocate

----- For the petitioner

Mr. Abdullah Al Mamun, Advocate

----- For the Opposite Parties.

Heard on: 10.10.2018, 11.10.2018,
21.10.2018 and Judgment on 22.10.2018.

Upon condoning a delay of 3 days in filing the civil revisional application Rule was issued in the instant Civil Revisional application calling upon opposite parties No. 1 and 9 to show cause as to why the judgment and decree dated 15.07.1998 and 20.07.1998 respectively passed by the learned Subordinate Judge, 2nd Court, Lalmonirhat in Other Appeal No. 34 of 1995 affirming the judgment and decree dated 24.04.1995 and 29.04.1995 respectively passed by the Senior Assistant Judge, Lalmonirhat in Other Class Suit No. 36 of 1992 should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

Facts relevant for disposal of the Rule in short is that the instant petitioners as plaintiffs instituted Other Class Suit No. 36 of 1992 in the court of learned Senior Assistant Judge, Lalmonirhat praying for declaration of Title, recovery of khas possession after evicting the defendants and for a further declaration that the registered kabala No. 2541 dated 08.02.1982 is created by false personation and as such the said kabala was in effective in respect of the land mentioned in the schedule 'Ka' to the plaint. It appears that the suit land belonged to Purna Chandra Barman as C.S recorded tenant who died leaving his only son Krishna Mohon Barman who while in possession of the said land transferred .54 acres out of 1.14 acres of land to Babur uddin and Omar Uddin and delivered possession there to and both of them transferred to Nurul Hossain who is still in possession of his share. By a kabala deed dated 28.10.1959 Krishna Mohon Barman transferred .54 acres to Sagir Sheikh and Sagir Sheikh has been possession of the same and his name was duly recorded in the S.A. operation and after his death his only son Shabib Ahmed inherited the property. Shabib Ahmed was a railway employee and worked in different places and lastly at Kaunia station as switch man of the cabin and is now a retired person. The defendant No. 1 was engaged as Adhiar of Shabib to cultivate the land as Bargadar for 8 to 10 years and the said Shabib by a kabala dated 10.04.1991 transferred his share of .54 acres. The further case of the plaintiff was that Dinesh, Bhadesh,

Denubala and other heirs of Krishna Mohon transferred their remaining share of .06 acre in the suit land to the plaintiff by a kabala dated 20.06.1991 and delivered possession. Shabib Ahmed was a Bihari and shifted his residence to Rangpur town and taking advantage the defendants No. 1 created a forged deed of transfer showing Shabib uddin and Habib Uddin sons of Sagir Sheikh as executants upon false personation registered the same being registration No. 2541 dated 08.02.1982. Shabib Ahmed never transferred the land by executing the kabala to the defendant No. 1. Shabib Ahmed during transfer of the land handed over the original kabala executed in favour of his father along with the rent receipts and the kharij khatians to the plaintiff and the plaintiff filed these before the court to prove his bonafide purchase. After purchase the plaintiffs got possession and cultivated crops and subsequently also constructed hatched hut on the suit land. Defendant No. 1, on July 1990, 1991 in the morning dispossessed the plaintiff and constructed thatched huts and a shallow machine and put the defendant Nos. 2-5 into possession and the plaintiff was dispossessed from the entire land of .64 acres and hence was constrained to file the suit.

The defendant Nos. 1-5 contested the suit by filing a joint written statement denying the material allegations in the plaint and thier case is that Sagir died leaving 2(two) sons Shabib and Habib and they used to speak in Urdu and hailed from Bihar. In

1971 during the war for liberation they left Lalmonirhat town and took shelter in Rangpur and the land remained vacant and the defendant No.1 came to possess the same initially in a different capacity and subsequently purchased it by a registered kabala dated 08.02.1982 executed by Shabib and Habib. The defendant No. 1 further made averment that the executants lost their old papers of title and the defendant No. 1 could not mutate his name due to the objection raised by local Touthildar claiming the suit land as Abandoned property and further made averments that the plaintiff on 25.04.1991 attempted to take possession forcibly and defendant No. 1 in May, 1991 constructed thatched huts on the suit land. Since Shabib and Habib did not know Bangla they put their thumb impression on the kabala and after filing the suit the defendant No. 1 came to know that for the sake of service Shabib learnt Bengali and put his signature of the plaintiff.

Upon trial, framing issues, pursuant to hearing both parties, adducing evidences and taking depositions of witness the court of learned senior Assistant Judge dismissed the suit on the ground of defect of parties and the plaintiff also failed to prove his case. However the trial court also came to a finding that the defendants also could not failed to prove their title and gave direction that until the genuine heirs of Sabib Sheikh could be found the suit land shall vest with the government.

Being aggrieved by the judgment and decree of the trial court dated 27.04.1995 the plaintiff (instant petitioner) as appellant preferred the appeal Other Appeal No. 34 of 1995 in the court of learned Subordinate Judge, 2nd Court, Lalmonirhat. Upon hearing the parties learned Subordinate Judge, 2nd Court, Lalmonirhat dismissed the appeal and upheld the judgment of the trial court in part and upon reversing in part pursuant to the rectification of some findings of the trial court.

The present petitioner upon being aggrieved by the judgment and decree dated 15.07.1998 affirming the earlier judgment and decree dated 27.04.1995 in Other Appeal No. 34 of 1995, the present plaintiff appellant as petitioner preferred the Civil Revisional application which is before me for disposal.

Learned Advocate Mr. Mansur Habib along with Ms. Simul Sultana, learned Advocate appeared on behalf of the petitioner while Mr. Abdullah Al Mamun, learned Advocate represented the opposite parties.

Learned Advocate for the petitioner asserts that both the courts below upon misreading of evidences and misinterpretation of the law erroneously dismissed the suit and the appeal. Upon elaborating his submissions he contends that the finding of the courts below that there was defect of parties in the suit is an erroneous finding. On this point he argues that no evidences was brought before the Court during trial regarding any road at all

being constructed upon the 6 acres of suit land by the local authority. He continues that hence in the absence of evidences to the effect that the local authority is a necessary party, the finding of the court that the suit is bad for defect of party is erroneous. He submits that since it was not proved before the trial court that a road was constructed by the local authority over the 6 decimals of land therefore local authority are not a necessary party to the suit and as such the suit did not suffer from any defect of parties. He next takes me to Exhibit 2 of the L.C.R which is the Baya dalil (বায়া দলিল) executed by Krishno Mohon Bormon who is the son of the original C.S recorded owner in favour of Sagir Sheikh by a registered kabala deed dated 28.10.1959. The learned Advocate for the petitioner tries to draw my attention to the fact that the Baya deed dated 28.10.1959 which was produced as exhibit -2 is an original document. In this context learned Advocate for the petitioner argues that the Baya deed of 1959 executed in favour of Sagir Sheikh by the son of the C.S recorded owner evidences the fact that Sabib (the vendor of the plaintiffs) handed over those documents to the custody of the plaintiffs. In this context he agitated that the facts and circumstances suggest that unless there was a valid execution of a deed by Sabib in favour of the plaintiffs the Baya Dolil could not have come into the custody of the plaintiffs. He submits that the custody of the Baya deed with the plaintiffs are strong evidences in their favour but that the courts below over looked

this significant aspect and came to an erroneous finding. Regarding the registered kabala deed dated 08.02.1982 executed in favour of the defendants by the 2 brothers Habib and Sabib by kabala deed dated 08.02.1982 in favour of defendant No. 1 Md. Arfanullah and the thumb impression of the Habib and Sabib in the kabala deed he argues that those thumb impressions were never proved upon comparison or in any other possible manner. However upon a query from the court learned Advocate for the petitioner conceded that Sabib who according to plaintiff's claim had executed the deed of 1991 in favour of the plaintiffs should have been brought as a witness before the court and the thumb impression should have been ascertained but that the plaintiffs failed to produce Sabib as a witness before court at any stage of the trial and that it was the plaintiffs' duty to produce sabib. Regarding the deposition of P.W-4 the scribe who executed the deed of 1991 in favour of the plaintiffs, he submits that he had proved the documents and deposed that two persons Shamsul Haque and Abdus Subhan had identified Sabib to him and agitated that nevertheless the courts erroneously did not take the deposition of the P.W-4 into consideration as to identification of Sabib. He also argues that the trial court "disbelieved" the identifier Shamshul Haque on the ground that he is a relative of the plaintiff. On this issue he argues that being a relation of the plaintiff can not be the only ground of disbelief or distrust. In support of his claim, he argues that the registered kabala deed of

the plaintiffs in the year of 1991 is a genuine kabala deed but that the courts below failed to appreciate the same. He further agitated that the plaintiffs were unlawfully dispossessed by the defendants in the year 1991 and further agitated that Sagir Sheikh had only one son Sabib and he had no son by the name of Habib and therefore the defendant's deed of 1982 is a fraudulent deed created upon false impersonation and concludes his arguments upon assertion that both judgments of the courts below being erroneous be set aside and Rule bears merit ought to be made absolute.

On the other hand learned Advocate for the opposite parties submit that the appellate court being a final court of appeal correctly gave the judgment and decree against the plaintiffs and in favour of the defendants. Regarding the judgment of the trial court he submits that the trial court's judgment is correctly given in so far as it dismissed the suit of the plaintiffs. But regarding the findings of the trial court that the defendants failed to prove their case and therefore the property shall vest in the government till the genuine owners of the suit land be found. The learned Advocate for the opposite parties submits that the trial court in its second part of the judgment came upon an erroneous finding causing grave injustice to the interest of the defendants casting a cloud upon their title. He submits that the trial court failed to appreciate and sift properly

through the evidences particularly the depositions of the D.Ws. He argues that however the appellate court upon carefully sifting through the evidences and upon correct appraisal of the depositions of the witnesses came to a correct finding regarding possession and title of the defendants. He agitated that the defendants have been in possession of the property since many years and the suit land was lawfully purchased from the two brothers Sagir and Habib and the appellate court came upon a correct finding regarding the title of the defendants. By way of countering the contention of the learned Advocate for the petitioner that the suit did not suffer from defect of parties, Learned Advocate for the opposite parties takes me to the copy of the plaint and draws my attention to the registered kabala deed of 1982 which the plaintiffs claim was executed upon false impersonation comprises of 54 decimals of land only. He now takes me to the kabala deed of 1991 and contends that the petitioners claim that they purchased of 54 decimals of land from Sabir and 6 decimals of land from another person. Learned Advocate for the opposite parties submit that both the courts of below came upon concurrent findings as to defect of parties in as much as that the local authority was a necessary party but they were not made a party. He further submits that the plaintiff could not prove at any stage no roads were constructed by the local authority that in the 6 decimals of land they claim by way of purchase from another person. He agitated that therefore the

findings of the courts below as to defect of parties is sustainable. Regarding the argument of the petitioner to the effect that the Baya deed of 1959 executed by Sagir Ali and the rent receipts being in the custody of the petitioner being circumstantial evidences that the plaintiffs are the genuine owners of the suit land, the learned Advocate for the opposite parties submits that there is no provision or definition in the Bengal Tenancy Act as to a Baya deed representing any record of rights. He also contends that therefore a mere custody of a Baya deed cannot prevail over any rights claimed under a subsequent deed. Countering the submissions of the learned Advocate for the petitioner pertaining to P.W-4, scribe's deposition being genuine, the learned Advocate for the opposite parties controverts that P.W-4 in his deposition relied on one Shamsul Haque and Abdus Subhan to identify Sabib the vendor of the plaintiff, but yet the plaintiffs could not produce Shamsul Haque and Abdus Subhan at any stage during trial. In this context he argues that therefore the deposition of P.W-4 as to the identity of Sagir became irrelevant at this point and did not merit any consideration. In support of his submission he draws my attention upon the provisions of Section 101 of the Evidence Act 1872. Section 101 expresses that ***“He who alleges fraud or forgery, burden lies upon him to prove the same.*** Such being the position of the law, he concludes that however in this case the petitioner as plaintiff appellant miserably to prove their case. By way of support of his

claim he cited 2 decisions of this court one in the case of Abdullah Vs. Majibul Huq reported in 56 DLR(2004)528 and in the case of Nil Sena Singh Vs. Radha Mohan Singh reported in 58 DLR(2006)329. He concludes his submissions upon assertion that the opposite parties are in lawful possession of the property through a valid title by dint of a valid registered deed of 1959 and the appellate court after correctly sifting through the evidences arrived upon a correct finding and the judgment and decree of the appellate court calls for no interference and the Rule bears no merit and ought to be discharged for ends of justice.

I have heard the learned Advocates for both sides, perused all materials on record including the judgments of the courts below, perused the L.C.R and decisions cited by the learned advocate for the opposite parties. Upon perusal of the record it is revealed that regarding the plaintiffs failure to prove their claim so far as the plaintiffs claim of title, recovery of khas possession and false impersonation is concerned, both the courts below upon sifting through the evidences arrived upon a concurrent finding. I have gone through the Lower Court Records and I have also compared those with the judgments of the courts below. Regarding the findings of the courts as to the plaintiffs failure to prove their case, I do not find any inconsistency or misreading in evidences and as such both the courts below upon correct

appraisal of the plaintiffs witnesses and documents gave their concurrent findings. I find no reason interference with their decisions.

However regarding the findings of relating to the depositions of the defendants, the courts below arrived at different findings. The trial court while dismissing the suit of the plaintiff also came upon a finding that the defendants also failed to prove their case and gave a direction that the property be vested with the government till the genuine owners of the suit land be found. The Appellate court however reversed this finding of the plaintiffs and concluded that the defendants succeeded to prove their title and possession. The trial court in its finding against the defendants made an observation that the defendants are in 'illegal' possession of the suit land but the appellate court later reversed its finding. To address these issue I have gone through the judgment of both the courts below and the records wherefrom it transpires that the appellate court upon a correct appraisal of the depositions of the D.W-2,3,4 and 5 arrived upon its finding that the defendants are in lawful possession. I also agree with its finding that there is no reason to disbelieve the deed of the defendant since the deposition of the witnesses of the D.Ws proved that Sagir Sheikh has 2 sons Habib and Sabib and not one son and that they were in lawful possession of the suit land. I have gone through the deposition of the DWs wherefrom I

can not draw out any significant inconsistency and I am of the view that the depositions may be relied upon as supporting evidence in favour of the defendants in the absence of proof to the contrary. I have also gone through the depositions of DWs wherein it is revealed that D.W-5 the deed writer deposes that he knew both Habib and Sabib and the thumb impression was given in front of him. I also find that the deposition of defendant No. 5 could not be proved to be untrue at any point upon cross or otherwise. I also find that the deposition of the other D.Ws also could not be disproved upon cross examination or through any other evidence. It is also quite clear from the records that although the plaintiffs claim to title is through a deed executed by Sabib but Sabib was not brought before the trial court at any point. Further the plaintiffs also could not prove upon evidences by any of the P.Ws or otherwise that they are in possession of the suit land and that they were unlawfully dispossessed from the suit land in 1981. The plaintiffs claim that the defendants were actually borgadars and the borga was given by Sabib and they were allowed to possess the case land only in their capacity of borgadars and nothing beyond. The plaintiffs further claim is that the deed of 1982 relied upon by the defendant is a false deed. But as is evident from the records, the plaintiffs could not prove any of these claims through oral evidences or otherwise. As to the issue of defect of parties both the courts below came to a

concurrent finding and I find no misreading of evidences and therefore no reason to interfere therein.

It is also my considered view that the Appellate Court's observation on the Trial Court's finding is correct. The Appellate Court finds “নালিশী জমি পরিত্যক্ত ও অনাবাদী সম্পত্তি হিসাবে গন্য হইয়াছে মর্মে যে অভিমত রাখিয়াছেন তাহাও সার্বিক বিবেচনায় যুক্তিযুক্ত বিবেচিত হয় না। এই প্রসঙ্গে ডি,ডাবিণ্টউ-১ আরফান আলী তাহার জেরায় বলিয়াছেন যে, নালিশী জমি পরিত্যক্ত হিসাবে ঘোষণা হইয়াছে এই রূপ কোন কাগজ পত্র তিনি দাখিল করেন নাই। তবে নালিশী জমি খারিজ করিতে গেলে সংশিষ্ট রাজস্ব কর্মকর্তা উহা অর্পিত সম্পত্তি হিসাবে গন্য হইয়াছে মর্মে উল্লেখ খারিজ করিয়া দিতে অস্বীকার করেন। সম্ভবতঃ বিবাদীর এই উক্তির ভিত্তিতেই নিম্ন আদালত নালিশী সম্পত্তি অর্পিত হিসাবে গন্য হওয়ার পক্ষে মতপোষন করেন। কিন্তু ইহা সাক্ষ্য প্রমাণে আসিয়াছে যে, নালিশী জমি ইতোমধ্যে অর্পিত ও অনাবাদী হিসাবে গণ্য হইয়াছে মর্মে কোন তালিকা আদালতে আসে নাই। কাজেই, আদালত মনে করে যে, নালিশী সম্পত্তি উপরোক্ত অবস্থায় অর্পিত ও অনাবাদী হিসাবে গন্য করার কোন কারণ নাই।” I am in agreement with the finding of the appellate court that the defendants have succeeded to prove the validity of the deed of 1982 and they also proved their possession. Therefore the question of the suit land being vested in the government till ‘genuine’ owners return is totally unwarranted and have no basis in facts and law. Learned Advocate for the opposite parties in support of his submission drawn upon the provision of Section 101 of the Evidence Act that the onus of proof lies upon the party who makes the allegation. In this context he also refers to two decisions of this court one in the case of Abdullah Vs. Majibul Huq reported in 56

DLR(2004)528. The principle relied upon this decision is reproduced hereunder: ***“He also alleges fraud or forgery, burden lies upon him to prove the same. The petitioners by filing an application for calling for the record of the concerned case took reasonable steps to prove their the case of fraud and forgery. The application was rightly filed.”*** The principle in the decision cited by the counsel for the opposite parties is in the case of Nil Sena Singh Vs. Radha Mohan Singh reported in 58 DLR(2006)329 is also reproduced hereunder: ***“The party on whom the onus of proof lies must, in order to succeed, establish his case and he cannot, on failure to do so, take advantage of the weakness of his adversary’s case. He must succeed by the strength of his own right and clearness of his own proof”.***

Under the foregoing facts and circumstances and in the light of the submissions made by the learned Advocates for both parties, from the discussions made above and relying upon the decisions cited by the learned Advocate for the opposite parties, I find no merit in this Rule.

In the result, the Rule is discharged without any order as to cost.

Send down the lower courts records at once.

Communicate the judgment at once.

Arif(B.O)