IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Appeal No. 221 of 2020

In the matter of:

Abdul Barek, son of late Abdul Hamid of village-Sataish, Police Station- Tongi, District- Gazipur.
… Appellant

-Versus-

Md. Abdul Kadir and others.
…Respondents.

Mr. Md. Mainul Islam with
Mr. Md. Mostafa Kamal, Advocates
…For the appellant

Mr. Mohammad Abdul Haque, Advocate
…For the respondent no. 8

Heard on 08.01.2025, 22.01.2025 and 23.01.2025.
Judgment on 23.01.2025.

Present:
Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of plaintiff in Title Suit No. 134 of 2010, this appeal is directed against the judgment and decree dated 06.02.2020 passed by the learned Joint District Judge, 2nd Court, Gazipur in that title suit dismissing

the same against the defendant nos. 1, 3-16 on contest and *ex parte* against the rest.

The precise facts leading to preferring this appeal are:

The present appellant as plaintiff filed the aforesaid suit for declaration of title and recovery of khas possession in the suit land measuring an area of 33 decimals so described in the schedule to the plaint stating *inter alia* that one, Amor Chandra Mollik while had been enjoying title and possession in the suit property died leaving behind one son namely, Sree Sukumar Mollik and thereby Sukumar Mollik got the property as of inheritance. While Sukumar Mollik had been enjoying title and possession over the suit land by inheritance, he transferred a total area of 179 decimals of land in favour of the predecessor of the plaintiff named, Habiz Uddin Matabbor by registered sale deed dated 14.05.1963 and accordingly, the said portion of land was prepared in R.S Khatian No. 440 in his name. While Habiz Uddin Matabbor had been enjoying title and possession peacefully, he by way of *heba* deed dated 06.07.1971, transferred 76 decimals of land out of C.S and S.A plot no. 640 and other lands totaling 162 decimals of land in favour of his son named, Abdul Hamid. While Abdul Hamid had been in possession of 76 decimals of land, he by way of registered *heba* deed dated 30.06.1980 transferred that 76 decimals of land out of S.A plot no. 640 and other land to the plaintiff, Abdul Barek and handed over possession thereof. After getting that 76 decimals of land, the plaintiff then mutated his name in the holding (khatian) by Mutation Case No. 17649/06-07 and started paying land development tax (খাজনা) to the respective office. Subsequently, out of said 76 decimals of land plaintiff,

Abdul Barek then transferred $16\frac{1}{2}$ decimals of land and $3\frac{1}{2}$ decimals of land respectively in favour of his two sisters namely, Anowara Begum and Ayesha Begum vide deed dated 03.05.2009 and therefore, the plaintiff retained 56 decimals of land and started enjoying the same by erecting a *semi-pucca* structure over the said property. After the demise of Abdul Hamid, the plaintiff then started enjoying title and possession over the suit property. It has further been stated that the defendant nos. 1-16 are the successor-in-interest of the two sons of the second wife of his grandfather Habiz Uddin Matabbor and those two sons, defendant nos. 1 and 6, Abul Hossain and Babul Hossain were the sons of the former husband of the second wife of that Habiz Uddin. In order to conduct their business, those defendant nos. 1 and 6 approached the plaintiff to take rent of the suit land in their favour when the plaintiff on 01.02.2005 rented the suit property in their favour and the plaintiff then started enjoying title and possession in rest 33 decimals of land by planting different kind of seasonal fruit bearing trees and receiving usufructs out of the fruits whereby the defendant nos. 1-16 have been possessing respective position of the suit property merely as tenants under plaintiff. Afterwards, on demand the defendants on 12.01.2009 declined to pay rent to the plaintiff and to leave the suit property and hence the suit.

On the contrary, the defendant nos. 4-6 contested the suit by filing a joint written statement denying all the material statements so made in the plaint contending *inter alia* that the suit itself is not maintainable in its present form as the plaintiff has got no title and possession in the suit property by way of the alleged deed of *heba* dated 30.06.1980. It has

further been asserted that the predecessor of these defendants, Habiz Uddin had two wives namely, Sagorjan Bibi and Jobeda Khatoon and said Sagorjan Bibi died leaving behind the plaintiffs and other heirs and accordingly, the said wife got $2677\frac{35}{100}$ decimals of land and in the same vein, the second wife of Habiz Uddin got $191\frac{16}{100}$ decimals and since the defendant nos. 1 and 6 are the sons of the former husband of Jobeda Khatoon, they are entitled to get the property so left by the second wife of Habiz Uddin namely, Jobeda Khatoon and they got $95\frac{58}{100}$ decimals of land. It has further been stated that, the suit property has not been partitioned through metes and bounds among the plaintiffs and the defendant nos. 1-16 and they got suit land that is, 33 decimals of land of R.S Plot No. 1123 out of S.A Khatian No. 640 as a co-sharers but by exerting influence, the plaintiff has been possessing the suit property and also transferred lands out of different plots of the scheduled land. It has further been stated that after the demise of the predecessor of the defendant nos. 1 and 6, the defendants by erecting two different houses have been living therein. It has also been stated that the deed of *heba* dated 30.06.1980 is forged and since Abdul Hamid died on 05.02.1980 and therefore, the said deed has not be acted upon and finally prays for dismissing the suit.

In order to dispose of the suit, the learned Judge of the trial court framed as many as 7(seven) different issues and both the plaintiff and the defendants examined 3(three) witnesses each in support of their respective

cases. Apart from that, the plaintiff also produced several documents which were marked as exhibit nos. '1'-'8' series while the defendants also produced several documents which were marked as exhibit nos. 'ka'-'ga' series.

The learned Judge of the trial court after conclusion of the trial by impugned judgment and decree, dismissed the suit holding that the suit is not maintainable as the plaintiff could not prove title and possession in the suit property and the suit is also bad for defect of parties.

It is at that stage, the plaintiff as appellant preferred this appeal.

Mr. Md. Mainul Islam along with Mr. Md. Mostafa Kamal, the learned counsels appearing for the appellant upon taking us to the impugned judgment and decree at the very outset submits that the learned Judge of the trial court erred in law innot taking into consideration of the fact that, the suit is well maintainable since the plaintiff's title has been denied by the defendants by filing a Miscellaneous Case for cancelling the mutation khatian stands in the name of the plaintiff having no scope to find the suit not maintainable.

The learned counsel further contends that though the learned Judge of the trial court found the suit is bad for defect of parties but there has been no clear assertion in the entire written statement to that effect but the learned Judge of the trial court on his own volition allegedly found such defect which cannot be sustained in law as such the assertion of the trial court is not based on any materials on record.

When we pose a question to the learned counsel for the appellant how a suit can be maintained against tenants for declaration of title and

recovery of khas possession, the learned counsel then contends that since in the cancellation of mutation, the defendants had claimed title in the suit property so the suit is well maintainable stating further that, since the defendants who are merely the tenants under the plaintiff denied to leave the suit property, for that obvious reason, the plaintiff had to file the suit praying for recovery of khas possession and the plaintiff's witnesses have proved those two counts of prayer.

The learned counsel in his second leg of submission then contends that as the plaintiff has found to have prove his title by sufficient evidence then there has been no necessity to prove the claim of recovery of khas possession. In support of his such submission, the learned counsel has then placed his reliance in the decision reported in 44 DLR (AD) 100 and take us through paragraph 9 thereof and contends that in that cited decision, it has been settled that if the plaintiff has been able to prove his/her title in the suit land, there is no need to prove recovery of khas possession in the suit land.

The learned counsel further contends that since the full-brother of plaintiff who deposed as P.W-3 also asserted the claim of the plaintiff having no reason to find the suit is bad for defect of parties even though there has been no such claim ever made by the defendants in their written statement.

When we pose a second question to the learned counsel for the appellant then what is the illegality in the impugned judgment, the learned counsel then readily submits that, the learned Judge has not taken into consideration of the material documents so produced by the plaintiff before

it, in particular, exhibit nos. 2, 3 and 4 through which the father and the grandfather of the plaintiff acquired title and possession over the suit property and until and unless, those title documents are challenged and declared void through a competent court, there has been no scope on the part of the trial court to disbelieve acquiring title of the plaintiff in the suit property. On these legal submissions, the learned counsel finally prays for allowing the appeal by setting aside the impugned judgment and decree.

On the contrary, Mr. Mohammad Abdul Haque, the learned counsel appearing for the respondent no. 8 vehemently opposes the contention taken by the learned counsel for the appellant and submits that, there has been no assertion in the plaint that the plaintiff had been in possession in the suit land before dispossession and such enjoying possession and dispossession has not been proved by any independent witnesses.

The learned counsel further contends that apart from P.W-1, P.W-2 and P.W-3 are the close relatives of the plaintiff that is, one his brother-in-law and another his full-brother so they cannot be considered as disinterested witnesses so their testimony cannot be believed in decreeing a suit.

The learned counsel goes on to submit that since the plaintiff claimed the defendants' to be his tenants so the suit itself is not maintainable in the form of declaration of title and recovery of khas possession rather the plaintiff ought to have filed a suit for eviction against the defendants.

The learned counsel next contends that since the mutation earlier stood in the name of the plaintiff has been cancelled and it was upheld up

to the Land Appeal Board and is now pending before this court in a writ jurisdiction so until and unless, mutation is restored in favour of the plaintiff, the plaintiff cannot claim title over the suit property.

The learned counsel further contends that since the suit has also been filed for recovery of khas possession, so the plaintiff has to prove dispossession from the suit property and even though there has been no witness when the defendants denied to pay rent to the plaintiff yet that very assertion of the plaintiff has not been proved by any independent witness and the trial court has rightly dismissed the suit. With those submissions, the learned counsel finally prays for dismissing the appeal by affirming the judgment and decree passed by the trial court.

Be that as it may, we have considered the submission so advanced by the learned counsel for the appellant and that of the respondent no. 8, perused the memorandum of appeal, including the impugned judgment and decree and all the documents appeared in the paper book.

At the very outset, we would like to examine the illegality ever committed in the impugned judgment by the learned Judge of the trial court. On going through the impugned judgment, we find that the learned Judge in order to dispose of the suit framed as many as 7 different issues. In disposing issue no. 1, the learned Judge of the trial court ultimately arrived at a finding that, since the suit is for confirmation of possession so the suit itself is not maintainable in its present form. But that very issue has not been properly addressed as it is admitted by the learned counsel for the respondent that the suit has not been filed for confirmation of possession rather recovery of khas possession so for that obvious reason the decision

on that very issue no. 1 cannot sustain on the face of the materials on record.

Furthermore, the learned Judge of the trial court also disposed of issue no. 2 which was framed to decide whether the suit is bad for defect of parties or not. The learned Judge of the trial court also disposed of the said issue against the plaintiff-appellant finding that some heirs of the plaintiff and the defendant have not been made party. But on that score, we have also very meticulously gone through the entire written statement and don't find any assertion of the defendants that the suit is bad for defect of parties other than an evasive denial to that effect. So how the learned Judge of the trial court came to a finding that, the suit is bad for defect of parties is totally incomprehensible to us rather reflection of non-application of his judicial mind.

Moreover, the suit has not filed for partition rather for declaration of title and recovery of khas possession and the plaintiff claimed the suit property to have obtained through a *heba* deed dated 30.06.1980. So under no circumstances, can a suit filed for declaration of title and recovery of khas possession be dismissed on account of bad for defect of parties.

Further, on going through the impugned judgment, we further find that the learned Judge of the trial court disbelieved acquiring title of the plaintiff in the suit property abruptly relying upon a sentence made by P.W-1 in his deposition as regards to the death of his father, and whimsically found that, since the father of the plaintiff died in the year 1980 so the deed dated 30.06.1980 has not been acted upon and no title accrued in his favour- which is totally absurd proposition in absence of any

evidence towards the proof of the death of the father of the plaintiff. So the learned Judge in a very cursory manner disposed of that very vital issue in acquiring title of the plaintiff in the suit land. We also totally at one with the submission so placed by the learned counsel for the appellant seeking title over the suit property instead of a suit for eviction against the defendants. Because, the defendants also claimed to be the heirs of their predecessor, Habiz Uddin and in the cancellation of mutation case, they also claimed title over the suit property and when the defendants denied title of the plaintiff in the suit land whatever manner of forum it might be, then there has been no other option but to pray for declaration of title and recovery of khas possession in the suit land which is thus well maintainable. So the submission so placed by the learned counsel for the respondents to that effect does not stand at all.

Furthermore, it is admitted position that no one was present when the defendants denied to pay rent to the plaintiff yet the said assertion has also been corroborated by P.W-2 and P.W-3 but no deviation can be made by the defendants by cross-examining those plaintiff's witnesses from which date, the cause of action of recovery of khas possession arose.

On top of that, since the defendants have not yet challenged the propriety of *heba* deed dated 30.06.1980 and since the said deed has yet been unchallenged, so there has been no scope for the defendant to deny title of the plaintiff in the suit property. It is also established principle as also put forward by the learned counsel for the appellant that since the mutation does neither establish nor extinguish any title of one's property so mere rejection of mutation earlier stood in the name of the plaintiff (though

the said dispute is still under challenge before this court) does not nullify title of the plaintiff in the suit land who acquired the same by way of *heba* deed dated 30.06.1980.

Given the above facts, circumstances of the case and discussion and observation made hereinabove, we are of the view that the learned Judge of the trial court in a very slipshod and causal manner dismissed the suit without taking into consideration of the materials and evidence on record in its proper perspective.

Overall, we find no substance in the impugned judgment and decree which is liable to be set aside.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and decree dated 06.02.2020 passed by the learned Joint District Judge, 2nd Court, Gazipur in Title Suit No. 134 of 2010 is thus set aside and the suit is decreed.

Let a copy of this judgment along with the lower court records be transmitted to the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.

Abdul Kuddus/**B.O.**