

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

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO. 125 OF 1991.

IN THE MATTER OF:

An application under Section 115 (1) of the Code of
Civil Procedure, 1908.

- AND -

IN THE MATTER OF:

Rahima Bewa and others

.... Petitioners.

-Versus-

Md. Aulad Hossain and others.

..... Opposite parties.

Mr. S.M. Mohammad Ali, Advocate

..... For the petitioners.

Heard on: 10.01.2024 and

Judgment on: 11.01.2024.

On an application of the petitioner Rahima Bewa and others under section 115 (1) of the Code of Civil Procedure, 1908, the Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 12.08.1989 passed by the Subordinate Judge, Sirajganj in Other Class Appeal No. 105 of 1984 affirming those dated 22.05.1984 and 30.05.1984 respectively passed by the Munsif, 2nd Court, Sirajganj in Other Class Suit No. 95 of 1981 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that, one Aksed Ali and others filed the Title Suit No.95 of 1981 in the Court of Munsif, 2nd Court, Sirajganj against the defendant Md. Aulad Hossain and others for declaration of title of the suit land, contending, *inter-alia*, that the suit land belonged to Yeasin Sheikh, Jubed Ali and Guli Bibi equally as per C.S. Khatian No.14 who possessed the land in ejmali and that Yeasin Sheikh died leaving one son Moydan Ali and Jubed Sheikh left three sons Abed Ali, Aksed and Kudrat Ali. Then Moydan died leaving one son Asab Ali and Abed left two sons Abul Kashem and Abdul Awal and Guli Bibi left three daughters namely, Nilu Bibi, Duku Bibi, Moni Bibi and two cousins Aksed and leaving one son Shamser Ali and all the heirs have been possessing the suit land in ejmali but the predecessor of defendant Nos.1-4 has got the S.A. record prepared in his name collusively of which the plaintiffs came to know on 01.01.1981. Hence, the suit.

The defendant Nos.1-4 contested the said suit by filing a joint written statement admitting the name of the C.S tenants but denied all other facts contending, *inter-alia*, that the suit land/property was put in auction in money execution Case No.541 of 1927 by this Court and the defendants' predecessor auction purchased the same and got possession through the Court and since then the defendants' predecessor had been possessing the same and the S.A record was correctly prepared and after his death the defendants have been

possessing the suit land. The petitioners have no right, title and possession in the suit land and hence this suit would be dismissed with costs.

At the time of trial the trial Court framed three issues.

During the trial the plaintiff adduced four witnesses as P.Ws-1-4 and also exhibited some documents.

The defendants also examined four witnesses as D.W-1-4 and also exhibited some documents to prove their respective cases.

The trial Court, after consideration of the evidence on record as adduced by the parties, dismissed the suit by its judgment and decree dated 22.05.1984 (decree signed on 30.05.1984). Against the said judgment and decree of the trial Court the plaintiffs as appellants preferred Other Class Appeal No.105 of 1984 before the learned District Judge, Sirajganj and the said appeal ultimately heard by the Subordinate Judge, Sirajganj, who after hearing the parties and considering the evidence on record dismissed the said appeal by its judgment and decree dated 16.07.1989 (decree signed on 12.08.1989)

Being aggrieved by and dissatisfied with the impugned judgment and decree passed by learned Subordinate Judge, Sirajganj the plaintiff-petitioners filed this revisional application under Section 115(1) of the Code of Civil Procedure, 1908, and obtained the Rule.

No one appears on behalf of the defendant-opposite parties.

Mr. S.M. Mohammad Ali, the learned Advocate appearing on behalf of the petitioners submits that both the Courts passed the impugned judgment without considering the material evidence on record. He further submits that the Appellate Court, being the final Court of facts ought to have considered the entire material evidence on record and discussed the details. But it appears that the Appellate Court without considering and discussing the details of evidence on record dismissed the appeal in a slipshod manner which he committed error in law resulting in an error in the decision occasioning failure of justice. The learned Advocate further submits that the trial Court in its judgment specifically mentioned that the predecessor of the defendants filed Money Suit No.118 of 1926 for the land of three plots and the trial Court also found that the predecessor of the defendants got decree of the said three plots for non-payment of loan money of Tk.57/- and accordingly, the বয়নামা এবং দখল নামা also was executed and the predecessor of the defendants also got their possession of the said three plots only. But in such a case the parties may dispose of the same amicably or by a fresh suit whereas the trial Court dismissed the suit finding that the plaintiff failed to prove his possession over the suit land but the defendants succeed to prove their possession over the suit land, which is also an erroneous decision of the trial Court. Even the Appellate Court also did not consider the said vital material facts of the case though the record was available specially the record of Money Suit

No.118 of 1926 was called for and accordingly the same was received from the concerned Court of Sirajgonj. Thus, both the Court committed error in law resulting in an error in the decision occasioning failure of justice. The learned Advocate for the petitioner prayed for making the Rule absolute.

I have heard the learned Advocate of the petitioner. It appears that the plaintiffs of this case filed title suit only seeking the declaration of title claiming that they are the C.S. recorded owner but they also claim that the subsequent S.A. record was wrongly prepared in the name of the defendants. The defendants entirely appeared and filed a joint written statement and claimed that their predecessor of the defendants acquired the suit land through an auction and the predecessor of the defendants Md. Kashimuddin filed the Money Suit No. 118 of 1926 and accordingly obtained a decree and thereafter through Money Execution Case No.541 of 1927, ownership of the predecessor of the defendants' obtained the said suit land and accordingly, বয়নামা এবং দখল নামা was obtained by the said predecessor of the defendants and they obtained the possession of the suit land and the S.A. record was rightly prepared in their name. Unfortunately, in the instant case, though the record was called for on 13.01.1991 but the said record was not received by this Court despite being sent by the concerned Court. But it appears from the office note dated 24.08.2002 that inadvertently in the head line of the judgment the Other Class

Appeal No.184 arising out of Other Class Suit No.492 of 1979 but Other Class Suit No.95 of 1981 nothing was mentioned by the concerned Court of Sirajganj. Subsequently, on 09.01.2005 this revisional application was discharged for non-compliance of the Court's order dated 26.08.2002 but it appears that Mr. S.M Mohammad Ali, filed an application for registration of the said revisional application, and accordingly the revisional application was restored on 07.02.2018. It also appears that the learned Advocate again filed an application for correction of the cause title stating that inadvertently in the head line of the judgment where the Other Class Appeal No.100 of 1981 was mentioned instead of Other Class Appeal No.105 of 1984 and accordingly the said application was allowed on 14.02.2018 and thereafter the reminder was sent and accordingly the L.C record of Other Class Appeal No.105 of 1984 arising out of Other Class Suit No.59 of 1981 received by this Court on 10.03.2019 but the office note showed that all the relevant matters are not available in the record. Accordingly, on the basis of the office note dated 12.02.2020 and dated 31.07.2022, this Court directed to make the Rule ready for hearing at the risk and peril of the concerned parties.

From the record, it appears that in the said record of Money Suit No.118 of 1926 and Money Execution Case No.541 of 1927, along with all other documents contained in the C-1 file, C-2 file, and D were destructed by the concerned Court as per the provision of law,

consequently there are no records or documents available in the current case. However, the learned Advocate Mr. S.M Mohammad Ali, filed a supplementary-affidavit annexing some documents related to the C.S. Porcha, S.A. Porcha, along with বয়নামা এবং দখল নামা and the record which was made according to the decree in the name of the defendant-purchaser.

Considering the aforesaid facts in the instant case all the relevant documents by which the defendants obtained the right and title cannot be considered at all. However, from the judgment of the trial Court, it appears that the trial Court in it's judgment stated to the effect that:

“In this suit at the instance of the plaintiffs the Suit Register of Money Suit No.118 of 1926 was called for, from which, it is evident that there was a suit by the predecessor of the defendants, named Kasim Uddin, against the plaintiffs' predecessor Yeasin, in which Kasim Uddin get the decree on 23.04.1927 and this execution Case No. 541 was filed on 07.11.1927 and the scheduled land was sold to the defendants on 21.03.1928, the sale was confirmed on 26.04.1928 and the possession was delivered on 09.06.1928.”

The plaintiff alleged that the said suit was filed for plot Nos. 2, 3 and 4 and not for plots of this suit, therefore, the suit land cannot be the subject of the auction sale in execution of the decree of Money Suit

No. 118 of 1926. It is evident from the Suit Register as well as from its certified copy (Exhibit-1) that the said decree was passed with the findings that the suit decreed on contest in part in a modified form. The plaintiffs, after getting the possession of the mortgaged plot Nos. 2, 3 and 4, shall get the unsatisfied principal sum of Tk.57/- with interest thereon at $3\frac{1}{8}$ % from the date of the cause of action (1st Sarabon 1330 B.S) to the date of his getting possession of the said 3 plots for the period which amount either party shall be at liberty to get determined either amicably or by a fresh suit.

It appears that thereafter the trial Court, after consideration of the evidence on record as adduced by the parties, opined that the plaintiff failed to prove the case of possession and further opined that since the defendant side proved the case and their possession through their Borgader D.W-1 and also found that considering the material facts and the evidence on record, the defendants are in the possession of the suit land.

The Appellate Court also opined that the plaintiff succeeded in proving their possession and the defendants by adducing evidence also proved their possession of the suit land and on that ground the Appellate Court dismissed the appeal and thereby affirmed the judgment of the trial Court. However, the trial Court opined that the defendant side produced the auction sale certificates (Exhibits-A and B) by which it is proved that the defendant side auction purchased the

property but we have examined the record and the exhibits, specially Exhibit A, B but others are not available on the record and it has already been discussed that all the other documents were destructed by the Court through the process of law.

However, the learned Advocate through supplementary-affidavit submitted some documents and argued that the auction purchaser only purchased three plots (being Nos. 2-4), the same was also mentioned by the learned judge, but no documents in my hand, and the documents, submitted by the learned Advocate, all are photocopy of the certified copies. In such a case since the petitioner in the application mentioned some deeds and others documents and thus all the documents should be considered by taking evidence.

I have considered the judgment of the Courts below. This is a simple suit for declaration and the plaintiff claimed the suit land on the basis of the C.S. record, and the defendants claimed that they had purchased the land through an auction process and the S.A. record was prepared in their names, in such a case, the plaintiff ought to have sought consequential relief for confirmation of possession or any other relief for challenging the auction procedure and others.

Though the trial Court took view that the plaintiffs argued that all the alleged documents, in question, are forged and collusive but took view that the same was issued by competent Court and the same is not the product of any forgery so from the said facts since the plaintiff only

seeking a simple declaration in the suit and did not claim any consequential relief, the suit, in such a case, is not maintainable and barred by Section 42 of the Specific Relief Act.

However, since the learned Advocate mentioned that all the documents were destructed by the Court and submits that which was done by the influence of the defendants' side, but it is my view that since the record was in the custody of the Court for a longer period and perhaps either side did not receive the certified copy of the said documents. However, since the learned Advocate produced some documents, in such a case, the trial Court took view that the matter should be resolved by either side amicably or by a fresh suit. The suit simple for a declaration is not maintainable without any proper for consequential relief and the learned Advocate since claimed that the defendant side purchased some portion of the suit land through the auction process, in such a case, if any right remaining then the plaintiffs ought to have filed a fresh suit for partition and there is no bar to file suit for partition afresh since in partition suit the cause of action is recurring, and since the matter is pending before the High Court Division, in such a case the limitation for filing the partition suit immaterial.

However, since both the Courts after considering the evidence on record opined that the plaintiffs side failed to prove their case and accordingly passed the impugned judgment and on perusal of the

record I am of the same view that both the Courts rightly passed the impugned judgment and thus committed no error in law resulting in an error in the decision occasioning failure of justice.

In the result, the Rule is discharged without any order as to costs. The impugned judgment and decree dated 12.08.1989 passed by the Sub-Judge, Sirajganj in Other Class Appeal No. 105 of 1984 affirming those dated 22.05.1984 and 30.05.1984 respectively passed by the Munsif, 2nd Court, Sirajganj in Other Class Suit No. 95 of 1981 is hereby upheld.

Sent down the lower Court records at once.

B.O. Obayedur