IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 138 OF 2009

(Arising out of C.P No. 819 of 2007)

Md. Abdul Hanif @ Abu Hanif and others .... Appellants

-Versus-

Bhupen Nath and others ....Respondents

For the Appellants	:	Mr. Md. Nurul Amin, Senior Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-record
For Respondent Nos. 3, 4, 5(a), 5(b)(i)-5(b)(iii), 5(c) and 5(d)	:	Mr. Md. Firoz Shah, Advocate-on-record
For Respondent Nos. 1-2, 5(b) and 6-8	:	Not represented
Date of Hearing	:	23.04.2024 and 24.04.2024
Date of Judgment	:	25.04.2024

J U D G M E N T

Md. Ashfaqul Islam, J: This appeal is directed against the judgment and order dated 20.03.2007 passed by the High Court Division in Civil Revision No. 4076 of 2000 discharging the Rule affirming the judgment and decree dated 29.06.2000 passed by the then Subordinate Judge, 1st Court, Pabna in Title Appeal No.28 of 1992 reversing those dated 05.10.1991 passed by the Assistant Judge, Sathia, Pabna in Other Suit No.40 of 1990 decreeing the suit.

The present appellants, the petitioners in civil revision were impleaded as parties in the lower appellate Court.

The aforesaid suit was filed for declaration of title and confirmation of possession over the suit land.

The case of the plaintiffs, in short, is that the land in CS Khatian No. 300 belonged to Bhim Sarder, who died leaving son Padda Sarder. Due to arrear of rents the landlord Binode Bihari Shaha and others filed rent suit in the Court of the then Munsif, Pabna against Padda Sarder for realization of rent for the years 1360-62 B.S. and subsequently he paid rent to the Landlord and got "Dakhila". At the time of preparation of S.A. record Padda Sarder became blind and his 3 sons i.e the plaintiffs were minor. As a result the suit land was recorded in the name of Shorot Shundori. That record was wrong. The plaintiffs have been possessing the suit land and the defendants have no right, title and possession in the suit land. The plaintiff No. 1 went to Ataikula Tahsil Office in the 1st part of Poush 1383 B.S. for payment of rent and came to learn that the suit land was

not recorded in their name, and the defendants claimed the suit land. Hence the suit was filed.

The defendant Nos. 2 and 3 contested the suit by filing written statement wherein they admitted the right, title, interest and possession of the suit land by Bhim Sarder.

The defendants, in their written statement, acknowledged Bhim Sarder's possession and Padda Sarder's subsequent ownership. They also mentioned that Padda had mortgaged the property in the year 1928 to one Irad Ali Matbar and took Taka 100/-. Irad Ali Matbar later acquired possession of the land through auction since Padda defaulted on repayment. After obtaining possession, Irad Ali Matbar transferred the property to Shorot Shundori. Shorot Shundori, who designated the property as her Stridhan, subsequently passed away, leaving her son, Shatin Chandra, as the heir. During her exclusive possession, Shorot Shundori transferred the land to her daughter, Sushila Bala's three sons: Dulal, Bhupen, and Paritosh on 13.05.1970 and delivered possession. They started possessing the suit lands. Dulal died leaving his

mother Sushila Bala and two brothers Bhupen and Paritosh who continued to possess the suit land since then.

The trial Court decreed the suit, leading to an appeal being Title Appeal No. 28 of 1992. The lower appellate Court reversed the decision, prompting the respondents to seek recourse in a civil revision before the High Court Division. The High Court Division upheld the lower appellate Court's decision, leading to the present appeal.

Mr. Md. Nurul Amin, the learned Senior Advocate for the appellants argues that Padda Sarder filed Miscellaneous Case No.36 of 1941 for setting aside auction followed by a compromise as evident by exhibit C1 but the Court of Appeal below and the High Court Division made out a third case that Padda Sarder made a compromise with Irad Ali admitting the auction and thereby erred in law in discharging the Rule.

