

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO. 426 OF 1991.

IN THE MATTER OF:

An application under section 25 of The Small Causes Courts Act, 1887.

- AND -

IN THE MATTER OF:

M. Sultan Ahmed, being dead his heirs 1(a) Mohammad Rafiqul Islam Sarder and others.

....plaintiff-petitioners.

-Versus –

Md. Mahmudul Anwar and others.

....defendant-opposite parties.

Mr. Manzur-al- Matin, Advocate, with

Mr. Tapos Bhundu Das, Advocate

..... For the petitioners.

Mr. Md. Tajul Islam Chowdhury, Advocate

..... For opposite parties.

Heard on: 27.02.2024, 05.03.2024 and Judgment on 06.03.2024.

On an application of the petitioners M. Sultan Ahmed, being dead his heirs 1(a) Mohammad Rafiqul Islam Sarder and others under section 25 of The Small Cause Courts Act, 1887, the Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 25.10.1990 passed by the Senior Assistant Judge, Chattogram in S.C.C. Suit No. 38 of 1986 actually the Small Causes 1st Court, Sadar, Chattogram but inadvertently, in the decree, has been mentioned as Senior Assistant Judge, 1st Court, Chattogram dismissing the suit, should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the suit properties belonged to the Aladi Jamadar Wakf Estate and according to the R.S. khatian Khondakar Azizullah was the Mutwalli of the Wakf Estate since 08.11.1921. During the R.S. operation commencing from 1926 and ending in 1930/1931, Khondakar Azizullah had been the Mutwalli of the Wakf Estate and the R.S. record was accordingly prepared. One Ershadullah Muktar was tenant under the said Wakf Estate and after his death in 1955 his sons the defendant Nos. 1-3 did not pay the rent to the Wakf Estate and neither Ershadullah nor his sons, the defendant Nos. 1-3 did not surrender the possession of scheduled properties in favour the Wakf Estate. The tenancy right was not inherited to the defendant Nos.1-3, they are not entitled to get notice under section 106 of the Transfer of Property Act. The defendant Nos.1-3 fraudulently recorded their names in the P.S. khatian in respect of the suit properties but recording their names in those khatians they did not acquire any right, title, interest and possession in the suit premises. Abdus Salam, a Mutwalli of the Wakf Estate, created various papers and documents collusively with the ultimate object of misappropriating the scheduled properties including other properties and for his such heinous object and other questionable activities, he was removed from the Mutwalliship. If there is any documents, created for the purpose of establishing title of the defendant Nos.1-3 in the suit land, are illegal, collusive, bogus, fraudulent and without any consideration and the Wakf Estate is not bound by those

documents. The plaintiff demanded khas possession of the suit premises including the compensation from the defendant Nos. 1-3, lastly on the 1st week of November, 1986 but to no effect and as such the plaintiff has been constrained to file this suit with the prayer of eviction of the defendant Nos.1-3 from the suit premises and prayed other relief also.

The suit was contested by the defendant Nos. 1-3 by filing joint written statements, denying all the material assertions made in the plaint, contending, inter alia, that the suit is not maintainable that there is no cause of action that the plaintiff does not have possession over the suit land and as such the plaintiff is not entitled to get any relief in this suit. There is no landlord and tenancy relation between the plaintiff and the defendant Nos. 1-3. The suit is barred by section 23 of The Small Cause Courts Act, 1887 and also barred by estoppels, waiver and acquiescence and denied all other material allegations of the plaint. The fact of the written statement, in short, is that the suit property, being R.S. plot No. 553, belonged to Azizullah with khas possession. He mortgaged the same in rehen to one Abdul Jalil and Hajee Yakub Ali Contractor on 11.04.1927 through the rehen deed No. 1563, and without redeeming the said mortgage he instituted the Other Suit No. 7 of 1924 against (I) Fazlur Rahman, (II) Abdur Rashid, (III) Oli Mia and (IV) Ali Mia of Bagmoniram in the 1st Court of Subordinate Judge where he lost and the cost of the said suit was decreed against him, but he did not pay the decreetal amount and as such those persons filed execution case against the said Azizullah.

