

**District: Jhalakathi**

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

Present

**Mr. Justice Sardar Md. Rashed Jahangir**

**Civil Revision No. 3052 of 1991**

**With**

**Civil Revision No. 3053 of 1991**

In the matter of :

Moin Uddin Howlader being dead his heirs  
Joinuddin Howlader and others

...Petitioners

-Versus-

Asraf Ali Howlader being dead his heirs Achia  
Begum and others

...Opposite parties

Mr. Mohammad Mostafa, Advocate with  
Mr. Mohammad Masud Parvez, Advocate

...For the petitioners

Mr. Bivash Chandra Biswas, Senior Advocate with  
Mr. Dipankar Halder,  
Mr. Mrinal Kanti Biswas,  
Mr. Utpal Biswas,  
Mr. Songjukta Dobay and  
Mr. Tusar Roy, Advocates

...For the opposite parties

Heard on: 06.01.2025, 08.01.2025,  
14.01.2025, 27.01.2025 and 28.01.2025

**Judgment on: 10.03.2025**

Both the revisional applications have been filed challenging the judgment and decree dated 08.01.1987 passed by the District Judge, Jhalakathi in Title Appeal No. 124 of 1985 heard analogous with Title Appeal No. 147 of 1985 dismissing the Title Appeal No. 124 of 1985 affirming those of dated 30.01.1985 passed by the Sub-ordinate Judge, Jhalakathi in Title Suit No. 547 of 1983 and allowing Title Appeal No. 147 of 1985 and thereby setting aside the findings of trial Court made in the body of the judgment and decree of Title Suit No. 547 of 1983 dated 30.01.1985.

The predecessors of present petitioners being plaintiffs on 05.05.1980 instituted Title Suit No. 166 of 1980 before the then Sub-ordinate Judge, Second Court, Barishal for declaration that the compromise decree passed on the basis of 'Solenama' in Title Suit No. 49 of 1950 is collusive, fraudulent, ineffective and not binding upon the plaintiffs. Subsequently, the suit was transferred to the Sub-ordinate Judge, Jhalakathi and renumbered as Title Suit No. 547 of 1983.

The case of the plaint briefly are that the suit property along with others was originally belonged to Mohon Bikrom Jially who

settled the property to Asimuddin Howlader, Asiruddin Howlader, Jigirulla Howlader and Abdul Kha through a patta on 16<sup>th</sup> Magh, 1305 B.S. As Asimuddin, Jigirullah and Abdul Kha refused to pay the salami and Asiruddin Howlader alone paid the entire salami amount to the land lord and thereby got the land-in-question by way of settlement. Accordingly, the record of right (C.S. Khatian) was prepared in his name. Abdul Kha, Jigarullah and Asimuddin Howlader never possessed the suit property, nor they had any title therein.

The superior rent receiver brought Rent Suit No. 3656 of 1933 in the Court of First Munsif of Pirojpur against Asiruddin Howlader as the rent of aforesaid suit was fallen due and obtained a decree. For execution of the aforesaid decree Rent Execution Case No. 1778 of 1934 was filed and the suit property was sold in auction pursuant to the execution case. One Akub Ali Howlader purchased the same in auction in the benami of his close relation Gahoruddin Sikder on 05.09.1934 and took delivery of possession. Akub Ali Howlader settled 4.69 acres of land to the predecessor of plaintiff Nos. 14-18 and 2.21 acres of land to the predecessor of plaintiff Nos. 1-13 through registered dakhilas. Karom Ali,

defendant No. 21, Golam Ali, predecessor of defendant Nos. 16-18 and Tarabanu, defendant No. 22 sold out .28 decimals of land to Adeluddin Howlader by a registered kabala dated 08.08.1959. Adeluddin Howlader died intestate leaving behind plaintiff Nos. 1-13 as his legal heirs. Golam Ali, Karom Ali and Tarabanu also sold .28 decimals of land to defendant No. 8 by kabala deed dated 02.07.1959 and said defendant No. 8 subsequently sold out the said property to plaintiff No. 1 by kabala deed dated 14.02.1970. Golam Ali, Karom Ali and Tarabanu also sold .22 decimals of land to the plaintiff Nos. 14 and 15 and in this way, the plaintiffs have acquired title over 7.68 acres of land within the scheduled property and they are in exclusive possession into the same. The S.A and R.S. khatians were prepared in their name, recently, they came to know that the principal defendants instituted a fraudulent suit being Title Suit No. 49 of 1950 in the Third Court of Sub-ordinate Judge and obtained a fraudulent Sole-decree in preliminary form on 02.03.1953 and thereafter, on 04.04.1980 the said decree was made final. Upon obtaining certified copy, the plaintiffs finally came to know about the Sole-decree on 03.05.1980 and thereafter, they filed the suit.

Defendant Nos. 16-20 and 22 contested the suit by filing a joint written statement denying all the material averments of the plaint, contending, inter-alia that the suit is not maintainable in its present form. It is barred under section 42 of the Specific Relief Act, 1877 as well as by the law of limitation. The further case of the defendants are that Mohon Bikrom Jially settled the land to Asimuddin Howlader, Asiruddin Howlader, Jigirullah and Abdul Kha in equal share, but the record of right erroneously prepared in the name of Asiruddin Howlader. On the death of Asimuddin, his brother Asiruddin Howdader being legal heir got the share of Asimuddin and accordingly became the owner of 8 annas of share of the settled land. The share of Asiruddin Howlader was put in auction due to arrear of rent and the share of Jigirullah and Abdul Kha was not affected by the aforesaid auction. The property of Asiruddin was purchased by Golam Ali, Karom Ali and Tarabanu in the benami of Gahoruddin Sikder. Akub Ali never purchased the property in auction. The further case of the defendants are that the Title Suit No. 49 of 1950 was a genuine one and in that suit, the plaintiffs and their predecessors were made party and after service of summons, the name of the predecessors of plaintiffs were struck

out from the said suit. The suit was decreed in term of Solenama justly and legally. The plaintiffs have no right, title and possession over the suit land, thus, the suit is liable to be dismissed.

On perusal of the pleadings of both the parties, learned Sub-ordinate Judge framed as well as 6(six) issues, which are as follows:

1. Is the suit maintainable in its present form?
2. Is the suit barred by section 42 of the Specific Relief Act?
3. Is the suit barred by limitation?
4. Is the impugned sole decree fraudulent and not binding upon the plaintiffs?
5. Are the plaintiffs entitled to get a decree as prayed for?
6. To what relief, if any, are the plaintiffs entitled?

On conclusion of hearing learned Sub-ordinate Judge decided as well as the first 4(four) issues in favour of the plaintiffs, finding their title and possession, but dismissed the suit on the ground of defect the parties while making discussion on issue Nos. 5 and 6.

Having been aggrieved, the plaintiffs preferred Title Appeal No. 124 of 1985 and the defendants filed counter appeal being No. 147 of 1985 against the findings of Issue Nos. 1 to 4.

Learned District Judge, Jhalakathi by his judgment and decree dated 08.01.1987 dismissed the Title Appeal No. 124 of 1985 (appeal of the plaintiffs). On the other hand, allowed the Appeal No. 147 of 1985 (defendants' appeal). While dismissing the appeal and affirming the judgment and decree of the trial Court, learned District Judge categorically also found that the plaintiffs are barred under section 66 of the Code of Civil Procedure in claiming that Gahoruddin Sikder is the benamder of their predecessor-in-interest and specifically further found that without specific and separate prayer for declaration of title or as to the legal right of the plaintiffs, the suit is not maintainable.

Having been aggrieved by the judgment and decree of both the appeals, the plaintiffs preferred these 2(two) revisional applications and obtained the Rules.

Mr. Mohammad. Mostafa, learned Advocate for the petitioners submits that the present plaintiffs were not party to the

decree of Title Suit No. 49 of 1950 and thus, the Sole-decree of Title Suit No. 49 of 1950 has no binding effect on them. He next submits that the Court of appeal below failed to consider that the Solenama of Title Suit No. 49 of 1950 was obtained by practicing fraud upon the Court, because all the parties to the Solenama did not appear before the Court or examined by the Court for its satisfaction and all the parties to the Solenama did not put their signature in the Solenama, rather it was fraudulently shown to be signed by all the concerned parties, which is apparent from the 'Solenama' itself (referring to the LCR), and as such, the sole decree as has been passed is hit by Order XXIII, rule 3 of the Code of Civil Procedure. He next submits that the trial Court upon exhaustive discussion decided all the issues including the title and possession in favour of the plaintiffs, save and except the issue Nos. 5 and 6, particularly issue No. 5 was decided against plaintiffs, holding that, the suit is suffered from defect of party, in as much as on the finding that Gahoruddin Sikder, a party to the Sole-decree, was the certified auction purchaser of the property and as such, in his absence the suit is not maintainable. He continues to submit that the aforesaid findings of fact is not based on material on record,



