

Bench:

Mr. Justice Bhishmadev Chakraborty

And

Mr. Justice Md. Ali Reza

First Appeal No. 331 of 2007

Md. Jamaluddin Sarkarappellant

-Versus-

Alhaj Mohammad Abdul Aziz being dead his
heirs and othersrespondents

with

First Appeal No. 335 of 2007

Salauddin Sarkar and othersappellants

-Versus-

Sheikh Mohammad Shahjahan and others
.....respondents

Mr. Md. Shahidul Islam, Advocate

.....for the appellant

(in FA No. 331 of 2007)

Mr. Md. Abdul Alim Miah, Advocate

.....for the appellants

(in FA No. 335 of 2007)

Mr. Rajiuddin Ahmed, Advocate

.....for the respondents

(in both the appeals)

Judgment on 19.02.2023

Md. Ali Reza, J:

These two appeals are taken up together for analogous hearing pursuant to order dated 12.01.2022 and accordingly disposed of by this common judgment. Title Suit No. 39 of 1999 was filed by the predecessor of the respondents named Md. Abbul Aziz on 27.05.1999 impleading 10 defendants. Subsequently by amendment 37 defendants were impleaded in

the suit. Defendants 1-9, 10, 14, 16, 18, 20 and 30-34 contested the suit. Defendant 10 and defendants 1-9 have preferred First Appeal No. 331 of 2007 and First Appeal No. 335 of 2007 respectively challenging the judgment and decree dated 21.06.2007 passed by the Joint District Judge, Court No. 2, Gazipur in Title Suit No. 39 of 1999 decreeing the suit in part in respect of 1.45 acres of land out of 1.48 acres of land. Plaintiff respondents did not file any cross appeal in respect of the rest 0.03 acres of land. Suit was filed for declaration of title and recovery of possession with regard to Ka schedule land and for further declaration that the documents mentioned in schedules Kha-Chha and schedule Ka/1 respectively are illegal, inoperative, null and void and not binding upon the plaintiffs. In presence of both parties issues were framed on 11.05.2000.

The case of the plaintiff, in short, is that the suit land measuring 1.48 acres of land appertaining to CS and SA plots 850 and 852 of CS khatian 186 and SA khatian 299 corresponding to RS plots 1332 and 1335 of RS khatian 125 belonged to Sheikh Abdul. CS khatian was correctly prepared in his name. He died leaving behind 03(three) sons named Sheikh Sobhan, Sheikh Koran and Sheikh Alimuddin who

sold entire 1.24 acres of land of CS and SA plot 852 to Mon Mohan Saha and Lalit Mohan Saha through *kabala* 3818 dated 11.04.1924 and delivered possession. Thereafter Sobhan, Koran and Alimuddin surrendered entire 0.24 acres of land of CS and SA plot 850 to superior landlord of CS Khebot 138 named Thakur Gobinda Roy in the first part of the year 1928 from whom Monmohan Saha took settlement and maintained possession upon payment of rent. All papers of settlement of 0.24 acres were lost during liberation war in 1971. Thus Monmohan acquired 1.48 acres of land of CS khatian 186 derived from CS Khebot 138. Monmohan then died leaving behind son Satish Chandra Saha who sold 1.48 acres of land to Abdul Mozid through *kabala* 1768 dated 06.10.1948 and delivered possession. Mozid transferred 1.48 acres of land to plaintiff Abdul Aziz through *kabala* 3946 dated 05.05.1954 and possession was delivered. Abdul Aziz maintained possession in the suit land through bargadars until dispossession on 29.11.1990. Defendants are very influential persons in the locality and always engaged to grab the property of others by misusing their power and creating false and forged deeds and nobody dared to protest against their illegal and nefarious activities. It is further stated that

defendant 1 with the cooperation of his deceased brother Shahajuddin who was the former Chairman of Tongi Pourashava illegally trespassed in the suit land with some dangerous men armed with weapons on 29.11.1990 at around 11 a.m. and dispossessed the plaintiff on denial of his title and cut away the paddy cultivated by bargadars. Defendants then erected a tinshed house in plot 852 and established a school named “Shahajuddin Sarker Adarsha High School” and formed a committee collusively in which defendants 3-9 are members and defendants 1 and 2 are president and secretary respectively. The school has yet not been approved by the Ministry of Education. Defendant 2 Amin Uddin subsequently at the end of 1991 constructed 08(eight) semi brick built and 03(three) tin shed houses on 0.24 acres of plot 850 and planted some trees. Plaintiff’s son Shahjahan earlier filed Title Suit No. 12 of 1990 on 07.06.1990 against Amin Uddin for permanent injunction which was withdrawn on 23.08.1992 after such dispossession. Defendants have no title and possession in the suit land because their predecessors transferred the suit land to the predecessor of the plaintiff by *kabalas* dated 11.04.1924 and 06.10.1948. Plaintiff came to learn the impugned documents including the gift dated

11.04.1991 executed by defendant 2 Amin Uddin in favour of school on 21.04.1991. The cause of action arose on 29.11.1990, 21.04.1991, 02.05.1999. Later on plaintiff by way of amendment specifically denied the case of defendant 10 and introduced the documents of defendant 10 and prayed relief with respect to schedules Ka-Chha. During pendency of the suit the sole plaintiff Abdul Aziz died and the respondents were substituted as plaintiffs in the suit on 04.02.2002.

Defendants 1-9, 10, 14/16/18/20 and 30-33/34 appeared in the suit and filed four sets of written statements.

Defendant 10 contested the suit by filing written statement denying all material averments made in the plaint contending, *inter alia*, that the suit land measuring 1.48 acres pertained to CS plots 850 and 852 of CS khatian 186 belonged to two brothers named Sheikh Abdul and Ebadulla Fakir. Ebadulla maintained possession in 0.03 acres out of 0.24 acres from plot 850 by amicable partition. Ebadulla died leaving behind son Hafijuddin who sold 0.03 acres to Asadullah, Tukka Mia and Gadu Mia by deed 8457 dated 19.08.1948 and handed over possession and RS khatian 125 was prepared in their names. They sold 0.03 acres by deed 4890 dated 03.06.1974 to Samirannessa who is the mother of defendant

10. Samirannessa mutated her name by Mutation Case No. 389 of 1985-86 and was in possession in self made homestead on payment of rent. Samirannessa sold the aforesaid land to her son defendant 10 by deed 86 dated 08.01.1998. Defendant 10 mutated his name by Mutation Case No. 6048 of 1997-98. It is further stated that CS tenant Abdul died leaving behind 03(three) sons named Sobhan, Koran and Alim. Koran died leaving behind son Rafiq and daughter Asia. Rafiq sold 0.05 acres from plot 850 to defendant 10 through deed 710 dated 14.03.1988. Siddiquir Rahman who is the son of Asia also transferred 0.01½ acres from the same plot to defendant 10 by deed 1400 dated 28.05.1997. Thus defendant 10 acquired 0.09½ acres from suit plot 850 and constructed 03(three) semi pucca building and have been in possession. The case of the plaintiff being false is liable to be dismissed.

The case of defendants 1-9 is that CS tenant Sheikh Abdul died leaving behind 04(four) sons named Sobhan, Korban, Hossain and Alimuddin. Sobhan is the father of defendant 2. Sobhan got the suit land by amicable partition and after his death defendant 2 acquired the same. In 1990 Sahajuddin Sarker was looking for a land to setup a school for which defendant 2 desired to gift 0.50 acres of land and

accordingly a school started to run from class VI-VIII with its name as 'Sahajuddin Sarker Adarsha Bidyalaya'. Thereafter in order to get approval from Ministry of Education defendant 2 executed a gift deed 584 on 11.04.1991 in favour of the school. There are 21(twenty one) teachers and other office assistants with night guards and sweepers working in this school. The other defendants have been in possession in plot 850 and the school is situated in 0.50 acres at the northern side of plot 852 and the rest land is under possession of the heirs of CS tenant Abdul and they are not made parties to the suit. One of the sons of plaintiff Aziz earlier filed Title Suit No. 12 of 1990 for permanent injunction against defendant 2 Aminuddin alias Aman Kari with a different claim and the suit was ultimately withdrawn. Plaintiff's claim that he had no knowledge about the deed dated 11.04.1991 is false and the suit is liable to be dismissed.

Defendants 14, 16, 18, 20 supporting the case of defendants 1-9 and defendants 30-33/34 supporting the case of defendant 10 filed two separate written statements and contested the suit but they did not approach this Court in appeal showing their discontent.

In presence of parties 05(five) issues were initially framed by the Court which were recast and reframed as 06(six) issues. During the course of trial plaintiffs examined 08(eight) witnesses and defendant examined 08(eight) witnesses and both the parties adduced documentary evidence in order to prove their respective cases.

The Joint District Judge upon perusal of the pleadings and evidence decreed the suit in part in modified form by judgment and decree dated 21.06.2007. As against the same defendant 10 preferred First Appeal No. 331 of 2007 and defendants 1-9 preferred First Appeal No. 335 of 2007.

Mr. Md. Shahidul Islam, learned Advocate appearing on behalf of the appellant of First Appeal 331 of 2007 submits that the trial Court without considering the evidence on record erroneously decreed the suit in part by granting saham of only 0.03 acres to defendant 10 although the suit was for declaration of title and recovery of possession. He further submits that there may be thousands of defects in defence case but that will not entitle the plaintiffs to get the decree under section 101 of the Evidence Act. He then submits that plaintiffs totally failed to prove the case of surrender and subsequent settlement under section 86 of the Bangal Tenancy

Act by producing any evidence. Plaintiffs also failed to prove the transfer by Sotish to Mojid by *kabala* deed dated 06.10.1948 and the *kabala* of defendant 10 dated 19.08.1948 being earlier in point of time shall prevail over the *kabala* dated 06.10.1948 and plaintiffs failed to prove their title and possession in plot 850. He further contends that the fact as given by the plaintiffs in earlier Title Suit No. 12 of 1990 is different from the present suit but the trial Court did not consider this aspect of the case and wrongly decreed the suit. The document dated 19.08.1948 being 30(thirty) years old document bears strong presumption under section 90 of the Evidence Act. He then submits that plaintiffs failed to prove possession followed by dispossession and this suit cannot be decreed. He then refers to exhibit-3 and submits that although Monmohan paid rent to Thakur Gobinda Roy but CS khatian shows that the superior landlord is Kali Narayon Roy and the rent was paid for a portion of land. He referred the cases of Mst. Gola Bewa and others Vs. Md. Abdur Rashid and others, 4 MLR(AD) 420; Mansur Ali Vs. Bangshidhari Thakur and others, 46 DLR 645 in support of his submission.

Mr. Md. Abdul Alim Miah, learned Advocate appearing on behalf of appellants of First Appeal No. 335 of 2007

submits that the recital of document of Sotish dated 06.10.1948 shows that he acquired the property through settlement but the plaintiffs claimed that his father took settlement from Monmohan. Thus the claim of the plaintiffs appears to be contradictory and oral evidence will be excluded by documentary evidence but trial Court failed to appreciate this aspect of the case. Trial Court also failed to consider that no decree can be passed against school because school was not made party in the suit and defendants 1-9 are not school. Since pourashava and school were not parties this suit suffers defect of party and cannot be decreed. He leads us to the prayer portion of the plaint and submits that no issue was framed against the gift document dated 11.04.1991 as well as possession followed by dispossession according to prayer and the impugned judgment is a nullity being decided without issue. He points out that PW 1 admitted in cross that there is a deep tubewell in plot 850 installed by pourashava but pourashava was not made party and since plaintiffs did not disclose any date of installation of such tubewell their case on date of dispossession is false and not proved in evidence. Plaintiffs have no reliable and credible case because the claim in earlier Title Suit No. 12 of 1990 is totally different from the

present claim and the trial Court erred in law and wrongly decreed the suit. The trial Court did not discuss the evidence of the witnesses of the plaintiffs and upon wrongful consideration decreed the suit which is not tenable in the eye of law. Referring to the ordering portion of the impugned judgment he submits that plaintiffs since did not prefer any cross appeal they are not entitled to relief. He submits that the document dated 06.10.1948 showing settlement instead of acquisition from father proves that the case of the plaintiffs is false. He refers to the case of Barada Sundari Paul and others Vs. The Assistant Custodian and others, 15 BLD(AD) 95 and finally prays that the appeal may be allowed.

Mr. Rajiuddin Ahmed, learned Advocate appearing on behalf of the respondents submits that at the time of dispossession in 1990 there was no school and plaintiffs' grievance is against persons involved in dispossession and moreover defendants 1-9 representing school are duly made parties to the suit. Defect of party was cured on several occasions through interrogatories and ultimately 37 defendants were added instead of 10 defendants while the suit was first filed on 27.05.1999. The case of possession followed by dispossession is clearly made out in the plaint. He takes us

through the evidence on record and submits that the averment on chain of acquisition of title of the plaintiffs is in conformity with the documents and oral evidence led by the plaintiffs. Referring to Order 41 Rules 22 and 33 of the Code of Civil Procedure he contends that respondents can have the remedy against the point decided against them even without preferring cross objection. He argues that trial Court misconceived the law and facts of the case and wrongly held that defendant 10 acquired title in 0.03 acres of land from plot 850 by adverse possession but failed to understand that the claim of defendant 10 is based upon documents and this Court can examine the decision of the lower Court on such point without a separate cross objection. In support of his submission he refers the cases of Haque Brothers Ltd. Vs. BSRS, 37 DLR(AD) 63; Hazrat Ali and others Vs. Yakub Ali Khan and others, 3 BLD(AD) 62; Mohammad Hussain Vs. Abul Kashem, 3 BLC 131; Sonali Bank Vs. Rana Oil Mill, 52 DLR(DB) 130 and Abdul Motaleb Vs. State, 25 DLR(DB) 21. He finally submits that appeals do not have any merit and prays for a full decree of the suit by dismissing the appeals.

We have heard the learned Advocates and perused the pleadings of the parties and the evidence on record and also

gone through the grounds taken in the appeals as well as the judgment passed by the Court below.

The suit was filed on 27.05.1999. Defendants 1-9 appeared in the suit on 07.06.1999 and filed written statement on 05.09.1999. On 17.05.2001 defendants 1-9 raised further question on defect of party by amendment. Plaintiffs filed application on 26.09.2001 for interrogatories which was replied by the defendants on 31.10.2001 and accordingly plaint was amended on 12.11.2001. Plaintiffs subsequently impleaded as many as 37 defendants which was allowed on 28.06.2003. Defendants 1-9 proceed with the allegation that the suit is bad for defect of parties because school and pourashava were not made parties to the suit. Question of defect of party should be raised at the earliest opportunity and in this suit plaintiffs brought all the necessary parties to the suit. It appears that at the time of dispossession in 1990 there was no school in the suit land and moreover defendants 1-9 stood for representing the school in proper way. Pourashava is also defendant 13 in the suit. The purpose of law of joinder of parties is to enable the Court to be in a position to determine the real controversy between the parties and to avoid allowing a mere technical objection successful to defeat a just claim.

Law is settled that suit does not fail on account of misdescription of parties when the same does not affect the merit of the controversy and cause failure of justice. This aspect has been decided in many cases including the case of Divisional Forest Officer Vs. Mohammad Sahabuddin and others, reported in 12 MLR(AD) 287. Moreover no issue on defect of party was framed in the suit although Court framed issues in two times. On 11.05.2000 issues were framed in presence of both parties without any objection. Law says that mere omission to frame an issue is not fatal unless such omission affects the trial of the suit and when parties are not prejudiced and substantial justice having been done with opportunity to adduce evidence absence of an issue does not vitiate the proceeding. We find the submission made by Mr. Mia on point of defect of parties bears no substance.

The lower Court ended the judgment with an allotment of 0.03 acres of land from CS plot 850 in favour of defendant 10 in the form of a relief of partition under Order 7 Rule 7 of the Code of Civil Procedure and it appears that such decision originated from the misconstruction of the word “admission” as is seen from the beginning of disposing of issues 3-5. Plaintiffs never admit that the CS recorded tenants are Sheikh

Abdul and Sheikh Ebadullah. The CS record 186 (exhibit-1) also does not mention so. But the Court assumed the fact mistakenly at the initial stage and could no longer move away from this misconception till reaching to its conclusion. This is a suit for declaration of title and recovery of possession and plaintiffs never made out any case that either of the defendants is co-sharer to them and as such any relief in the name of partition is absolutely uncalled for and misconceived. In the name of granting general or other relief the Court can not and would not mount any surprise on the other side. A party cannot be granted a relief which is not claimed and if it works serious injustice to the other party and deprives him of a valuable right the Court cannot make out a third case in the name of granting general and special relief. In the instant case defendant 10 is claiming under documents of title not through adverse possession. The decision of the Court on this point is not sound, legal and proper.

Plaintiffs claim that the CS tenant Abdul was owner in possession in 1.48 acres of land of CS plots 850 and 852 of CS khatian 186 (exhibit-1). Plaintiff Aziz was examined as PW 1 on 17.04.2001. After the death of sole plaintiff Aziz his heirs were substituted in the suit as present plaintiff-respondents.