The scheduled properties including other properties were sold on auction by the court and they acquired the same through an auction purchase and obtained the certificates of sale and possession. The heirs of late Fazlur Rahman and Abdul Rashid namely Kala Mia, Jamila Khatun, Abul Khair, Saleha Khatun, Achhia Khatun and other decree holders sold two annas of auction purchased land to one Saidur Rahman. Saidur Rahman sold the same property to Abdul Rashid and others, in this circumstances Hajee Yakub Ali Contractor demanded the rehen money and the said Abdul Rashid and others paid the said rehen money to him. The decree holder Ali Mia died leaving behind his two daughters Mallika Khatun and Rabeya Khatun as heirs and possessors of his properties, they (Mallika Khatun and Rabeya Khatun), being in possession, sold the land of the suit including other land to one Abdul Jalil Sowdagar vide Deed No. 2496 dated 03.10.1945. The said Saidur Rahman, being in possession as purchaser of the suit land, settled the same to the father of these defendants (Ershadullah) through Patta No. 1142 dated 29.03.1950. Then Ershadullah, by obtaining permission from Chattogram Divisional Commissioner, build a house through house building case No. 521/51-52 dated 29.05.1952 and constructed a semi-pacca house with a boundary wall and started living therein with his family members. It is to be noted that R.S. Plot No. 553 was wrongly written as 353 in the said patta and as such he executed an amended deed being No. 2217 dated 02.04.1957, wherein he mentioned an area of .84 decimals from plot No. 553, the suit plot was identified as

Municipal Holding No. 214A (Shabek) then 370 (Shabek) then 418 (Hal). These defendants had been living therein with their family members by exercising their rights and title and paying rent and taxes to the authorities concerned and as such these defendants obtained the rights and title adversely against the plaintiff. The suit property was recorded in the name of these defendants both in P.S. and B.S. operation, the plaintiff filed an appeal under section 31 of E.B.S. and T. Rules before Settlement Authority and the plaintiff lost in that case on contest, since the suit property is not the Waqf property and it belonged to these defendants, the suit is liable to be dismissed.

Thereafter, the Senior Assistant Judge, S.C.C. Court framed 4 (four) issues for disposal of the suit.

At the time of trial, the plaintiff examined the witness himself as P.W.1 and another witness is P.W.2 and exhibited the documents as Exhibit-1-7 and the defendant side also examined himself one witness as D.W.1 and also exhibited some documents as Exhibit-A-J to prove their respective cases.

The S.C.C. court, after consideration of the evidence on record, facts and circumstances of the case and also the documentary evidences, dismissed the suit by its judgment and decree dated 25.10.1990.

Being aggrieved by and dissatisfied with the impugned judgment and decree of the S.C.C. court, the then Mutwalli, the plaintiff filed this

revisional application under Section 25 of The Small Cause Courts Act, 1887 and obtained the Rule.

Initially the learned Advocate Mr. H. K. Abdul Hye and Mr. Abdul Hai Sarker appearing on behalf of the opposite party Nos. 1-3 but it is reported that Mr. H.K. Abdul Hye has expired but there is no indication that Mr. Abdul Hai Sarker has issued a N.O.C. to anyone. Subsequently Mr. Shahiduzzaman and Mr. Md. Tajul Islam Chowdhury, the learned Advocate filed an application for addition of the parties by way of substitution of the opposite party No.2, Shamsul Huda and the said application was allowed and now the heirs of deceased opposite party No. 2, Shamsul Huda, became the opposite party No. 2(a) to 2(g) and as such Mr. Abdul Hai Sarker the learned Advocate now represented the defendant No. 1 and 3 but did not appear to oppose the Rule.

