

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.4570 OF 2008

In the matter of:

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

And

Azahar Ali Piada and others

... Petitioners

-Versus-

Most. Chunarbi Bewya and others

... Opposite parties

Mr. Dewan Makhdum, Advocate

... For the petitioners.

None appears

... For the opposite parties.

Heard and Judgment on 18.06.2023

This Rule arises out of the impugned judgment and decree dated 19.10.2008 passed by the learned Joint District Judge, 2nd Court, Naogaon in Title Appeal No.175 of 2002 allowing the appeal and sent back on remand setting aside the judgment and decree dated 13.07.2002 passed by the Senior Assistant Judge, 1st Court, Naogaon in Other Class Suit No.27 of 1989 dismissing the suit.

Facts in short are that the opposite parties as plaintiffs filed Other Class Suit No.27 of 1989 for declaration of title for 23 decimals of land as described in 'Kha' schedule to the plaint. It was alleging that 10.43 acres of land as described in 'Ka' schedule belonged to Kadombini Chowdhury who died leaving behind Boni Behari Chowdhury as sole

heir who exchanged above land by a registered deed of exchange dated 25.03.1963 to the predecessors of the plaintiffs namely Altaf Hossain Miah, Abul Hossain Miah and Rezia Khatun. While in possession in the 'Ka' "schedule land by way of Exchange above mentioned Altaf Hossain and others transferred 'Kha' schedule land to the plaintiff No.1 and predecessor of plaintiff Nos.2-10 namely Neyara @ Leharat Mondal by registered kabala deed dated 11.10.1966. During R.S. survey above disputed 'Kha' schedule land was erroneously recorded in the names of Badruddin Peyada predecessor of the plaintiff. The predecessor of defendant namely Badruddin Peyada constructed his dwelling house in 7 decimals of land on permission of above mentioned Altaf Hossain predecessor of the plaintiffs. In the above land there is a graveyard of the plaintiffs. On the basis of above erroneous R.S. Khatian the defendants denied title of the plaintiffs.

Defendant Nos.1-3 and 5-6 contested the suit by filing a joint written statement alleging that above disputed land of 'Kha' schedule belonged to Kadombini and on her behalf Sree Aditto Nath gave settlement of above land to the predecessor of the defendants namely Badruddin Peyada by an amalnama and plaintiffs are in peaceful possession in above land by paying rent to the Zaminder and subsequently to the Government. In above land the defendants have their dwelling house, graveyard and the plaintiffs do not have any

possession. R.S. Khatian No.154 was correctly recorded in the nameS of the predecessor of the defendants.

At trial the plaintiffs examined 4 witnesses and defendants examined 7. Documents produced and proved by the plaintiffs were marked as Exhibit Nos.1-6 and those of the defendants were marked as Exhibit Nos.'Ka' to 'Jha'.

On consideration of submissions of the learned Advocates for respective parties and evidence on record the learned Senior Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree the plaintiffs as appellants preferred Title Appeal No.175 of 2002 to the District Judge, Naogaon which was heard by the learned Joint District Judge, Second Court, Naogaon who allowed the appeal and set aside the impugned judgment and decree of the Trial Court and remanded the suit for retrial.

Being aggrieved by above judgment and decree of the learned Joint District Judge, Second Court, Naogaon respondents as petitioners moved to this Court and obtained this Rule and an ad-interim order of stay.

Mr. Dewan Makhdum, learned Advocate for the petitioners submits that the plaintiffs could not prove their title and possession by legal evidences. Admittedly the disputed R.S. khatian was prepared in the name of the predecessor of the defendants. In the plaint plaintiffs

have admitted that the dwelling house of the defendants is situated in the disputed land and claimed that they constructed above house on the permission of the Altaf Hossain but the plaintiffs did not make any endeavor to prove above claim of oral permission. On the other hand PW1 and PW2 have admitted the peaceful possession of the defendants in the disputed land. On consideration of above evidence on record the learned Joint District Judge should have dismissed the appeal outright. But the learned Joint District Judge has failed to appreciate the legal value of above evidence on record and most illegally and unnecessarily remanded the suit for retrial which is not tenable in law.

None appears on behalf of the opposite parties when the case was taken up for hearing although the case appeared in the list for hearing today.

I have considered the submissions made by the learned Advocate for the petitioner and carefully examined the pleadings, evidence and impugned judgment and decree passed by the learned Joint District Judge and other materials on record.

It is admitted that 23 decimals land as described in the 'Kha' schedule to the plaint originally belonged to Kadombini Chowdhury.

It is admitted that in R.S. Khatian No.154 of above disputed land has been recorded in the name of Bodruddin Peyada the predecessor in interest of the defendants.

In the plaint plaintiffs admitted that the dwelling house of the defendants is situated in 7 decimal land out of disputed 23 decimal land as described in schedule 'Kha' to the plaint.

Plaintiffs claim that Badruddin Peyada the predecessor of the defendants constructed above dwelling house in the disputed land on the permission of Altaf Hossain Miah the predecessor of the plaintiffs. But no date and place of giving of above oral permission by Altaf Hossain Miah has been stated in the plaint. The plaintiffs did not adduce any evidence to substantiate above claim of oral permission to Badriddin Peyada by Altaf Hossain Miah for constructing his dwelling house in the disputed land. On the contrary in his evidence as PW1 Sukur Ali Mondal have admitted in his cross examination that the defendants have their homestead, graveyard and saw machine in the suit land. PW2 Mahtab Ali and PW3 Soleman have corroborated above evidence of PW1 Sukumar Ali and stated that the defendants are in possession of the disputed land.

In view of above evidence it can be clearly concluded that the defendants are in peaceful possession in the disputed land and disputed of R.S. Khatian No.154 in the name of their predecessor Badruddin Peyada was correctly prepared.

The plaintiffs have produced and proved the registered deed of exchange dated 26.03.1963 which was marked as Exhibit-1. Above document shows that the same was executed by Altaf Hossain Miah the

predecessor of the plaintiffs as an attorney of the Banbehari Chowdhury. But no deed of power of attorney executed by Banbehari Chowdhury empowering Altaf Hossain Miah to transfer above land was produced and proved at trial. It further turns out that the above deed of exchange was not authenticated by the Deputy Commissioner of Dinajpur. There is no explanation in the plaint or in the evidence of any plaintiffs witness as to non authentication of above deed of Exchange by the relevant Government Officer.

At trial the plaintiffs produced and proved a certified copy of registered kabala deed dated 11.10.1966 but there is no explanation as to why the original document was not produced.

On consideration of above materials on record I hold that the defendants are in peaceful possession in the disputed land by constructing their dwelling house, graveyard and shallow tube well and relevant R.S. Khatian No.154 was correctly prepared in the name of the predecessor of the defendants. On the other hand the plaintiffs have failed to prove by legal evidence their claim of acquisition of title in the disputed land by a valid deed of exchange nor they have succeeded to prove their possession in the disputed land at any point of time by legal evidence.

In above view of the materials on record we are unable to find any illegality in the judgment and decree passed by the learned Judge of the Trial Court but the learned Joint District Judge committed serious

illegality in setting aside the lawful judgment of the Trial Court and sending the case for retrial which is not tenable in law.

In above view of materials on record I find valid substance in this Civil Revision and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 19.10.2008 passed by the learned Joint District Judge, 2nd Court, Naogaon in Title Appeal No.175 of 2002 is hereby set aside and the judgment and decree dated 13.07.2002 passed by the Senior Assistant Judge, 1st Court, Naogaon in Other Class Suit No.27 of 1989 is hereby restored.

However, there is no order as to costs.

Send down the lower Court's record immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER