

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 3044 of 2005

Md. A Barek petitioner

-Versus-

Md. Chan Miah and others

..... opposite parties

Mr. Md. Abdul Barek Chowdhury with

Mr. Nowaj Sharif, Advocates

..... for the petitioner

Mr. Abdul Hai Sarkar, Advocate

..... for the opposite parties 3-6,8-13

Judgment on 20.05.2024

At the instance of defendant 22 this rule was issued calling upon the plaintiff-opposite parties to show cause as to why the judgment and decree of the Joint District Judge, Court No. 1, Pirojpur passed on 11.01.2005 in Title Appeal No. 102 of 1999 allowing the appeal reversing the judgment and decree of the Assistant Judge, Mathbaria, Pirojpur passed on 21.07.1999 in Title Suit No. 190 of 1994 dismissing the suit should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

The plaint case, in brief, is that Nazar Ali Khalifa and others were the *karsh* tenant under Tamizuddin Mridha through a amalnama. Nazar Ali died leaving behind his wife Zarina Khatun, sons Abdul Mazid, Abdus Sattar and Abdul Aziz and a daughter Nurnessa as heirs. The above heirs became the owners and

possessors of the land of plot 1474. Subsequently Abdul Mazid and Abdus Sattar died leaving his brother Abdul Aziz, mother Zarina Khatun and sister Nurunnessa. After Nurunnessa's death Zarina Khatun and Abdul Aziz became the owner in possession of the plot. During their possession and enjoyment they transferred .13 acres to plaintiff 1 Mofizuddin through a registered *patta* dated 29.06.1949 and handed over possession thereof. The lands of CS plot 1474 was recorded in RS khatian 560 plot 497. Plaintiff Mafizuddin thus became owner and possessor of the land described in schedule 'Kha' to the plaint and started possessing the same by paying rents to the concerned. Plaintiff 1 then transferred .12 acres to plaintiff 2 Chan Miah through a registered *heba-bil-awaz* dated 21.06.1989 and handed over its possession. Although the plaintiffs had been in possession of the aforesaid land but SA khatian 243 was prepared in the names of 3 sons and a daughter of late Nazar Ali erroneously. Plaintiff 1 went to the *tahashil* office to pay rent in respect of the suit land but the office refused to accept rent because of the record of right was prepared in the name of previous owner. The plaintiffs then requested defendant 1 to correct the record of rights but he refused to do so. He then came to learn that erroneously RS plot 385 has been written in place of 497 in the *patta*. The cause of action of filing the suit arose on 15.08.1994 hence the suit for declaration of title

and confirmation possession in the suit land as detailed in schedule 'Kha' to the plaint.

Added defendant 22 contested the suit by filing written statement. In the written statement he contended that according to the share the names of Ente Ali, Bashiruddin, Hatem Ali, Abdul Ali, Hukum Ali, Suryaban, Abdul Mazid, Abdul Aziz, Abdus Sattar, Nurunnessa, Bakful Bibi and others RS khatian 560 plots 497, 533, 534, 337, 535, 536 and 418 measuring an area of total 2.79 acres was prepared. During their possession and enjoyment Abdus Sattar and Abdul Mazid died unmarried leaving no issue and consequently Abdul Aziz and Nurunnessa inherited their shares. SA record was correctly prepared in their names. Nurunnessa died leaving his daughter Kadbanu and brother Abdul Aziz and they inherited her share as par law. Kadbanu sold out .11 acres from SA khatian 243 plots 497 and 498 to Abdul Barek (petitioner herein) and Zakir Hossain through a registered kabala dated 18.06.1974 and handed over possession thereof. Abdul Aziz during his possession and enjoyment sold out his share of .23 acres from the aforesaid two plots to Abdul Barek and Abdul Zamal through a registered *kabala* dated 11.06.1989. Although in the said *kabalas* .34 acres of land was included but actually.23 acres was transferred and the defendant has been possessing that quantum. The defendant has been possessing the land through his

bargadar by paying rents to the concerned authority. The plaintiffs created forged deed and instituted the suit on false allegation and as such the suit would be dismissed.

