

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3794 of 2009

In the matter of:

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

And

Fazlur Rahman and another
... Petitioners

-Versus-

Mujtaba Akter and others
... Opposite parties

Mr. Golam Ahmed, Advocate
... For the petitioners.

Mr. Shishir Kanti Majumder, Advocate
... For the opposite party Nos.1-11.

Heard and Judgment on 08.01.2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party Nos.1-11 to show cause as to why the impugned judgment and decree dated 15.07.2009 passed by the Joint District Judge, 1st Court, Netrokona in Other Class Appeal No.189 of 2006 and affirming the judgment and decree dated 20.09.2006 passed by the Assistant Judge, Madar, Netrokona in Other Class Suit No.25 of 2004 should not be set aside and/or pass such other or further order or as to this Court may seem fit and proper.

Facts in short are that the opposite parties as plaintiffs instituted above suit for recovery of possession of 2.64 acres land as described fully in the schedule to the plaint alleging that above property belonged to Bhupendra Chakrabarty and predecessor of the plaintiff Nos.1-3 purchased 1.69 acres land from above Bhupendra Chakrabarty by three registered kabala deed Nos.2574, 2576 and 2577 dated 16.10.1976. They also purchased land of Plot No.2599 from Joyal who in his turn purchased the same from Bhupendra Chakrabarty. The father of plaintiff No.1 filed Title Suit No.180 of 1989 against the Government and the defendant of this suit and obtained a decree and above defendants preferred Other Class Appeal No.100 of 1991 which was disposed on compromise on 17.08.1994. Predecessor of the plaintiff Nos.1-9 namely Janab Hossain gave oral permission to defendant No.1 to erect a dwelling hut in a part of above disputed land. On 23.05.2004 defendant Nos.1 and 2 prohibited the plaintiffs from catching fish from the the pond of the disputed land.

Above suit was contested by defendant Nos.1, 2 and 4 by filing two separate written statement. Defendant No.1 claimed that he obtained settlement of 14 decimal land of Plot No.2599 from the Government vide Settlement Case No. $\frac{1505(XII) 99-2000}{202(XII) 99-2000}$ and they are possessing above land by mutating their names and paying rent to the

Government. Above defendant purchased 83 decimal land out of above disputed property by registered kabala deed dated 02.02.1971 from Purno Chandra Chakrabarty and he is possessing above land by constructing his dwelling house, excavating a tank and growing trees. Defendant was not a permissive possess Janab Hossain or of the plaintiffs and plaintiffs did not have any title and possession in above land.

Defendant No.4 Government of Bangladesh represented by Deputy Commissioner, Netrokona stated that 14 decimals land of Plot No.2599 was rightly recorded in the name of the Government in S.A. Khatian No.1 and the Government gave settlement of above land to defendant No.1. Plaintiffs do not have any right, title and possession in above land.

At trial plaintiffs examined 3 witnesses and their documents were marked as Exhibit Nos.1-7. On the other hand defendants examined 4 witnesses and their documents were marked as Exhibit Nos.'Ka' - 'Ga'.

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

Being aggrieved by above judgment and decree of the trial Court above defendants as appellants preferred Other Appeal No.189 of 2006 to the District Judge, Netrakona which was heard by the learned Joint

District Judge, 1st Court who dismissed above appeal and affirmed the judgment and decree of the trial Court.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of Appeal below above appellants as petitioners moved to this Court with this civil revisional application under Section 115(1) of the Code of Civil procedure and obtained this Rule.

Mr. Golam Ahmed, learned Advocate for the petitioners submits that the father of the plaintiff namely Janab Ali gave oral permission to the defendant No.1 erect a dwelling house but the plaintiff could not prove above claim by legal evidence. Nor the plaintiffs have succeeded to prove that they filed above suit within the statutory period of limitation. But the learned Judges of the Courts below have failed to appreciate above basic deficiency in the suit of the plaintiffs and most illegally the trial Court decreed the suit and the learned Judge of the Court of appeal below without an independent assessment of materials on record dismissed the appeal and upheld the flawed judgment and decree of the trial Court which is not tenable in law.

Mr. Shishir Kanti Majumder, learned Advocate for the opposite party Nos.1-11 submits that admittedly disputed property belonged to Bhupendra Chakrabarty and in his name S.A. Khatian Nos.129 and 132 were correctly recorded and Bhupendra Chakrabarty transferred above

land to the predecessor of plaintiff No.1-9 Janab Hossain and after his demise plaintiffs are in possession of above land. Above Janab Hossain permitted defendant No.1 to erect a dwelling hut in a part of the land for his temporary accommodation and after demise of above Janab Hossain plaintiffs requested above defendant No.1 to remove his hut and hand over vacant possession of the disputed land but he refused to do so. Plaintiffs have succeeded to prove their claim of title and previous possession and giving of permission to defendant No.1 to possess a part of above land by mutually corroborative evidence of three competent plaintiff witnesses and production of registered kabala deeds and certified copies of relevant khatians. On consideration of above facts and circumstances of the case and evidence on record the learned Judges of both the Courts below rightly and concurrently held that the plaintiffs have succeeded to prove their title and the fact of giving oral permission to defendant Nos.1 to possess a part of the disputed land and accordingly decreed the suit and dismissed the appeal respectively and in the absence of any allegation of non consideration or misreading of any evidence on record this Court cannot in its revisional jurisdiction interfere with above concurrent findings of fact.

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

At the very outset the learned Judges of both the Courts below have treated this suit as one under Section 8 of the Specific Relief Act, 1877 for declaration of title and recovery of possession of 2.64 decimal land. But in fact this is a suit for mere recovery of possession of above disputed land and the suit falls under Section 9 of the Specific Relief Act, 1877. At Paragraph No.8(Ka) of the plaint while seeking relief the plaintiff has sought a decree for only recovery of possession of above 2.64 acres land on removal of structure of the defendants. No relief has been sought for a decree for declaration of title of the plaintiffs in above land. The learned Judges of both the Courts below committed serious illegality in treating this suit for declaration of title and recovery of possession under Section 8 of the Specific Relief Act, 1877 which is not tenable in law.

It has been stated at Paragraph No.3 of the plaint that above Jaban Hossain gave oral permission to defendant No.1 for erecting a hut in a part of the disputed land. Since this suit under Section 9 of the Specific Relief Act, 1877 has been filed after more than 10 years from the entry of

the defendant into possession of the disputed land the same was hopelessly barred by limitation.

A suit under Section 9 of the Specific Relief Act, 1877 is legally maintainable when there is a statement both in the plaint and in the evidence of the PW that the plaintiff was dispossessed by the defendant from the disputed land without his consent. In the plaint and in the evidence of PW1 there is no such claim that defendant No.1 entered into the possession of the disputed land without consent of Jaban Hossain. On the contrary it has been stated that defendant No.1 was inducted into possession of the disputed land willingly and with consent of above Jaban Hossain. As such this suit under Section 9 of the Specific Relief Act, 1877 was misconceived and not tenable in law.

It turns out from certified copy of S.A. Khatian No.132 marked as Exhibit Nos.4(Kha) that land of above khatian was recorded jointly and in equal shares of two brothers namely Bhupendra Chakrabarty and Purno Chandra Chakrabarty. The plaintiffs claim to have purchased land from Bhupendra Chakrabarty who had 8 anas share in above khatian but on the basis of above purchase the plaintiffs have claimed total land of above khatian No.132. There is no explanation either in the plaint or in the evidence of the PW1 that at any point of time Bhupendra Chakrabarty acquired the land of Purno Chandra

Chakrabarty. As such there is no legal basis of plaintiff's claim of total land of S.A. Khatian No.132 on the basis of purchase of share of Bhupendra Chandra Chakrabarty.

In above view of the facts and circumstances of the case and evidence on record I hold that the learned Judges of both the Courts below totally failed to appreciate the facts and circumstances of the case and relevant laws properly and learned Joint District Judge most illegally dismissed the appeal and affirmed the unlawful and flawed judgment and decree of the trial Court which is not tenable in law.

The learned Advocate for the petitioner lastly submits that the plaint of this suit was defectively drafted and appropriate evidence was not adduce at trial and above deficiencies were caused due to lack of skill and professional experience of the appointed Advocate of the plaintiffs at trial Court. The plaintiffs who are village people should not be made to suffer for above errors and mistakes committed by their appointed Advocate and this suit may be remanded to the trial Court for retrial after giving both parties an opportunity to amend their respective pleadings and adduce further evidence.

Since this was a suit under Section 9 of the Specific Relief Act, 1877 for mere recovery of possession the plaintiffs be at liberty if so advised to file a regular title suit in an appropriate Court of law.

On consideration of above facts and circumstances of the case and materials on record I find substances in this civil revisional application under Section 115(1) of the Code of Criminal 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 and decree dated 15.07.2009 passed by the Joint District Judge, 1st Court, Netrokona in Other Class Appeal No.189 of 2006 and affirming the judgment and decree dated 20.09.2006 passed by the Assistant Judge, Madar, Netrokona in Other Class Suit No.25 of 2004 is set aside and above suit is dismissed on contest against defendant Nos.1 and 4 and ex-parte against the rest.

However, there is no order as to costs.

Send down the lower Courts record immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER