

Present:-

***Mr. Justice Mahmudul Hoque***

***And***

***Mr. Justice Md. Mahmud Hassan Talukder***

**First Appeal No. 07 of 2021**

Government of Bangladesh and others

.... Appellants

-Versus-

Md. Abul Hossain Sowdagor and another

..... Respondents

Mr. Apurba Kumar Bhattacharjee D.A.G. with

Mr. Kamal Haider, A.A.G. and

Mrs. Shahla Sharafat Neza, A.A.G.

.... For the Appellants

Mr. Abdul Wadud Bhuiyan, Senior Advocate  
with

Mr. Md. Momtaz Uddin Fakir, Senior Advocate

Ms. Syeda Nasrin

Mr. Fahad Mahmood Khan and

Mr. Mohammad Alauddin, Advocates

... For the Respondents

**Judgment on 15.12.2022**

**Mahmudul Hoque, J:**

This appeal is directed against the judgment and decree dated 17.06.2019 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Dhaka in Title Suit No. 249 of 2017 decreeing the suit.

Facts relevant for disposal of this Appeal, in short, are that the respondents, as plaintiffs, instituted Title Suit No. 249 of 2017 in the Court of learned Joint District Judge, 2<sup>nd</sup> Court, Dhaka for declaration of title against the defendant government along with others claiming that the property covered by C.S. Plot No. 3 under Khatian No. 19 measuring 53.43 acres, C.S. Plot No. 6 measuring 1.43 acres and C.S. Plot No. 8 measuring 1.76 acres originally belonged to zamindar Sree Padmalochan

Dutta son of Ratan Chandra Dutta and others. Padmalochan Dutta by a registered Deed of Trust No. 4460 dated 20.06.1907 made a trust in favour of his 4 sons namely Avoy Kumar Dutta, Baikuntha Dutta, Madhusudhan Dutta and Bhuban Mohan Dutta. Among the brothers Avoy Kumar Dutta was trustee of the trust under whom one Jamila Bibi was owner in possession of 5.20 acres land as “বাজেয়াণ্ডি নাখেরাজ”. Accordingly, C.S. Khatian No. 19 stands recorded in her name. Said Jamila Bibi wife of Md. Shah Sufi Panaullah Darbari while in possession died leaving only son Sukur Mohammad Darbari and daughter Rabeya Khatun. While they were in possession Sukur Mohammad Darbari died leaving only son Shah Sufi Mohammad Hossain Darbari. The then government acquired vast area of property vide L.A. Case No. 32/60-61 for establishment of Lalmatia Housing Estate but a quantum of land measuring 3.77 acres owned by Jamila Bibi was not acquired. Accordingly, a portion of the property rightly recorded in the name of Shah Sufi Mohammad Hossain Darbari in S.A. khatian covered by Plot No. 78. Said property remained in the possession and enjoyment of Shah Sufi Sukur Mohammad Darbari who died in the year 1959 leaving wife Begum Bibi Quraishi, daughter Hafiza Khatun and son Shah Sufi Mohammad Hossain Darbari. Shah Sufi Mohammad Hossain Darbari was in possession and enjoyment of 3.77 acres land.

He transferred  $4\frac{1}{2}$  sataks land to the plaintiff No. 1, Abul Hossain Sawdagar by a registered deed No. 5593 dated 30.12.1986 and on the

same date transferred  $4\frac{1}{2}$  sataks land to his wife Kamrun Nahar, the plaintiff No. 2 by registered deed No. 5592 and delivered possession of the same to them. Thereafter, he transferred 2 kathas of land to Md. Abdul Momin, plaintiff No. 3 by registered deed No. 973 dated 10.03.1988, 6.50 sataks of land to Mir Md. Abul Kalam Mohiuddin Ahmed and Abu Alam Mia, plaintiff Nos. 4 and 5 by registered deed No. 4211 dated 09.12.1987, but in the said deed the deed writer wrongly mentioned the plot and khatian number for which he executed a registered Deed of Rectification No. 4372 dated 05.12.1987. Said Shah Sufi Mohammad Hossain Darbari again by a registered deed No. 4325 dated 01.12.1987 transferred 4 kathas of land to Most. Saleha Begum and Abul Kalam Azad, plaintiff Nos. 6 and 7 and executed a registered Power of Attorney No. 38 dated 05.01.1992 appointing one Ali Mia as her attorney for 2 kathas of land. Though a portion of the land measuring 1.11 acres under S.A. Plot No. 78 rightly recorded in the name of Shah Sufi Sukur Mohammad Darbari, but the remaining land was wrongly recorded in the name of titleless persons for which Shah Sufi Mohammad Hossain Darbari and others filed a Miscellaneous Case No. 75/84 before the C.O. Revenue, Tajgaon, which was allowed on 27.06.1986. Shah Sufi Hossain Mohammad Darbari made a deed of gift on 15.05.1993 in favour of his son-in-law Abul Kalam Azad and daughter Achia Hossain (Asha) for 6 bighas land evidencing which he made a declaration before a Notary Public on 18.06.1993 by an affidavit.

