

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.2417 of 2021

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Md. Khalilur Rahman

.... Petitioner

-Versus-

Dr. Md. Sekendar Ali and another

.... Opposite parties

None appears

.... For the petitioner.

Mr. Uzzal Paul, Advocate

.... For the opposite party Noa.1-5.

Heard and Judgment on 20.08.2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite parties to show cause as to why the judgment and decree dated 27.10.2021 passed by the learned District Judge, Kurigram in Other Appeal No.54 of 2020 allowing the appeal and reversing the judgment and decree dated 19.07.2019 passed by the learned Assistant Judge, Rowmari, Kurigram Other Suit No.78 of 2012 should not be set aside and/or pass such other or further order or as to this Court may seem fit and proper.

Facts in short are that opposite party No.1 as plaintiff instituted above suit for declaration of title and recovery of possession of 0.0544

decimal land as described in the schedule to the plaint. It was alleged that above land was owned and possessed by Nayeb Ullah who died leaving behind the plaintiffs as heirs. Plaintiff No.1 was in charge of superintendence of above property who gave permission to defendant No.1 for erecting a shop in above land on condition that he would remove above shop whenever asked by the plaintiffs. Subsequently the defendant erected other three shops in the above land. On 28.02.2012 the defendant denied to remove above shops and hand over possession at about land to the plaintiffs.

Defendant No.1 contested the suit by filing a written statement wherein he denied all material claims and allegations made in the plaint and stated that 24 decimal land appertaining to S.A. Plot No.2648 of S.A. Khatian No.1 belonged to the Government and defendant No.1 and his wife as landless peasants received settlement of above land by a registered kabuliyat on 06.12.2000. The defendant is possessing above land by constructing a dwelling house and four shops.

At trial plaintiffs and defendant examined two witnesses each. The documents produced and proved by the plaintiffs were marked as Exhibit Nos.1-4 and those of the defendants were marked as Exhibit Nos. 'Ka', 'Kha' and 'Ga'.

On consideration of facts and circumstances of the case and evidence on record the learned Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree plaintiffs preferred Other Class Appeal No.54 of 2020 to the District Judge, Kurigram who on consideration of facts and circumstances of the case and evidence on record allowed, the appeal set aside the judgment and decree of the Trial Court and decreed the suit.

Being aggrieved by above judgment and decree of the Court of appeal below respondent No.1 as petitioner moved to this Court and obtained this Rule.

No one appears on behalf of the petitioners at the time of hearing of this Rule.

Mr. Ujjal Paul, learned Advocate for the opposite party Nos.1-2 submits that the important question of this case is whether the disputed land belongs to the Plot No.2648 or 2689 since the plaintiffs do not have any claim over the land of Plot No.2648 and the defendants do not have any claim over the land of 2689. The Advocate Commissioner appointed by the Court of appeal below on conclusion of local investigation submitted a report stating that the suit land belonged to S.A. Plot No.2689 and on the basis of above report the learned District

Judge has rightly allowed the appeal and decreed the suit which calls for no interference.

I have considered the submissions made by the learned Advocate for opposite party Nos.1-2 and carefully examined all materials on record including the pleadings and evidence.

This is a suit for declaration of title and recovery of khash possession for 0.544 decimals land. It is admitted that the defendants are in possession in the disputed land.

It has been claimed in the plaint that the plaintiff gave permission to defendant No.1 to erect one shop in the above land and the defendant was a mere permissive possessor. In the plaint the plaintiff did not mention whether above permission was given orally or by any written document. There is no mention of the name of any person who witnessed above event of giving of permission to the defendant. The plaintiffs did not mention any date, time or place where or when above permission was given.

In his evidence as PW1 plaintiff No.1 Sekander Ali has reiterated the above statements as set out in the plaint and stated that defendant erected a ghar in the disputed land on his permission. But he could not mention any date, time or place of giving above permission. He also did not endorse PW2 Nur Mohammad as a witness to the above occurrence.

In cross examination PW1 Sekander admitted the claim of the defendant as to his dwelling house in the disputed land and stated that the defendant had erected a dwelling house in the disputed land in 2008. PW1 lastly stated that he could not recollect the date when he asked the defendant to remove his shop from the suit land.

PW2 Nur Mohammad claimed that he knew the disputed land but he did not mention his capacity as to how he was acquainted with the disputed land. He lastly stated that the defendants erected a shop in the disputed land forcibly which is contrary to the claim of the plaintiffs that the defendant was a permissive possessor in the disputed land.

On consideration of above evidence on record the learned Judge of the trial Court rightly held that the plaintiff could not prove his claim that he gave permission to the defendant for erecting a shop in the disputed land and the defendant was mere a permissive possession in the disputed property.

It is well settled in suit for declaration of title and recovery of khas possession besides proving good title a plaintiff must prove by legal evidence his previous possession in the disputed land and subsequent dispossession from the same land and further prove that the suit has been filed within 12 years from the date of dispossession.

The plaintiff could not adduce any credence inspiring evidence in support of his previous possession or manner of previous possession in the disputed land nor he has succeeded to prove by oral evidence of trust worthy and reliable witness or any documentary evidence that the defendants are his permissive possessor in the disputed land.

As mentioned above the plaintiff has claimed that the disputed land which is in the possession of the defendants appertains to S.A. Plot No.2689. But in the written statement the defendants denied that the disputed land belonged to S.A. Plot No.2689.

It is not disputed that the land of S.A. Plot No.2648 has been recorded in the name of the defendant and the plaintiffs filed an objection case under Section 30 of the Survey Act which was dismissed. No evidence was adduced at trial by the plaintiff in support of his claim that the suit land belonged to S.A. plot No.2689.

On consideration of above facts and circumstances of the case and materials on record I hold that the learned District Judge committed serious illegality in appointing an Advocate Commissioner beyond the pleadings and on the basis of report of above Advocate Commissioner allowing the appeal disregarding the fact that the appellant could not prove by legal evidence his previous possession in the disputed land and that the defendant was his permissive possessor evidence.

In above view of the materials on record I find substance in this revision under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 27.10.2021 passed by the learned District Judge, Kurigram in Other Appeal No.54 of 2020 is set aside and those dated 18.07.2019 passed by the learned Assistant Judge, Rowmari, Kurigram Other Suit No.78 of 2012 is restored.

However, there is no order as to costs.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER

