

District: Cumilla

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 6148 of 2001

In the matter of :

Abdul Khaleque and another

... Petitioners

-Versus-

Abdur Rahaman and others

...Opposite parties

Mr. Mohammad Mostafa, Advocate with

Mr. Mohammad Masud Parvez, Advocate

...For the petitioners

Mr. Mohammad Ali Zinnah, Advocate

...For the opposite parties

Heard on: 28.10.2024,

26.11.2024 and 01.12.2024

Judgment on: 08.12.2024

Rule was issued under section 115(1) of the Code of Civil Procedure calling upon the opposite parties to show cause as to why the judgment and decree dated 16.08.2001 passed by the Sub-ordinate Judge, Second Court, Cumilla in Title Appeal No. 187 of 1999, reversing those of dated 26.09.1999 passed by the Senior Assistant Judge, Chandina, Cumilla in Title Suit No. 85 of 1994 dismissing the suit should not be set aside and/or

such other or further order or orders as to this Court may seem fit and proper.

The present opposite party Nos. 1-3 as plaintiffs filed Title Suit No. 185 of 1994 before the Court of Senior Assistant Judge, Chandina, Cumilla for permanent injunction impleading the predecessors of the present petitioners as defendants.

The case of the plaintiffs briefly are that the .486 decimals of land of the disputed joth was originally belonged to Jafar Ali, who died intestate leaving behind 2(two) sons, Roshan Ali and Abdul Hamid Ali and a daughter Saberunnessa as his legal heirs. During the State Acquisition Settlement, in the year 1960, the name of Roshan Ali, Abdul Hamid and their sister were duly recorded and finally published in S.A. Khatian No. 412. The land measuring an area of .105 decimals of plot No. 1303 is part and parcel of the aforesaid land of S.A. Khatian No. 412. The said property of .105 decimals is viti-land and through amicable partition Roshan Ali, predecessor of the plaintiffs got .18 decimals of land adjacent to the south of the

graveyard, comprising of .15 decimals of land at the northern side of plot No. 1303. Abdul Hamid got .18 decimals of land to the adjacent south of Roshan Ali and thereafter, Roshan Ali again got .6 decimals at the adjacent south of Abdul Hamid. Accordingly, Roshan Ali's .18 decimals, Abdul Hamid's .18 decimals and Roshan Ali's further 6 decimals in total measuring an area of .42 decimals situated at the northern part and adjacent south of the graveyard. While Abdul Hamid was in enjoyment of the aforesaid .18 decimals of land transferred the same to plaintiff Nos. 1 and 2 through registered kabala dated 03.01.1977. The plaintiffs being heirs of late Roshan Ali got his aforesaid share (.18+.6) in total .24 decimals of land and by purchase got .18 decimals, and in this way they have acquired title and possession over the aforesaid .42 decimals of land. The defendants have residence adjacent western side of the disputed plot. The sons of Abdul Hamid also sold out their

other shares, inherited from their father, to the plaintiffs. The plaintiffs have good title and exclusive possession in the aforesaid property and on being threatened by the defendants to dispossess from the suit land, the plaintiffs instituted the present suit for permanent injunction. Subsequently by way of amendment the plaintiffs amended the plaint, incorporating the fact that after institution of the suit they have been dispossessed by the defendants from .3 decimals of land out of the aforesaid .42 decimals on 15.07.1994. Accordingly, they incorporated an additional prayer for recovery of khash possession, allegedly under section 9 of the Specific Relief Act, 1877.

The defendant Nos. 1 and 2 contested the suit by filing written statement contending, *inter alia* that the disputed 4.86 acres of land was originally belonged to Khodabakshwa, who died intestate leaving behind 2(two) sons, namely Gafur Ali and Ala Bakshaw. The sons of Khodabakshwa acquired the said

property by way of inheritance, measuring an area of 2.43 acres each, at ejmally. Munsur Ali, son of Ala Bakshaw got 2.43 acres of land from his father and while was in exclusive possession transferred $.101\frac{1}{4}$ decimals of land including $.19\frac{1}{2}$ decimals of plot No. 1303 to his 3(three) sons, Samsul Haque, Moslehuddin and Keramat Ali on 24.05.1983. Munsur Ali on the same day also transferred $.101\frac{1}{4}$ decimals of land to his another son Ali Azam including $.19\frac{1}{2}$ decimals from the northern side of the disputed plot. Jafar Ali died leaving behind 2(two) sons, namely Roshan Ali and Abdul Hamid and one daughter Saberunnessa. Accordingly, Roshan Ali acquired $.97\frac{1}{3}$ decimals of land by way of inheritance out of his ancestral property of 2.43 acres. Roshan Ali died leaving behind 3(three) sons, the plaintiffs who got his left property. Abdul Hannan, one of the heirs of Abdul Hamid transferred $.1\frac{1}{2}$ decimals of

land to Abu Taher and Abu Taher subsequently transferred the same to defendant No. 1. Defendant Nos. 1 and 2 by way of purchase acquired $.42\frac{1}{2}$ decimals of land situated at the adjacent south of the graveyard. The plaintiffs have possession over the land of southern side of the land of those of the defendants. The plaintiffs have no possession over the scheduled property, thus the question of dispossession does not at all arise and thus, they prayed for dismissal of the suit.

The plaintiffs examined 4(four) witnesses and adduced documentary evidences as Exhibit-‘1’ to ‘3’ and the defendants also examined 4(four) witnesses and adduced documentary evidences as Exhibit-‘Ka’ to ‘Umah’.

On conclusion of hearing, learned Senior Assistant Judge by his judgment and decree dated 26.09.1999 dismissed the suit.

The plaintiffs having been aggrieved took Title Appeal No. 187 of 1999 before the District Judge, Cumilla. On transfer the said appeal was heard by the Sub-ordinate Judge, Second Court, Cumilla and by his judgment and decree dated 16.08.2001 passed in Title Appeal No. 187 of 1999 allowed the appeal, reversing the judgment and decree of the trial Court and thereby decreed the suit.

Learned Advocate Mr. Mohammad Mostafa along with Mr. Mohammad Masud Parvez, learned Advocate appearing for the petitioners submits that the original suit was filed for permanent injunction and subsequently by way of amendment the plaintiffs amended the prayer and thereby sought for recovery of khash possession under section 9 of the Specific Relief Act, 1877 and in such situation, he continues to submit that the suit at it's present form is not maintainable, because, the suit under section 54 of the Specific Relief Act, seeking a

decree of permanent injunction altogether has a different proceeding and procedure than of a suit for recovery of possession under section 9 of the said Act i.e. a suit section 9 has a summary proceeding, the only question is to be adjudicated therein, the plaintiff's possession and subsequent dispossession by the defendants and no appeal shall lie against the judgment and decree of the suit under section 9 of the Specific Relief Act. On the other hand, the judgment and decree under section 54 of the Specific Relief Act is an appealable one. Thus, a suit cannot be permitted to proceed together with the aforesaid 2(two) different nature of prayers and procedures. He next submits that the defendants have title and possession in the scheduled property in ejmally with the plaintiffs and others, thus, the present suit without a prayer of partition is not maintainable. He further submits that the trial Court categorically found that the plaintiffs miserably failed to prove

their exclusive possession and thus, they are not entitled to get relief as sought for and the appellate Court below without considering the evidences on record illegally reversed the aforesaid finding of the trial Court and thus, the judgment of the appellate Court below is not sustainable in law.

On the other hand, Mohammad Ali Zinnah, learned Advocate for the opposite parties submits that the plaintiffs have title and exclusive possession over the .42 decimals of land of plot No. 1303 and which has been specifically demarcated by boundary through the plaint. The appellant Court below after considering the evidences on record and after controverting the each and every findings of fact of the trial Court arrived at the positive findings that the plaintiffs have title and exclusive possession over the .42 decimals of land at the northern part of plot No. 1303 adjacent south of the graveyard of .15 decimals. He next submits that since the Court

of appeal below arrived at the positive findings upon assessing the evidences on record properly, thus, there remains no scope to interfere with the findings of fact of the Court of appeal below.

