Bench:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice Md. Akhtaruzzaman

First Appeal No. 643 of 2000

Ainali Kha and others .....appellants
-Versus-
Government of Bangladesh and others
..... respondents

Mr. Abdul Hye Fakir with
Mr. Md. Towhidul Islam, Advocates
.....for appellants

Ms. Rahima Khatun, Deputy Attorney General
with Ms. Farida Pervin Flora and Mr. Md.
Ruhul Amin, Assistant Attorney Generals
..... for respondent No.4

Heard on 02.11.2023, 21.11.2023, 27.11.2023
and 09.01.2024
Judgment on 16.01.2024.

Md. Akhtaruzzaman, J.

The plaintiffs have preferred this appeal under section 96 of the Code of Civil Procedure (in short, the Code) challenging the judgment and decree dated 31.08.1999 passed by the learned Subordinate Judge, Court No. 2, Barishal in Title Suit No. 23 of 1996 dismissing the suit on contest.

Facts relevant for disposal of the present appeal, in brief, are that the present appellants being plaintiffs filed Title Suit No. 23 of 1996 before the Subordinate Judge, Court No. 2, Barishal praying for declaration of title over the suit land duly described in the schedule of the plaint contending, *inter alia*, that Titu Kha was the owner of 8 annas share in C.S. Khatian Nos. 113/114/116/117 and 119 of Mouza Mahisha Paguria under Mehendigonj police station whereas Ayub Ali

and Shamsuddin had their 4 annas shares each. Khatian No. 315 was entirely prepared in the name of Titu Kha. In C.S. Khatian No. 115 he was a sharer of 8 annas. Titu Kha died leaving behind his son Kali Kha. Kali Kha died leaving behind 2 (two) sons, named, Ainali Kha and Chandu Kha (plaintiff Nos. 1/2) and wife Fatema Bibi. Fatema Bibi died leaving behind her 2 (two) sons mentioned above. Ayub Ali died leaving behind 1 (one) son Kurman Kha who subsequently died leaving behind Ingul Kha and Azahar Kha. Thereafter, Ingul Kha died leaving behind 1 (one) son Sattar Kha (plaintiff No. 3). Azahar Kha died leaving behind 3 (three) sons, named, Mrit Ali, Shahjahan Kha (plaintiff No. 4), Abdul Malek Kha (plaintiff No. 5) and daughter Renu Bibi (plaintiff No. 6). Ali Kha died leaving behind 1 (one) son Abdul Jabbar who subsequently died leaving behind 1 (one) son Ratan Kha (plaintiff No. 7) and 1 (one) daughter Rizia Khatun (plaintiff No. 8). After the demise of Shamsuddin his son Hasu Kha inherited him. Hasu Kha died leaving behind 3 (three) sons, named, Fotu Kha (plaintiff No. 9), Rajek Kha (plaintiff No. 10), Khalek Kha (plaintiff No. 11) and a daughter Saleha Begum. Abdul Karim Kha of C.S. Khatian No. 115 died leaving behind his son Hamed Ali Kha who subsequently died leaving behind his daughter Zarina (plaintiff No. 13). In this way the plaintiffs became the owner of the suit land and have been possessing the entire 23.30 acres of land upon cultivating crops therein. But the S.A. khatian of the suit land was erroneously prepared in the name of Kedareswar and others against which they

filed Title Suit No. 302 of 1983 before the Munsif, 1st Court, Barishal which was decreed *ex parte* on 12.07.1986. The plaintiffs had tried to correct the wrong record of right on the basis of the *ex parte* decree but defendant Nos. 117-119 denied to do the same. Defendant Nos. 117-119 intentionally claimed that the disputed land is the sekosti (diluvion) land of the government. The defendants have no title and possession in the suit land. On 30.06.1996 corresponding to 16th Ashar 1403 B.S. the plaintiffs for the first time came to know about the diara settlement prepared in the name of the defendant Nos. 117-119 which date the Tahsildar denied to accept the tax of the land which gave rise to institute the instant suit.

Defendant No. 119 contested the suit by filling a written statement denying all material allegations made in the plaint and contended that the suit is barred by limitation; bad for defect of parties; barred by *res judicata* and also barred under section 42 of the Specific Relief Act. The further case of the contesting defendant is that 10.32 acres of land out of 23.30 acres is the diluvion property and the respective diara khatian was correctly prepared in the name of the government. Upon practicing fraud, the plaintiffs obtained an *ex parte* decree in Title Suit No. 302 of 1983. The government was not made a party to that suit. The suit land became alluvion land in between 1335 B.S. to 1340 B.S. After diluvion it was recorded as khas property of the government through Misc. Case No. 8M/80-82. The plaintiffs have no right, title and possession over the suit land. They did not pay

rents of the land. The plaintiffs filed the suit only to grab the disputed property.

Mr. Md. Towhidul Islam for Mr. Abdul Hye Fakir, learned Advocate appearing for the plaintiff-appellants taking us through the plaint, written statement, evidence of witnesses and the documents exhibited along with materials on record submits that the plaintiffs have right, title and possession over the suit land and observing all these the learned Munsif, Barishal declared the title of the plaintiffs in Title Suit No. 302 of 1983 but the learned Subordinate Judge illegally dismissed the instant suit taking fake grounds of limitation and *res judicata.* He further submits that during preparation and publication of the S.A. Khatians, the suit property was never sekosti land but the defendant Nos. 117-119 on the pretext of said sekosti note in the S.A. Khatians secretly made the suit land as the government khas land and in doing so, no notice whatsoever, was served upon the plaintiffs. The learned Advocate further submits that during pendency of the instant suit the government illegally leased out the suit property in favour of defendant Nos. 1-116. Mr. Islam finally submits that without taking into consideration of the materials as well as evidence on record, the trial Court dismissed the suit which is liable to be set aside.

On the flip side, Ms. Rahima Khatun, learned Deputy Attorney General with Ms. Farida Pervin Flora, learned Assistant Attorney General appearing on behalf of the respondent - government submits that the suit land is the diluvion land and for that the diara as well as

S.A. Khatians of the land were correctly prepared in the name of the government and, as such, the suit is not maintainable under section 5 of the President's Order No. 135 of 1972. She next submits that since after diluvion, the suit property was recorded as khas land of the government vide Miscellaneous Case No. 8M/80-82. The learned Deputy Attorney General further submits that the suit is barred by limitation since the cause of action of the suit arose while the plaintiffs filed Title Suit No. 302 of 1983. The parties of the earlier suit as well as some of the C.S. recorded tenants are not made party to the instant suit as such the suit is bad for defect of parties – the learned Deputy Attorney General contends. Ms. Khatun goes to submit that the plaintiffs did not file any rent receipts as well as the respective khatians to prove their chain of title and possession in the suit land. Moreover, the suit land is not specified and, as such, according to her, the suit is not at all maintainable. She finally submits that during his testimony D.W.1 has filed the relevant documents but inadvertently those were not marked as exhibits by the trial Court which needs to be considered by this Court as additional evidence to support the defence case as stated in the written statement. In support of her submission, Ms. Khatun refers to the case of ***Bangladesh*** v. ***Joynal Abedin Dewan*** reported in 1 BLC (AD) 26.

We have heard the submissions put forward by the learned Advocate of the plaintiff-appellants as well as by the learned Deputy Attorney General, perused the impugned judgment and decree along

with other connected materials available in the record and also considered the facts and circumstances of the case minutely.

In order to appreciate the aforesaid rival submissions advanced by both the parties and with a view to arrive at a correct decision, we are now required to scrutinize and weigh the relevant witnesses together with the surrounding facts and circumstances of the case.

In his testimony P.W.1 Ainali Kha gives out that Titu Kha, Ayub Ali, Shamsuddin and Karim Kha were the original owners of the suit land and C.S. Khatian Nos. 113-119 and 315 were correctly prepared in their names. After the death of Titu Kha, they became his heirs. Ayub Ali died leaving behind a son Khorshed Kha and Khorshed Kha died leaving behind two sons-Ingul Kha and Azahar. Ingul Kha died leaving behind one son Abdul Satter. Azahar Kha died leaving behind one son Mrit Ali Kha and plaintiff Nos. 4-6 as his children. Mrit Ali Kha died leaving behind his son Jabbar Kha who subsequently died leaving behind a son and a daughter. Shamsuddin died leaving behind a son Hasu Kha. After the death of Hasu Kha, his three sons and one daughter (plaintiff Nos. 9-12) became his heirs. Abdul Karim died leaving behind a son Hamed Kha and Hamed Kha died leaving behind plaintiff No. 13 as his heir. They have been cultivating the disputed property for a long time. They have their homestead on 2.30 acres of land whereas the rest 21.00 acres are nul (cultivable) land. Their predecessors-in-interest were inexperienced persons and, as such, the relevant record of right was erroneously

prepared. They filed Title Suit No. 302 of 1983 for correction of records and it was decreed on 12.07.1986. On the basis of the said decree, they wanted to correct the record but failed. They are the heirs of the C.S. tenants. The suit land was intentionally recorded as diluvion land. The land in dispute is not diluvion at all. They came to know about the erroneous record of right on 30.06.1996. They have been possessing the land but the defendants have no possession therein. In support of his claim P.W.1 filed C.S. Khatian No. 113-117 and 119 which have been marked as Exhibit No. 1 series.

In cross-examination he states that he filed the suit on the basis of C.S. plot numbers. In addition to the instant suit, earlier they filed Title Suit No. 302 of 1983. There were as many as 41 (forty one) defendants. They have been possessing the land by way of inheritance. The record of right in the name of Kedareshwar was wrongly prepared. On 12.07.1996 they obtained the decree and thereafter went to pay taxes, but it was refused by the concerned authority. He could not say the recent khatian numbers of the suit land. He had no rent receipts regarding the suit land. Before obtaining the decree they did not go to pay the taxes. Diara settlement was prepared on the basis of actual position of the land.

In his evidence P.W. 2 Md. Nurul Islam states that the suit land is being possessed by the plaintiffs. There are ponds, madrasha, mosjid and graveyard on it. Except the plaintiffs the suit land is not possessed by any other persons. The suit land was never went into the

river. It is not government property and was not leased out. Disputed property is being possessed by the plaintiffs.

In cross-examination he says that he did not see the C.S. tenants. He saw the C.S., R.S. and S.A. Khatians of the lands after filing Title Suit No. 302 of 1983. He could not say on which plot and when the mosjid was constructed. He could not say who made waqf for construction of the mosjid. Accordingly, he could not say on which plot the graveyard is located.

In his examination-in-chief P.W.3 Md. Hasan Sekander unfurls that there are homestead, graveyard, mosjid, madrasha and pond on the suit land. It is possessed by the plaintiffs and not by the defendants. The suit land is not a diluvion land.

In cross-examination this witness states that he could not say the plot numbers as well as khatian numbers of the suit property. Nobody executed deed of Waqf for construction of mosjid and madrasha.

D.W.1 Abdul Wahab, the Surveyor of Thana Land Office, Mehendigonj, Barishal, deposed on behalf of defendant No. 119. According to him, suit land is the government property. The diara settlement of the property has been partially prepared in the name of the government. During preparation of S.A. record it was an alluvion land and, thereafter, became diluvion and it was correctly prepared in the name of the government. 10.32 acres out of 23.30 acres of land was recorded in the name of the government as diluvion. The

government was not a party in Title Suit No. 302 of 1983. The disputed land was made khas land through Miscellaneous Case No. 8M/1980-82. Suit land is the property of the government and, as such, no tax was collected from any one. Suit land is not possessed by the plaintiffs. Most of the plaintiffs are false. He filed the lease documents and the relevant khatians before the Court.

In cross-examination he states that the lease was made during the pendency of the instant suit, but permission was not accorded from the Court. He had no personal knowledge regarding the instant suit. He did not visit the disputed land.

These are all about the evidence that have been adduced by the parties in a bid to prove their respective cases.

