

Bench:
Mr. Justice Bishmadev Chakraborty
And
Mr. Justice Md. Ali Reza

First Appeal No. 369 of 2009

Sajon Kumar Agarwala

.....plaintiff-appellant

-Versus-

Government of Bangladesh and others

.....plaintiff-respondents

Mr. Bivash Chandra Biswas with

Mr. Utpal Biswas, Advocates

.....for the appellant

Mr. AM Amin Uddin, senior Advocate with

Mr. AKM Faiz, senior Advocate and

Mr. Mahbubur Rahman, Advocate

.....for the respondents

Judgment on 05.12.2022

Md. Ali Reza, J:

This appeal at the instance of the plaintiff is directed against judgment and decree dated 12.10.2009 passed by the Joint District Judge (in charge), 2nd Court, Jamalpur in Other Class Suit No. 23 of 2007 dismissing the suit.

The suit was filed on 18.10.2007 for declaration of title simpliciter.

The case of the plaintiff, in short, is that 0.38 acres of land appertaining to CS plot 314 of CS khatian 263 corresponding to SA plot 314 of SA khatian 552 and RS plot 518 of RS khatian 385 of mouza Balijuri of Police Station-Madargonj of District-Jamalpur belonged to Gour Dutta Agarwala. He died leaving behind 02(two) sons named Mohan Lal and Ram Kumar. By amicable partition Ram Kumar got 0.09½ acres in 04(four) anna share and Mohan Lal got the remaining 0.28½ acres equivalent to 12(twelve) annas. Mohan Lal died leaving behind 03(three) sons named Gangadhar, Purna Lal and Satya Narayan. Ram Kumar died leaving behind 04(four) sons named Golap Chandra, Debi Dutta, Kishan Lal and Prahlad Lal. SA record was prepared in the names of all the heirs. Thereafter Purna Lal, Satya Narayan, Golap Chandra, Debi Dutta, Kishan Lal, Prahalad Lal left Jamalpur for Akkelpur of Bogura District except Gongadhar who started running Jute business in Balijuri Bazar. Purna Lal and Satya Narayan while living in Akkelpur sold 0.19 acres to Gangadhar by kabala dated 22.08.1968. The 04(four) sons of Ram kumar made an exchange of 0.09½ acres with Gangadhar by document dated 27.04.1963. Thus

Gangadhar got 0.38 acres by inheritance, purchase and exchange and had been maintaining possession in 05(five) suits shops including homestead and conducting jute business in rented godown and then died in 1994 leaving behind only son plaintiff Sajon Kumar Agarwala. Sajon completed Higher Secondary Examination in 1972 from Akkelpur College. After death of his father he rented the shops and homestead of Balijuri and went to Akkelpur and still lives there permanently. Gangadhar died in this soil and plaintiff is also a permanent resident of this country. The RS DP khatian 385 showing their address in India was collusively prepared. Plaintiff went to the settlement office on 18.04.2007 for separation of holding but defendant 5 informed that the suit land has been recorded in the name of the Government and denied his title. Defendants 1-5 have no title and possession in the suit land. Hence the suit was filed.

Respondent Israfil Sheikh is defendant 6 added by order 3 dated 06.02.2008. He contested the suit. His case, in short, is that his father Talhan Miah and one Lal Mahmud took settlement from the CS tenant in around 1950 and have been maintaining possession upon erecting homestead and suit

shops. Although the names of the heirs of CS tenants were wrongly made in the subsequent khatians but nevertheless in the remark column the names of Talhan and Lal Mahmud appear as forcible possessors since 1357 BS. Subsequently Talhan and Lal Mahmud stopped payment of rent and the heirs of CS tenant also left this country in 1965. Consequently the then Revenue Officer and Additional Deputy Commissioner, Mymensing by Memo 13724/375A/21W dated 26.12.1966 served notice under section 92(1)(c) of the State Acquisition and Tenancy Act intending to enter in the holding under Proceeding Case No. 33g(w) of 1966-67 for declaration of abandoned property as detailed in the schedule of the notice as Government khas land and accordingly the authority by memo dated 20.03.1967 authorised the Sub-divisional Officer to take possession by 27.03.1967 which is recorded in Register VIII. This defendant thus became landless and prayed for settlement in Petition Case No. 187(XII) of 1976-77 and Jamalpur Sub-divisional Officer allowed the application in Miscellaneous Case No. 198(XII) of 1978-79 and called for a kabuliyat and accordingly defendant 6 executed the same and

got certified copy on 01.01.1986 and consequently separate khatian 738 was opened in his name with reference to Petition Case No. 187(XII) of 1976-77. Defendant 6 has been maintaining possession upon payment of rent. One Belal by creating various fake documents including a deed of agreement No. 4942 dated 22.10.2007 has filed this suit in the name and with the help of this plaintiff. Plaintiff has no title and possession in the suit land. This suit being false is liable to be dismissed with cost.

Trial Court framed as many as 06(six) issues and during trial plaintiff examined 03(three) witnesses and defendant 6 examined 05(five) 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 on record dismissed the suit by judgment and decree dated 12.10.2009.

As against the same plaintiff preferred the instant appeal.

Mr. Bivash Chandra Biswas, learned Advocate appearing on behalf of the appellant submits that the learned

Joint District Judge erred in law in dismissing the suit upon wrongful consideration. He submits that the trial Court misconceived the law and facts of the case. He argues that since defendants 1-5 did not contest the suit, the finding of the Court that the suit land became khas was wrong. He submits that the trial Court failed to understand that defendant 6 could not prove the basis of the entry of his father's name in the SA khatian as forcible possessor. He also submits that defendant could not show that how the suit land became abandoned under section 92 of the State Acquisition and Tenancy Act. Defendant since could not prove any notice under section 92(3) of the Act the kabuliyat has got no value. He compares exhibit-2 with exhibit-Ka and submits that exhibit-Ka being subsequent is forged so far it relates to showing forcible possession. He again submits that the entry of the names of the predecessors of the plaintiff in RS khatian with the address of India is mistaken which is apparent from exhibit-5 series, 6, 8 and 9. He very candidly submits that since the kabuliyat was not executed by both the lessor and lessee the same is a void document under section 107 of the Transfer of Property Act. He also submits that onus is upon

both the parties to prove their respective claims and when both parties lead evidence question of onus is out of place and the matter is to be decided on the evidence led by the parties and in support of such submission he refers the case of Chinibash Pramanik Vs. Md. Nurul Hossain Molla, reported in 1987 BLD(AD) 103. Referring to the original sale deed dated 22.08.1968 (exhibit-4) he steers our attention to the *ratio* laid down in the case of Feroza Majid and another Vs. Jiban Bima Corporation, reported in 39 DLR(AD) 78 and submits that oral evidence to contradict the contents of a document is inadmissible under section 92 of the Evidence Act and in furtherance of such submission he contends that possession is presumed to be in favour of such person who has got better title thus concludes with the principle that possession goes with title.

Mr. AM Amin Uddin, learned senior Advocate appearing on behalf of the respondent submits that the learned Joint District Judge upon proper appreciation of evidence rightly dismissed the suit. Referring to the evidence of both the parties Mr. Amin Uddin submits that the registered kabuliyat dated 01.01.1986 (exhibit-Ga) has got

presumption of correctness under section 79 of the Evidence Act unless such presumption is dislodged by any other cogent and reliable evidence. He submits that none of the witnesses of the plaintiff could prove possession in the suit land rather it is evident that the plaintiff admittedly started living in Akkelpur. He takes us to the prayer portion of the plaint and strongly submits that since plaintiff is out of possession the instant suit for declaration of title is barred under section 42 of the Specific Relief Act. He also submits that exhibit-Ga stands as a bar in the way of plaintiff's title and a consequential relief having not been prayed against exhibit-Ga renders the suit fatal according to proviso to section 42 of the Act and in support of such submission he refers the case of Rabeya Khatun and others Vs. Monowara Begum and others, reported in XIII ADC 477. He finally submits that weakness of defence, if any, is no ground to pass a decree in favour of the plaintiff.