He further argues that the Court of Appeal below committed an error of law for taking into consideration Exhibit-C1 without noticing that no amendment was made in the pleading in respect of the same in violation of

provisions of Order 6 Rule 7 of the Code of Civil Procedure.

Next he submits that the plaintiffs' witnesses PW-1 to PW-6 proved the plaintiffs' case. Moreover, defence witness DW-2 also in his examination-in-chief stated "নালিশী জমি বর্তমানে ক্ষুদিরাম দখল করে" and in cross-examination deposed that "মধু, যদু ও খুদিরাম নিজ হাতে হাল চাষ করে". But the High Court Division did not at all consider this vital evidence and also violated the mandatory provisions of law without discussing any evidence.

Lastly, he submits that even the case of the defendants is taken to be true in its entirety; the compromise decree in Miscellaneous Case No. 36 of 1941 is not admissible in evidence as because the same is not registered under Section 17(2)(VI) of the Registration Act.

On the other hand, Mr. Md. Firoz Shah, the learned Advocate-on-record appearing for the respondents made his submissions supporting the decision of the High Court Division. He contends that the continuous possession by the plaintiffs as the heirs of Padda Sarder was not proved. He further submits that the plaintiffs produced

rent receipts of the year of 1385 and 1387 BS but they failed to produce rent receipts ranging from the year of 1362-1385 BS. Moreover, the plaintiffs did not produce the nephew of Padda, Rupendranath whose testimony was very much important as he was in possession of the suit land on behalf of Padda Sarder well before the advent of the plaintiffs in the scenario as the heirs of Padda Sarder.

He further submits that there is an anomaly in as much as the plaintiffs claim that they paid the rent for the suit land as aforesaid but they came to know about the so-called wrong SA khatian later in 1383 BS. Therefore, the suit is barred by limitation as not being filed in due time.

He also submits that SA khatian was rightly recorded in the name of Shorot Shundori as Padda Lal Sarder waived the claim of the suit land through clause 3 of the solenama submitted in the Mortgage Suit No. 36/41 filed in first Munsif Court of Pabna acknowledging the possession of Irad Ali.(Exhibit C1). After the compromise decree dated 24.4.42 the claim of Padda Lal Sarder does not exist on the suit land as the same was waived and

duly recorded in the name of Shorot Shundori, the mother of the defendants.

We have heard the learned Advocates of both sides and gone through the judgments of the Courts below. We have also perused the evidence on record.

PWs 1-6 deposed confirming the title and possession of the plaintiffs. Moreover, DW-2 also stated in his examination-in-chief that "নালিশী জমি বর্তমানে ক্ষুদিরাম দখল করে" and in cross-examination stated that "মধু, যদু ও খুদিরাম নিজ হাতে হাল চাষ করে". This vital aspect of the evidence of PWs which was also supported by the defence witness No. 2 has a positive evidential value on the question of possession of the plaintiffs in the suit land which escaped notice of the High Court Division.

The defendants' endeavor to put forward exhibit C1 on record was erroneous since the same was not in their pleadings as opposed to Order 6 Rule 7 of the Code of Civil Procedure.

In the case of 5 BLC AD 108 this Division observed:

"Neither from the averments made in the plaint that the plaintiff claimed the property in suit as a vested property nor the learned Subordinate Judge held that the

property was a vested property but in spite of absence of such averments and finding the learned Judges of the High Court Division have made out a third case in holding that the property is a vested property which is wrong."

As already we have mentioned that the consideration of exhibit C1 by the lower appellate Court was not in the written statement of the defendants. Hence, it offends the provision of Order 6 Rule 7 of the Code of Civil Procedure which enjoins that the new grounds of claim those are absent in pleadings should not be allowed to raise without amendment of pleadings. This statutory provision of law has been designed as a safeguard so that one cannot be taken by surprise by the other side at the time of trial.