After getting the property by way of gift by a registered Power of Attorney No. 4401 dated 01.07.2009 they appointed one Md. Abu Alam

Mia (Dulal) as their attorney for management of the property including right of transfer. Shah Sufi Mohammad Hossain Darbari died on 08.05.1995 leaving wife Bibi Halima Khatun, 2 sons, Sabbir Hossain and Belayet Hossain and 3 daughters Achia Hossain (Asha), Shefali Hossain and Sabina Hossain. Thereafter, Halima Khatun, Sabbir Hossain, Belayet Hossain and Sabina Hossain transferred 2 bighas or 66 sataks of land in favour of Shahidul Islam Rahamat, Hasnat Ali, Jahangir Alam (Mohim), Aminul Islam (Amin), Mohammad Emdadul Haq Mollik, Mrs. Nasima Akter, Most. Mafia Akter, the plaintiff Nos. 8-14 by a registered deed No. 3227 dated 10.09.1998. In the way aforesaid the plaintiffs by way of gift and by purchase have been possessing the property by erecting houses and residing therein with their families and letting out some portion to the tenants obtaining electricity and gas connection, creating holding in their names and by paying rents and all the taxes to the concerned authorities. The defendants have had no title and possession in the property. It is further stated that while the heirs of Shah Sufi Mohammad Hossain Darbari transferred 66 sataks of land to Shahidul Islam Rahamat and others by registered deed dated 10.09.1998, the value of the property was shown less than the market value for minimizing stamp duty and registration costs which was subsequently declared impounding vide Case No. 8923/08. The purchasers paid deficit stamp and registration costs along with penalty to the government vide Challan No. 05/31 dated 18.05.2009.

The plaintiffs being owners and possessors of the suit property went to the local land office for mutation of their names in the khatian on 10.01.2007, but the defendant No. 3 refused to accept rents and mutate their names in the khatian saying that R.S. khatian for the property stands recorded in the name of “গৃহ নির্মান পুনর্বাসন দপ্তর” in Khatian No. 3 and city jorip stands recorded in the name of the government under Khatian No. 1 and advised the plaintiffs to get decree from the court. Thereafter, the plaintiffs collected R.S. khatian and city jorip khatian on 25.01.2017 from the office of the defendant No. 3 and came to know that R.S. khatian wrongly recorded in the name of “গৃহ নির্মান পুনর্বাসন দপ্তর” and Dhaka City Jorip in the name of government instead of recording the same in the name of plaintiffs and their vendor. The plaintiffs were not aware earlier about wrong record of right in the name of defendant No. 4 and the government. The suit property belonging to the plaintiffs by way of gift and purchase and there was no earthly reason for recording the same in the name of “গৃহ নির্মান পুনর্বাসন দপ্তর” and the government. Because of wrong record of right, title of the plaintiffs have become clouded, hence, the present suit for declaration.

Summon notices were duly served upon the defendants, but none of the defendants appeared and contested the suit by filing written statement. In usual course, because of failure of the defendants to appear and contest the suit, the trial court heard the suit ex parte and plaintiff No. 4 deposed before the trial court as P.W. 1 on behalf of all the plaintiffs in support of

their case and submitted series of documents which were marked as exhibits-1-12.

The trial court upon hearing the plaintiffs and considering evidences both oral and documentary decreed the suit ex parte by the impugned judgment and decree dated 17.06.2019.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the government preferred this Appeal.

Mr. Apurba Kumar Bhattacharjee, learned Deputy Attorney General with Mr. Kamal Haider and Mrs. Shahla Sharafat Neza, learned Assistant Attorney Generals appearing for the appellant-government submit that the suit property belonged to a trust made by Padmalochan Dutta named “Padmalochan Duttar Trust” of which his son Avoy Kumar Dutta was trustee. Said Avoy Kumar Dutta and other sons of Padmalochan Dutta left this country and whereabouts of those persons is not known to anybody, consequently, the property in question automatically vests in the government by operation of law after the SAT Act came into force.

He further submits that though in the remark column of class of tenant one Jamila Bibi has been shown as “বাজেয়াপ্তি লাখেরাজ”, but the plaintiffs could not prove by any evidence either oral or documentary that said Jamila Bibi as tenant under the zaminder Avoy Kumar Dutta paid any rents by producing any rent receipts. It is also argued that though S.A. Khatian No. 50 S.A. Plot No. 78 alleged to have been recorded in the name of Sukur Mohammad Darbari, but the plaintiffs could not file the

original khatian which has created doubt about genuineness of the same whether the said khatian is at all prepared in the name of Sukur Mohammad Darbari and failed to prove that Sukur Mohammad is son of Jamila Bibi by producing document before the trial court, but in this appeal the plaintiff-respondents filed some photocopies of documents, e.g. S.A. Khatian, R.S. Khatian, Dhaka City Jorip, death certificate, heirship certificate to prove their case but all those documents are photocopies and in the absence of original, those cannot be accepted.

He finally submits that, it is the cardinal principle of law that the plaintiffs are to prove their case independent of the case of the defendants, but in the present suit, in one hand, the plaintiffs could not prove that Jamila Bibi paid rents to the zaminder Avoy Kumar Dutta and Sukur Mohammad is son of Jamila Bibi, on the other hand could not prove chain of title, as such, on the basis of some paper transactions in the form of sale deed, the plaintiffs acquired no title and possession in the suit property.

The government submitted R.S. and City Jarip khatian by a supplementary affidavit showing that the suit property recorded in the names of “গৃহ নির্মান পুনর্বাসন দপ্তর” and the government and a report of the Assistant Commissioner (Land) which show that on the suit property there is a Mosque, Madrasha, School and road and major portion of the property is a tank which has been leased out to the managing committee of Mosque for 30 years, as such, the plaintiffs are not in possession and have no title in the property. He submits that had the government got

opportunity to contest the suit, the suit would not have been decreed in favour of the plaintiffs because of failure of proving their case.

Mr. Abdul Wadud Bhuiyan, learned senior Advocate with Mr. Md. Momtaz Uddin Fakir, Senior Advocate with Ms. Syeda Nasrin, Mr. Fahad Mahmood Khan and Mr. Mohammad Alauddin, learned Advocates appearing for the respondents submit that admittedly the property belonged to Padmalochan Trust of which Avoy Kumar Dutta was trustee under whom one Jamila Bibi was “বাজেয়াপ্তি লাখেরাজ” tenant. The plaintiffs categorically stated in the plaint that Shah Shufi Sukur Mohammad Darbari is son of Jamila Bibi and Shah Sufi Mohammad Hossain Darbari is son of Sukur Mohammad Darbari, nothing contrary to the claim and statement made by the plaintiffs could submit by the defendants before the court.

Mr. Bhuiyan submits that since none of the defendants contested the suit by filing written statement challenging the statement made in the plaint, the plaintiffs in suit felt no necessity to file heirship certificate, death certificate and S.A. khatian before the trial court. While the government by filing this appeal raised question about heirship of Sukur Mohammad and Shah Sufi Mohammad Hossain Darbari, the plaintiffs filed all those documents before this Court with an application praying for admitting the same as additional evidence. Though the government challenged the judgment and decree of the trial court, but nothing could bring how by the decree passed by the trial court the government has become aggrieved, moreover, no positive case of the appellant-



government is brought how the property recorded in City Jorip in the name of government and R.S. khatian in the name of “গৃহ নির্মাণ পুনর্বাসন দপ্তর”. In the absence of any contrary statement or documents, the trial court had no other option, but to believe the case of the plaintiffs and the documents submitted in original and duly marked as exhibits.

He further submits that unless a positive case is made out by the appellant or other defendants in suit contrary to the statement of the plaintiffs made in their plaint and the original sale deeds along with other connected papers before the trial court, the decree passed by the trial court either ex parte or on contest is not liable to be set aside. He finally submits that where the appellant-government has no positive case regarding acquisition of title in the property either by acquisition process or by operation of law and any contrary statement or document, the decree is not liable to be interfered with. Admittedly, a vest area were acquired by the government for Lalmatia Housing Estate except the suit plots, in support of which the plaintiffs submitted gazette notification of the acquisition case and acquisition plan showing the property acquired, but the suit plots were not acquired by the government and remains in the possession and enjoyment of the plaintiffs, as such, the appeal is liable to be dismissed.

Heard the learned Advocates of both the sides, have gone through the memo of appeal and the grounds setforth therein, plaint in suit, written statement, evidences both oral and documentary available in lower court records and the impugned judgment and decree passed by the trial court.

The impugned judgment and decree was passed by the trial court ex parte, as none of the defendants appeared in suit and contested the same by filing written statement though summon notices were duly served upon the defendants.

The plaintiffs claimed that the suit property along with other properties originally belonged to one Padmalochan Dutta who during his life time made a trust in the name of Padmalochan Dutta Trust of which his son Avoy Kumar Dutta was the trustee, accordingly, C.S. Khatian No. 19 stands recorded in the name of Avoy Kumar Dutta son of Padmalochan Dutta under whom one Jamila Bibi was a tenant as “বাজেয়াপ্তি লাখেবাজ”. Jamila Bibi died leaving only son Shah Sufi Sukur Mohammad Darbari. After abolition of zamindari and SAT Act came into force a portion of the property recorded in the name of her son Shah Sufi Shukur Mohammad Dorbari in S.A. Khatian No. 50, Plot No. 78, measuring 1.11 acres and other property under S.A. Khatians prepared in the name of some private persons who are made defendants in suit. Shah Sufi Shukur Mohammad Darbari died leaving wife Begum Bibi Quraishi, son, Shah Shufi Mohammad Hossain Darbari and daughter Hafiza Khatun. Shah Shufi Mohammad Hossain Darbari transferred the property by different deeds to the plaintiffs claiming that those were their inherited property, but in S.A. khatian name of some titleless persons have been recorded and a vast area was acquired by Ministry of Works for establishing Lalmatia Residential Area as found from a gazette notification dated 08.01.1953 which shows that C.S. Plot Nos. 1, 2, 4, 5 and 9 of Mouza Sarai Begumpur was

acquired by the government, but the suit Plot Nos. 6 and 8 left unacquired and remains in the ownership of the heirs of Jamila Bibi named, Shah Sufi Shukur Mohammad Darbari. Present R.S. Khatian No. 3 for the suit property along with other acquired properties stand recorded in the name of “গৃহ নির্মান পুনর্বাসন দপ্তর” and Dhaka City Jorip Khatian No. 1 recorded in the name of the government.

The plaintiffs claimed that those khatians wrongly recorded in the name of the government and “গৃহ নির্মান পুনর্বাসন দপ্তর” who had no title in the property. It is also their claim that S.A. khatian recorded in the name of other defendants also without title and possession in the suit property. The plaintiffs in support of their claim submitted a series of documents which were duly marked as (exhibits-1-12). The basis of their title is C.S. Khatian No. 19 (exhibit-1) and also submitted S.A. Khatians (Exhibits 2 and 3 series) which stand recorded in the name of some private persons who are defendants in suit. Series of registered documents starting from 1986 to onward executed by Shah Shufi Mohammad Hossain Darbari and subsequent purchasers of the property submitted by the plaintiffs before the trial court. Because of non-appearance of the defendants and contesting the suit by filing written statement the trial court relying upon the evidences of the plaintiffs both oral and documentary decreed the suit ex parte.

Defendant Nos. 1-3, the government filed this appeal against the judgment and decree of the trial court and in the appeal the government also made other defendants, as appellant Nos. 4-11, who did not authorize

the government to file the appeal or they appeared in the appeal by filing vokalatnama. It is not understandable why all those private persons have been made co-appellants with the government without any authorization or any power instead of making them defendant-respondents. Because of this situation we can only see whether the grounds set forth in the appeal memo by the government is at all considerable and on those grounds the judgment and decree of the trial court is at all liable to be set aside.

To challenge a judgment and decree passed by the trial court, the appellant must show prima facie that they have a good case to be defended, if they would have given a chance to contest the suit by filing written statement. Here, the government though preferred this appeal on the ground of non-appreciation of the facts of the case, but could not produce any positive case showing their entitlement to have the suit adjudicated upon on contest by filing written statement.