It is on record that the plaintiffs claimed title of the suit property by way of inheritance from the C.S. tenants, but in support of their claim they did not file any documents except the C.S. khatians. The plaintiffs claimed that they have been peacefully possessing the property for more than 12 (twelve) years, but failed to submit any rent receipts which is admitted in evidence by the P.W. 1.

In the plaint the plaintiffs further claim that the diara, S.A. and R.S. records were not prepared in their names or in the names of their predecessors-in-interest. S.A. khatians of the land were erroneously prepared in the name of the Kedareshwar and others and for the wrong record of right they filed Title Suit No. 302 of 1983 before the Munsif, 1st Court, Barishal and obtained an *ex parte* decree. On the

basis of that *ex parte* decree they went to the office of the defendant Nos. 117-119 to pay land development taxes, but they refused to receive taxes on the pretext of preparation of S.A. record which ultimately proves that the plaintiffs are not paying the rents of the land though they claimed that it is their ancestral property. It is the further claim of the plaintiffs that the suit land is not diluvion land and the diara as well as S.A. records of the same were erroneously prepared in the name of the government.

P.W.1 in his evidence also unfurls that the suit land never went into the river and it is not the diluvion land of the government. In respect of the nature of the land the learned Subordinate Judge in the impugned judgment states as under:

> "অপর দিকে বাদী পক্ষের সাক্ষীগণ সকলেই তাহাদের সাক্ষ্যে উল্লেখ করিয়াছেন নালিশী জমি থেকে নদী দুই/আড়াই মাইল দূরে । বর্তমানে নালিশী জমিতে বাদীদের স্বত্ব, স্বার্থ ও দখল আছে এই কথা দাখিলী সাবেক রেকর্ড এবং প্রদত্ত সাক্ষীদের সাক্ষ্য হইতে পাওয়া যায় বটে । কিন্তু উপরের আলোচনায় আর,এস ও এস,এ পর্চা দৃস্টে নালিশী সম্পত্তি নদী সিকস্তি হওয়ার কথা উল্লেখ থাকায় নালিশী সম্পত্তির বর্তমান অবস্হা সম্পর্কে স্হানীয় তদন্তের মাধ্যমে বাদীদের প্রমাণ করা উচিৎ ছিল । কিন্তু তাহা না করায় নালিশী সম্পত্তি নদী সিকস্তি না বা কখনো নদী গর্ভে যায় নাই এই কথা সন্দেহাতীতভাবে প্রমাণ হয় না ।"

From the above it appears that admittedly the plaintiffs did not make any attempts to ascertain the nature of the land by appointing Advocate commissioner. It is already found from the record that the plaintiffs did not file the diara as well as S.A. khatians of the land which according to the claim of the contesting defendants were correctly prepared in the name of the government and since then the

suit land became diluvion and, as such, no taxes had been determined for the suit land. Regarding preparation of diara settlement, P.W.1 in cross-examination said, "দিয়ারা জরিপ সরেজমিনে হইয়াছে ।"

On the other hand, in his evidence D.W.1 submitted the certified copy of diara khatian Nos. 1, 4, 15, 88, 92, 168 and S.A. khatian Nos. 204, 206, 251 and 256 from which it appears that the suit land is the diluvion land of the government and, accordingly, government did not receive any taxes from any persons including the plaintiffs. The contesting defendants have filed the photostat copy of Miscellaneous Case No.8M/1980-81 and perusal of the given documents it appears that the proceeding in respect of suit land was started under the President's Order No. 135 of 1972.

In the midst of hearing of the appeal, learned Deputy Attorney General on 05.12.2023 filed an application for marking the submitted documents as exhibits and on 15.01.2024 filed another application under Order XLI Rule 27 of the Code for acceptance of additional evidence. We kept the aforesaid applications with the record to be considered at the time of disposal of the Rule on merit, if required.

The learned Deputy Attorney General submits that since the diara as well as S.A. records were prepared in the name of the government the instant suit is not maintainable under section 5 of the President's Order No. 135 of 1972. Section 5 of the President's Order No. 135 of 1972 is reproduced below:

> "All suits, applications, appeals or other proceedings in respect of any claim to the re-possession of any land lost by diluvion which

> has re-appeared or is alleged to have re-appeared pending before any Court or authority on the date of commencement of the said Order shall, not be further proceeded with and shall abate and no Court shall entertain any suit, application or other legal proceedings in respect of any such claim."

The learned Deputy Attorney General submitted S.A. Khatian Nos. 365, 371, 395, 396, 399 and 406 on 15.01.2024 in addition to the Khatians submitted by the D.W.1 during trial of the suit and contends that during hearing of the instant appeal it came to her notice that the above mentioned khatians are necessary for arriving at a correct decision of the suit but the contending defendants inadvertently failed to produce those Khatians in proving their right, title and possession over the disputed property.

We have considered the submission of the learned Deputy Attorney General and perused the submitted Khatians. It appears that in the remarks columns of those khatians, the concerned authority has made the following remarks:

"সম্পূর্ণ জমি সিকস্তি হেতু খাজনা ধার্য্য হয় নাই / সম্পূর্ণ জমি সিকস্তি হেতু খাজনা আদায়ের অযোগ্য / সিকস্তি জমির জন্য খাজনা ধার্য্য হয় নাই ।"

It has been observed earlier that the plaintiffs did not file any copies of C.S. or S.A. Khatian to prove that their predecessors were the owners of the suit land and thus they obtained the same by way of inheritance. It is an established principle of law that plaintiff is to prove his own case.

Therefore, taking into consideration of the materials on record as well as the provision of section 5 of the President's Order No. 135

of 1972, we are of the view that the suit land is the diluvion land of the government and under the above provisions of law the instant suit is not maintainable.

We have scrutinized the plaint specially the schedule thereof. It appears that the plaintiffs claimed their title over 23.30 acres of land which are not well demarcated and specified. Since the suit land is not specified, as such, the submission made by the learned Deputy Attorney General on this point appears sustainable in law.

We have perused the plaint of Title Suit No. 302 of 1983. It appears that the present plaintiffs as plaintiffs filed the above noted title suit where they claimed declaration of title in the suit property mentioned in schedule 'ka' of the plaint. It is evident that the schedule 'ka' of the instant suit is similar to that of the earlier suit. The present suit is also filed by the plaintiffs for a declaration of title in the suit land which they sought in the earlier suit.

As regards the cause of action, the plaintiffs in the plaint of their earlier suit had stated:

> "৮।(ক) তপছিল বিরোধীয় ভুমির ভুল রেকর্ড সম্পর্কে অত্র পক্ষ এ যাবতকালিন কিছুই জানিতে বা বুঝিতে পারেন নাই । কেবল মাত্র ১৩৮৯ সনের চৈত্র মাসের মধ্যভাগে তহশীল অফিসে খাজনা দিতে গেলে তহশীলদার বিবাদী গনের নামে ভুল রেকর্ড থাকায় খাজনা নিতে অস্বীকার করিলে তক্ষনই অত্র পক্ষ ভুল রেকর্ড সম্পর্কে জানিতে পারেন । অতঃপর অত্রপক্ষ বিবাদী গনকে প্রোক্ত ভুল রেকর্ড সংশোধন করিয়া দিতে বলিলে তাহারা দেই দিচ্ছি করিয়া ঘুরাইতে থাকিয়া ১৩৯০ সনের আষাঢ় মাসের ১ম ভাগে সরাসরি অস্বীকার করিয়া আদালত যোগে করাইয়া নিতে বলিলে অত্র পক্ষ বাধ্য হইয়া অত্র মোকদ্দমা আনায়ন করিলেন ।"

So, from the above it appears that the plaintiffs of the earlier suit as well as the present suit came to know about the wrong record of right in respect of the suit property in the middle of the month of Chaitra, 1389 B.S. and then filed Title Suit No. 302 of 1983 and obtained an *ex parte* decree.

But on the selfsame matter they have filed the instant suit and in paragraph 10 of the plaint, the plaintiffs have stated:

> "১০। নালিশের কারণ অত্রাদালতের এলাকাধীন ষ্টেশন মেহেন্দীগঞ্জ মোতালক জে,এল, ১১৮ নং গাগরিয়া মৌজার বিরোধীয় ভূমির অবস্থিত স্থল তহশীলদার কর্তৃক দিয়ারা জরিপের ভুল রেকর্ড সম্পর্কে জানার তারিখ ১৪০৩ সালের ১৬ই আষাঢ় অতীতে উদ্ভব হইয়াছে।"

From the above it is evident that in the instant suit the plaintiffs wanted to establish that the cause of action of filing the present suit arose on 16th Ashar, 1403 B.S. in which date they came to know about the wrong record of right. Regarding cause of action, P.W.1 in his evidence said, "নাঃ জমি কোন দিন নদীতে যায় নাই। নাঃ জমি নদী সিকস্তি .... না। ৩০/০৬/১৯৯৬ তারিখে জানিতে পারি।"

In respect of knowledge of filing the instant suit, learned Subordinate Judge in the impugned judgment has observed:

> "বিবাদী পক্ষ দাবী করেন সরকারের নামে নদী সিকস্তি হিসাবে অনেক আগেই রেকর্ড হইয়াছে। কিন্তু বাদী পক্ষ দীর্ঘ দিন পরে মামলা করায় তামাদিতে বারিত। অপর দিকে বাদী পক্ষের বিজ্ঞ আইনজীবী সাহেব যুক্তি প্রদর্শন করেন যে, রেকর্ড ভুল হইলেই তাহা জানার সময় হইতে মামলা করিতে হইবে আইনে এমন কিছুই নাই বরং যখন বাদী ক্ষতিগ্রস্ত হইয়াছে পড়িয়া মনে করিবে বা বাদীর স্বত্ব অস্বীকার করা হলে অর্থাৎ নালিশের কারন দেখা দিবে তখন হইতেই তামাদির মেয়াদ গণনা করা হইবে। অত্র মামলায় বাদী ৩০-৬-৯৬ তারিখ তহশীল অফিসের রেকর্ড সম্পর্কে জানিতে পারেন এবং বাদীর নিকট হইতে খাজনা নিতে অস্বীকার করেন। উক্ত সময় হইতে নালিশের কারন দেখার কারন উল্লেখে অত্র মামলা দায়ের করেন।
>
> উপরে ৪নং বিচার্য্য বিষয় আলোচনায় দেখা যায় মামলাটি রেস-জুডিকাটা দোষে বারিত অর্থাৎ ইহার কারণ হইল যে, আগে ও একটি মামলা হইয়াছিল। মামলাটি ১২-৭-৯৬ ইং তারিখ একতরফা ডিক্রি হয় বটে। এই

মামলায় নালিশের কারন ছিল ১৩৯০ সালের আষাঢ় মাসের প্রথম ভাগে এই মামলায় আরো উল্লেখ করা হইয়াছিল যে বাদী গন ১৩৮৯ সালের চৈত্র মাসের মধ্য ভাগে তহশীল অফিসে খাজনা দিতে গেলে বিবাদীদের নামে ভুল রেকর্ড থাকায় খাজনা নিতে অস্বীকার করায় ভুল রেকর্ড সম্পর্কে জানিতে পারেন । এই বিষয়টি নথিতে রক্ষিত বাদীদের দাখিলী ৩০২/৮৩ নং মামলার আরজি নকল হইতে পাওয়া যায় । ইহাতে প্রমানিত হয় যে ভুল রেকর্ডের বিষয় বাদী পক্ষ আগেই জ্ঞাত ছিলেন । ফলে উক্ত সময় হইতে ধরিলে অথবা ৩০২/৮৩ নং মামলার ডিক্রি এবং ১২-৭-৮৬ তারিখ হইতে গণনা করিলে ও ৬ বছরের বেশী সময় পরে এই মামলাটি দায়ের হইয়াছে । ফলে বর্তমান মামলা তামাদিতে বারিত । কাজেই ঐ সময়ে বাদীদের স্বত্ব অস্বীকার করা হইয়াছিল । ফলে ঐ সময় থেকে ৬ বছরের মধ্যে মামলা না করায় মামলা তামাদিতে বারিত । তাই এই ইস্যুটি বাদীদের বিপক্ষে নিষ্পত্তি ও প্রমানিত হইল ।”

