

In the Supreme Court of Bangladesh  
High Court Division  
(Civil Revisional Jurisdiction)

Present:

**Mr. Justice A.K.M. Zahirul Huq.**

**Civil Revision No. 4249 of 2018.**

Md. Momin Ullah and others.

.....Petitioners.

Vs.

Mosammat Nasima Akter.

..... Opposite-Party.

Mr. Md. Zulfiqur with

Mr. Md. Harunur Rashid, Advocates.

.... For the petitioners No.1 & 2.

Mrs. Syeda Nasrin with

Mr. Bibek Chandra with

Mr. Marzia Sultana, Advocates.

..... For the Opposite-party.

Heard on 30.10.2024 and 31.10.2024  
and Judgment on : 31.10.2024.

This Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 21.10.2018 (decree signed on 24.10.2018) passed by the learned Joint District Judge, 1<sup>st</sup> Court, Chandpur in Civil Appeal No.14 of 2016 reversing the judgment and decree dated 06.01.2016 (decree signed on 12.01.2016) passed by the learned Senior Assistant Judge, Kachua, Chandpur in Civil Suit No.95 of 2011 should not be set-aside and or such other or further order or orders passed as to this court may seem fit and proper.

The relevant fact giving rise to this Rule, in short, is that the Opposite-party as plaintiff instituted a Suit on

17.10.2011 being Civil Suit No.95 of 2011 in the court of Assistant Judge, Chandpur praying for permanent injunction to restraining the defendants not to dispossess the plaintiffs or not to break and damage the plaintiff's house or not enter into or not to change the nature and character of the suit schedule land or not to any disturbance in peaceful possession of the plaintiff's suit schedule land contending inter alia that the suit schedule land was belonged to one Serajuddin who died leaving behind 3(three) sons namely, Delwar, Razzak, Wadud , 1(one) daughter and 1(one) wife. The B.S Plot No. 64 former Plot No. 18 measuring 38 decimals of land the petitioners father possessing the said land by cultivation. Subsequently plaintiff's father transferred many undisputed land to other person. Abdur Razzak another son of Serajuddin transferred 12 decimals of land from the total land to Mofizul Islam in Eastern side of the schedule plot and the defendant no. 3 the father of the defendant no. 1 and 2 being absolute owner and possessor of 13 decimals of land in the middle side of the schedule land and accordingly B.S Plot No. 64 under the B.S Khatian No. 238 was recorded in the name of defendant no.3. The plaintiffs disclosed a gift deed being deed No.2513 dated 24.02.1990 in which it is shown that the plaintiff's father Delwar Hossain gifted 26 decimals of land from the suit

schedule. Hence, the plaintiff filed a suit for permanent injunction.

On the other hand, the defendants contested the suit by filling written statements contending inter alia that the original owner Serajuddin died leaving behind 3(three) sons namely, Md. Delowar Hossain, Abdul Razzak and Abdul Wadud, 1(one) daughter and 1(one) wife. Upon amicable partition defendant No.3 Abdul Wadud got the suit land and is in peaceful possession of the suit by erecting shops. Hence, the suit for permanent injunction is liable to be dismissed.

At the trial, the plaintiff examined as many as 5(five) witnesses and exhibited their documents and the defendants examined as many as 3(three) witnesses and exhibited their documents in support of their respective cases.

On conclusion of trial the learned Judge of the trial court considering the evidence and materials on record dismissed the suit by his judgment and decree dated 06.01.2016.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiff preferred the appeal before the learned Joint District Judge, 1<sup>st</sup> Court, Chandpur

who after hearing the parties and considering the evidence and materials on record allowed the appeal and set aside the judgment and decree of the trial court by his judgment and decree dated 21.10.2018.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree the defendants as petitioners approached this court and obtained the instant Rule.

Mr. Md. Zulfiqur with Mr. Harunur Rashid, the learned advocates appearing on behalf of the petitioners submits that in the instant suit question of disputed title involvement in the schedule suit property and as such permanent injunction is not maintainable. He submits that B.S. record which is the primary evidence of title and possession stands in the name of Md. Delowar Hossain, Abdul Razzak and Abdul Wadud in the view of the provision of Section 144 (A) of the State Acquisition and Tenancy Act. He submits that without documentary evidence B.S. Khatian has presumption of correctness in respect of its entry and the plaintiff has failed rebut the presumption by adducing evidence in support of amicable partition. He further submits that without declaration of the title this suit is not maintainable. He lastly submits that since both the parties are the descendants of original owner, Serajuddin a

complicated question of title is involved in the case and hence a suit for permanent injunction cannot be allowed to be maintainable to use the suit as a technical device to avoid regular title or partition suit. He lastly submits that a partition suit between the parties being partition suit No.49 of 2012 is pending before the Senior Assistant Judge, Kochua, Chandpur and as such they could get any relief in that suit. In support of his contention he has cited decision of a case (1) Rafizuddin Ahmed Vs. Mongla Barman and others, reported in 43 DLR(A) 215 wherein their lordships held that-

*"In a simple suit for permanent injunction with regard to a disputed landed property the relief is available to a person who is in possession. The Court may enquire incidentally into the respective claims of the parties to the suit for determining whether the plaintiff is in possession of the disputed property and entitled to the specific relief of permanent injunction.*

*If the dispute involves complicated questions of title the plaintiff must establish his title by filing a regular suit for declaration of title. A simple suit for permanent injunction should not be allowed to be used as a testing device for ascertainment of title. "*

(2) Abdul Mannan Vs. Masummat Suratun Nessa and others, reported in XVIII ADC(2021) 538 wherein their lordships held that-

*" If the dispute involves complicated question of title, the plaintiff must establish his little (title) by filing a regular suit*

*for declaration of title. A simple suit for permanent injunction should not be allowed to be used as a testing device for ascertainment of title."*

On the other hand, Mrs. Syeda Nasrin, the learned advocate appearing on behalf of the opposite-party submits that the opposite-party obtained the suit land by way of registered heba deed long before filling of the suit, therefore her property is not an ejmali. She submits that in the written statement, the defendants could not deny the title and exclusive possession of the plaintiff in the suit land. She submits that defendants did not deny that the schedule of property of the plaint is not correct or unspecific or beyond the registered deeds upon which the plaintiff relied on. She submits that the suit property is very specific and clearly demarcated as affirmed and confirmed by all the P.Ws. She submits that all the witnesses proved the exclusive possession of the plaintiff in the suit land. She submits that the appellate court correctly found the prima facie title in the suit land. In support of her contention she has cited decision of a cases :-

(1) Kalipada Dey Sarkar Vs. Hemchandra Dey Sarkar, reported in 44 DLR 419 wherein their lordships held that-

*" The plaintiffs being in exclusive possession of the suit land are entitled to the relief prayed for a decree of permanent injunction. But such a decree shall not be*

*treated as ouster of the defendants as co-sharers from the suit land for the purpose of a suit for partition."*

(2) Vazkyr Raghman Vs. Jan Mohammad, reported in 37 DLR 79 wherein their lordships held that-

*" Suit for injunction- incidentally the question of title is gone into that will not covert the suit to one for declaration of title and injunction. Where defendant is in possession or the plaintiff has no legal possession suit for permanent injunction will not lie."*

(3) Sheikh Ahmed and others Vs. Abdul Alim, reported in 42 DLR 408 wherein their lordships held that-

*"Suit for permanent injunction, maintainability of –The paramount consideration in a suit for permanent injunction is whether the plaintiff has been successful in proving his exclusive possession. Question of title may be looked into incidentally but decision on title in such a suit is not a guiding principle for holding that the suit is not maintainable without a partition suit"*

In order to appreciate the submissions made by the learned advocate for the petitioners and learned advocate for the opposite-party, I have gone through the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below very carefully.

Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree reversing the judgment and decree passed by the trial court.

On perusal of the record it appears that the plaintiff purchased the suit land from one Md. Delwar Hossian who executed and registered heba deed on behalf of herself. It appears that the suit land originally belonged to one Md. Serajuddin and the death of Serajuddin the suit land has been recorded B.S. Khatian No.238 in the names of his 3 sons namely Md. Delwar Hossain, Abdul Razzak and Md. Abdul Wadud which was marked as exhibit-gha did not challenged by the plaintiff. Defendants-petitioner No.3 Md. Abdul Wadud and defendant-petitioner Nos.1 and 2 are his son. On the other hand, plaintiff-opposite-party got the suit property by way of heba deed from her father Md. Delowar Hossain. It appears that the plaintiff and defendants have 6 shops on the land and they have been possessing the suit



land which was supported by D.Ws. 2 and 3 of them D.W.3 Rafiqul Islam uncle of both the parties. It further appears that partition suit being suit No.49 of 2012 is pending before the Senior Assistant Judge, Khochua, Chandpur.

On perusal of the judgment of the trial court it appears that the learned Judge considering the evidence and materials on record observed that- “বাদীর দাবীকৃত দলিলে (প্রদর্শনী-২) নালিশী দাগের পূর্বাংশের ১২ শতক এবং পশ্চিমাংশের ১৪ শতক জমি হস্তান্তর করার কথা উল্লেখ আছে। কিন্তু বাদী পক্ষ নালিশী দাগের পশ্চিমাংশের ২৬ শতক জমি দখল করেন মর্মে দাবী করেন। বাদীর দাবীকৃত দলিল অনুযায়ী সুস্পষ্ট যে বাদীকে নালিশী দাগের মধ্যতরফের জমি হস্তান্তর বা দখল প্রদান করা হয়নি।সেক্ষেত্রে বাদী পক্ষের দালিলিক সাক্ষ্য এবং প্রদত্ত মৌখিক সাক্ষ্য সামঞ্জস্যপূর্ণ নয়। সাক্ষ্য আইনের বিধান অনুযায়ী মৌখিক সাক্ষ্য অপেক্ষা দালিলিক সাক্ষ্য বেশী প্রাধান্য পায়। তাই বাদী পক্ষের দলিলের বক্তব্য অনুযায়ী নালিশী দাগের পশ্চিমাংশের ২৬ শতক জমিতে বাদীপক্ষের দখলের বিষয়টি গ্রহণ করার যুক্তিসন্মত কোন কারণ দেখা যায় না and accordingly dismissed the suit.

It appears from the judgment of the appellate court that without considering the evidence both oral and documentary abruptly allowed the appeal and set aside the judgment and decree passed by the trial court. In the suit for permanent injunction the plaintiff is required to prove his

possession and title in the suit land. In the instant case the plaintiff did not exclusive proved his right, title and possession in the suit land and as such the learned Judge of the appellate court failed to consider the evidence both oral and documentary and allowed the appeal and set aside the judgment and decree of the trial court which is not sustainable in law.

However, I have gone through the decisions reported in 44 DLR 419, 37 DLR 79 and 42 DLR 408 cited by the learned advocate for the opposite-party. I am respectful agreement with principles enunciated therein. But the facts leading to those cases are quite distinguishable to that of the instant case and therefore, to that effect I am also unable to accept his submissions. On the contrary the legal pleas taken by the learned advocate for petitioner prevail and appear to have a good deal of force.

The trial court elaborately discussed the oral and documentary evidence and found the possession of the plaintiff and defendants and dismissed the suit. The appellate court in his impugned judgment and decree without controverting the specific findings of the trial court allowed the appeal which is not in accordance with law.

In view of the discussions, decisions and reasons stated above, I am of the view that the impugned judgment and decree passed by the appellate court suffers from legal infirmity which calls for interference by this court for misreading, non-consideration of the evidence on record and misinterpretation of the relevant provision of law. Accordingly, I find merit in the rule.

However, in the instant suit it is clear that the plaintiff and defendants are co-sharer and they are in possession of the suit property jointly. The plaintiff and defendants have 6 shops on the suit land and a partition suit being suit No.49 of 2012 is pending before the Senior Assistant Judge, Kochua, Chandpur and as such both parties may get any kind of redress in that suit in accordance with law. In such situation, the complexity will increase if permanent injunction maintained on the schedule property. Thus justice will be met if both the parties maintained status-quo in respect of possession and position of the schedule suit property until disposal of the Partition Suit.

In the result, the Rule is disposed of. However, there will be no order as to costs.

The judgment and decree dated 21.10.2018 ( decree signed on 24.10.2018) passed by the learned Joint District Judge, 1<sup>st</sup> Court, Chandpur allowing Civil Appeal No.14 of 2016 are set aside and those of the trial court are restored and affirmed. However, there will be no order as to costs.

The learned Senior Assistant Judge, Kochua, Chandpur is directed to dispose of the Partition Suit being suit No.49 of 2012 as early as possible, preferably within 6(six) months from the date of receipt of the copy of this judgment without any adjournment, if exist.

The order of stay granted earlier by this Court stands vacated.

Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.