Heard learned Advocates of both the parties, perused the revisional application, the supplementary affidavits filed by both the parties; having gone through the cited judgments.

It appears that the plaintiffs filed a suit for permanent injunction for restraining the defendants from interfering into their peaceful possession in the suit land. In a suit for permanent injunction, the prime consideration is whether the plaintiffs have successfully proved their exclusive possession over the suit property and in such suit prima facie title of the plaintiffs may also be taken into consideration.

In the said suit, subsequently by way of amendment the plaintiffs incorporated the fact that subsequently they were

dispossessed by defendants from .3 decimals of land out of the scheduled .42 decimals of land and thereby incorporated a prayer for recovery of khash possession.

Now let us see, what is the findings of fact of the Court of appeal below regarding exclusive possession of the plaintiffs over the suit land.

The Court of appeal below categorically found that the S.A. Khatian No. 412 was prepared in the name of Roshan Ali, Abdul Hamid and Saberunnessa, the sons and daughter of Jafar Ali and also found that the D.W. 1 admitted that there is no evidence that Ala Bakshaw or his son Monsur Ali ever challenged the aforesaid recording in the S.A. Khatian. The appellate Court also found that the predecessor of the plaintiffs namely, Roshan Ali being son of original C.S. recorded tenant, Jafar Ali have got .18 decimals of land at the northern part of plot No. 1303 adjacent south to the graveyard of .15 decimals

of land and Abdul Hamid, another son of Jafor Ali also got .18 decimals of land adjacent south of Roshan Ali's aforesaid .18 decimals. The said Abdul Hamid through registered kabala dated 03.01.1977 transferred his said .18 decimals of land to the plaintiffs, the deed has been exhibited as Exhibit-'2' and Roshan Ali again got .6 decimals at the adjacent south of the aforesaid land. The appellate Court also found that the P.W. 2, 3 and 4 in their evidences categorically supported the claim of P.W. 1 as to the plaintiffs' possession into the suit land and prior to them, their father and uncle (Abdul Hamid) were in exclusive possession over the said land. The appellate Court below while considering the balance of convenience and inconvenience for granting injunction, categorically found that admittedly no khatian was prepared in the name of Ala Bakshaw, the predecessor-in-interest of defendants and it is also found that the defendants did not claim the property by way of

inheritance, but by way of purchase, thus, whether the defendants were inducted into the possession of the property by their vendors before filing of the suit or not or the defendants vendors were in possession or not, is to be proved by the defendants by adducing evidences. The appellate Court also categorically found that the defendant No. 2, Siddique Rahman, who examined as D.W. 1, in his cross, admitted that they purchased the property from the southern part of the plot in question from Abdul Hanan, Abdul Malek and Siraj and thus, the defendants by purchasing property from the southern side cannot claim the property at northern side. It is to be noted here that the plaintiffs sought for a permanent injunction regarding an area of .42 decimals of land situated at the northern side of plot No. 1303 out of .105 decimals of land. It is the finding of the appellate Court below that there is no evidence that the Munsur Ali and his 2(two) sons had any possession over the

suit land. Referring to the evidence of D.W. 3, appellate Court below also found that the D.W. 3 admitted the .36 decimals of land having been purchased by the defendants are situated at the very southern part. It was also categorically found that the suit was filed on 13.07.1994 by the plaintiffs and the defendants purchased the alleged .36 decimals of land through registered sub-kabala dated 29.10.1994 (Exhibit-‘Umah’) i.e. after filing of the suit. From the aforesaid facts, it appears that the defendants cannot claim that they were in possession over the aforesaid .36 decimals of land prior to filing of the suit, when admittedly the deed was executed and registered on a later date and when the .36 decimals of land situated at the very southern portion of plot No. 1303.

