Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No.2557 of 2010

Md. Kutubuddin Bhuiyan being dead his heirs Rabiul Islam Bhuiyan and others.

……………Petitioners.

-Versus-

Shakhina Bibi and others

………….Opposite parties.

Mr. Shaheed Alam, Advocate

……….For the petitioners.

Mr. M. Belayet Hossain, Advocate.

.........For the Opposite parties.

Heard and Judgment on 16.05.2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the Opposite Parties to show cause as to why the judgment and decree dated 01.12.2009 passed by the Joint District Judge, 3rd Court, Dhaka in Title Appeal No. 157 of 1998 affirming those dated 30.04.1998 passed by the Assistant Judge, 3rd Additional Court, Dhaka in Title Suit No. 221 of 1997 dismissing the suit should not be set aside.

Petitioner Nos. 8-10 and one Kutubuddin Bhuiyan predecessor of the petitioner Nos. 1-7 as plaintiff filed Title Suit No. 221 of 1997 against the opposite parties for cancellation of auction sale dated 26.09.1995 and for a declaration that the judgment passed in Title Suit No. 5 of 1959 is not binding upon the plaintiffs.

Plaint case in short, inter alia, is that suit property was belonged to Radha Charon Saha, who died leaving behind two sons Gobindo Charan Naha and Prasanna Kumar Naha became the owner of the suit property and possessing the suit property in equal share each. Gobindo Charan Naha sold his 08 annas share to the plaintiff on 15.05.1943 and Prasonna Kumar Naha gave his 08 annas share pattan to the plaintiff in the year 1944. In 1945 one Monsur Ali took pattan on the suit land from the plaintiffs and S.A. khatian was prepared in the name of the plaintiffs and the said Monsur Ali. Suit land was acquired in L.A. Case No. 48 of 2003 and compensation was given to the sons of Monsur Ali.

Plaintiff's further case is that land of Taluk 12184 was sold for rent sale in 25.09.1945 from Gobindo Charan Naha and Prosanna Kumar Naha. Chand Mia purchased the said property in

auction but could not get in possession thereon. Prasanna Kumar Naha thereafter transferred the same to Mawla Baks, predecessor of the defendants. In a said rent suit, plaintiffs were need not made parties although they were the owner and possessor of the suit land and as such plaintiff's title has not been affected by the said auction. The said Mawla Baks, predecessors of the said defendants filed Title Suit No. 05 of 1959 for declaration of title and recovery of khas possession, wherein plaintiffs were made parties as heirs of Abdus Sobhan Bhuiyan. In the said suit, it was alleged that present plaintiffs trespass the suit through by his father Abdus Sobhan Bhuiyan although they have no title in the suit land. In that suit plaintiff filed a written statement and contended that they are not trespasser and they are possessing the suit land by way of purchase in the year 1943. In that suit plaintiff did not claim their interest and affected by the rent sale as well as there is no such issue as such since the said issue was settled earlier in the institution of suit, plaintiff filed the suit for declaration that the auction sale dated 25.09.1945 and the decree in Title Suit No. 05 of 1959 are not binding upon the plaintiffs and the order passed in

Execution Case No. 36 of 1978 to give possession to the defendants is illegal.

Opposite Party as defendants contested the suit by filing written statement, denying the plaint case, stating, inter-alia that suit is barred by limitation as well as barred by res judicata and their further case is that Radha Charon is the original owner. After his death two sons Gobindo Charan Naha and Prosanna Kumar Naha became the owner in the suit property in equal share. They failed to pay the rent and property was put to an auction on 25.09.1945 in the Rent Suit and one Chand Mia purchased the said suit land on auction, who sold the property to Prosanna Kumar Naha on 23.04.1946, who thereafter gave permanent lease to Mawla Baks on 08.03.1949. Said Mawla Baks was dispossessed from the suit land by Monsur Ali and Abdus Sobhan, predecessor of the petitioner nos. 1-7. Then Mawla Baks while filed Title Suit No. 5 of 1959 for declaration of title and recovery of khas possession. In that suit, this petitioner were made party and contested the suit and finally that suit was decreed on contest in favour of the present defendants. Against the said judgment and decree Habiba Bibi, the mother of the plaintiff preferred Title

Appeal No. 116 of 1962 and got part decree. Against the said judgment and decree, plaintiff of that suit filed 2nd Appeal before the High Court Division in 497 of 1963, which was allowed and the decree passed in First Appeal was set aside and decree passed in Title Suit No. 05 of 1959 was restored. Against the said judgment and decree of the High Court Division, Habiba Bibi went to the Appellate Division in Civil Petition for Leave to Appeal No. 86 of 1978 and the said appeal was ultimately also being dismissed. Then the defendants filed Execution case No. 36 of 1978 to execute the decree passed in Civil Petition for Leave to Appeal No. 36 of 1978 and got decree through court. The instant suit is false and is liable to be dismissed with cost.

By the judgment and decree dated 30.04.1998, the learned Assistant Judge, 3rd Additional Court, Dhaka dismissed the suit on contest.

Challenging the said judgment and decree, petitioners preferred Title Appeal No. 157 of 1998 before the Court of District Judge, Dhaka, which was heard on transfer by the Joint District Judge, 3rd Court, Dhaka, who by the impugned judgment

and decree dated 01.12.2009 dismissed the appeal and affirmed the judgment of the trial court.

Being aggrieved thereby plaintiff obtained the instant rule.

Mr. Shaheed Alam, the learned advocate appearing for the petitioners drawing my attention to the judgment of the court below submits that both the courts below concurrently erred in law in dismissing the suit upon considering that suit is barred by limitation as well as barred by res-judicata most illegally. The impugned judgment is thus not sustainable in law.

The learned advocate further submits that the issue of res-judicata has been decided earlier by the Hon’ble High Court Division in the case which has been reported in 43 DLR (1991) page 601 but the Appellate Court totally failed to appreciate this approach. The impugned judgment is thus not sustainable in law, which is liable to be set aside.

Mr. M. Belayet Hossain, the learned advocate appearing for the opposite party, on the other hand, drawing my attention in the judgment of the Appellate Court submits that the opinion as being formed by Hon’ble High Court Division in 43DLR (1991)page

601 as been cited by the petitioner is no more in existence as has already been set at rest by the Appellate Division given direction to consider the same by framing fresh issues to the court below and the Appellate Court after noticing the same has come to a clear findings that

> 'Since the plaintiff was party in the earlier suit and in two suits made different story in order to vague a complex and creates confusion but the issues are same in both the suits, which has been decided earlier and the said earlier suit being Title Suit No. 05 of 1959, the question of res-judicata obviously will effect in the instant suit. '

He further submits that the main question of fact, which is also barred by constructive res-judicata. The learned Appellate Court and the trial court committed no illegality in dismissing the suit. He finally prays that since rule contains no illegality, it may be discharged.

Heard the learned Advocate of both the sides and perused the impugned judgment and the L.C. Records.

This is a suit for declaration that all proceedings in auction sale is illegal and not binding upon the plaintiffs and also declaration that judgment and decree passed in Title Suit No. 05 of 1959 together with possession given to the defendant through Execution case instituted thereof are illegal. According to the plaintiff, suit property, which was admittedly belonged to Gobindo Charan Naha and Prasana Kumar Naha. Plaintiffs claimed that they purchased the suit property from Gobindo Charan Naha by way of registered sale deed dated 15.05.1943 and obtained rest of the land from Prasanna Kumar Naha by taking pattan in the year 1944. One Monsur Ali took pattan from the plaintiffs and both of them paid rents and obtain rent receipts and are in possession thereon. Thereafter although Taluk of property mentioned in Plot No. 12184 was sold in auction, held on 25.09.1945 in the Rent Suit and was alleged to have purchase the said property on auction but neither plaintiffs mortgaged property was shown in the rent suit nor the possession was obtained by the Chand Mia from plaintiffs. Thereafter defendant's predecessor one Mawla Baks, when instituted Title Suit no. 05 of 1959 for declaration of title and recovery of khas possession, the plaintiffs

were although made party thereon. but since in the said suit, no issues were framed on auction of sale, the decree passed in Title Suit No. 05 of 1959 is not binding upon them and needs to be declared as void and not binding upon the plaintiffs. Although these contentions are being opposed by the defendants upon filing a written statement in the instant suit, the courts below after assessing all the evidence on record as well as decision as being given by the Apex Court earlier in a rule against an interlocutory order in the suit, courts below found that the auction sale was held long before in the year 1945 and the instant suit i.e. Title Suit No. 221 of 1997 was filed long thereafter in the year 1947 is barred by limitation. Since in the earlier suit being no. 05 of 1959, plaintiffs were party and very much aware about the existence of the said Rent suit but thereafter did not challenge the said Rent suit within time. In the premises, the institution and contention of the present suit is obviously barred by limitation. On the contrary Appellate Court further while affirming the judgment of the trial court held that the point of res-judicata as being brought into the notice by the Hon'ble High Court Division in Civil Revision No. 62 of 1985 being ultimately set at rest by the Appellate Division in the Leave

to Appeal being no. 170 of 1990 with the observation that this point may be settled by framing issue by the court below. Accordingly the appellate court upon noticing the same as being narrated by the plaintiff in the written statement filed earlier in the earlier suit being Title Suit No. 05 of 1959 and the statement made in the plaint in the instant suit found that they made two types of story of the ownership in two different case, which is self contradictory and not acceptable in law. In the judgment appellate court found that

