

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

Present:

Mr. Justice Muhammad Abdul Hafiz

Civil Revision No. 1145 of 2003

Ali Farid

Defendant-Appellant-Petitioner

-Versus-

Md. Harun Rashid (Matawalli) and others
Plaintiffs-Appellants-Opposite Parties

Mr. Sudipta Arjun, Advocate
for the Petitioner

Mr. Abdul Barek Chowdhury, Advocate
with

Mr. Md. Alamgir Kabir, Advocate

Mr. Md. Sharif Uddin Ratan, Advocate
for the Opposite Party No. 1

with

Civil Revision No. 304 of 2021

Ali Farid

Defendant No. 1-Appellant-Petitioner

-Versus-

Jhalopara Jame Masjid and others
Plaintiffs-Respondents-Opposite Parties

Mr. Sudipta Arjun, Advocate
for the Petitioner

Mr. Abdul Barek Chowdhury, Advocate
with

Mr. Md. Alamgir Kabir, Advocate

Mr. Md. Sharif Uddin Ratan, Advocate
for the Opposite Parties

Judgment on: 14.3.2023

These two Rule have been arisen out of the same Judgment and Decree and were heard analogously and thus both the revisions are to be disposed of by one Judgment.

In Civil Revision No. 1145 of 2003 Rule was issued calling upon the opposite party Nos. 1-6 to show cause as to why the impugned Judgment and Decree dated 14.10.2002 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet in Title Appeal No. 129 of 1991 dismissing the appeal and thereby affirming the Judgment and Decree dated 27.3.1991 passed by the learned Senior Assistant Judge, Circuit Court, Sylhet in Title Suit No. 24 of 1990 decreed the suit in part should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

In Civil Revision No. 304 of 2021 Rule was issued calling upon the opposite party Nos. 1-27 to show cause as to why the impugned Judgment and Decree dated 14.10.2002 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet in Title Appeal No. 74 of 1991 allowing the appeal and thereby reversing the Judgment and Decree dated 27.3.1991 passed by the learned Senior Assistant Judge, Circuit Court, Sadar, Sylhet in Title Suit No. 24 of 1990 decreed the suit in part 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 party Nos. 1, 18, 19 and predecessors of opposite party Nos. 2-17, 20-27 as plaintiffs in representative capacity filed Title Suit No. 24 of 1990 before the learned Senior Assistant Judge, Circuit Court, Sadar Sylhet, against the defendant-petitioner and others for declaration of title of Jhalopara Jame Masjid in respect of the suit second schedule land, confirmation of possession in respect of the suit third schedule land and recovery of khass possession of the suit fourth schedule land of the plaint by evicting defendant Nos. 1 to 4 therefrom.

The Case of the plaintiffs in brief is that the suit plot Nos. 1074 and 1075 belongs to Jhalopara Jame Masjid. In plot No. 1074 Masjid building and pond with pucca ghat is situated and in plot No. 1075 area 0.0468 acres of land Imam house and Masjid store is situated. In the 4th schedule land a house was built with the people's subscription during British era in which cloth sewing works were done. Subsequently this house was transformed by Masjid Committee into a tin shade pucca wall house in which the father of defendant No. 1 Niamat Ullah used to work. Niamat Ullah died leaving behind minor defendant No. 1 and his wife. As the defendant No.1 and his mother prayed for permission to

continue work in the said 4th schedule house, the local elderly people permitted them to stay therein in the first part of 1940 with condition to vacate whenever Masjid committee demands. The defendant No. 5 served as a Motwalli of the plaintiff Masjid from 1950 to 1986 and he did not take any step although the suit second schedule land was wrongly recorded in the name of defendant No. 1. In the year 1986 the defendant No. 1 started to erect new wall in place of the old wall in suit premises by renovating the house thereon and he claimed title over the suit land on the basis of wrong record denying title of the plaintiff Masjid. He also refused to deliver possession of the 4th schedule land and premises and hence the suit.

The defendant No. 1 petitioner herein contested the suit by filing a written statement and contended inter-alia that there is no cause of action of filing this suit and it is not maintainable in its present form, it is barred by limitation as well as by estoppels, waiver and acquiescence. Denying all the material facts of the plaint, the defendant No. 1 stated that the father of the defendant No. 1 took jote settlement of the suit plot No. 1075 from the Jhalopara Jame Masjid about 70 years ago, constructed house thereon to do cloth sewing business therein and paid rents to the Masjid Committee. The defendant No. 1 was a minor when his

father died and due to this reason he could not continue with the Tat factory and his mother sold out all the materials. After being major, defendant No. 1 again started business in the suit land and as the house fencing was damaged, the defendant No. 1 constructed pucca wall in the year 1972. The defendant No. 1 is in exclusive possession of the 2nd schedule land and SA record has also been prepared in his name with full knowledge of the Masjid Committee. As the Imam of Jhalopara Masjid had no place to stay, the local elders requested the defendant No. 1 permit the Imam to stay in 2nd schedule land, for which the defendant No. 1 permitted him and as such the Imam has been living therein as permissive possessor of the defendant No. 1. The defendant No. 1 has been possessing the suit land by paying rents to the Government. The plaintiffs failed to cancel record of the suit land in ADC revenue and filed the suit with false statements and therefore the suit is liable to be dismissed with cost.

The learned Senior Assistant Judge, Circuit Court, Sadar, Sylhet, by judgment and decree dated 27.03.1991, decreed the suit in part declaring title and confirming possession of the plaintiffs only in respect of the 3rd schedule land of the plaint.

Being aggrieved the plaintiffs as appellants filed Title Appeal No. 74 of 1991 and the defendant No. 1 as appellant also

filed Title Appeal No. 129 of 1991 before the learned District Judge, Sylhet, which on transfer were heard analogously by the learned Joint District Judge, Artharin Adalat, Sylhet, who by judgment and decree dated 14.10.2002 allowed Title Appeal No. 74 of 1991, thereby decreeing Title Suit No. 24 of 1990 and dismissed Title Appeal No. 129 of 1991 and hence the defendant as petitioner filed Civil Revision No. 1145 of 2003 against the judgment and decree passed in Title Appeal No. 129 of 1991 and obtained Rule from this Court. Subsequently the petitioner also filed Civil Revision No. 304 of 2021 against the judgment and decree passed in Title Appeal No. 74 of 1991 and obtained the Rule.

Mr. Sudipta Arjun, the learned Advocate for the defendant-appellant-petitioner submits that the plaintiffs filed the suit for declaration of title of Jhalopara Jame Masjid in the suit schedule land of the plaint and as per the plaint case, admittedly the said Masjid is Waqf property. Under Section 50 of the Waqf Ordinance, 1962 such a suit is barred by law, since any question as to whether a property is waqf or not, can only be determined by the Waqf Administrator and the plaintiff by filling a suit for declaration of title, actually trying to declare the defendant's land as the Masjid Waqf Property. The Hon'ble Appellate Division in a case reported

in 20 BLC (AD), P- 338, specifically held that such a suit for declaration of title on behalf of a waqf property is not maintainable at all. But both the Courts below without considering such mandatory provision of law entertained the suit and decreed the same, which was not maintainable at all. He next submits that the suit plot No. 1075 has been admittedly recorded in SA khatian Nos. 582 (Exhibit-2ka) as “shop” in the name of answering defendant and finally published. Moreover, Exhibit-Ka-Ka(9) series and the series of rent receipts, clearly show that the defendant has been paying rents since 1964; Apart from this, the Exhibit- Kha, the Certificate No. 157/71-72 issued under the Public Demand Recovery Act also prove that the defendant Ali Farid, as owner of the suit 0.06 acres of land, paid rents to the Government from 1369-1377 B.S. All these documents were exhibited without any objection from the plaintiffs and clearly prove the defendant’s jote right as well as exclusive title and prolong possession in the suit plot No. 1075 as recorded owner. Moreover, it is also evident from the records that land of the Masjid has been separately recorded in S.A. plot No. 1074 in different khatian in the name of Jhalopara Jame Masjid. But the Courts below without considering any of these evidences on record most arbitrarily decreed the suit. He next submits that the plaintiffs

claim that the defendant recorded the land in his name collusively; but the Court of appeal below specifically found that the defendant was only 13 years old at the time of SA record. Therefore the plaintiffs allegation of collusion against a child is absurd and not tenable in the eye of law. He next submits that the Trial Court although specifically found that the defendant No. 1 has been possessing the 4th schedule land beyond the period of limitation and that the plaintiff could not prove their story of permissive possession of the defendant. Therefore the very basis of the plaintiff's case has not been proved at all. But the learned Trial Court erroneously decreed the suit in part in respect of 3rd schedule land only and on appeal the learned Appellate Court below without reversing those findings of the Trial Court below most arbitrarily decreed the suit in full. He next submits that in paragraph No. 4 of the plaint, the plaintiffs specifically admit that the then Motwalli of the plaintiff Masjid who performed since 1950 to 1986 was fully aware of the record of rights in the name of defendant No. 1 and it has been further admitted that the predecessor of the defendant No. 1 as well as the answering defendant has been possessing the suit land since British period; all which clearly show that the suit was specifically barred by limitation. But both the Courts below without framing any issue regarding limitation most arbitrarily

decreed the suit. He next submits that although the plaintiffs claim that the defendant and his predecessors were permissive possessor in the suit land under the Masjid but they failed to produce any oral or documentary evidence to prove such claim. But the Court of Appeal below shifted the burden of proof the case upon the defendant despite the plaintiffs failed to discharge their onus of proving the case of permissive possessor. He next submits that PW-1 himself in cross examination specifically admitted that he has no personal knowledge as to who constructed the house in the suit land and that he only heard the story from the local elderly persons; But the Court of Appeal below on the basis of such hearsay evidence most arbitrarily decreed the suit in favour of the plaintiffs. He next submits that although the paragraph No. 4 of the plaint specifically states that the defendant No. 5, the previous Motwalli did not take any step against the wrong record in collusion with the defendant No. 1 but the P.W.1 in cross examination specifically stated- “কারী আব্দুল হামিদের পরে মোতোয়াল্লী হন ৫ নং বিবাদী.....”... “কারী আব্দুল হামিদ ও ৫ নং বিবাদী উভয়ই সৎ লোক এবং মসজিদের স্বার্থ ঠিকভাবে দেখা শূনা করিত।” – and all these contradictory statements make it crystal clear that statements of the plaint are false and previous Motwalli did not take any step against the defendant simply because he is the recorded owner of the suit land.

He next submits that the P.W. 2 in his deposition clearly stated that- “মসজিদের জায়গা ১নং বিবাদীর পূর্ব পুরুষের এবং পূর্ব পুরুষ তাহা মসজিদকে দান করে। ১নং বিবাদীও ঝালোপাড়া মসজিদে নামাজ পড়ে।” and the PW-3 stated in his chief examination - “এখন হইতে ৫ বৎসর পূর্বে ১নং বিবাদী দোকান ঘরের পরিবর্তন করিতে চাহিলে মসজিদের মুসল্লীগন ও মোতাম্মলী তাহাতে বাধা প্রদান করেন।” and in cross examination he stated- “ উক্ত ৫ বৎসর পূর্বে মসজিদ কখনো নাঃ গৃহ দাবী করে নাই।” and such admissions by PWs clearly prove that the defendant No. 1 is the owner of the suit land. He lastly submits that under the aforesaid facts and circumstances, it appears that the plaintiffs filed the suit for declaration of title of Jhalopara Jame Masjid, which according to plaint case, is Waqf Property. Although such a suit was specifically barred under the provisions of the Waqf Ordinance, 1962 and was not maintainable at all. But both the Courts below without considering such statutory bar, proceeded with the suit as well as appeal without having any jurisdiction to decide the waqf character of the suit land. Therefore, the Rule as issued in both the Civil Revision is liable to be made absolute and the judgment and decree of the Courts below are liable to be set aside.

Mr. Abdul Barek Chowdhury, the learned Advocate with Mr. Md. Alamgir Kabir, the learned Advocate opposes the Rules.

Heard the learned Advocates for the parties and perused the record.

Jhalopara Jame Masjid as plaintiffs filed the instant suit for declaration of title in the suit land and as per the plaint the said Masjid is Waqf property. The Hon'ble Appellate Division in a case reported in 20 BLC (AD) 338 specifically held that such a suit for declaration of title on behalf of Wafq property is not maintainable at all. On the other hand under Section 50 of the Waqf Ordinance, 1962 such a suit is barred by law. But both the Courts below without considering such mandatory provision of law entertained the suit and decreed the same.

Considering the facts and circumstances of the case I find substance in the Rules.

In the result, both the Rules are made absolute.

The impugned Judgment and Decree dated 14.10.2002 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet in Title Appeal No. 129 of 1991 dismissing the appeal and thereby affirming the Judgment and Decree dated 27.3.1991 passed by the learned Senior Assistant Judge, Circuit Court, Sylhet in Title Suit No. 24 of 1991 is hereby set aside.

And

The impugned Judgment and Decree dated 14.10.2002 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet in Title Appeal No. 74 of 1991 allowing the appeal and

thereby reversing the Judgment and Decree dated 27.3.1991 passed by the learned Senior Assistant Judge, Circuit Court, Sadar, Sylhet in Title Suit No. 24 of 1990 is hereby set aside.

The opposite parties may seek remedy from the Waqf Administrator if they desire.

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