

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

First Appeal No. 269 OF 2019.

**Batalian Commander 12, Border Guard
Bangladesh, BGB, Sarail, Kalikachcha,
Brahmanbaria and others.**

..... Defendant-Appellant.

-Versus-

Bir Muktijodha Abdul Hamid and others.

.....Plaintiff- Respondents

Mr. Weyesh Al-Haroni, D.A.G.

... For the Appellant

Mr. Md. Nurul Amin, Advocate with

Mr. Md. Mizaur Rahman, Avocate and

Mr. Liton Ranjan Das, Advocate

... For respondent No.1

Heard on: 11.01.2024 and judgment on: 17.01.2024.

Sashanka Shekhar Sarkar, J:

This appeal, at the instance of the defendant No. 05 is directed against the judgment and decree dated 30.11.2016 (decree signed on 01.12. 2016) passed by the learned Joint District Judge, 1st Court, Brahmanbaria in Title Suit No. 120 of 2012 decreeing the suit.

The fact relevant for disposal of the appeal in short are that the Respondents No. 1 & 2 as plaintiffs filed Title Suit No. 120 of 2012 in the 1st Court of Joint District

Judge, Brahmanbaria impleading as many as 16 defendants for declaration of title and recovery of Khash possession of the land mentioned in the schedule of the plaint alleging that the land in question with other lands was originally belonged to C. S. recorded tenants Kumud Chandra Mollick in 8 annans share and Akkhoy Chakroborty and Adiddtya Kumar Chakroborty in 4 annas share each. Akkhoy Chakroborty (one of the C.S. recorded tenants) died, without any issues, but only leaving behind full brother Adiddtya Kumar Chakroborty who inherited his share. Adiddtya Kumar transferred 12 decimals of land in favour of the mother of the present plaintiffs vide kabala No. 7582 dated 26.12.1956 and subsequently 9 decimals out of 12 decimals of land was recorded in her name in S.A. khatian. The mother of the present plaintiffs being the owner of 12 decimals of land transferred 5 decimals for a mosque and 2 decimals for family graveyard and rest 5 decimals were remained under her possession and

thereafter, died leaving behind the plaintiffs as her legal heirs.

During their peaceful enjoyment and possession, Defendants No. 1-8 in connivance with the Defendants No. 9-13 made threat to dispossess them from the suit land, then the plaintiffs filed Writ Petition No. 1684 of 2012 before the High Court Division and obtained Rule and an order of ad interim injunction restraining them from entering into the case land. In spite of that, the defendants again on 27.02.2012 at 10:00 a.m., in absence of the family members of the plaintiffs, while tried to dispossess them by force, the locals, resisted them and accordingly a case and counter case were filed between the parties. As, in violation of the injunction granted in writ petition, the plaintiffs initiated a proceedings of contempt of court against the defendants. The defendants appeared before the High Court Division and begged pardon giving undertaking that they in future would not do any harm in respect of the suit land.

The defendants though had given undertaking to the court not to disturb the plaintiffs or not to dispossess them but again and again tried to dispossess them from the suit land and lastly on 09.05.2012 by showing arms dispossessed the plaintiffs from the suit land and erected a semi pucca tin shed measuring length of 60 feet and width of 20 feet. The plaintiffs took shelter to the local elites for solving the problem but the defendants did not pay any heed to their request and then the plaintiffs filed the instant suit.

Defendant No. 5 now the appellant, only entered appearance and contested the suit by filing a written statement denying all material allegations of the plaint of the suit and contended that, in 1975, the Artillery Regiment of Bangladesh Army set up an unit on 30.69 acres of land. Thereafter in 1978 the said land was abandoned, consequently, defendant No. 05 took possession of the said abandoned land and obtained permission from the Ministry of Home Affairs to continue

with their possession. On the request of defendant No. 05 a survey was held in presence of the local elites and Defendant No. 5 erected boundary pillar without any resistance from the plaintiffs and since the land in question was found as abandoned, defendant No. 05 made a construction thereon and obtained no objection certificate from defendant No. 4, i.e. the Deputy Commissioner, Brahmanbaria. Defendant No. 05 at present is in possession in the suit land by erecting a semi pucca tin shed comprising of 19 shops and 13 shops are under construction. The defendant in the written statement further contended that the plaintiff managed to obtain a B.S. khatian No. 325 collusively and that has no effect and by the said B.S. khatian they obtained no right to possess the land in question. Since in the meantime 4 decimals of land from plot No. 12853 has been recorded in the name of defendant No. 5 and they already made a construction thereon, the same is to be treated as the government

property and defendant No. 5 has responsibility to protect the interest of the Government and since defendant No. 5 already has constructed a construction measuring 60 feet long and 20 feet wide, the plaintiffs are not entitled to any declaration as prayed for and the suit being not maintainable is liable to be dismissed with costs.