The learned Subordinate Judge opined that the suit is barred by limitation as well as it is barred by the principles of *res judicata*. On going through the materials on record, we are also of the view that the cause of action of filing the suit was admittedly arose in the middle of the Month of Chaitra, 1389 B.S. when the plaintiffs filed Title Suit No. 302 of 1983 for declaration of their title in the suit land and obtained an *ex parte* decree on 12.07.1996. On the basis of that decree they failed to get correct of the respective khatian and subsequently stating a new cause of action filed the instant suit which, in our view, is barred by limitation.

We have perused the plaint of the earlier suit as well as the instant suit and of the view that the land as well as the parties of both the suits are same. The plaintiffs of the earlier suit and the present suit are same. In both the suits the plaintiffs have claimed their title in the disputed land. The defendants of both the suits are almost same. It is seen that in the earlier suit the government was not made defendant though they sought relief against the government for wrong record of

right since the diara and S.A. records were prepared in the name of the government.

In deciding the matter the trial Court has observed as under:

"এখন দেখা যাইতে পারে মামলাটি রেস-জুডিকাটা দোষে বারিত কিনা ? বিবাদী পক্ষ যুক্তি প্রদর্শন করেন যে এই বাদী পক্ষ নালিশী জমি নিয়া ইতিপূর্বে বরিশাল ১ম মুন্সেফী আদালতে ৩০২/৮৩ নং দেং মামলা করেন । উক্ত মামলার পরে একই জমি নিয়া একই দাবীতে পুনরায় বর্তমান মামলা দায়ের করেন । মামলাটি রেস-জুডিকাটা দোষে বারিত । অপর দিকে বাদী পক্ষের দাবী যে বাদীগন এবং তাহাদের পূর্ববর্তীগন বিষয় কার্য্যে অনভিজ্ঞ থাকায় আর,এস, রেকর্ড সংশোধন করিতে পারেন নাই । ফলে এস,এ, রেকর্ডের সময় প্রদত্ত স্বত্ব দখলের বিপর্যয়ে বাদীদের নামে রেকর্ড না হইয়া অন্যায় ও অবৈধভাবে কেদারেশ্বর গং নামে রেকর্ড হয় । ফলে তাহাদের বিরুদ্ধে দেং ৩০২/৮৩ নং মামলা দায়ের হয় । এবং উক্ত মামলায় এক তরফা ডিক্রি হইয়া রায় ডিক্রি বহাল ও বলবৎ আছে । উক্ত দেং ৩০২/৮৩ নং মামলার আলোকে নথি পর্যালোচনায় প্রতীয়মান হয় যে, মামলাটি দায়ের হইয়াছিল কেদারেশ্বর গং দের বিরুদ্ধে । কিন্তু সরকার পক্ষ ঐ মামলায় পক্ষ ছিলেন না । বর্তমানে বাদী পক্ষ যদিও দাবী করেন যে নালিশী সম্পত্তি নদী সিকস্তি না । কিন্তু বিবাদী পক্ষের দাখিলী কেস রেকর্ড বিদ্যমান এস,এ, পর্চায় প্রতীয়মান হয় যে, নালিশী সম্পত্তি এস, এ, রেকর্ডে কেদারেশ্বর গং দের নামে হইয়াছিল । উক্ত এস,এ, পর্চাসমূহ পর্যালোচনায় প্রতীয়মান হয় যে, জমির শ্রেণীতে এবং মন্তব্য কলামে নদী এবং নদী সিকস্তি লেখা আছে । যেহেতু নদী এবং নদী সিকস্তি পরিলক্ষিত হয় সেই হেতু সরকার আবশ্যকীয় পক্ষ ছিল । কিন্তু সরকারকে ঐ মামলায় পক্ষ না করায় উক্ত ৩০২/৮৩ নং মামলায় রায় ডিক্রি বর্তমান মামলার ১১৯ নং বিবাদী সরকার পক্ষের উপর বাধ্যকর না । নথিতে বিদ্যমান ২/১৭ নং আর,এস খতিয়ানের পর্চা পর্যালোচনায় নদী সিকস্তি কথা পরিলক্ষিত হয় । যদিও বর্তমান মামলায় সরকারকে পক্ষ করা হইয়াছে কিন্তু আগের মামলায় সরকারকে পক্ষ করা হয় নাই । আগের মামলায় যাহাদের পক্ষ করা হইয়াছিল তাহাদের বর্তমান মামলায় পক্ষ করা হয় নাই । এই কথা বাদী পক্ষের ১ নং সাক্ষী তাহার জেরায় ও স্বীকার করিয়াছেন । ফলে একই জমি নিয়া একইরুপ স্বত্ব ঘোষনার দাবীতে আগে একটি মামলা হওয়ায় পুনরায় আর একটি মামলা দায়ের করায় মামলাটি রেস-জুডিকাটা দোষে বারিত বলিয়া পরিলক্ষিত হয় । বাদী পক্ষ উপরোক্ত ৩০২/৮৩ নং মোকদ্দমায় বর্তমান নালিশের কারণ উল্লেখে সরকারকে বিবাদী করিয়া তাহাদের দাবী উপস্থাপন করিতে পারিতেন । এখানে একটি কথা উল্লেখ্য যে, আর,এস এবং এস,এ রেকর্ডে নালিশী সম্পত্তি নদী সিকস্তি ছিল না এই কথা প্রমান করার জন্য বাদী পক্ষ কোন আর,এস এবং এস,এ পর্চা প্রদর্শনী চিহ্নিত হিসাবে দাখিল করিয়া প্রমান করেন নাই । কিন্তু নথিতে আর,এস পর্চা বিদ্যমান আছে । বাদী পক্ষ কেবলমাত্র সাবেক পর্চা প্রদর্শনী-১ চিহ্নিত হিসাবে দাখিল করিয়াছেন । কিন্তু আর,এস ও এস,এ পর্চা দাখিল করেন নাই । ইহাতে প্রতীয়মান হইতেছে যে, প্রকৃত ঘটনা প্রমানিত হইবে বলিয়া বাদী পক্ষ আর,এস এবং এস,এ খতিয়ান দাখিল করেন নাই । উক্ত অবস্থায় এই ইস্যুটি বাদী পক্ষের বিপক্ষে নিস্পত্তি করা হইল ।"

