

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No. 411 of 1994

Sree Samir Kumar Nath since deceased substituted by his heirs Shimul Debnath and others

...Petitioners

-Versus-

Government of the Peoples Republic of Bangladesh represented by the Deputy Commissioner, Jessore and another

...Opposite Parties

Mr. Bivash Chandra Biswas, Advocate

...for the petitioners

Mr. Goutam Kumer Roy, D.A.G. with Mr. S M Quamrul Hassan, A.A.G.

... for the opposite parties

Judgment on 2.10.2012

This Rule at the instance of the plaintiff-appellants was issued to examine the legality of judgment and decree dated 14.10.1993 (decree signed on 21.10.1993) passed by the Subordinate Judge (now Joint District Judge), Jessore in Title Appeal No. 257 of 1989 dismissing the appeal and affirming those dated 28.6.1989 passed by the Assistant Judge, Jessore Sadar in Title Suit No. 738 of 1976 dismissing the suit for perpetual injunction.

The predecessors-in-interest to petitioner Nos. 1(a)-(b), 6(a)-(b) and petitioner Nos.2-5 instituted a suit for perpetual injunction against

the opposite parties in the Third Court of Munsif at Jessore on the averments, *inter alia*, that the land as described in *Ka* and *Kha* schedules of the plaint originally belonged to Kalipada Nath and Sudhir Kumar Nath. Due to arrear of rents, a certificate case was initiated in respect of the *Ka* scheduled land and ultimately it was sold in auction to Bimala Bala Nath in an execution case on 11.5.1962. The sale was confirmed by issuing a *boynama* in her name and she went in possession thereof. Bimala Bala Nath had entered into an agreement for sale with the plaintiffs on 24.7.1973 and inducted them into possession thereof on receipt of earnest money. The *Kha* scheduled land was still under control and possession of its original owners Kalipada Nath and Sudhir Kumar Nath, who also entered into an agreement for sale with the plaintiffs and on receipt of earnest money, inducted them into possession thereof on 8<sup>th</sup> Sraban, 1380 B.S. Two sale deeds were accordingly executed on 7.3.1975 and 13.3.1975 and were registered on 15.3.1975 on payment of the balance consideration money. Since then the plaintiffs were in peaceful possession and enjoyment of the suit land by residing at the reconstructed house in *Ka* schedule land and performing rituality and worshipping in a temple at *Kha* schedule land. All on a sudden the vested property authority served them a notice on 6.9.1976 to surrender possession of the suit land claiming it to be a vested property, thus the cause of action for the suit.

The defendant-opposite parties contested the suit by filling a written statement denying the material facts of the plaint contending,

*inter alia*, that the S. A. recorded tenants Kalipada Nath and Sudhir Kumar Nath had left the country before 1965. Accordingly the land was treated initially as enemy property and thereafter vested and non-resident property. Bimala Bala Nath or Kalipada Nath and Sudhir Kumar Nath did not transfer any land to the plaintiffs and the sale deeds produced by them were forged. They had no lawful possession in the suit land and that the suit was not maintainable.

On the aforesaid pleadings the trial Court framed issues, namely, whether the suit was maintainable in its form; whether it was barred by limitation; whether the plaintiffs had any right, title and possession over the suit land; and whether they were entitled to get any relief as prayed for.

In order to prove their case the plaintiffs examined three witnesses including plaintiff No.1 Samir Kumar Nath as P.W.1 and two deed writers, namely, Bhabesh Banarjee (P.W.2) and Elahi Box (P.W.3), who scribed the agreements and sale deeds respectively. P.W.1 adduced in evidence two sale agreements as exhibits-1 and 1(a); two sale deeds as exhibits- 2 and 2(a); two S. A. khatians in names of the original owners Kalipada Nath and Sudhir Kumar Nath as exhibits-3, 3(a) and certified copy of *boynama* in their vendor's (Bimala Bala Nath's) name as exhibit-4.

On the other hand, Government-defendants examined only one witness Atiar Rahman, an Office Assistant of the office of vested property, Jessore as D.W.1, who did not adduce any documentary

evidence. He admitted the plaintiffs possession in the suit land, but termed it illegal.

After conclusion of the trial, learned Assistant Judge dismissed the suit by judgment and decree dated 28.6.1989, against which the plaintiffs preferred Title Appeal No. 257 of 1989 in the Court of District Judge, Jessore. Ultimately the Subordinate Judge (Artha Rin), Jessore heard the appeal and dismissed the same by judgment and decree dated 14.10.1993. Being aggrieved the plaintiff-appellants moved in this Court with the present civil revision and obtained the Rule with an order of *status quo*. During pendency of the Rule, petitioners 1 and 6 died and their legal heirs were substituted.

Mr. Bivash Chandra Biswas, learned Advocate appearing for the petitioners submits that in a suit for perpetual injunction, possession is the paramount consideration. In the present case, the plaintiffs claim of title is backed by two registered sale deeds by which they have been able to prove their prima facie title to the suit land. Admittedly they were in possession of the suit land, but the Courts below without considering the basic legal requirements in a suit for perpetual injunction unnecessarily traveled into their title with adverse remark and thereby committed error of law resulting in an error in decision occasioning failure of justice.

In support of his contention Mr. Biswas refers to the case of Satish Chandra Barua Vs. Samir Kanti Barua and others, 19 BLD

(HCD) 609 and Manindra Nath Sen Sarma Vs. Bangladesh, 1984 BLD (AD) 285.

Mr. Goutam Kumar Roy, learned Deputy Attorney General appearing for the opposite parties at the very outset submits that the present civil revision is related to a vested property and has therefore abated under section 13 of the অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ (in brief ~~the~~ Ainq). With reference to the written statement, he submits that when the defendants had denied the material fact relating to cause of action in their written statement, it was incumbent upon the plaintiffs to produce and prove the notice, which was allegedly served upon them claiming the suit land to be a vested property, but they hopelessly failed to do it, and therefore, no cause of action was proved. Learned Deputy Attorney General finally submits that even if the notice was served upon them, it was served by the vested property authority while performing public duties and therefore, injunction cannot be granted as it is barred by section 56 (d) of the Specific Relief Act.

In support of his contention learned Deputy Attorney General refers to the case of Barada Sundari Paul and others Vs. The Assistant Custodian, Enemy Property (Land and Buildings), Comilla and others, 15 BLD (AD) 95.

In reply, Mr. Biswas submits that service of notice upon the plaintiffs by the vested property authority having not been specifically denied, it cannot be said that the cause of action was not proved, especially when specific pleading was made and oral evidence was led

by P.W.1 to that effect. In response to a query by the Court, Mr. Biswas apprises that the suit land has been enlisted in official gazette as a vested property, but fails to produce the gazette notification.

I have gone through the records, judgments of the Courts below and the decisions cited. In 19 BLD (HCD) 608 a suit for perpetual injunction was instituted on simple threat of eviction. Subsequently the defendant in his written statement raised conflicting claims of title and possession over the suit land. During the trial, ten witnesses were examined by the parties to prove their respective claim of possession over the suit land. The suit was decreed and the decree was upheld on appeal. The defendant-petitioner moved in the High Court Division with a civil revision. A single bench of the High Court Division sent the case on remand on setting aside the judgment and decree. In so doing, the High Court observed that the Courts below had erred in law in decreeing the suit for permanent injunction without discussing and considering any evidence of the witnesses to prove the factum of possession, and further observed that the Courts below had judged the case from a wrong angle placing unnecessary importance on the question of title.

The said case was between two individuals and at the time of alleged threatening for dispossession, no title was claimed. In the present case a Government-functionary claimed title of the Government as vested property and served a notice while performing his official duty.

In the case reported in 1984 BLD (AD) 285 the Appellate Division allowed an appeal restoring a decree of trial Court, by which perpetual injunction was granted in favour of plaintiff. In that case the plaintiff's title was established in an earlier suit and this was the paramount consideration of the Appellate Division. But in the present case plaintiff's title was not decided. More so, both the Courts below incidentally examined the title of the plaintiffs and found it in the negative. Therefore, the cases cited are distinguishable and do not lend any support to the petitioners.

Section 13 of the অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ provides abatement of suits or proceedings claiming title to any vested property or any proceedings for release of the same pending before the Custodian of Vested Property on the date of publishing the list of vested property in official gazette. The present case is a simple suit for perpetual injunction. Any relief regarding vested character of the suit land having not been sought for, it does not come within the scope of section 13 of the Ain and therefore, I am unable to accept the submission of learned Deputy Attorney General that the instant civil revision has already abated.

In 15 BLD (AD) 95 as cited by learned Deputy Attorney General, a suit for declaration of some landed property to be not of enemy character with further relief of perpetual injunction was dismissed mainly on the ground of defect of parties. The said judgment and decree of dismissal was upheld by all the Courts up to High Court Division. The

Appellate Division by a majority judgment ultimately allowed the civil appeal and thereby decreed the suit.

The point of legal controversy is quite different in the present case and as such the case cited by the learned Deputy Attorney General does not help him in any manner.

In the present case, the trial Court discussed that the record of *Ka* schedule land was not mutated in the name of Bimala Bala Nath, and no rent receipts in names of the plaintiffs or any municipal tax receipts in names of the plaintiffs were produced. It also referred to D.W.1 who admitted the plaintiffs' possession in the suit land terming it to be illegal, but did not arrive at any definite findings on their possession of the suit land. The appellate Court concurred with the trial Court and found that the plaintiffs had failed to produce any writ of possession in the name of Bimala Bala Nath. From the sale agreement their induction into *Ka* schedule land was also not proved. Both the Courts below discussed mainly the evidence relating to title and concurrently found that the plaintiffs failed to prove their title in the suit land, and dismissed the suit and appeal.

It appears from the plaint that when the vested property authority served a notice upon the plaintiffs on 6.9.1976 claiming the suit land to have vested in the Government, cause of action for the suit arose. The plaintiffs did not seek any relief against the notice or against the vested character of the property as alleged in the notice. Even they did not produce the same to infer their possession in the suit land. Although



P.W.1 gave oral evidence in support of the plaintiffs possession, his evidence was not corroborated by any other witness. In such a position, the D.W's evidence in support of the plaintiffs physical possession is questionable and not fully trustworthy.

However, when the notice was served upon the plaintiffs claiming the suit land to be vested property, they ought to have instituted a properly framed suit for declaration of their title with a further declaration against its vested character or against the notice as an ancillary relief. In absence of which the simple suit for perpetual injunction was not maintainable. This view finds support from Rafizuddin Ahmed Vs. Mongla Barman and others, 11 BLD (AD) 245. Under similar facts and circumstances M H Rahman, J while speaking on behalf of the Court held:

*“In a simple suit for permanent injunction with regard to a disputed landed property, the relief is available to a person who is in possession. The Court may enquire incidentally into the respective claims of the parties to the suit for determining whether the plaintiff has got a prima facie case, i.e., whether he is in possession of the disputed property and entitled to the specific relief of permanent injunction. If the dispute involves complicated questions of title, the plaintiff must establish his title by filing a regular suit for declaration of title. A simple suit for permanent injunction should not be allowed to be used as a testing device for ascertainment of title. In this case the plaintiff assails the presumption of the C.S. Khatian, a kind of exercise, the Court in a simple suit for permanent injunction should ordinarily avoid.” (emphasis supplied)*

Under the facts and circumstances, I am of the view that the suit itself was not maintainable, and therefore, the Courts below in dismissing the suit and appeal did not cause any failure of justice. The plaintiffs may, however, institute a properly framed suit, if so advised and in that case the adverse observations regarding the plaintiffs' title documents will not operate. If the property in question is enlisted as vested property, they are also at liberty to approach the Tribunal or District Committee under the অর্পিত সম্পত্তি প্রত্যাপন আইন, ২০০১ for release of the same.

The Rule is thus discharged with above observations, however, without any order as to cost. The order of *status quo* granted earlier is vacated.

Send down the lower Courts' records.