because the D.W. 2, Monsur Ali, son of the Gahoruddin Sikder deposed in the present suit and stated that they had no interest and title in the present suit and thereby supported that Gahoruddin was benamder in respect of the suit property and thus, neither Gahoruddin nor his heirs are necessary party in the present suit. He further submits that under Order I, rule 9 of the Code of Civil Procedure, no suit shall be defeated by reason of misjoinder or nonjoinder of a party, meaning thereby, the suit cannot be failed solely on the ground of defect of parties. He further submits that from Exhibits-5, 6 and 7 series, R.S. khatian and S.A. khatian and dakhilas, it is proved that the recent record of right has been rightly/duly prepared in the name of the plaintiffs and they are possessing the property by paying rent to the Government. He lastly submits that the plaintiffs-petitioners having exclusive right, title, interest and possession in respect of 7.68 acres of land out of decreed (through Sole-decree) 17.66 acres of land of Title Suit No. 49 of 1950 and the record of rights having been duly prepared in their name and thus, the plaintiffs have every right to challenge the aforesaid fraudulent and collusive decree. Both the Courts below

committed error of law in an error in the decision occasioning failure of justice.

In support of the submission, he cited the case of Sananda Barua and another Vs. Pramatosh Barua and others, reported in 9BLT(AD) 269, the case of National Engineers Limited and others Vs. Jubok Housing and Real Estate Development Ltd., reported in 67 DLR(AD) 176.

On the other hand, Mr. Bivash Chandra Biswas, learned Senior Advocate appearing for the opposite parties submits that concurrent finding of fact as well as decision of both the Courts bellow is that the suit is not maintainable in its present form and such concurrent findings of fact is immune from interference in the revisional jurisdiction. He next submits that the compromise decree dated 02.03.1953 was declared by a competent Court upon examining all the relevant parties as well as the compromise deed and long after 30 years of the decree, the plaintiffs filed the suit challenging the same only to frustrate the aforesaid decree. He next submits that from the record it appears that the plaintiffs hopelessly failed to establish their title. To maintain a suit under section 42 of

the Specific Relief Act, the plaintiffs are to prove that they are entitled to the declaration of title of the property or they have a legal character or right attached to the property, but since the plaintiffs failed to prove the legal character or to establish their right attached to the property, both the Courts below justly and legally refused to grant a decree in favour of them.

In support of the submission, he cited the case of Dr. Md. Nuruddin and another Vs. Md. Abdul Barek alias Manik Mia and another, reported in 67 DLR 507, the case of Ruhul Amin (Md) and others Vs. Mustafizur Rahman and others, reported in 67 DLR 259 and the case of Hasmat Ali Vs. Mofizuddin Majhi and others, reported in 37 DLR 231.

Heard learned Advocates of both the parties, perused the revisional applications together with the lower Courts' record, the written argument filed on behalf of the opposite parties and the cited judgments.

It appears that the plaintiffs filed the suit for a declaration that the Sole-decree dated 02.03.1953 passed in preliminary form in Title Suit No. 49 of 1950 and the final decree dated 08.04.1980 is

collusive, fraudulent, ineffective and not binding upon the plaintiffs. I have examined the plaint, from which it transpires that the suit as framed by the plaintiffs undoubtedly shall fall within the periphery of section 42 of the Specific Relief Act, 1877. For better appreciation, the said provision is reproduced herein below:

*“42. Discretion of Court as to declaration of status or right-*

*Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:*

*Bar to such declaration- Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*

*Explanation- A trustee of property is a “person interested to deny” a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.”*

From a bare reading of the aforesaid provision, it appears that to get a decree within the scope of aforesaid provision, the

plaintiffs must establish that they are entitled to any legal character or to any right attached to any property at the time of institution of the suit and the defendants have denied plaintiff's such right, title or legal character.

In the case of Shafi A Choudhury Vs. Pubali Bank Limited and others, reported in 54 DLR 310, a Division Bench of the High Court Division referring to a judgment of the case of Krishnaveni Ammal Vs. Soundararajan and others, reported in AIR 1945 Mad 53, held that-

*“it is true, as laid down in various decisions to which I have referred, that the general view is that section 42, Specific Relief Act, is not exhaustive, but there is no authority for the proposition that a suit for a declaratory decree will lie when the plaintiff is neither entitled to any legal character nor to any right in the suit property.”*

In the case of Sheoparsan Singh and others Vs. Ramnandan Prasad Narayan Singh and others, reported in AIR 1916 Privy Council 78, it is held that-

*“the suit fails at the very outset, for the plaintiffs, while the will stands, as stand it must, for the purposes of this suit, are not clothed with a legal*

*character or title which would authorise them to ask for the declaratory decree sought by their plaint. The suit, therefore, should be dismissed because it is misconceived and incompetent.”*