Therefore, taking into consideration the observations made by the trial Court as well as the materials on record, we are of the view that the instant suit is barred by the principles of *res judicata.*

The learned Subordinate Judge in delivering the impugned judgment and decree though observed that the suit is not bad for defect of parties, but on perusal of the exhibited documents (Exhibit 1 series) as well as the documents submitted by the contesting defendants, it appears that actually the heirs of C.S. recorded tenants, namely, Sarifuddin and Abdul Kalam are not made party in the present suit. In the aforesaid premises, we are of the view that there is defect of parties in the instant suit and the observations made by the trial Court on this count is wrong.

From the above discussions and on perusal of the materials on record, our considered view is that the plaintiff-appellants have failed to prove their chain of title in the suit land. They have failed to submit any rent receipts as well as other relevant documents to prove their title and possession, since burden of proof always lies upon the plaintiffs.

The learned Advocate appearing for the plaintiff-appellants did not make any reply to the objections raised by the learned Deputy Attorney General.

In the result, the appeal is dismissed without any order as to costs.

The impugned judgment and decree dated 31.08.1999 passed by the learned Subordinate Judge (now Joint District Judge), Court No. 2, Barishal in Title Suit No. 23 of 1996 is affirmed.

Send down the lower Courts record along with a copy of this judgment.

Bhishmadev Chakrabortty, J.

I agree.

Jahangir/Bench Officer.