We have heard the learned Advocates of both sides and considered the pleadings and evidence adduced by both the parties and also gone through the judgment as well as the record of the case and grounds taken in the appeal.

Earlier the appellant filed an application on 09.11.2021 for calling the record of Miscellaneous Case No. 33g(w) of 1966-67, Memo No. 13724/375A/21W dated 26.12.1966, record of Lease Case No. 198(XII) of 1978-79, Application Case No. 187(XII) of 1976-77 and kabuliyat dated 01.01.1986 executed by respondent 6 from the office of respondent 1 Deputy Commissioner, Jamalpur. The application was heard on the same day and was allowed with direction to send the records by special messenger and produce before the Court on or before 24.11.2021. But record did not reach by then. On 24.11.2021 a reminder was sent by registered post. The record reached to the office of this Court on 02.12.2021. On 05.01.2022 an order was passed to the effect that respondent 1 sent the register II relating to khas land with a certified copy of kabuliyat dated 01.01.1986 but the record of 02(two) miscellaneous cases and application of the respondent's father was not produced as being not available and in such circumstance the Court directed the appellant to inquire into the matter and take necessary step whether the records are lying in the office of respondent 1. Subsequently respondent 1 sent a report dated 07.04.2022

that the complete record was not available in the collectorate as is seen from order dated 20.04.2022 and the appeal started to proceed without the unsent documents called for. It appears from Memo 1115 dated 02.12.2021 that the respondent 1 could not send the original of Lease Case No. 198(XII) of 1978-79 and Application No. 187(XII) of 1976-77 but the attested photo copies of the relevant pages showing inclusion of register VII relating to settlement of khas land and the certified copy of the kabuliyat dated 01.01.1986 were sent to this Court and those are available in the record. However appellant did not file any objection against such papers sent on 02.12.2021.

It is stated in paragraph 2 of the plaint that before 1968 all the successive heirs of CS tenant Gour Dutta except Gongadhar left Balijuri, Jamalpur and went to Akkelpur, Bogura and after success in HSC in 1972 plaintiff became destitute because 02(two) boats with 3,000(three thousand) maunds of jute sank in a storm in the Jamuna and meanwhile in 1994 plaintiff's father died. These statements do not lead to the satisfaction of common prudence. Because there is 22(twenty two) years gap and this word "meanwhile" does

not denote the true drift of time. However plaintiff admitted that he left Balijuri for Akkelpur permanently. The statement on possession made in the plaint is apparently vague and it leads to believe that the same was attempted for testing false story. These statements creates ambiguity as to when plaintiff left the suit land. The rent receipts exhibit-7 and 7(ka) are only documentary evidences produced by the plaintiffs which are of the years of 1950-57 and 1960. The death certificate of his father (exhibit-9) was not proved by its issuing authority. PW 1 stated in examination-in-chief that he used to live in Akkelpur. He admitted in cross-examination that he lived with his father in Balijuri in 1980-82. There is electricity line in the house but he could not say in whose name the line was connected. There are 6-7 shops in the suit land and he could not say who runs the business in those shops. He also could not say if defendant 6 realises rent from those shops. He also admitted that he executed a deed of agreement to look after the suit land and CS and SA khatians were taken by Belal. PW 2 admitted in cross-examination that there are 6-7 shops in the suit land and it appears that PW 2 did not mention any name of any tenant under the ownership of plaintiff and he

