

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO. 1813 OF 2008

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Md. Bachchu Mia

... Petitioner

-Versus-

Md. Shah Alam and others

... Opposite parties

Mr. Md. Aktaruzzaman, Advocate

.... For the petitioner.

Mr. M. A. Khaleque with

Mr. Md. Robiul Islam, Advocates

.... For the opposite party No.1.

Heard on 28.08.2024 and Judgment on 22.10.2024.

This Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment ad decree dated 08.04.2008 passed by the learned Additional District Judge, Thakurgaon in Other Appeal No.41 of 2006 allowed the appeal reversing those of the judgment and decree dated 30.03.2006 passed by the learned Senior Assistant Judge, Peergonj, Thakurgaon in Other Suit No.26 of 2003 dismissing the suit should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite party as plaintiff instituted above suit for declaration that the registered kabola deed 13.02.1989 executed by defendant No.2 in favour of defendant No.1 for 4 decimals land as

described in 'Kha' schedule to the plaint is unlawful, collusive, without consideration and not binding upon the plaintiff.

It was alleged that the plaintiff was the owner and possessor of 46 decimal land including disputed 4 decimal land and he was in peaceful possession of the same. Defendant No.2 as plaintiff instituted Partition Suit No.23 of 1985 impleading this plaintiff as defendant No.29. Above partition suit was decreed on compromise against defendant No.28, 36, 43, 44, 82-85 and on contest against plaintiff No.15-18 and 29. Defendant No.2 was given separate saham for $94\frac{1}{2}$ decimal land and defendant No.29 (plaintiff of this suit) was given separate saham for $45\frac{11}{15}$ decimal land. No party preferred an appeal against above preliminary decree but above preliminary decree has not yet been made final since a revisional application against Advocate Commissioner report is pending for hearing in this Court.

During pendency of above partition suit defendant No.2 transferred disputed 4 decimal land to defendant No.1 by impugned kabola deed dated 13.02.1989. As such above kabola deed was hit by Section 52 of the Transfer of Property Act and the same is an illegal and unlawful document. On the strength of above kabola deed defendant No.1 has forcibly dispossessed the plaintiff from the disputed 4 decimal land on 07.04.2000.

Defendant No.1 contested the suit by filing a written statement alleging that disputed 4 decimal land and a shop on the same belonged to defendant No.2 who sold the same to defendant No.1 by registered kabala deed dated 13.02.1989 and the defendant is running his hardware business in the above shop. The plaintiff was never in possession in above land nor the defendant dispossessed him from the same forcibly.

At trial plaintiff examined 4 witnesses and defendant examined 7. Documents produced and proved by the plaintiffs were marked as Exhibit No.1-9 and those of the defendants were marked as Exhibit Nos.'Ka' - 'Cha'.

On consideration of the facts and circumstances of the case and evidence on record the learned Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree of the trial Court plaintiff preferred Title Appeal No.41 of 2006 to the District Judge, Thakurgaon which was heard by the learned Additional District Judge who allowed the appeal set aside the judgment and decree of the trial Court and decreed the suit.

Being aggrieved by above judgment and decree above respondent as petitioner moved to this Court and obtained the Rule.

Mr. Md. Aktaruzzaman, learned Advocate for the petitioner submits that defendant No.2 as the lawful owner of disputed 4 decimal land was in possession in the same by constructing a shop and he

transferred the same to defendant No.1 on receipt of valuable consideration and defendant No.1 is continuing his hardware business in the above shop. It is true that above document was executed during pendency of Partition Suit No.23 of 1985 which was instituted by defendant No.2 as plaintiff. In above partition suit plaintiff of this suit was defendant No.29. Above partition suit has been decreed on contest against defendant No.29 and defendant No.2 got a separate saham for $94\frac{1}{2}$ decimal land. The plaintiff as defendant No.29 got separate saham for $45\frac{11}{15}$ decimal land. The legality and propriety of above preliminary decree of above partition suit was not challenged by any party. Since defendant No.1 purchased disputed 4 decimal land during pendency of above partition suit he shall get his land out of the saham of the defendant No.2. Defendant No.1 does not have any claim in the land which was given in the saham of the plaintiff or defendant No.29 of above partition suit. As such the plaintiff did not have any locus standi to challenge the legality and propriety of the impugned kabola deed of defendant No.1. As far as dispossession from disputed 4 decimal land is concerned the plaintiff could not prove the same claim by legal evidence. The learned Judge of the Court of appeal below failed to appreciate the true meaning of the evidence on record and most illegally allowed the appeal and set aside the lawful judgment of the trial Court which is not tenable in law.

On the other hand Mr. M. A. Khaque, learned Advocate for the opposite party No.1 submits that since the impugned kabola deed dated 13.02.1989 was executed by defendant No.2 in favour of defendant No.1 during pendency of Partition Suit No.23 of 1985 as such, above document was hit by Section 52 of the Transfer of Property Act and the same became a void document. Defendant No.1 was not a party to above partition suit but he has forcibly dispossessed the plaintiff from disputed land. As such the plaintiff was entitled to get back the possession of disputed 4 decimal land from the unlawful possession of the defendant No.1. On consideration of facts and circumstances of the case and materials on record the learned Judge of the Court of appeal below has rightly allowed the appeal, set aside the judgment and decree of the trial Court and the suit which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record including the pleadings, judgments of the Courts below and evidence on record.

It is admitted that defendant No.2 as plaintiff instituted Title Suit No.23 of 1985 for partition of 4.05 acres land including disputed 4 decimal land and sought a separate saham for $94\frac{1}{2}$ decimal land and plaintiff of this suit was defendant No.29 in above partition suit and above partition suit was decreed on contest against the defendant

Nos.15-18 and 29 and on compromise against the rest and plaintiff of above suit was given a separate saham for $94\frac{1}{2}$ decimal land and defendant No.29 was given separate saham for $45\frac{11}{15}$ decimal land.

No party to above partition suit challenged the legality and propriety of above preliminary decree. As such above preliminary decree has reached to finality. Learned Advocates for both sides frankly concedes that above preliminary decree has not yet been made final since one defendant has submitted an objection against the Advocate Commissioner report and the same is pending for hearing in the Appellate Division. Undisputedly plaintiff was not a party to the disputed kabala deed dated 13.02.1989 and above kabala deed was executed by defendant No.2 in favour of defendant No.1 for sale of disputed 4 decimals land and defendant No.2 has got a separate saham for $94\frac{1}{2}$ decimal land in above partition suit. As such the impugned kabala deed although executed and registered during the pendency of above partition suit shall remain as a valid document and defendant No.1 shall get his 4 decimal land out of $94\frac{1}{2}$ decimal land of defendant No.2.

Undisputedly defendant No.2 does not claim any land on the basis of above impugned kabala deed out of the saham allocated to the plaintiff.

The principle of lis pendense provides that the fate of the kabala deed executed during the pendency of the suit involving the property of the above suit shall depend on the outcome of the suit and such a document shall not be treated as a void or illegal document. The learned Judge of the Court of appeal below failed to appreciate the true meaning of Section 52 of the Transfer of Property Act and without any legal evidence on record most illegally held that above kabala deed was without any consideration which is not tenable in law.

The plaintiff has challenged the legality and propriety of above impugned kabala deed dated 13.02.1989 due to erroneous perception as to the meaning of Section 52 of the Transfer of Property Act. Since the plaintiff is not a party to above kabola deed and defendant No.1 does not claim any land out of the saham of the plaintiff on the basis of above kabola deed the plaintiff does not have any locus standi to challenge the legality of above deed

As far as alleged dispossession of the plaintiff from disputed 4 decimals land is concerned, it turns from the judgment of the trial Court that the learned Assistant Judge on a detailed analysis of the evidence on record held that the disputed land was never in the possession of the plaintiff but the same was in the possession of defendant No.2 and subsequently in the possession of the defendant No.1. The learned Judge of the Court of appeal below neither discussed the evidence as to

possession and alleged dispossession nor reversed above findings of the trial Court as to possession of the disputed land.

In above view of the materials on record I find substance in the application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment ad decree dated 08.04.2008 passed by the learned Additional District Judge, Thakurgaon in Other Appeal No.41 of 2006 is set aside and those dated 30.03.2006 passed by the learned Senior Assistant Judge, Peergonj, Thakurgaon in Other Suit No.26 of 2003 is restored.

However, there is no order as to costs.

MD. MASUDUR RAHMAN
BENCH OFFICER