In the case of Most. Sahera Khatun and another Vs. Mrs. Anwara Khatun and others, reported in 1 BCR(1981) 126 a Division Bench of the High Court Division held that-

*“this was a suit for declaration that a decree passed against some third parties in a suit in which the plaintiff was not a party was void and without jurisdiction and the locus standi on which the plaintiff relied was that she owned the properties by exchange. Before the plaintiff can be given a declaration under section 42 of the Specific Relief Act, she had to prove before the Court that she had the legal character or the right to property she claimed and unless the plaintiffs could prove such legal character or right to property, she could not be given any declaratory relief.”*

In the case of Imanuddin Rarhi Vs. Lilabati Das, reported in 32 DLR75, it is held that-

*“the plaintiff may ask for relief under that section, provided that the plaintiff must at the time of the suit be entitled to any legal character or to any right to any property. Section 42 must be construed strictly. The courts are only to grant such declaration*

*which came within the terms of that section where the plaintiff has asked for a declaratory decree, namely a declaration that the decree obtained was fraudulent and void. Such a simple declaration could not be given within the provisions of section 42 as such the suit on the face of that section has to be dismissed.”*

In the case of Hasmat Ali Vs. Mofizuddin Majhi and others, reported in 37 DLR 231, it is held that-

*“To maintain a suit under this section the following 2 ingredients must be proved:-*

- (I) that plaintiff is entitled to a legal character or right as to the property.*
- (II) and that the defendants is denying or is interested to deny such character or right.*

*So, the suit must fail if the plaintiff fails to establish his legal character or title which authorizes him to ask for the declaratory decree.”*

From the authorities discussed in above, it is clear that to succeed in a suit framed in a declaratory form, the plaintiff must establish that at the time of institution of the suit, he has/had a legal right to any property and he is entitled to a legal character and the

defendants of the suit are denying or likely to deny such right, title and character.

Under the suit in hand, the trial Court in its judgment while deciding the issue No. 4 decided that the Akub Ali purchased the suit property in the benami of his close relative Gahoruddin Sikder and in arriving at such conclusion he relied upon 'Exhibit-1 series' registered kabala deeds dated 02.07.1959 and 08.08.1959. According to the recital of those deeds, the Golam Ali, Karom Ali and Tara Banu being the heirs of Akub Ali inherited the property and thereafter, transferred the property to Imman Uddin Howlader and others. The aforesaid deeds were relied upon and exhibited by the plaintiffs and the contesting defendants denied the execution of those deeds. In particular, defendant Nos. 21, 22 and the heirs of Golam Ali denied those deeds, claiming those are not genuine. In spite of that the trial Court believed those deeds, shifting the onus upon the defendants to prove that those deeds were not genuine. Relying solely upon the recital of the disputed deeds title of Akub Ali cannot safely be declared. It is pertinent to mention here that apart from the recital of those disputed deeds, there is no evidence in the record to prove that Akub Ali had a title over the suit land. It



is Gohoruddin Sikder in whose name the property was auction purchased not in the name of Akub Ali.

Mr. Mohammad Mostafa, learned Advocate contended that the plaintiffs are in exclusive possession of the property and the S.A. and R.S. record were prepared in their name and the dakhilas 'Exhibits-7 series' also proved that they are possessing the property by paying rent. It is not the case of the plaintiffs for declaration of title by way of prescription and if they are in possession in the property, they can maintain the same against all the concerned except the persons having better title than the plaintiffs.

Mr. Mohammad Mostafa further contended that the appellate Court at the time of dismissing the appeal wrongly relied upon section 66 of the Code of Civil Procedure referring to the judgment of Sananda Barua and another Vs. Pramatosh Barua and others (Supra), he submits that the plaintiff in the present suit did not challenge the title of Gahoruddin Sikder and thus section 66 having no implication in the present suit whatsoever. Meaning thereby, they did not institute the suit to establish title against the certified purchaser, Gahoruddin Sikder. This Court is in agreement with the

contention of learned Advocate for the petitioners to the effect that the suit as framed is not barred by under section 66 of the Code of Civil Procedure. But when the plaintiffs failed to establish their right or title in the property by adequate evidence or they failed to establish their legal character, they are not entitled to maintain their suit under section 42 of the Specific Relief Act, 1877.

In the premise above, this Court finds no reason to interfere into the judgment and decree of the lower Courts' below, when the plaintiffs are even not entitled to maintain their suit in the present form.

Accordingly, both the Rules are discharged.

No order as to cost.

Send down the lower Courts' record.

Communicate the judgment and order at once.