On pleadings the Assistant Judge framed 5 issues. In the trial, the plaintiffs examined 3 witnesses while the defendant examined 2. The documents produced by the plaintiffs were exhibits 1-5 and the documents of defendant 22 were exhibits-Ka-Uma-3. However, the Assistant Judge decided the material issues against the plaintiffs and dismissed the suit. Against which the plaintiffs preferred appeal before the District Judge, Pirojpu. The Joint District Judge, Court No. 1, Pirojpur heard the appeal on transfer and allowed it setting aside the judgment and degree passed by the trial Court which prompted defendant 22 to approach this Court with this revision upon which the rule was issued with an interim order of stay of the impugned judgment and degree.

Mr. Md. Nowaj Sharif, learned Advocate for the petitioner taking me though the judgments passed by the Courts below and other materials on record submits that defendant 22 purchased the suit land measuring .34 acres by 2 *kabalas* exhibits-Ka and Kha. Nurunnessa had a daughter named Kadbanu who inherited the share of her mother and 02 (two) brothers after their death. She sold out her share of .11 acres to this defendant through exhibit-

'Ka'. Abdul Aziz a recorded tenant of RS and SA khatian also transferred his share of .23 acres to this defendant on 14.06.1999 through exhibit-'Kha'. The plaintiff did not challenge that Nazar Ali had another daughter named Kadbanu and as such the defendant has been able to prove his title over the suit land through purchase from Kadbanu. He then submits that the subsequent sale deed of Abdul Aziz who is a RS and SA record tenant in the suit land proves defendants title therein also. The aforesaid deeds have been exhibited duly without any objection from the plaintiffs. Mr. Sharif then submits that DWs 1 and 2 in evidence proved defendant's possession in the suit land. He paid rent to the concerned authority through exhibit-'Uma' series. In a suit for declaration of title and confirmation of possession the plaintiffs are to prove *prima facie* title in the suit land and then exclusive possession on it. Without possession the plaintiffs cannot get a decree for its confirmation. He further submits that the trial Court correctly decided the issues that the suit is bad for defect of parties and *hotch potch* which were not reversed by the Court of appeal below assigning reason. Therefore, the judgment and decree passed by the appellate Court should be set aside and the rule be made absolute.

Mr. Abdul Hai Sarkar, learned Advocate for opposite parties 3-6, 8-13 on the other hand opposes the rule and supports

the judgment and degree passed by the appellate Court. Mr. Sarkar then submits that defendant 22 disowned Nazar Ali's ownership in the suit land but claimed land by way of purchase from Nazar Ali's heirs which is self contradictory. Defendant 22 failed to prove that Nurunnessa, the recorded tenant had any daughter named Kadbanu. No evidence was led in support of the claim. Moreover, exhibits-'Ka' and 'Kha' i.e., the title deeds of defendant 22 was not proved in accordance with law by examining any of the attesting witness to the deeds. The suit is not bad for defect of parties because all the alive heirs of RS and SA recorded tenants have been made parties to the suit. To dispose of this suit all the property as required by law has been brought into *hotch potch*. The Court of appeal below correctly assessed the facts and evidence and reversed the findings of the trial Court about *hotch potch* and bad for defect of parties. The registered *patta*, a deed of 1948 exhibit 1 has been proved by PW 2. The plaintiffs' proved possession in the suit land by the evidence of PW 1 which has been corroborated by PWs 2 and 3. Since the title of the plaintiffs over the suit land has been proved by documentary and oral evidence and their possession is found therein, the Court of appeal below correctly allowed the appeal and decreed the suit. The Court of appeal below did not misread

and mislead the evidence on record and as such it may not be interfered with by his Court.

I have considered the submissions of the learned Advocates for both the sides and gone through the materials on record.

It is admitted facts that Nazar Ali was the owner of the suit land with other lands. During his life time he enjoyed his share. He died leaving behind his wife Zarina Khatun, 3 sons Abdul Mazid, Abdus Sattar and Abdul Aziz and a daughter Nurunnessa. It is also admitted that Abdul Mazid and Abdus Sattar died and Zarina Khatun, Abdul Aziz and Nurunnessa inherited the property. The plaintiffs claimed that after Nurunnessa's death Abdul Aziz and Zarina khatun became heirs of the suit land and transferred .13 acres by a registered *patta* dated 29.06.1948 to plaintiff 1 Mofizuddin and handed over possession thereof. On the other hand defendant 22 claimed that on Abdul Sattar and Abdul Mazid death Abdul Aziz and Nurennessa inherited their share. Nurunnessa died leaving his only daughter Kadbanu who subsequently transferred .11 acres to defendant 22 and Zakir Hossain through registered *kabala* dated 18.06.1974. Abdul Aziz also sold .23 acres to defendant 22 and Abdul Zamal by another *kabala* dated 14.06.1989. Although they purchased total .34 acres of land through separate *kabalas* but practically they have been owning and possessing total .23 acres.

The plaintiffs produced the original *patta* registered on 29.06.1948 exhibit-1. On going through the *patta* it is found that Zarina Khatun and Abdul Aziz transferred .13 acres from CS plot 1474 corresponding to SA plot 385. This is a very old document and has presumptive value under section 90 of the Evidence Act unless the presumption is rebutted. PW1 led evidence supporting exhibit-1 which was corroborated by PW2 stating that at the time of negotiation of transfer he was present. In cross examination by defendants nothing came out adverse. He is a man of 70 years old and can safely be relied upon considering the facts and circumstance of the case.

In the plaint the plaintiffs prayed for declaration of title and confirmation of possession in respect of the 'Kha' schedule land. The above land corresponds to RS khatian 560 SA khatian 243 appertains to SA plot 497 as per the description made in the *pattan*. The land has been described in the schedule by giving specific boundary. The plaintiffs prayed for *decree* on .13 acres of land of RS khatian 560 SA khatian 243 of SA plot 497. The plaintiff instituted the suit because the record of right was wrongly prepared in the name of the original owner who gave the land *pattan* to them. RS khatian was prepared before 1944 correctly in the name of the previous owner. But the land has been transferred to the plaintiffs in 1948 through a *patta*. So according to *patta* the

subsequent record has to be prepared in the name of the plaintiffs. The defendants tried to make out a case that Nurunnessa had a daughter namely Kadbanu and she transferred .11 acres to defendant 22. I find no documents or believable oral evidence in the record to hold that Nurunnessa had a daughter named Kadbanu. For the sake of arguement, even it is admitted that Kadbanu was Nurunnessa's daughter her share as per muslim law would be less than she transferred. The other deed exhibit-'Kha' dated 27.06.1989 in which Abdul Aziz shown to have been transferred .23 acres to defendant 22 is also found not valid. If Kadbanu transfers .11 acres it remains .12 acres of Abdul Aziz in the aforesaid plot. From RS khatian 530 and SA khatian 243 and exhibit-Ka it appears that the land of the heirs of Nazar Ali was .23 acres whereas by the 2 *kabalas* exhibits 'Ka' and 'Kha' his heirs have transferred .34 acres which they cannot.

Therefore I find that the plaintiffs through exhibits-1, 1(Ka), 2 series, 3 and 4 proved their title in the suit land which has been corroborated by the oral evidence of witnesses. On the other hand the claim of defendant 22 through exhibit-'Ka' and 'Kha' is unfounded. The appellate Court considered the plot index exhibit-3 and found that actually CS plot 1474 corresponds to SA plot 497 but it was wrongly written in the *patta* as 385. The Court of appeal below correctly scrutinized the documents and has come to the

decision. The findings and the decision of the appellate Court as to the bad for defect of parties and *hotch potch* are also well founded based on materials on record. Both the parties led evidence and produced documents to prove possession in the suit land. PW 1 in evidence proved his possession in the suit land. In evidence he identified the land with boundary. His evidence has been corroborated by PWs 2 and 3. Both of them deposed that the plaintiffs are in absolute possession in the suit land. DWs 1 and 2 although supports the claim of the defendants but DW 2 claimed himself to be the *bargadar* of DW 1. Considering his evidence as a whole his evidence cannot be relied upon. However, in the rent receipts submitted by the parties, I find that the plaintiffs' paid rent through exhibit-5 after institution of the suit and the rent receipts of defendant 22 exhibit-'Uma' series do not attract the suit land. Therefore, the appellate Court rightly relied on the oral evidence of the parties and found plaintiffs' possession in the suit land.

In a suit for declaration of title and confirmation of possession the plaintiffs are to prove their *prima facie* title and exclusive possession in the suit land. The plaintiffs herein succeeds in both the counts. The appellate Court correctly assessed and appraised the evidence of the parties and allowed the appeal decreeing the suit by setting aside judgment and decree

passed by the trial Court. I find no misreading of evidence and non consideration of the materials on record for which the judgment and decree passed by the appellate Court can be interfered with.

Therefore, this rule bears no merit. Consequently, it is discharged. No order as to costs. The order of stay stands vacated. The judgment and decree passed by the appellate Court is hereby affirmed.

Communicate this judgment and send down the lower Court records.

Rajib