Upon such pleadings of the parties, the trial court framed issues in the following terms;

- I. Whether the suit is maintainable in its present form?
- II. Whether the suit is barred by limitation and defect of parties ?
- III. Whether the plaintiffs have ownership in the disputed land ?
- IV. Whether the incident of dispossession had occurred?
- V. Whether the plaintiffs were in possession in the suit land before dispossessed?

VI. Whether the plaintiffs are entitled to any further reliefs?

During trial, the plaintiffs examined 05 witnesses (PW-1-5) and produced certain documentary evidences which were marked as Exhibit-1-5, X and X(ka), 2X(kha).

On the other hand contesting defendant No. 05 examined 05 witnesses (D. W. 1-5) and produced certain documentary evidences which are marked as Exhibits Ka and Kha.

The trial court, after hearing the parties and perusing the evidences and materials on record was pleased to decree the suit on contest on 30.11.2016 against defendant No. 5 declaring the right, title and interest in respect of 05 decimals of suit land in favour of the plaintiffs directing defendant No. 05 to handover the possession of dispossessed portion of the suit land to the plaintiffs as allegedly have been dispossessed by them.

As against the said judgment and decree dated 30.11.2016 passed by the learned Joint District Judge, 1st Court, Brahmanbaria in Title Suit No. 120 of 2012, defendant No. 05, now the appellant, being aggrieved by and dissatisfied with, filed the present appeal.

Mr. Weyesh Al-Haroni, the learned Deputy Attorney General along with Mr. Sheikh Md. Mazu Miah the learned Assistant Attorney General appearing for the appellant submits that the land in question along with other lands was acquired by the Government for setting up an artillery battalion of Bangladesh Army in 1975 but subsequently the said property became abandoned and then defendant No. 05 with the permission of the authority entered into the land in question. Defendant No. 05 subsequently obtained permission from the Deputy Commissioner Brahmanbaria to continue his possession and accordingly record was prepared in its name and by dint of the above records of right, defendant No. 05, in presence of the local elites and

also within the knowledge of the plaintiffs had been in possession and constructed a pacca tin shed building consisting of 26 shops.

The learned Deputy Attorney General further submits that since Defendant No. 05 took possession of an abandoned property wherein the plaintiffs had no right, title and possession and as within the knowledge of all of the local elites erected boundary pillar and made a construction, they have already obtained right to possess the same.

The learned Deputy Attorney General further submits that the mother of the plaintiffs though purchased the land in question from the original C.S. recorded tenant vide kabala dated 26.12.1956 in respect of 12 decimals of land but in S.A. record only 9 decimals of land was recorded in the name of the plaintiffs and rest 3 decimals of land was left out against which they did not take recourse in any court of law. The learned Deputy Attorney General lastly

submits that since the plaintiffs did not rectify their kabala deed and subsequently did not take any recourse to law to have the left out 3 decimals recorded in their names, tantamount as an abandoned property wherein, defendant No. 05 entered into with the knowledge of all and has been in possession. So the suit filed by the plaintiffs seeking reliefs being not maintainable the judgment and decree impugned is liable to be set aside and the appeal is liable to be allowed in dismissing the suit.

Mr. Nurul Amin, the learned Senior Advocate along with Mr. Liton Ranjan Das, the learned Advocate appearing for the respondent submits that admittedly the land in question belonged to C.S. recorded tenant Adiddtya Kumar Chakroborty from whom mother of the plaintiffs namely Most. Kodbanu Bibi purchased vide kabala No. 7582 dated 26.12.1956. The plaintiff's mother, after obtaining the property from the C.S. recorded tenant, recorded in her name in S.A. khatian where erroneously 3 decimals of land

was left out during S.A. operation. In spite of that, there was no obstructions or hindrances from any corner in respect of continuation of her enjoyment and possession of the suit land.

The mother of the plaintiffs out of 12 decimals of purchased property, transferred 5 decimals for building a mosque and two decimals for family graveyard and rest five decimals of land was under her possession invariably. During peaceful possession in the rest five decimals of land, when defendant No. 1-8 inconvenience with defendant No. 9-13 made sound to dispossess the plaintiffs by force, they being peace loving and law abiding citizen without going to the clash with the defendants, had taken shelter to the highest court of law by filing a writ petition and obtained an order of injunction against defendant No. 05. Subsequently, when, by violating the injunction granted by the High Court Division, the defendant again started ill activities to dispossess, the plaintiffs initiated a

proceedings of contempt of court against defendant No. 5 who appeared and prayed unconditional apology giving undertaking that in future they will not do any harm or dispossess the plaintiffs from the suit land. The plaintiffs when having all the legal supports were in peaceful possession, the ill activities of defendant No. 5 was again started and in several occasions they made threat to dispossess the plaintiffs and on 09.05.2012 they dispossessed the plaintiffs from 2.96 decimals of land for which the plaintiffs wanted to have settlement with the help of the local elites but being failed, filed the suit. Mr. Nurul Amin lastly submits that the plaintiffs accrued best right, title and interest in respect of the suit land from their mother who acquired title by virtue of Kabala dated 26.12.1956 and during their possession had been dispossessed by defendant No. 5 in respect of 2.96 decimals of land. Mr. Nurul Amin also submits that since defendant No. 05 illegally dispossessed the plaintiffs from

the suit land, they have every entitlement to challenge the same by filing a suit for declaration with a consequential relief of recovery of possession and the learned trial Judge on considering the evidences and other reliable materials on records has rightly decreed the suit in which nothing remains to be interfered and as such the appeal is liable to be dismissed with costs.

We have heard the learned Deputy Attorney General for the appellant and Mr. Nurul Amin the learned Senior Counsel for the respondent at length, have gone through the pleadings of the suit and other evidences and materials on records. In a suit for declaration of title and recovery of khash possession, the plaintiffs have to prove first their title and possession in the suit land by adducing oral and documentary evidences and also have to prove that during their peaceful possession they have been dispossessed by the defendant forcefully. The plaintiffs to prove their right, title and interest in respect of the suit land had adduced

C.S. khatian as Exhibit-1, original deed of sale Exhibit-2, S.A. khatian prepared in the name of the mother of the plaintiffs Exhibit-3, the order of the High Court Division passed in writ petition No. 1684 of 2012 Exhibit-4, the order passed in the proceedings of the contempt of court Exhibit-5 and 25 cartularies and signature thereon Exhibit X and X(ka)to X (kha) series.

Defendant No. 05 to disprove the plaint case has adduced a letter of authority to lead the case against the plaintiff Exhibit-ka and deed of kabala No. 7582 dated 26.12.1956 Exhibit-Kha.

Upon the pleadings of the parties and submission made by the learned Counsels of both the parties, we have framed the following issues for deciding the appeal on merit:

- I. Whether the plaintiffs had accrued their right, title and interest by virtue of the

kabala No. 7582 dated 26.12.1956 in respect of 12 decimals of land?

- II. Whether the plaintiffs were all through in possession in respect of 12 decimals of land before dispossession?
- III. Whether the plaintiffs were dispossessed by the defendant forcefully?
- IV. Whether the plaintiffs have been able to prove their dispossession by evidences and lastly;
- V. Whether the defendant had entered into the suit land by virtue of lawful instruments and with the approval of law full authority?

In this case, onus of proving the right, title and possession by virtue of deed of kabala dated 26.12.1956 lies exclusively upon the plaintiffs. The plaintiffs have to prove their own case by adducing sufficient oral and cogent documentary evidences. The

defect of the defendant will not however help the plaintiffs to remedies.

In this case, the Exhibit-1 the C.S. khatian proves that the land originally belonged to Adiddtya Kumar Chakroborty who admittedly became 8 annas share of the land of the C.S. Khatian on the death of his full brother. The Exhibit-2 the sale deed No. 7582 dated 26.12.1956 proves that the mother of the plaintiffs purchased 12 decimals of land from the original C.S. recorded tenant Adiddtya Kumar Chakroborty. The Exhibit 3 S.A. khatian proves that the record was prepared in the name of the mother of the plaintiffs in pursuance of the sale deed though there from left out of 3 decimals of land because of erroneous recording by the concerned authorities. Exhibit-4 shows that the plaintiffs being apprehensive to be dispossessed by the defendant No. 5 sought relief by filing a writ petition in the High Court

Division and got injunction restraining the defendant No. 5. Exhibit-5 shows that the order of injunction granted by the High Court Division was violated in a proceedings of contempt of court, the officials of defendant No. 5 admitting their guilt prayed unconditional apology with an undertaking that in future they would not take any step of dispossession of the plaintiffs and the Exhibit-X and X (ka) to X (kha) shows that the plaintiffs several times took steps for restraining defendant No. 5 from entering into the suit land by force.

By all of the above exhibited documents submitted by the plaintiffs before the court very clearly proves that the mother of the plaintiffs became the owner of the suit land by virtue of a deed of kabala which subsequently vested to the plaintiffs as heirs of their mother and it also contemplates that since the plaintiffs were threatened several times to be

dispossessed and eventually were dispossessed, they properly sought reliefs to have restoration to the dispossessed land.

So the above all the material document as have been shown as Exhibits in the suit clearly proves that the plaintiffs obtained the property by virtue of sale deed and subsequently they continued their possession on the suit land. It also reveals from the Exhibit X and X(ka) to X (kha) series that an advocate commissioner was appointed to inquire about the nature and feature of the case property and accordingly he visited the suit land and found that out of 12 decimals of land purchased by the mother of the plaintiffs, 5 decimals were transferred for mosque, 2 decimals were transferred for family graveyard and 05 decimals remained as homestead and also found that there was a pucca constructions of 60 feet long and 20 feet wide and accordingly submitted his report. So

the commission report clears that there was a construction made by respondent No. 5. On the other hand defendant No. 5 for disproving the plaint case adduced Exhibit –Ka, a letter of authority to lead the case against the plaintiffs and Exhibit-kha a document of title which does not specifically indicate anything and any manner of title to defendant No. 5.

Save and except those two Exhibits, defendant No. 5 did not produce any other document or evidence before the court to prove their title and possession.

Now the moot question of this particular case is whether the plaintiffs have accrued best right, title and interest in respect of suit land by virtue of the deed dated 26.12.1956 and whether the plaintiffs during their peaceful possession were dispossessed by the defendant forcefully.

Plaintiff No. 1 as PW-1 stated in his testimonies that during peaceful enjoyment and possession of the

suit land as obtained by sale deed defendant No. 5 forcefully dispossessed them from 2.96 decimals of land on 09.05.2012.

PW-2 testified that the plaintiffs were all through in possession but on 09.05.2012 defendant No. 5 had dispossessed the plaintiffs forcibly.

PW-3 testified that the plaintiffs had been all through in possession in the suit land but on 09.05.2012 defendant No. 5 forcefully dispossessed the plaintiffs.

PW-4 also in the same voice testified that on 09.05.2012 defendant No. 5 forcefully dispossessed the plaintiffs from the suit land.

PW-5, the Advocate Commissioner, testified that he has given a report stating the present nature and feature of the case land.

On the other hand defendant witness No.1 testified that defendant No. 5 took over possession

having found the case land as abandoned property and thereafter continued their possession.

D.W-2 testified that defendant No. 5 had been in possession on an abandoned property.

D.W.-3 and 4 also testified that defendant No. 5 had been in possession on an abandoned property.

On a careful examination of the evidences of the plaintiffs as well as the defendant witnesses it has been clear that the plaintiffs had been all through in possession of the suit land and defendant No. 5 forcefully dispossessed them on 09.05.2012 from the suit land. The plaintiffs' witnesses in a chorus corroborated the evidence of each other regarding dispossession held forcefully by defendant No. 5.

The suit for declaration of title and recovery of khas possession was filed by the plaintiffs seeking reliefs under the provision of section 42 of the Specific relief Acts. The plaintiffs were all through in

possession by dint of a sale deed executed in favour of their mother. The mother of the plaintiffs having accrued exclusive and best right, title and possession admittedly handed over 5 decimals of land to the mosque and 2 decimals of the land for family graveyard and rest five decimals of land was under their exclusive possession but whenever defendant No. 5 without having any legal authority or without any legal basis illegally dispossessed the plaintiffs forcefully from some portion of the land and thereby created a cloud over the title of the plaintiffs, then to remove the cloud from the suit land filed suit for declaration of title and recovery of possession is very much maintainable as was filed with a consequential relief of recovery of khas possession on dispossessed part.

So in the above situation the suit for declaration of title and recovery of khas possession was rightly

filed and thus maintainable and we find no illegalities with the same.

Accordingly the suit was very much maintainable.

As we already observed that the plaintiffs have successfully proved their best right, title and possession in respect of suit land by adducing sufficient oral and documentary evidences and also have been able to prove the dispossession held by respondent No. 5, so we are of the view that there is no illegality and infirmities in the judgment and decree passed by the trial court decreeing the suit and as such calls for no interference by this court.

In the result, the appeal is dismissed with costs.

The judgment and decree dated 30.11.2016 passed by the learned Joint District Judge 1st Court, Brahmanbaria in Title Suit No. 120 of 2012 decreeing the suit is maintained.

Communicate the judgment and order at once
and send down the lower courts records immediately.

(Justice Sashanka Shekhar Sarkar)

I agree.

(Justice Md. Badruzzaman)

A.B. Sutar
B.O.