Mr. Manzur-al-Matin, the learned Advocate along with Mr. Taposh Bandhu Das, Advocate appearing on behalf of the petitioner submits that the learned S.C.C. court erroneously dismissed the suit without considering and discussing each and every issue was framed. He further submits that the plaintiff filed the S.C.C. Suit for the eviction of the tenant and in support of his suit, plaintiff adduced documentary evidences but the S.C.C. Court failed to consider the material facts of the case and dismissed the suit solely on the defendant's assertion of rights to the suit land. He further submits that as per provision of section 23 of The Small Cause Courts Act, 1887, the trial court may, at any stage of the

proceedings, return the plaint to be presented to a court, having jurisdiction to determine the title when the right and title claimed by the plaintiff depends upon the proof or disproof of a title to immovable property or other title which such a court cannot finally determine but the trial court, without considering the aforesaid provision, dismissed the suit which is a clear error in law resulting in an error in the decision occasioning failure of justice. He further submits that in another suit the title of Aladi Jamadar Wakf Estate has been established and settled by the Appellate Division and in such a case this court may consider the facts since the title of the Aladi Jamadar Waqf Estate has been settled. He prayed for making the Rule absolute.

On the contrary Mr. Md. Tajul Islam Chowdhury, the learned Advocate appearing on behalf of the opposite parties submits that the trial court rightly dismissed the suit. He further submits that it is the discretion of the S.C.C. court, either to dismiss the suit or may return it to the appropriate court with proper jurisdiction. The stipulation in section 13 of The Small Cause Courts Act, 1887, does not state that a title dispute makes an S.C.C. suit non-maintainable; rather it indicates that the S.C.C. Judge has discretionary authority to adjudicate such cases. In support of his argument the learned Advocate cited the decision of the case of Merajuddin Ahmed Vs. Anwarul Islam and others, reported in 26 DLR (HCD)-314. He prayed for discharging the Rule.

I have heard the learned Advocate of both the sides, perused the impugned judgment and the decree of the court below, the provision of law and the papers and documents as available on the record.

It appears that the then Mutwalli M. Sultan Ahmed of Aladi Jamadar Wakf Estate filed S.C.C. Suit No. 38 of 1986 in the then Small Cause Courts of Sadar, Chattogram for the khas possession of the suit property, by evicting the defendant opposite parties, claiming that the defendant Nos. 1-3 are their tenant under the Wakf Estate.

The defendant Nos. 1-3 contested the suit by filing a written statement denying all the material ascertain made in the plaint and claiming that they are not the tenant of the plaintiff.

It appears that at the time of trial, the plaintiff side adduced the witness Mutwalli himself as P.W.1 and another as P.W.2 and the defendant side also examined the witness as D.W.1 and in support of their respective cases they adduced some documentary evidences.

It appears that the trial court framed 4 (four) issues, which are as follows:

- ১। অত্র মোকদ্দমা বর্তমান আকারে চলিতে পারে কি না?
- ২। বাদী ও বিবাদীর মাঝে মালিক ভাড়াটিয়া সম্পর্ক আছে কি না?
- ৩। বিবাদী নালিশী গৃহে ডিফলটার কি না?
- ৪। বাদী তাহার প্রার্থিত মতে বা অন্য কোন প্রকারে প্রতিকার পাইতে পারে কি না?

It appears that the trial court, while determining the issues, took view that: “বাদীপক্ষ সাক্ষীর সাক্ষ্য ও বিবাদীপক্ষ গন সাক্ষীর সাক্ষ্য প্রদান করিয়াছেন। উভয়

পক্ষের কাগজাদি সাক্ষীর সাক্ষ্যাদি পর্যালোচনায় নালিশী সম্পত্তির মালিকানা দখল নিয়া গুরুতর প্রশ্ন জড়িত। উভয় পক্ষই নিজেদের মালিকানার সমর্থনে কাগজাদি দাখিল করিয়াছেন। বিবাদীগণ ভাড়াটিয়া তদ বিষয়ে কোন কাগজাদি আদালতে উপস্থাপিত হয় নাই। যেহেতু অত্র মোকদ্দমায় নালিশী সম্পত্তির বিষয়ে বাদী বিবাদীদের মধ্যে কে মালিক তদ বিষয়ে গুরুতর প্রশ্ন জড়িত সেহেতু মালিকানার বিষয়ে নির্ধারণ করার জন্য পক্ষগণ অপর মোকদ্দমা দায়ের করিয়া সিদ্ধান্তে আসিতে পারে। অত্র মোকদ্দমা উক্ত বিষয়ে সিদ্ধান্তে আসা আইন সংগত নহে। অতঃপর মালিকানার বিষয়ে সিদ্ধান্তে না আসিয়া অত্র মোকদ্দমা বর্তমান আকারে চলিতে পারে না।”

And further took view that: “সূত্রাং বাদী বিবাদীর মাঝে মালিক ভাড়াটিয়া সম্পর্ক আছে কি না, নালিশী গৃহে বিবাদী ডিফলটার কি না তদ বিষয়ে আলোচনা করার প্রয়োজন আছে বলিয়া মনে করি না। সূত্রাং আমার সিদ্ধান্ত বাদী তাহার প্রার্থীত মতে বা অন্য কোন প্রকারে প্রতিকার পাইতে পারে না।” and dismissed the suit.

