

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

Present:

Mr. Justice Muhammad Abdul Hafiz

Civil Revision No. 5012 of 2014

Zafar Ahmed

Defendant-Respondent-Petitioner

-versus-

Abdul Mostan Billah and others
Plaintiffs-Appellants-Opposite-Parties

Mr. Md. Dider Alam Kollol, Advocate
for the petitioner

Mr. Shahdad Hossain, Advocate with
Mr. Hazi Kabir Miah Sarker, Advocate
for the opposite parties

Judgment on 01.3.2023

This Rule was issued calling upon the opposite parties to show cause as to why the impugned Judgment and Decree dated 03.6.2014 passed by the learned Additional District Judge and Bankruptcy Court, Chittagong in Other Appeal No. 416 of 2005 allowing the appeal and thereby reversing the Judgment and Decree dated 10.8.2005 passed by the learned Senior Assistant Judge, Banskhali, Chittagong in Other Suit No. 174 of 2001 dismissing the suit 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 opposite parties as plaintiffs instituted Other Suit No. 174 of 2011 in the Court of Senior Assistant Judge, Banskhal, Chittagong impleading the instant petitioner as defendant No.1 and other pro-forma opposite parties as the defendant Nos. 2-4 in the original suit (after death of the defendant No.2 his legal heirs are added as respondent Nos. 2-5 in the instant appeal) praying for permanent injunction in the scheduled suit land.

The Case of the plaintiffs, in short, is that the schedule suit land originally belonged to Bacha Mia and his mother Jamijunessa who owned the property by compromise and Bacha was owner of his mother's portion by inheritance. After the death of Bacha Miah his son Abdus Salam defendant No. 3 (proforma opposite party No. 14 herein) and four daughters namely Sakera, Sukuntaz, Hafeza and Chemona were the existing legal heirs. Then the defendant No. 3 Abdus salam (proforma opposite party No. 14 herein) had mortgaged his portion of the schedule suit land to the defendant No. 2 Nikkunja Bihari Das (after his death his legal heirs are added as respondent Nos. 2-5 in the appeal and proforma opposite party Nos. 10-13 herein) being mortgage deed No. 1656 dated 01.04.1978 and on the same date a registered deed of agreement was executed. Thereafter the defendant No. 3 (proforma-

opposite party No. 14 herein) filed a suit No. 149 of 1982-1983 against the said defendant No. 2 with a view to redeem the mortgage of schedule suit land and accordingly redeemed the suit land on 22.06.1983 and thus being in possession sold out the same and delivered the possession of 1(one) Gonda 02(two) Kara of schedule suit land to the predecessor of instant opposite parties Fazlul Kabir and rest of 01(one) Gonda 01 (one) Kara of schedule suit land was purchased by the instant opposite party No. 8 on 17.11.1986. Subsequently, the daughters of Bacha Miah sold out 1(one) Gonda 2(two) Kara of their portion of schedule land to the opposite party No. 8 vide deed dated 04.08.1992 and 1(one) Ganda of schedule land vide deed dated 21.01.1992 sold out to the instant opposite party No. 9. Thus, the instant opposite party Nos. 8 and 9 and Fazlul Kabir had become absolute owner and possessor of the said schedule suit land. The said Fauzul Kabir died leaving instant opposite party Nos. 1-8 as his legal heirs and they had possessed the same since purchase by erecting house etc. The defendant-petitioner has no title and interest in the schedule suit land and they had not obtained any share or right, title from the defendant No. 3. That on 10.08.2001 the defendant-petitioner came in the

schedule suit land and threatened to the plaintiffs claiming his title in the suit land, then the plaintiffs filed the instant suit.

The defendants contested the suit by filing written statement denying all the material allegations as set forth in the plaint. The of defendant's case in short, is that the original suit land was originally belonged to Bacha Miah and his mother Jamizunessa. After the death of Bacha Miah his 1 (one) son Abdus Salam defendant Nos. 3 and 4 daughters got title and possession of the same as their respective share. The defendant No. 3 (herein proforma opposite party No. 14) on 01.04.1978 mortgaged the said share of land and on the same date made an agreement being Nos. 1656 and 1657 in favour of the defendant No. 2 (predecessor of proforma opposite party Nos. 10-13) and also delivered possession of the same. Then the defendant No. 3 filed M.L. Case No. 149 of 1982-1983 before the Assistant Commissioner (land), Banskhal, Chittagong for redemption the mortgage of the said scheduled land from the defendant No. 2. Accordingly, on 25.06.1983 the Assistant Commissioner (Land) Banskhal, Chittagong was pleased to pass an order stated that as the 7 years stipulated period of said mortgage had not been expired so the petitioner is directed to pay borrowed money at Tk. 856 to the defendant No. 3. But the defendant No. 3 failed

to deposit the same as per aforesaid order as a consequence defendant No. 3 could not redeem the mortgage said suit property which belonged to defendant No 2. Then the said M.L. Case reopened and in that Case on 13.09.1998 the defendant No. 2 filed Solenama and as per Solenama the defendant No. 2 had become absolute owner of the suit land by virtue of earlier mortgage dated 01.04.1978. Then on 15.09.1978 the petitioner Zafar Ahmed had purchased suit land from the defendant No. 2 Nikunja Bihari Das and being in possession mutated his name vide Mutation Case No. 158/2000-2001 but the plaintiff filed the present suit which is false and also with the intension to harass the defendants.

The learned Senior Assistant Judge, Banskhali, Chittagong dismissed the suit by his judgment and decree dated 10.8.2005. Against the aforesaid judgment and decree the plaintiffs as appellant preferred Other Appeal No. 416 of 2005 before the learned District Judge, Chattogram which was transferred to the learned Additional District Judge and Bankruptcy Court, Chattogram who allowed the appeal on 10.8.2005 and hence the defendant as petitioner moved before this Court with an application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

Mr. Md. Dider Alam Kollol, the learned Advocate for the defendant-petitioner, submits that at the time of taking evidence the defendant-petitioner produced the mortgaged deed and registered agreement being Nos. 1656 and 1657 dated 01.4.1978 as Exhibit- Ka and Kha, Order of the M.L. Case No. 149 of 1982 as Exhibit-Ga and Solenama dated 13.8.1998 executed between the defendant No. 3 (herein proforma opposite party No. 14) and defendant No. 2 (predecessor of proforma opposite party Nos. 10-13) which proved that on 25.6.1983 as per Order of the said M.L. Case the defendant No. 3 did not deposit the borrowed money for redemption of the said schedule mortgaged suit land as a consequence the schedule case land had not been redeemed. The possession of the suit land was belonged to defendant No. 2 and subsequently transferred the same in favour of instant petitioner vide registered kabala on 13.8.1998. But the learned Appellate Court below misread and non-reading both oral and documentary evidence without applying judicial mind passed the impugned judgment and decree which is liable to be set aside. He further submits that the Solenama Exhibit-Ga executed between the defendant Nos. 2 and 3 is not proved forged or concocted. But on the basis of Solenama the right, title and interest of the schedule suit land had been transferred and vested upon the defendant No. 2.

Subsequently the defendant No. 2 transferred the same to the instant petitioner. The learned Trial Court correctly found that the plaintiffs-opposite parties did not prove their possession in the suit land. The learned Trial Court in its observation held that সালামের (defendant No. 3) ১ বৎসর দখল দেখে জমি খরিদ করেছেন এবং তিনি ১৯৮৬ইং সনের পূর্বে দেশের বাহিরে ছিলেন এবং ১৯৯৮ইং সনে ৩ নং বিবাদীর এম.এল কেইস বিষয়ে তাহারা জানেন এবং তিনি ১নং বিবাদীর অংশ দাবী করেন না। এই সাক্ষী এম, এল মোকদ্দমায় ৩নং বিবাদী দখল পায় কিনা প্রশ্নে নীরব থাকে। But the learned Appellate Court below without considering the same reversed the judgment and decree passed by the learned Trial Court which is liable to be set aside. He lastly submits that the learned Appellate Court below misread and misconstrued and misinterpreted the provision of Section 95A of the State Acquisition and Tenancy Act and thereby committed an error of law resulting in error in his decision occasioning failure of justice.

Mr. Shahdad Hossain, the learned Advocate for the opposite-parties, submits that admittedly the defendant No. 3 Abdus Salam had mortgaged his portion of the schedule suit land to the defendant No. 2 Nikungo Bihari Das being mortgage deed No. 1656 on 1.4.1978 and on the same date a registered agreement deed No. 1657 was executed. Thereafter the defendant No. 3 Abdul Salam filed a Suit No. 149 of 1982-1983

against the said defendant No. 2 Nikunjo Bihari Das with a view to redeem the mortgage of schedule suit land and accordingly the order of redemption allowed by order dated 22.06.1983 in favour of defendant No. 3 Abdur Salam giving the title and possession of the mortgaged property. He further submits that as the mortgaged deed and also an agreement deed to recovery is completely a usufructuary mortgage (খাই খালাসী বন্ধক) according to section 95A of the State Acquisition and Tenancy Act and after that period mortgagee has no more right over that mortgaged property which rightly found by the Court of Appeal below উক্ত ধারা মতে এগ্রিমেন্ট যুক্ত বন্ধক খাই খালাসী বন্ধক হিসেবে বন্ধক গ্রহীতা ৭ বৎসর ভোগ দখল করার পর উক্ত বন্ধক বিমুক্ত হইয়া যায়। ফলে ২নং বিবাদীর বরাবরে ৩নং বিবাদী কর্তৃক প্রদর্শনী- ৭ হিসাবে চিহ্নিত বিগত ০১/৪/১৯৭৮ইং তারিখের এগ্রিমেন্ট মূলে অত্র মামলার নালিশী ভূমি বাবদ প্রদত্ত খায় খালাসি বন্ধক বিগত ০১/৪/৮৫ইং তারিখে অবসান ঘটয়াছে।” He next submits that from the material on record it is clear that the opposite-parties brought the schedule suit land on 17.11.1986 that means after 1.4.1985. So it is crystal clear that the title of the plaintiff-opposite parties established according to the law and there is no scope in the eye of law after about 16 (sixteen) years to reopen the said M.L. Case No. 149/1982-83 on 13.9.1998 and filing Solanama and getting order; hence the Trial Court committed an error of law

taking into no consideration. In this regard he referred a decision reported in 58 DLR (AD)79. He next submits that the agreement made between the defendant Nos. 3 and 2 is completely a usufructury mortgage according to section 95A of the State Acquisition and Tenancy Act 1950. This law is actually very much strict to protect the raiyat as the background of the legislation that the underlying object of the provision of section 95A is to rescue a raiyat from the clutches of the money lenders who taking advantage of the poverty of the raiyat. In this regard he referred a decision reported in 49 DLR (AD)71. He next submits that the activity of the petitioner defendant that reopen the M.L Case No. 149/1982-83, filed Solenama and got order accordingly is nothing but a chain of fraud with a view to grab the plaintiff's scheduled land that it is well established principle of law that fraud vitiates all judicial proceedings. In this regard he referred a decision reported in 50 DLR (AD) 209. He next submits that the opposite parties-plaintiffs witnesses proved their possession by producing documents and adducing corroborating evidences categorically asserted that plaintiffs have been in possession with converting the suit land into vhati land connecting their homestead and subsequent B.S record had been prepared in the name of plaintiffs-opposite-parties being

B.S. khatain No. 3459 and accordingly the plaintiffs have been paid land rents to the Government properly till 1423 B.S. (Exhibit-2, rent receipt). In this regard he referred a decision reported in 35 DLR (AD) 217 and he further submits that the Appellate Court below rightly found that পি, ডাব্লিউ ১ তাহার জবানবন্দীতে বলেন যে, তাহারা পূর্ববর্তীএরমে নালিশী জমি বসত বাড়ীর সামিলে ভোগ দখল করিয়া আসিতেছেন। বিবাদীপক্ষ কর্তৃক এই সাক্ষীকে জেরা কালে এই সাক্ষী বলেন যে, নালিশী জমির পশ্চিমে বাদীনি ফিরোজার বসত বাড়ী। একইভাবে বাদীপক্ষের ২ নং সাক্ষী জেরার উত্তরে বলেন যে, নালিশী জমির পশ্চিমে বাদীর ভিটা। একইভাবে বিবাদীপক্ষের সাক্ষী ডি, ডাব্লিউ-২ জেরায় বলেন যে, নালিশী জমির পশ্চিমে বাদীর বাড়ী ও গোরস্থান। উক্ত পি, ডাব্লিউ-১, পি, ডাব্লিউ-২ এবং ডি, ডাব্লিউ-২ এর সাক্ষী দ্বারা এবং তৎসমর্থনে বাদীপক্ষের প্রদর্শনী-৩ হইতে প্রদর্শনী- ৬ পর্যন্ত মূল দলিলাদি, প্রদর্শনী- ২ হিসাবে দাখিলী খাজনার দাখিলা হইতে বাদীপক্ষের দখল প্রমানিত হয়। He lastly submits that the defendant No. 3 Abdus Salam being plaintiff filed a suit of Haqqe-shufa'a under Muslim law against the plaintiff-opposite parties being Miscellaneous Case No. 15 of 1994 which was non-prosecuted by defendant No. 3 Abdus Salam on ground of compromise between the parties out of Court; all documents are available in LCR record. So the right, title and possession of the plaintiff-opposite parties over the suit land has been proved beyond all shadow of doubt.

Heard the learned Advocate for both the parties and perused the record.

Admittedly, the defendant No. 3 Abdus Salam (herein proforma opposite party No. 14) on 01.4.1978 mortgaged the suit land and on the same date made an agreement being No. 1656 and 1657 in favour of the defendant No. 2, Nikunja Bihari Das (predecessor of proforma opposite party Nos. 10-13) and also delivered possession of the same to him. Then the defendant No. 3 filed M.L. Case No. 149 of 1982-83 before the Assistant Commissioner (Land), Banskhal, Chattogram for redemption the mortgage of the suit land from the defendant No. 2. Accordingly, on 25.6.1983 the aforesaid Assistant Commissioner (Land) passed an order dated 22.6.1983 stated that as the 7 years stipulated period of said mortgage had not been expired so the aforesaid Abdus Salam defendant No. 3 is directed to pay borrowed money at Tk. 856 to the defendant No. 2 Nikunja Bihari Das but the defendant No. 3 Abdus Salam failed to do the same. As the mortgaged deed and also an agreement deed to reconvey is completely an usufructuary mortgage (থাই খালাসী বন্ধক) according to Section 95A of the State Acquisition and Tenancy Act and after that period mortgagee has no more right over the mortgaged property which rightly found by the Court of Appeal below.

Considering the facts and circumstances of the case I find no substance in the Rule, rather I find substances in the submissions of the learned Advocate for the plaintiffs-opposite parties.

In the result, the Rule is discharged.

The impugned Judgment and Decree dated 03.6.2014 passed by the learned Additional District Judge and Bankruptcy Court, Chittagong in Other Appeal No. 416 of 2005 allowing the appeal and thereby reversing the Judgment and Decree dated 10.8.2005 passed by the learned Senior Assistant Judge, Banskali, Chittagong in Other Suit No. 174 of 2001 dismissing the suit is hereby upheld.

The order of stay and status-quo granted earlier by this Court is hereby vacated.

Send down the lower Courts record with a copy of this Judgment to the Courts below at once.