admitted that the shops belonged to some other persons. PW 3 a near neighbour supports the possession of the plaintiff in examination-in-chief but in cross-examination he admitted that there are 15-20 shops in the suit land and the tenants paid rent to Khaleque Mondol two years ago and he does not know who realises the current rent and the electricity line was taken by Khaleque. Exhibit-3 the RS record filed by the plaintiff prepared in the concerned area within 1980 to 1986 shows the address of the successive heirs of CS tenant is in India. There is no evidence of conducting jute business by the plaintiff in Balijuri as claimed in the plaint. Thus from reading of plaint and perusing the oral and documentary evidence it transpires that plaintiff has utterly failed to prove his possession in the suit land.

Plaintiff has claimed title over 0.38 acres of land and for the entire land rent was shown to have been paid till 1960 by exhibit-7 series wherein it is seen that there is discrepancy in the name with father's name of the rent payer. Plaintiff has claimed the suit land by exchange document dated 27.04.1963, the sale deed dated 22.08.1968 and inheritance. Plaintiff did not file the exchange deed dated 27.04.1963 with

respect to 0.09½ acres. The kabala dated 22.08.1968 (exhibit-4) was admitted in evidence in original. Plaintiff did not take any step to prove the document by calling the volume from the concerned sub-registry office. We have perused the document and at least 5 things come to our notice which are alarming. First is the seals of sub-registrar which are completely indistinct and bleary in every place and it is not understood of whose office of sub-registrar the seals belonged to. Secondly there is penning through with a different ink other than the red ink which is used only in the seal where the sub-registrar makes endorsement under Rule 45(2) of the Registration Rules done at the reverse side of the 1st page of the document and the Rule clearly provides that there is no scope to use any ink other than the red ink while making the endorsement and use of blue black or royal blue ink in such endorsement is not permitted and the black ink is used only for signature with date of the sub-registrar in the seal followed by such endorsement. Third is that the endorsement shows only the name of Purna Lal but no name of Satya Narayan is there. It is not understood how the identifier Mulchand identified Satya Narayan under Rule 46

that he put his thumb impression under Rule 48 in presence of the sub-registrar. Fourth is plaintiff never made out any case in the plaint followed by any evidence that he has any land belonging to him in Rajshahi. But the second schedule of the document shows that 0.15 acres of land situated in Rajshahi has been shown to have been transferred by this document. This document apparently contains fictitious property. Thus the same appears to us is a forged, fraudulent, invalid document under section 28 of the Registration Act. Fifth is the stamps as apparent were purchased from Patnitala sub-registry office, Rajshahi on 22.08.1968 the day the document is shown to have been registered in respect of suit land of Balijuri, Jamalpur. Thus it is explicit that plaintiff practised gigantic fraud not only upon the parties but also upon the Court. Law is settled that fraud vitiates everything and it is the duty of the Court to bury the suit the moment fraud comes to its notice.

Mr. Biswas referred the kabuliyat (exhibit-Ga) dated 01.01.1986 and placed two-fold of arguments. At first he points out clause 2 of the kabuliyat and draws our attention that the kabuliyat contains agricultural land. Thus the

possession of the defendant failed because admittedly there are structures in the suit land. His submission is not correct because from perusal of clause 5 of exhibit-Ga it appears that the executant is permitted to make structure for living and moreover there is no contention that parties to exhibit-Ga have any dispute on this point. He raised his second point and strongly submitted that the kabuliyat (exhibit-Ga) being an unilateral document is void because under section 107 of the Transfer of Property Act the same was not executed by both the lessor and lessee. We have considered this submission and found no substance in it. Section 107 is included in chapter 5 of the Transfer of Property Act (Act IV of 1882) which starts with section 105 and ended in section 117. Section 117 excludes the suit land from the mischief of section 107 because the suit land is admittedly agricultural land.

DW 1 stated in examination-in-chief that he has obtained lease from the Government. He paid rent and khatian is opened in his name. One Belal filed this false suit. He stated in cross-examination that he obtained the certified copy of kabuliyat on 01.01.1986. He denied the suggestion

that his kabuliyat is forged. DW 2 a tenant under defendant 6 stated in cross-examination that he carries out business in the shop letting out by defendant 6. He denied the suggestion that he is not a tenant under defendant 6. DW 3 in examination-in-chief stated that he is also a tenant under defendant 6 and runs fuel wood business. In cross-examination he stated that his homestead is flanked by the suit land and defendant 6 has homestead and shops in the suit land. DW 4 proved the information slip with respect to SA record 522 with the working volume. It appears that in the deposition SA record 552 is written as 522. In cross-examination he was not confronted with such different numbers and he denied the suggestion that the volume was forged. DW 5 who is a land Assistant Officer proved the information slip with the volume register VIII in respect of Application Case No. 187(XII) of 1976-77 and Miscellaneous Case No. 198(XII) of 1978-79. He denied the suggestion that the volume is concocted. Exhibit-Ka the information slip shows that in the remark column of SA record Talhan and Lal Miah are mentioned as forcible possessors. Exhibit-Kha shows that the suit land according to register VIII belongs to Government. Exhibit-

Ga is the certified copy of the kabuliyat dated 01.01.1986 having reference of the petition and miscellaneous cases. Exhibit-Gha is the separate khatian 738 opened on 14.01.1986 on the basis of Exhibit-Ga. Exhibit-Uma is the receipt of holding tax. From reading of these evidences it appears that the defendant has title and possession in the suit land. Mere claim by the plaintiff that exhibit-Ga is a forged document without proving his title and possession in the suit land does not bear any importance.

As stated above this Court earlier directed the appellant on 05.01.2020 to inquire into the lease matter and take necessary step within 02(two) months and on 20.04.2022 passed further order that the appeal would proceed without the documents as called for by order dated 09.11.2021 passed at the instance of an application filed by the appellant. Thus it appears that after sending the attested photo copies of the relevant pages of register XII along with a certified copy of Exhibit-Gha by memo 31.45.3900.013.18.012.96-(1115) dated 02.12.2021 by the Deputy Commissioner, Jamalpur appellant did not turn up with any further grievance after 05.01.2022 and the state of things remained the same after

20.04.2022. From perusal of the papers sent through memo dated 02.12.2021 it appears that those papers are in conformity with the written statement along with the statements of DW 1 and DW 5 as well as with the recital of Exhibit-Ga which creates a jural relationship between the parties to the document as enunciated in the case of Bangladesh Vs. S. Ahmed, reported in 4 BCR(AD) 201.

Learned senior Advocate for the respondent points out the age-old principle that plaintiff has to prove his own case and weakness of defence is no ground to grant a decree in favour of the plaintiff. He refers the case of 13 ADC 477 and further draws our attention that since the plaintiff did not ask relief against Exhibit-Ga and his possession is also unfounded this suit for declaration of title simpliciter without consequential relief is barred under section 42 of the Specific Relief Act. As discussed above plaintiff has failed to prove his title and possession in the suit land. Plaintiff has sorely failed to discharge his initial onus according to sections 101 and 103 of the Evidence Act. We find no substance in the submissions made by the learned Advocate Mr. Biswas and the *ratio* given in 7 BLD(AD) 103 case does not fit at all in

the instant case considering the present fact and circumstance. Since Exhibit-4 is on its face a forged, fraudulent, collusive, void document the principle laid down in 39 DLR(AD) 78 case is not applicable in the present case rather the same in fact goes against his own case.

The learned Joint District Judge upon proper appreciation of evidence and record correctly dismissed the suit. We find no merit in the appeal.

Accordingly this appeal is dismissed. There will be no order as to costs.

The order of *status quo* passed by this Court stands vacated.

Communicate this judgment and order and send down the lower Court's record.

Bhishmadev Chakraborty, J:

I agree.