The most significant issue of the instant case is that the trial Court as well as the lower appellate Court both had recognized that the RS Khatian have been rightly prepared in the name of the plaintiffs. It is written in the judgment of the trial Court:

"বাদীপক্ষ আরো দাবী করেন যে, না: জমি বাবদ আর,এস, হাল রেকর্ড বর্তমান বাদীগনের নামে শুদ্ধ ভাবে সরজমিনে দখল দৃষ্টে লিপিবদ্ধ হইয়া যায়। এবং বাদী পক্ষ নাঃ জমি বাবদ ১৩৮৬ সন পর্যন্ত খাজনা

দিয়াছেন। বাদীপক্ষ আর,এস, খতিয়ানের কপি প্রমান ৪ এবং সরকারী খাজনার দাখিলা প্রমান ৫,৫(ক) দাখিল করিয়াছেন।”

On the other hand lower appellate Court also found:

“ইহা বিতর্কিত নহে যে, নালিশী জমি বাবদ আর,এস, খতিয়ান বাদীগনের নামে প্রস্তুত হইয়াছে। বাদী পক্ষ উক্ত আর, এস, খতিয়ানে আপীল আদালতে দাখিল করিয়াছেন এবং উক্ত আর,এস, খতিয়ানে বিরুদ্ধে বিবাদী পক্ষ কর্তৃক আনীত ১৩ নং .... কেস ও ১৬৮৮/৭৯ নং আপীলের যথাক্রমে ১৪/৬/৭৮ ও ১৪/৯/৮১ ইং তারিখের আদেশে জাবেদা নকল দাখিল করিয়াছেন।”

The presumption of correctness as to CS record of rights is not certainly available with regards to the state acquisition Khatians in pursuance of the provisions under Section 103(B) of the Bengal Tenancy Act but subsequently by an amendment in the year 1967, section 144A was incorporated in the State Acquisition and Tenancy Act. It is reproduced below:

“Every entry in a record-of-rights prepared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.”

Notably, both the provisions as contemplated in Section 103(B) of the Bengal Tenancy Act (in respect of CS Khatian) and Section 144A of the State Acquisition and Tenancy Act (in respect of RS Khatian) are rebuttable,

that is to say, every entry in the Khatians, as the case may be, shall be presumed to be correct until it is proved by evidence to be incorrect.

The thrust and the gravamen of the instant case invariably relates to the question of the entry of the plaintiffs' names in the RS Khatian.

In the instant case admittedly RS Khatian was prepared in the name of plaintiffs. The trial Court as well as the Appellate Court below clearly mentioned and admitted regarding the same. We don't find any positive steps that have been taken to dislodge the said presumption of correctness from the record, only a feeble attempt was made by the Court to that effect in its observations which is as under:

"উক্ত আর,এস, খতিয়ানে বিরুদ্ধে বিবাদী পক্ষ কর্তৃক আনীত ১৩ নং .... কেস ও ১৬৮৮/৭৯ নং আপীলের যথাক্রমে ১৪/৬/৭৮ ও ১৪/৯/৮১ ইং তারিখের আদেশে জাবেদা নকল দাখিল করিয়াছেন। যাহা হইতে দেখা যায় যে, উক্ত আপলি কেস ও আপীল বিবাদীপক্ষ কর্তৃক আনীত হইলেও পরবর্তী পর্যায়ে তাহা পরিচালিত হয় নাই।"

Therefore, the plaintiffs' names in the RS Khatian stand correct. Certainly this piece of evidence though rebuttable could not be rebutted by the defendants in due course.

Let us now glean some relevant authorities on the point:

In the case of Halima Begum vs. Syed Ahmed 21 DLR 854 his lordship Nurul Islam, J observed:

> "It is true that record of right indicates certain right of certain parties but that right is certainly dependent on some material evidence, oral and documentary so as to establish title in favour of persons who claim under the said record of right. The presumption of correctness as to CS record of right is not certainly available with regard to the State Acquisition Khatians. There is no presumption of correctness in respect of the State Acquisition Khatians as it is to be found in case of CS khatians in pursuance of the provision under section 103-B of the Bengal Tenancy Act."