The Small Cause Courts constituted under section 16 of The Small Cause Courts Act, 1887 and section 16 states that: “*Save as expressly provided by this Act or by any other enactment for the time being in force, a suit cognizable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable*”

So, from the aforesaid section it is clear that the S.C.C. court has jurisdiction to consider the case mentioned in 2nd schedule and accordingly the plaintiff filed the suit but subsequently the defendant by filing written statement denying the material facts of the case and claimed the title and in support of their claim they also adduced some evidence of title.

Section 23 of The Small Cause Courts Act, 1887 specifically provides that the court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a court cannot finally determine. It means that when the title of the plaintiff has been challenged by the other side then the S.C.C. court can consider the same, incidentally discussed the title of the parties or may return the plaint to be presented to a court having jurisdiction to determine the title and in such a case if the S.C.C. court were to dismiss the suit then the court should consider the evidence on record and address all the matters raised by the parties and also discuss each issue that has been framed in the instant case. As the court has framed issues whether the present suit is maintainable or not, in such a case, the S.C.C. court if desires then sent the matter or return the plaint to any of the court having jurisdiction to determine the title.

It is settled facts that the S.C.C. Court can also dispose of the suit by touching the question of title incidentally but not finally, in such a case, it is better to return the plaint. The learned Advocate Mr. Md. Tajul Islam Chowdhury cited the decision of the case of Merajuddin Ahmed Vs. Md. Anwarul Islam and others, reported in 26 DLR (HCD)-314, wherein their lordship held that: *“The provision of section 23 of the Small Cause Court Act, does not lay down that an issue as to title render’s an S.C.C. suit non-*

maintainable as such but enacts that the authority of a S.C.C. judge to hear such a suit is discretionary.”

So, from the aforesaid decision it is also found that it is the court to decide whether he disposed of the same or since the S.C.C. court has no jurisdiction to determine the title of the parties only to touch or discuss the title incidentally, in such a case, without dismissing the suit, the S.C.C. court ought to have returned the suit to be presented to a court having proper jurisdiction to determine the title. The Mutwalli of the Aladi Jamadar Wakf Estate filed another suit No. 243 of 1996 and in the said suit the title of the Wakf Estate has been established even by the Appellate Division in Civil Petition for Leave to Appeal No. 1720 of 2008 but in the instant case it is found that considering the scheduled of the land it is only found that the scheduled land has been mentioned in R.S. Khatian No. 92, R.S. plot No. 553 measuring .378 Shatak, corresponding to P.S. Khatian No. 190, P.S. plot No.480, measuring .0737 Shatak covered by municipal holding No. 370 (old) and 418(new), but it cannot be ascertained that the title of the parties should be decided the S.C.C. court based on the aforementioned schedule and the same can be decided by the court with appropriate jurisdiction, in such a case, it is my view that the S.C.C. court, without returning the plaint to the court having jurisdiction to decide the title of the parties, erroneously passed the impugned judgment and dismissed the suit, thus I find merit in the Rule.

In the result the Rule is made absolute. The impugned judgment and decree dated 25.10.1990 passed by the Senior Assistant Judge, Chattogram in S.C.C. Suit No. 38 of 1986 actually the Small Causes 1st Court, Sadar, Chattogram but inadvertently, in the decree, has been mentioned as Senior Assistant Judge, 1st Court, Chattogram is hereby set-aside.

However, the S.C.C. court is directed to pass necessary order to return the plaint to the plaintiff, after receiving the record, to be presented to the court having jurisdiction to decide the title.

Send down the Lower courts record at once and communicated the order at once.

M.R.