Subsequently, defendant 10 filed written statement on 07.03.2002 against which plaint was amended on 28.06.2003 and PW 8 being son of Aziz deposed on 09.05.2006. He denied the relation and existence of Ebadullah Fakir in his examination-in-chief. He was not cross examined but only confronted suggestion on this point. It is the definite case of defendant 10 that CS tenant Abdul had a brother named Ebadullah who got 0.03 acres of land from CS plot 850 by amicable partition. Defendant 10 himself as DW 1 deposed in the suit and was mainly supported by 2 witnesses Mosharaf Hossain and Nur Mohammad. But defendant 10 did not take any step to prove the existence and relation of Ebadullah with Sheikh Abdul by producing any witness relating to the family of Ebadullah or by local aged person or persons having knowledge of the existence of Ebadullah. Defendant 10 claimed that Ebadullah died leaving behind son Hafiz Uddin. DW 2 Mosharaf Hossain stated in cross that he does not know how many brothers and sisters Ebadullah had. There is no evidence to show that Sheikh Abdul had a brother named Ebadullah and Hafizuddin was Sheikh Abdul's nephew. It is the settled principle of law that CS record has got a strong presumptive value under section 103B of the Bengal Tenancy

Act and the same is presumed to be correct until it is found to be incorrect. Therefore it is held that defendant 10 could not prove the existence of Ebadullah and since he is an imposter the successive transfers claiming under him have got no value. The document dated 19.08.1948 [exhibit-Kha(2)] was not proved either by scribe, identifier, attesting witness or by calling the volume from the concerned office. Exhibit-Kha(2) is not filed in original and the same is not a 30(thirty) years old document. The submission of Mr. Islam on this point bears no value. Defendant 10 acquired no title by exhibit-Kha(2) as well as by the following document dated 03.06.1974 [Exhibit-Gha(2)] and document dated 08.01.1998 [Exhibit-Gha(2)(1)]. RS record 125 [Exhibit-1(kha)] is wrong so far it relates to the entry of the names of Asad Ullah, Tukka Baksh, Gedu Baksh because the basis of such entry is absolutely unfounded. The findings of the trial Court in respect of document dated 14.03.1988 [Exhibit-Gha-2(2)] and document dated 28.05.1997 [Exhibit-Gha-2(3)] that those documents are illegal, ineffective and void is based on proper appreciation of evidence. Defendant 10 failed to prove his title to the suit land.

The case of defendants 1-9 is that CS raiyot Sheikh Abdul died leaving behind 04(four) sons named Sobahan,

Koran, Hoshen, Alim Uddin and among them Sobahan acquired the suit land by amicable partition. Defendant 2 Amin Uddin is the son of Sobahan. Sobahan and his brothers never sold 1.24 acres of plot 852 nor surrendered 0.24 acres of plot 850. They and their descendants have been maintaining title and possession in the suit land. In 1990 a school named Sahajuddin Sarker Adarsha Bidyalaya was established in 0.50 acres of land at the northern portion of plot 852 and a gift document was accordingly executed and registered by defendant 2 on 01.11.1991. Defendant 2 as DW 1 stated in examination-in-chief that the school was established in 1990. DW 2 Mir Siddiqur stated in examination-in-chief that Sahajuddin Sarker established the school through discussion with the eminent persons. DW 3 Barek stated in examination-in-chief that Sahajuddin established the school before 20(twenty) years. DW 4 Anisur Rahman is the teacher of the school. DW 5 Sukkur Ali stated in examination-in-chief that founder Sahajuddin was the Chairman of Tangi Pourashava for two times. On the other hand plaintiffs claimed that CS raiyot Sheikh Abdul was the owner in possession in 0.24 acres and 1.24 acres of CS plots 850 and 852 respectively appertaining to CS khatian 186. He died leaving behind