In the case of Government of Bangladesh vs. Tenu Miah Tofadar 14 LM AD 30 it was observed:

> "If we glean the said provision it transpires that a finally published record of rights revised under Section 144(A) of the State Acquisition and Tenancy Act has a presumption of correctness and that presumption continues till it is otherwise rebutted by a reliable evidence. This proposition of law is well settled. The oldest record of rights being the cadastral

survey prepared under section 103(B)(5) of the Bengal Tenancy Act (Act No. VIII of 1885) also got a high presumptive value as to correctness of entries therein as it has also been enjoined under section 144(A) of the State Acquisition and Tenancy Act. Of course this is a rebuttable peace of presumption, if it has been so rebutted by evidence. Since the entry of the land in question as per the State Acquisition and Tenancy Act recorded in the name of the government as land, in the absence of any positive evidence oral and documentary onus was upon the plaintiff to discharge the presumption proving the same to be wrongly recorded in the record of rights bereft of which title and interest cannot vest upon the plaintiff. The case of Government of Bangladesh vs. A.K.M Abdul Hye 56 DLR AD 53 is an authority on this issue. The decision of High Court Division is totally devoid of consideration of all these settled principles of law adversely reversing the lower appellate Court's judgment committing a palpable wrong which required to be intervened by this Division."

In the case of Md. Hossain vs. Dilder Begum 9 MLR AD 361 it was observed:

"Being aggrieved the petitioners moved the High Court Division in its revisional jurisdiction in

> Civil Revision No. 176 of 1990 and obtained a rule which was discharged and the learned Single Judge of the High Court Division by his judgment and order dated 23.05.1999 rejected the application on the finding that the RS khatian, exhibit-1, has been prepared in the name of the predecessors of the plaintiffs to the extent of 1/3rd share and the name of the predecessors of the defendant petitioners to the extent of 2/3rd shares. The learned single judge observed that though there is conflict between the CS and RS khatians the RS khatian will prevail over the former."

The case of the Chief Engineer, Roads and Highway Directorate vs. Asaduzzaman Siddique 69 DLR AD 440 also echoed accordingly on the point.

The decision also highlighted:

> "Referring the explanation of the Judicial Committee of Privy Council on the nature of an entry in a record of right in the ensuing words-
>
> "A record of rights has been described by Sir Henry Maine as a detailed statement of all rights in land drawn up periodically by the functionaries employed in setting the claims of the Government to its shares of the rental..... Though it does not create a

> title, it gives rise to a presumption in its support, which prevails until its correctness is successfully impugned."

To sum up, we have found that the Court of Appeal below put special emphasize as to how the defendants proved their case ignoring the plaintiffs' steps of proving the same on evidence. The law enjoins it is the bounden duty of the Court to discuss first how the plaintiff proved its case to the hilt. In a judicial proceeding, where all souls solicit justice equally and are entitled to the same, the plaintiff usually has to prove its case. In this situation, the plaintiffs' ownership of the land is backed by official records more specifically the RS record of rights. But when the case went to the lower appellate Court in the appeal, it didn't give enough importance to these records. Even though the lower appellate Court acknowledged the plaintiffs' rights supported by the unchallenged RS record of rights, it didn't impartially and objectively handle the proceedings to rectify the true ownership of the suit land. We acknowledge that in the realm of

judicial proceedings related to land rights, where the plaintiff bears the weight of proof, the sanctity of RS records serves as an unwavering beacon of truth as cemented by the section 144A of the State Acquisition and Tenancy Act. We also record, since the matter has been decided to the hilt as aforesaid, question of registration of solenama (exhibit C1) has become redundant.

Another point is the question of limitation as raised. The question of limitation is a mixed question of fact and law. The submissions of the learned counsel for the respondents on the question of limitation have no legs to stand. The lower appellate Court, in this regard remained oblivious and for that reason we are of the view that no deliberation is required to address the point.

The High Court Division absolutely treading on a wrong premise overlooked all these aspects holding the decisions of the lower appellate Court to be correct.

Accordingly, this appeal is allowed. The judgment and order passed by the High Court Division and the lower

appellate Court is set aside. The judgment of the trial Court is restored.

J.

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The 25th April, 2024
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