The defendants claimed that sons of Abdul Hamid transferred $6\frac{1}{2}$ decimals of land through several deeds to the defendnats on 08.06.1988, 20.11.1989, 09.06.1988 and

20.11.1988 (Exhibit-‘Kha’, ‘Kha-1’, ‘Kha-2’ and ‘Kha-3’), but the defendants did not deny that the father of their vendors, Abdul Hamid transferred .18 decimals of land to the plaintiffs long before 11 and $\frac{1}{2}$ years of their purchase. Thus, the defendants or their vendors cannot claim that they transferred their $6\frac{1}{2}$ decimals of land out of the aforesaid .18 decimals, acquired and possessed by the plaintiffs through purchase from Abdul Hamid. It is found by this Court herein before as well as the Court of appeal below that the said transferred of $6\frac{1}{2}$ decimals of land situated at the very southern part of plot No. 1303, which in no manner can be the part of the plaintiffs claimed .42 decimals of land situated at the northern side of plot No. 1303. Thus, this Court does not find any infirmity in the findings of fact of the appellate Court below.

The appellate Court also found that the plaintiffs have also proved that they have been dispossessed by the defendants

from .3 decimals of land after filing of the suit. Thus, they are entitled to get the relief as sought for in Title Suit No. 85 of 1994.

So far the contention of Mr. Mohammad Mostafa, learned Advocate for the petitioner that the suit is not maintainable with the prayer of permanent injunction together with recovery of khash possession under section 9 of the Specific Relief Act. This Court already found that the suit was initially instituted for permanent injunction and subsequently, the prayer for recovery of khash possession was incorporated in the said suit, since the plaintiffs dispossessed from .3 decimals of land out of .42 decimals of the suit land.

From the record, I do not find anything that the defendants ever tried to resist the aforesaid amendment or challenged the proceedings of the suit before the trial Court or before the Court of appeal below. Thus, the suit was allowed to

proceed with the aforesaid prayer. This Court has already found that the plaintiffs by adducing adequate evidences have been able to prove that they are in exclusive possession in the suit land and their subsequent dispossession from .3 decimals of land out of the aforesaid .42 decimals, and as such, they are legally entitled to get the decree as prayer for.

Mr. Mohammad Mostafa, learned Advocate for the petitioner cited the case of Munshi Kamal Hossain Vs. Shamsul Hoque reported in 14 BLD 385, wherein although a single Bench of this Division maintained the decree of the suit partly, but did not come to a conclusion that the suit filed with the aforesaid 2(two) prayers is not maintainable. In numerous cases, our Apex Court as well as this Division held that the mufassil pleas should be construed liberally and for the fault of mufassil pleader in preparing the pleadings, the parties should not be deprived from their entitlement of getting relief. From

the record, it further appears that the plaintiffs could have prayed for mandatory injunction or status-quo ante with the fact of dispossession. Even the Court of law is not powerless to grant proper remedy on the fact of dispossession and may pass order under section 151 of the Code of Civil Procedure, restoring the plaintiffs into the possession in a proper case. In such circumstances, this Court does not find any reason to deprive the plaintiffs from the remedy as sought for, since the evidences and materials are available on the record to grant them the relief as sought for. Thus, in allowing the appeal and reversing the judgment of the trial Court the appellate Court below having not occasioned any failure of justice.

I do not find any merit in the Rule.

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

However, regarding the submission of Mr. Mohammad Mostafa that it is settled by the Apex Court as well as by this Division that in proper cases, the plaintiffs are entitled to get a relief to maintain their exclusive possession against the disturbance of defendant-cosharers until the property is being partitioned and the defendants have adequate scope to sought for partition of the ejmaily property before the Court of law. The defendants have already filed Partition Suit No. 67 of 2001 before the Court of Assistant Judge, Chandina, Cumilla. Thus, the plaintiffs can maintain their exclusive possession till disposal of that suit.

The ad-interim order passed earlier is hereby recalled.

Communicate the judgment and order at once.