03(three) sons named Sobhan , Koran, Alim Uddin. They sold entire 1.24 acres from plot 852 to Monmohan and Lalit both sons of Ram Chandra by *kabala* 3818 dated 11.04.1924 (exhibit-7) and delivered possession in which Monmohan maintained possession by amicable arrangement. This document was proved by PW 3 Belal Uddin who brought the volume book as per call of the Court. Further case of the plaintiffs is that 03(three) sons of Sheikh Abdul surrendered 0.24 acres of land of plot 850 to the superior landlord from whom Monmohan took settlement and became owner in possession in the entire 1.48 acres of land of CS khatian 186. He died leaving behind son Sotish who sold the land to Mojid by *kabala* 1768 dated 06.10.1948 the certified copy of which dated 09.05.1985 was marked in evidence as exhibit-6 and the same is proved by PW 6 Badiuzzaman who brought the volume book as per order of the Court. Both PW 3 and PW 6 were cross examined but their depositions remained unshaken. Mojid then sold the suit land to the plaintiff Aziz by *kabala* 3946 dated 05.05.1954 the original of which is exhibit-4. It is a 30(thirty) years old document produced before the Court from the proper custody and it attaches presumption under section 90 of the Evidence Act that the same was duly

executed and attested. Defendants could not produce any cogent and tangible evidence to dislodge the value of exhibit-4. The contention that the *kabala* dated 19.08.1948 exhibit-Kha(2) being earlier in point of time shall prevail over exhibit-4 under section 47 of the Registration Act is wrong and misconceived because the basis of exhibit-Kha(2) is unfounded in evidence.

Plaintiffs have asserted in the plaint that they maintained possession in the suit land till 29.11.1990 through bargaders. On 29.11.1990 defendants along with some dangerous persons entered into the suit plots and dispossessed them. Earlier there was a threat of dispossession by defendant 2 in collusion with other defendants for which plaintiff-1(ka) filed Title Suit No. 12 of 1990 for permanent injunction and the suit was withdrawn on 23.08.1992 due to subsequent dispossession by the defendants. As discussed above the entry of the names of the vendors of defendant 10 in RS khatian 125 exhibit-1(kha) in respect of 1 anna 10 gondas share is without basis and wrong. Defendants claim that their predecessors neither sold nor surrendered the property and they have been in possession since CS record was finally published in the name of Sheikh Abdul. It appears from record that the SA record 299 [Exhibit-

1(ka)] was finally published in the name of Abdul Aziz on 01.08.1963 and the subsequent RS record was also prepared in his name. From exhibit-1 series, 2 series and 3 it appears that the plaintiffs paid rent from 1339 BS to 1403 BS. Exhibit-3 which is register II showing payment of arrear rent with respect to 1.48 acres of land was then under sikimi or in other words subordinate taluk of register-1 under landlord Thakur Gobinda Roy. The defendants did not adduce any documentary evidence showing their previous possession since 1924 the time when exhibit-7 was executed. Since exhibits-4, 6, 7 are duly proved in evidence as genuine documents, the gift document 584 dated 11.04.1991 executed by defendant 2 appears to us a completely sham transaction and it does not confer any title to the school. The case of surrender as made out by the plaintiffs is proved by other evidence and subsequent act and conduct of the parties. The ratio laid down in 4 MLR(AD) 420 and 46 DLR 645 cases is not applicable considering the facts and circumstance of the present case because in those cases the claim of surrender was not supported by any documentary and circumstantial evidence. But in the instant case the surrender is impliedly

proved by exhibit-4, exhibit-6, exhibit-1(ka), 1(kha), exhibit-2 series and exhibit-3.

It is the definite case of the defendants that the school was established in 1990. PW 1 stated in cross examination that school was forcibly established in 1990. PW 2 who was the bargadar stated in examination-in-chief that defendants dispossessed the plaintiffs by cutting down the paddy and establishing school in 1990. He stated in cross examination that the deep tubewell is outside the suit land. PW 5 was also one of the bargadars and he stated in examination-in-chief that “আমার নাম মোঃ আম্বর আলী। নাঃ জমি চিনি। নাঃ জমি বাদী আব্দুল আজিজের থেকে নিয়া আমি ১৯৬৩ সন থেকে বর্গাদার হিসাবে বর্গা করিতাম। তার আগে বর্গা করত মোজাফফর (PW-2) নামীয় ব্যক্তি। নালিশী জমি বাইদ (নীচু) জমি। ৮৫২ দাগে জমির পরিমান ১.২৪ একর। আমি ২৯/১১/১৯৯০ সন পর্যন্ত বর্গা করি। ঐ তাং এ বিবাদী ও চেয়ারম্যান সহ লোকজন লইয়া নাঃ জমি হইতে ধান কাটিয়া নিয়া যায়। আমরা বাধা দিলে তারা বলে যে, তোদের জমি না, জমির মালিককে নিয়ে আয়। বিচার মানছিলাম কিন্তু চেয়ারম্যানের বিরুদ্ধে কেহ সাক্ষী দিতে আসে নাই। মালিক আব্দুল আজিজকে জানালে তিনি বলেন যে, তিনি থানায় কেস করেছেন।” He was not cross examined on point of such dispossession but only was confronted a suggestion. PW 7 who is the brother of PW 5 also deposed as bargadar. He stated in examination-in-chief that “আমার নাম মোঃ জয়নাল আবেদীন। বাদী আব্দুল আজিজ কে চিনি। নালিশী

জমির দাগ নং ৮৫২ এবং পরিমাণ ১.২৪ একর অপর দাগ নং ৮৫০ এবং পরিমাণ ০.২৪ একর। জমির প্রকৃতি বাইদ জমি। নাঃ জমি বাদীর থেকে লইয়া আমার পিতা ১৯৬৩ সন হইতে বর্গা করতেন। বর্তমানে পিতার গতায়ুঅন্তে আমরা ৩ ভাই উক্ত জমি চাষাবাদ করি বর্গাদার হিসাবে। '৬৩ সনের পূর্বে জনৈক মোজাহার বর্গা করতেন এই জমি। ইং ২৯/১১/১৯৯০ তাং পর্যন্ত আমরা বর্গা করছি। ঐ দিন নাঃ জমি হইতে আমান কারী ধান জোর করিয়া দখল করিয়া নেয় এবং পাকা ধান কাটিয়া নিয়া যায় এবং আমরা বাধা দিতে আসিলে আমাদেরকে বলে যে, “তোরা বর্গা করিস তবে তোরা তোদের মালিককে জানা এই ধান কাটিয়া নিয়া গেলাম। এই পাকা ধান কাটিয়া নিয়া গেলে সালিশ করলে সালিশ হয় নাই সবাই বলে যে, মামলা করো তখন বাদী মামলা করে থানায় কারন বিবাদীরা খুব প্রতাপশালী লোক। ৮৫০ দাগের জমি বিভিন্ন সময় বিভিন্ন লোক দিয়া বর্গা করায়।” His statement of dispossession was not challenged in cross examination and he stated in cross examination that there is a school in the suit plot since 1990. Thus the documentary and oral evidence showing earlier possession of the plaintiffs followed by dispossession in consonance with the averment of pleading is apparently proved in evidence.

Trial Court decreed the suit in part in a modified form in respect of 1.45 acres out of 1.48 acres of land. Respondents did not file any cross appeal against such decision. Learned Advocates for the appellants raised objection for not filing such cross objection. Learned Advocate for the respondents

refers the provisions of Order 41 Rules 22 and 33 of the Code of Civil Procedure along with the decisions of 25 DLR(DB) 21, 52 DLR(DB) 130, 3 BLD(AD) 62, 37 DLR(AD) 63 and 3 BLC 131 cases and submits that respondents can urge a point decided against him without filing cross objection considering the facts and circumstances of an appropriate case and mere fact that respondents having not filed any cross appeal would not by itself be sufficient to justify refusal to exercise the power conferred under Order 41 Rules 22 and 33 of the Code of Civil Procedure. We have gone through the referred cases and found substance in his submission. In view of the ratio laid down in those decisions, we find merit in his submission and accordingly the same is accepted.

As discussed above the trial Court was wrong in granting saham of 0.03 acres of land in favour of defendant 10 and this finding arrived at by the trial Court is hereby expunged and set aside. Plaintiffs have been able to prove their title in the entire suit land and they are also entitled to recovery of possession in respect of suit land measuring 1.48 acres of land of CS plots 850 and 852 of CS khatian 186. Documents mentioned in schedules Kha-Chha are declared illegal, inoperative, null and void and not binding upon the plaintiffs and RS record 125 is

also declared wrong so far it relates to the entry of the names of Asadulla, Tukka Baksh, Gedu Baksh with their share.

It is sad but true that the school students will experience temporary difficulties but we have got nothing to do with it because law shall take its own course.

It is therefore held that the judgment and decree passed by the trial Court is affirmed in the modified form and the suit is decreed in full and both the appeals are dismissed. Defendants are directed to deliver khas possession of 1.48 acres of land as mentioned to the schedule of the plaint within 60(sixty) days from the date of this judgment failing which plaintiffs shall get khas possession of the same through Court in accordance with law.

Send down the lower Court's record with the copy of this judgment.

Communicate this judgment and order to the concerned Court.

Bhishmadev Chakraborty, J:

I agree.