

District: Jeshore

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 6807 of 2001

In the matter of :

Tarek Ejaj alias Sohel

... Petitioner

-Versus-

Monir Jahidul Islam and others

...Opposite parties

Mr. Bivash Chandra Biswas, Advocate with
Ms. Songjukta Dobay, Advocate

...for the petitioner

Mr. Md. Ekramul Islam, Advocate

...For the opposite parties

Heard on: 28.10.2024, 12.11.2024

and 18.11.2024

Judgment on: 02.12.2024

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1 and 2 to show cause as to why the judgment and decree dated 09.09.2001 passed by the Additional District Judge, Second Court, Jeshore in Title Appeal No. 155 of 1991 reversing those of dated

30.05.1991 passed by the Assistant Judge, Abhoynagar, Jeshore in Title Suit No. 16 of 1989 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 opposite party Nos. 1 and 2 as plaintiffs filed Title Suit No. 16 of 1989 before the Court of Assistant Judge, Abhoynagar, Jeshore for declaration of title, recovery of khash possession and for further declaration that the auction sale as well as the boynama regarding the suit land as disclosed by the defendants is false, illegal, collusive, ante-dated, fabricated, in-operative and not binding upon the plaintiffs.

The case of the plaintiffs briefly are that the property appertaining to C.S. khatian No. 406 measuring an the area of .63 decimals under plot No. 1804 was belonged to Haibatullah Behara and Khadem Behara in equal share. Upon an amicable settlement Khadem Behara became owner of the .32 decimals of land on the northern side of the plot. While the Khadem Behara was in peaceful possession and enjoyment, he gave settlement of the said .32 decimals of land to Afazuddin on 06.05.1930. Afazuddin while was in exclusive enjoyment died intestate leaving behind one son, Aftabuddin, 5(five) daughters, Aytun Nessa, Abejan Bibi, Lakshminessa Bibi, Insan Nesa and Noorjahan Bibi and wife

Mariam Bibi as his legal heirs. Accordingly, during the State Acquisition Survey, the S.A khatian No. 414 was prepared in their name. Subsequently, Mariam Bibi died intestate leaving behind the aforesaid son and daughters as legal heirs. Aftafuddin Shaikh died intestate leaving behind 5(five) sons, defendant Nos. 2 and 7-10 and 5(five) daughters, defendant Nos. 3, 11-13, Ayesha Khatoon and 1(one) wife, defendant No. 14 and second wife, Durlovi Bibi. Aftafuddin had 1(one) son through Durlovi Bibi, defendant No. 2 and 2(two) daughters, defendant No. 3 and Ayesha Khatoon. Ayesha Khatoon died intestate leaving behind defendant Nos. 4, 5 and 6. The defendant Nos. 2-14 are heirs of deceased Aftafuddin. Abejan Bibi, the daughter of Aftabuddin transferred her share in favour of defendant No. 7; Aytun Nessa and Insan Bibi 2(two) daughter of Aftabuddin transferred their shares to defendant Nos. 2 and 7, through separate deeds dated 27.02.1979. The defendant Nos. 8-11 and 13, 14, heirs of Aftabuddin transferred their shares to Abdul Hakim through registered kabala dated 12.02.1982. Defendant No. 12 transferred her share to Jinnat Ali by registered kabala dated 23.04.1982. Defendant No. 7 by registered kabala dated 02.01.1983 transferred .11 decimals of land to Abdul Hakim. The further of the minor plaintiffs on their behalf purchased $\frac{1}{2}$ decimals of land through

registered kabala dated 24.07.1983 from Jinnat Ali and was inducted into possession. Abdul Hakim on 24.07.1983 transferred .11 decimals of land to plaintiff No. 1 and on the same date he also transferred $.10\frac{3}{4}$ decimals of land to plaintiff No. 2 by registered kabala. Father of the minor plaintiffs handed over the consideration money on behalf of plaintiffs and was enjoying exclusive possession over $.22\frac{1}{4}$ decimals of land out of the scheduled property. Earlier the plaintiffs filed Title suit No. 102 of 1986 before the Assistant Judge, Abhoynagar, Jeshore and in the said suit plaintiffs filed an application under Order XXIII, rule 1 for withdrawal of the suit with permission to sue afresh on the self same cause of action and said application was allowed with a cost of Tk.100/-. Thereafter, the defendant Nos. 1 and 2 on 01.09.1988 forcibly dispossessed the plaintiffs from the suit land; hence, they filed the present suit after observing all formalities and with the aforementioned prayer. It is further case of the plaintiffs that the defendant Nos. 1 and 2 in order to grab the property and to deprive the heirs of Aftabuddin managed to create a Boynama allegedly issued in Certificate Case No. 38632 of 1962-63, which is false, fabricated, collusive, illegal, in-operative, having no legal implication and not binding upon the plaintiffs.

On the other hand, the defendant No. 1 contested the suit by filing written statement contending, *inter alia* that the suit is not maintainable in its present form. Defendant No. 1 in his written statement upon admitting the genealogical table upto the recorded owner of S.A. khatian No. 414 stated his specific case, *inter alia* that due to arrear of rent the property of the heirs of Aftabuddin was put in auction in pursuant to Certificate Case No. 38632 of 1962-63 and Durlavi Bibi by her own fund and own interest purchased the property in auction on 16.05.1962 and the sale was confirmed on 26.08.1963. Durlavi Bibi died intestate leaving behind 1 (one) son defendant No. 2 and 2(two) daughters defendant No. 3 and Ayesha Khatoon, who inherited the entire .32 decimals of land. Defendant No. 2 through amicable partition became absolute owner of the aforesaid .32 decimals of land. While defendant No. 2 was in exclusive possession and enjoyment of the property, he transferred the same through registered kabala dated 25.07.1983 to defendant No. 1. The defendant No. 1 has acquired right, title and exclusive possession over the suit land.

The plaintiffs examined 6(six) witness and adduced documentary evidences, on the other hand, the defendant also examined 6(six) witnesses and adduced documentary evidences. Learned Judge of the trial Court on conclusion of hearing by his

judgment and decree dated 30.05.1991 dismissed the suit on contest holding that the predecessor-in-interest of defendant namely, Durlavi Bibi through Certificate Case No. 38632 of 1962-63 purchased the entire .32 decimals of land in auction, which was held due to the failure of the heirs of Aftabuddin to pay the rent to the Government and through the said certificate case, the S.A. recorded tenants lost their title. Accordingly, the plaintiffs did not acquire any right, title, through the alleged purchase from title less persons.

Having been aggrieved by the judgment and decree dated 30.05.1991 passed by the Assistant Judge, Abhoynagar, Jeshore in Title Suit No. 16 of 1989, the plaintiffs preferred Title Appeal No. 155 of 1991 before the District Judge, Jeshore. On transfer the said appeal was heard by the Additional District Judge, Second Court, Jeshore and by his judgment and decree dated 09.09.2001 allowed the appeal, reversing the judgment and decree of the trial Court and thereby decreed the suit as a whole.

On being aggrieved by and dissatisfied with the aforesaid judgment and decree of learned Additional District Judge, the defendant-petitioner preferred this revisional application and obtained the Rule.

Mr. Bivash Chandra Biswas, learned Advocate for the petitioner submits that earlier the plaintiffs filed Title Suit No. 102 of 1986 before the Upazila Munsif, Abhoynagar, Jeshore and the said suit was permitted to withdraw with permission to sue afresh under Order XXIII, rule 1 of the Code of Civil Procedure with a cost of Tk.100/- and thereafter, the plaintiffs filed Title Suit No. 16 of 1989; no where in the plaint or judgment it is stated that the plaintiffs ever deposited the aforesaid cost of Tk.100/- and thus, without depositing the cost, the plaintiffs are not entitled to institute the present suit on the self same cause of action together with consequential relief. Thus, the present suit is not maintainable in it's present form. Referring to Exhibit-'Umah', he next submits that a compromise was taken place between the auction purchaser and predecessor-in-interest of the plaintiffs namely, Abdul Hakim Khan and Jinnat Ali in Miscellaneous Case No. 14/XIII/1983-84, wherein they admitted the title of the predecessor of defendant and thus, the plaintiffs are barred by estoppel in denying the defendant's title. He further submits that the Court of appeal below without any cogent reason or specific finding came to an arbitrary conclusion that the 'Boynama' in pursuant to the Certificate Case No. 38632 of 1962-63 is forged and fabricated document and thereby committed error of law in

his decision occasioning failure of justice. He also submits that it is admitted by the plaintiffs that Aftabuddin and others inherited the suit property from Afajuddin and it is also admitted that Abdul Mannan is the son of Aftabuddin and it is proved that Abdul Mannan was in possession of the suit land and thereafter he inducted the defendant-petitioner into the possession in the suit land and thus, this petitioner became a co-sharer of the holding and as such, the present suit is not maintainable without a prayer for partition. He further submits that the suit land is not specified and specifically demarcated and as such, the suit in its present form is not maintainable.

In support of the submissions he cited the case of Marfat Ali Miah(Md) Vs. Jagadish Chandra Sheel and others reported in 58 DLR(AD) 133, the case of Ananda Lal Das and others Vs. A.N.M. Ehia Wakf Estate by Matwalli Deputy Commissioner and another reported in 3 DLR 229, the case of Ershad Ali Howlader being dead his heirs: Nazrul Islam (Babu) and others Vs. Santi Rani Dhupi and others reported in 12 MLR(AD) 105, the case of Tayeb Ali Vs. Abdul Khaleque and others reported in 43 DLR(AD) 87, the case of Mrs. Sabiha Khanam Vs. Jaitun Bibi alias Mrs. Syed Moazzem Hossain being dead her heirs: Syed Nurul hasan and others reported in 18 BLD(AD) 95 and the case

of Nuruzzaman Sarkar Vs. Seraj Mia and others reported in 41 DLR(AD) 106.

On the other hand, Mr. Md. Ekramul Islam, learned Advocate for the plaintiffs-opposite parties submits that the Court of appeal below categorically found that the Boynama in question, through which the defendant claim his title, is forged, fabricated and created document and through which the defendant did not acquire any right, title over the suit land. On the other hand, the plaintiffs are claiming the property from the heirs of admitted original recorded tenant and if the defendant's alleged certificate case is not proved, then there is almost no dispute regarding the title of the recorded tenants of S.A. Khatian No. 414 and the subsequent purchaser. The appellate Court below categorically found that the plaintiffs are in exclusive possession over $.22\frac{1}{4}$ decimals of land. The findings of fact arrived at by the appellate Court below upon proper appreciation and consideration of the evidences on record cannot be interfered in revision. He next submits that the compromise between the son of Durlavi Bibi and Abdul Hakim and Jinnat Ali bears no significance, because, before the said compromise, Abdul Hakim and Jinnat Ali became title less, transferring their property on 24.07.1983. He further submits that the defendant Nos. 2 and 7 through registered kabala dated

27.02.1979 purchased the entire shares of Aytun Nessa, Abejan and Insan Bibi, heirs of Afajuddin, who acquired title to the extent of their shares through inheritance. The recital of those deeds categorically admitted the title of the successors of Afazuddin and thus, now the defendant is barred by estoppel in demanding their title in a different way through Certificate Case No. 38632 of 1962-63. By referring Exhibit-'2 Kha', the judgment and decree dated 27.04.1988 passed in Title Suit No. 100 of 1986, he next submits that in the said judgment the alleged auction sale of Durlovi Bibi was declared void, illegal and in-operative. He continues to submit that the S.A. record of the locality was finally published on 01.08.1963 and the auction was held on 16.05.1962 prior to the publishing of the S.A. record, but from the sale certificate, it is seen that even before publishing the S.A. record officially, the S.A khatian number has been mentioned in the said certificate, which categorically proves that the said boynama is a forged and fabricated one.

Further referring to the Exhibit-'Kha', the sale certificate issued in pursuant to Certificate Case No. 38632 of 1962-63, he submits that according to the pleadings of defendant, the auction was taken place for arrear of Government rent and as such, the proceeding ought to have been started under the Public Demands

Recovery Act, 1913 and the sale certificate claimed to be issued in pursuant to the certificate case is to be issued in Form No. 28 of the Appendix, appended to the Public Demands Recovery Act, 1913, pursuant to rule 74 of the Schedule II Rules to the said Act, instead of that the Exhibit-‘Kha’ shown that it was issued under Order XXI, rule 94 of the Code of Civil Procedure, which can only be issued in pursuant to a rent suit initiated under B.T. Act, he continues, from the Exhibit-‘Kha’ it is apperant that the Sale Certificate produced by the defendant is a fabricated one.

Heard learned Advocates of both the parties, perused the revisional application together with the lower Court’s record. Having gone through the relevant provisions of law and the cited judgments.

It appears that the initial objection of learned Advocate for the defendant-petitioner is that the plaintiffs did not deposit the cost of Tk.100/- in any time before any Court and as such, the plaintiffs were not entitled to proceed with the suit. I have examined the record, where from, it appears that no where the defendant raised such objection or question before the original Court or before the appellate Court below. The question of fact of depositing or non-depositing of cost, which has been raised first time before the revisional Court hardly can be accepted.

Moreover, from the record, I could not find out anything to hold that Title Suit No. 16 of 1989 was continued irregularly. Under section 114(e) of the Evidence Act, 1872, it is presumed that the judicial and official acts have been regularly performed and who ever wishes the Court to believe contrary, is to prove the same. In this regard the judgment of 3DLR, cited on behalf of the petitioner does not help to improve his case. Regarding the rest contention, the defendant admitted the title of the predecessor-in-interest of the plaintiffs, the title of the S.A. recorded tenants i.e. the defendant admitted the title of the heirs of Afazuddin, and upon admitting the said title his specific case is that the mother of defendant No. 2, Durlovi Bibi purchased the property in auction in pursuant to Certificate Case No. 38632 of 1962-63. To prove the said claim defendant exhibited Exhibit-‘Kha’, the Sale Certificate. The appellate Court below in its judgment specifically found that:

“নিম্ন আদালতে বিবাদীপক্ষ প্রদঃ-‘খ’ একটি বয়নামা দাখিল করিয়াছেন। উক্ত প্রদঃ-‘খ’ বয়নামা এবং বিবাদী পক্ষের সাক্ষী গনের সাক্ষ্য এবং নিম্ন আদালতের নথি পর্যালোচনা করিলে দেখা যায় যে, প্রদঃ-‘খ’ বয়নামায় বর্ণিত ৩৮৬৩২/১৯৬২-৬৩ নং খাজনা মামলার কোন নথি তলব দেওয়া হয় নাই। প্রদর্শনী-‘খ’ বয়নামা দৃষ্টে নালিশি দাগের ৩২ শতক সম্পত্তি ১৯৬২ সালে ১৬/০৫/১৯৬২ইং তারিখ প্রকাশ্য নীলামে বিক্রয় হয় বলিয়া উল্লেখ আছে। অথচ ১৬/০৫/১৯৬২ইং তারিখ হাল রেকর্ড আদৌ চূড়ান্তভাবে প্রকাশিত হয় নাই। অথচ হাল ৪১৪ নং খতিয়ান উল্লেখে প্রদঃ-‘খ’ নিলাম বয়নামা প্রস্তুত হইয়াছে বলিয়া দেখা যায়।

বিবাদী পক্ষের সাক্ষীগণের সাক্ষ্য এবং নথি পর্যালোচনা করিয়া প্রদঃ-‘খ’ বয়নামা একটি বানোয়াট ও যোগসাজসী জাল ও ভূয়া কাগজ হইতেছে বলিয়া প্রতীয়মান হয়। ১নং বিবাদীর পূর্ববর্তি এবং ২নং বিবাদীর মাতা দুর্লভী বিবি নালিশী সম্পত্তি নিলাম মূলে খরিদ করার দাবীটি মিথ্যা, ভিত্তিহীন এবং ঐ রূপ নিলাম মূলে দখল পাওয়ার কোন দালিলিক প্রমাণ আদালতের নজরে আসে নাই। প্রদঃ-‘খ’ বয়নামা বিবাদী পক্ষ সুকৌশলে ও যোগসাজসে সৃষ্টি করিয়াছে বলিয়া প্রতীয়মান হয়। এবং উক্তও বয়নামার ভিত্তিতে দুর্লভী বিবি বা তাহার ওয়ারিশদের নালিশী সম্পত্তিতে মালিক হওয়ার দাবীটি আদৌ গ্রহণযোগ্য নহে।”

Upon examination of the Exhibit-‘Kha’, it transpires that it is issued under Order XXI, rule 94 of the Code of Civil Procedure, but the case of defendant is that they purchased the property in pursuant to a certificate case which was started for the arrear of Government rent, meaning thereby, the said certificate case was to be filed and governed under the Public Demands Recovery Act, 1913 and if any sale certificate was issued in pursuant to the said proceeding, was to be issued under rule 74 of Schedule II Rules, appended to the Public Demands Recovery Act, 1913 and the Sale Certificate is to be prepared in ‘Form No. 28’ of ‘the Appendix’ appended to the Public Demands Recovery Act, 1913. Moreover, it is the specific finding of the appellate Court below that the S.A. record of the locality was finally published after holding the auction or issuance of Sale Certificate, but exhibit- ‘Kha’

mentioned the S.A. khatian number, which cannot be a bonafide one.

If further appears that the defendant specifically claimed that his predecessor-in-interest got the title over the suit property through the 'Boynama' issued in pursuant to Certificate Case No. 38632 of 1962-63. Sections 101 and 103 of the Evidence Act, 1872 provides that whoever wishes the Court to believe the existence of any fact to get a relief and decree in his favour on the basis of the said particular fact, the onus heavily lies upon that person to prove that the said fact exists.

In the earlier Suit, i.e. in Title Suit No. 102 of 1986, the present defendant appeared and submitted a written statement specifically asserted that he claimed the property through a 'Boynana' issued in pursuant to the aforesaid certificate case and due to the reason, the plaintiff had to withdraw his suit with permission to sue afresh and thereafter, the plaintiff filed the present suit, for declaration of title, recovery of possession and for a further declaration that the boynama and the certificate case is void, illegal, fabricated and not binding upon the plaintiff. From the said fact, it appears that the defendant specifically wishes to get a judgment as to his legal right depending on the existence of the certificate case as well as the 'Boynama', but miserably failed

to prove the said certificate case or 'Boynama' by taking initiative to call for the original record or producing any other reliable evidence.

The Court of appeal below with specific and positive findings found that the plaintiffs have title and exclusive possession over $.22\frac{1}{4}$ decimals of land and from which they have been dispossessed by the defendant No. 1.

The judgments cited on behalf of the petitioner are of no legal assistance to improve his case.

In the premise above, I do not find any reason to interfere with the judgment and decree of the Court of appeal below.

Accordingly, the Rule is discharged, no order as to cost.

The order of stay granted at the time of issuance of the Rule is hereby recalled.

Send down the Lower Courts' Record.

Communicate the judgment and order at once.

Obaidul Hasan/B.O.