> 'এই দেঃ ৫/৫৯ নং মামলার দাবী মতে নালিশী সম্পত্তির আট আনা অংশের শরিক প্রসন্ন কুমার নাহা তাহার সম্পত্তি বন্দোবস্ত মূলে বাদীগণের মাতা হাবিবা বিবির অনুকূলে হস্তান্তর করিয়াছিলেন। কিন্তু বর্তমান মামলার দাবী মতে প্রসন্ন কুমার নাহা ঐ সম্পত্তি বাদীগণের নিকট বন্দোবস্ত মূলে হস্তান্তর করিয়াছিলেণ। কিন্তু বর্তমান মামলার দাবী মতে প্রসন্ন কুমার নাহা ঐ সম্পত্তি বাদীগণের নিকট বন্দোবস্ত মূলে হস্তান্তর করিয়াছিলেন। দেঃ ৫/৫৯ নং মামলায় বর্তমান বাদীপক্ষের দাবী মতে নালিশী ৫২৩৩ নং দাগের সম্পত্তিতে তাহাদের পিতা স্বত্ববান দখলকার হইয়া মুনসুর আলীর নিকট হস্তান্তর করেন। কিন্তু বর্তমান মামলার দাবীমতে বাদীগন নিজেরাই এই ৫২৩৩ নং দাগের সম্পত্তি মুনসুর আলীর নিকট হস্তান্তর করেন। উক্ত দেঃ ৫/৫৯ নং মামলায়

বর্তমান বাদীপক্ষের দাবী মতে নালিশী সম্পত্তিতে তাহারা তাহাদের খরিদা স্বত্ব স্বার্থ তাহাদের মাতা ঐ মামলার ৯নং বিবাদী হাবিবা বিবির অনুকুলে হস্তান্তর করিয়াছিলেন। কিন্তু অত্র মামলায় আবার তাহারা ঐ হস্তান্তরের বিষয়ে কোন কিছু উলেলখ না করিয়া নিজেদের স্বত্ব দাবী করিয়াছেন। বাদীগণের মাতা হাবিবা বিবি উক্ত দেঃ ৫/৫৯ নং মামলায় মহামান্য সুপ্রীম কোর্ট পর্যন্ত পরাজিত হইবার পর বাদীগণ বর্তমান মামলায় এইরুপ ভিন্ন দাবী উথাপন করিয়াছেন। নালিশী সম্পত্তি সংক্রান্তে বাদীগণের এইরুপ পরস্পর বিরোধী বক্তব্য তাহাদের দাবীর দুর্বলতাকে প্রমান করে। নালিশী সম্পত্তির আট আনা অংশের শরিক প্রসন্ন কুমার যদি তাহার ঐ সম্পত্তি বাদীগণের অনুকুলে বন্দোবস্ত প্রদান করিতেন বা বাদীগণ নিজেরাই যদি নালিশী ষোল আনা সম্পত্তিতে স্বত্ব দখলে প্রতিষ্ঠিত হইতেন তাহা হইলে এই বিষয়টি দেঃ ৫/৫৯ নং মোকদ্দমায়ই উপস্থাপন করা উচিত ছিল এবং ঐ মোকদ্দমায় তাহা উলেলখ না করিয়া বরং বরং ভিন্নরুপ বক্তব্য উলেলখ করিয়া বর্তমান মোকদ্দমায় আবার পূর্বোক্ত বক্তব্য উপস্থাপন করা আইনতঃ অবকাশ নাই এবং এই ক্ষেত্রে বাদীপক্ষের এইরুপ স্বত্বেও দাবী দেঃ কাঃ বিঃ আইনের Section 11 Explanation-IV এর বিধানে বর্ণিত মতে Constructive Res Judicata দ্বারা বারিত বলিয়া বিবেচিত হয়। এমতাবস্থায় পূর্ববর্তী আলোচনা মতে আমি মনে করি যে, অত্র মোকদ্দমাটি একই পক্ষের মধ্যকার পূর্ববর্তী দেঃ ৫/৫৯ নং মোকদ্দমার

কারণে রেস-জুডিকেটা দোষে বারিত এবং এই বিষয়ে বিজ্ঞ নিমন আদালত তাহার রায়ে যে সিদ্ধান্ত প্রদান করিয়াছেন তাহা আইনতঃ সঠিক।'

Upon going through the record and considering the factual aspect of this case, I find no illegality in the above findings of the court below in as much as petitioner could not assail this findings by showing any further development of the case and bringing any decision of the Apex Court in support thereof.

Having regards to the above law, facts and circumstances of this case, I am of the opinion that since the suit is found barred by limitation and as well as barred by res-judicata and the courts below correctly found the same. In the premises, judgment of the courts below contains no illegality and I find no merit in this rule. Accordingly the Rule devoids any merits for consideration.

In the result, the rule is discharged without any order as to costs and the judgment and decree passed by the courts below are hereby upheld.

Send down the L. C. Records and communicate the judgment to the court below at once.