The government appellant by a supplementary affidavit, filed a report furnished by Assistant Commissioner (Land) on 27.07.2022 before the Land Acquisition Officer, Dhaka, stating that Khatian No. 3, Plot No. 450 measuring 2.1720 acres recorded in the name of “গৃহ নির্মান পুনর্বাসন দপ্তর” and Khatian No. 1, Plot No. 2566 measuring 2.1140 acres stands recorded in the name of the government which is the definite case of the plaintiffs as stated in the plaint and also submitted those Khatian Nos. 1 and 3 showing the same in the name of the government and “গৃহ নির্মান পুনর্বাসন দপ্তর” and recording of such khatian is the cause of action for filing of the suit by the plaintiffs, therefore, admittedly present R.S. khatian and Dhaka

City Jorip khatian stand recorded in the names of government and “গৃহ নির্মান পুনর্বাসন দপ্তর” instead of recording the same in the name of the plaintiffs. Plaintiffs claim that the property originally belonged to Padmalochan Dutta who made a trust in his name and his son Avoy Kumar was the trustee. C.S. Khatian No. 19 stands recorded in the name of trust and one Jamila Bibi mother of Sukur Mohammad Darbari was a tenant under Avoy Kumar as “বাজেয়াপ্তি লাখেরাজ”. In recognition of such tenancy, the plaintiffs claim that S.A. Khatian No. 50, Plot No. 78, measuring 1.11 acres rightly recorded in the name of her son Shah Sufi Shukur Mohammad Darbari, but some other property recorded in the name of defendant Nos. 5-11 who had no title in the suit property. If the defendant Nos. 4-11 had title and possession in the property by any means other than the plaintiffs they would have contested the suit appearing before the trial court after service of summons upon them.

The government though preferred this appeal and claimed the property belongs to the government but could not show any scrap of papers how the government or “গৃহ নির্মান পুনর্বাসন দপ্তর” acquired the property. It is true that in acquiring property by the government there has been some processes either by wholesale acquisition after abolition of zamindary or acquisition of property for arrear rents through certificate proceeding under the PDR Act, but in the instant case the government could not substantiate any claim how they acquired the property and the city jorip khatian recorded on what basis, similarly, the “গৃহ নির্মান পুনর্বাসন

দপ্তর” also did not come forward to claim that the property rightly recorded in their names.

We have carefully gone through the gazette notification and found that the suit property covered by Plot Nos. 6 and 8 are absent in the notification, meaning thereby, that the two plots have been left from the acquisition scheme, therefore, in the absence of any claimant of the property on the basis of any document and in the absence of any document of the government or “গৃহ নির্মান পুনর্বাসন দপ্তর” it is not understandable why the government has preferred this appeal without any positive case. Had there been any positive case on the part of the government attracting the property to be owned by the government or acquisition of title in any manner they would have got a chance to contest the suit and to prove their claim before the trial court on evidence, but in the instant appeal no positive case of the appellant is found and the documents so have been submitted is a report of the Assistant Commissioner (Land) stating that those two plots recorded in the name of government and “গৃহ নির্মান পুনর্বাসন দপ্তর” and regarding some structures standing thereon, but nowhere in the report it has been stated that the property belongs to the government or any other organizations. However, other private persons who are defendants in suit if could prove that no summons were served upon them and could show any document of title they can seek setting aside of the ex parte judgment, not the government.

Since the appellant-government raised questions regarding chain of document, heirship of Sukur Mohammad Darbari at the time of hearing

appeal, the respondents by an application submitted some documents showing recording of name of Sukur Mohammad Darbari in S.A. Khatian No. 50, acquisition gazette, death certificate, heirship certificate and khatians, those are accepted as additional evidence as nothing contrary to those documents could bring by the appellant-government.

In the absence of any contrary document or any positive case or facts on the part of the appellant or any other person, the trial court had no other alternative but to believe the document and statement made in the plaint to be true, consequently, decreed the suit upon observing the provisions of law under Order 20 Rules 4 and 5 of the Code of Civil Procedure.

In the situation, we find no merit in the appeal and the grounds setforth in the memo.

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

Communicate a copy of this judgment to the court concerned and send down the lower court records at once.

**Md. Mahmud Hassan Talukder, J:**

I agree.