

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 4415 of 2017

With Civil Revision No. 4416 of 2017.

Md. Zafar Ali Sardar.

.....*Petitioner.*

Versus-

Ashok Kumar Roy and others.

.....*Opposite parties.*

Mr. F.M. Mizanur Rahman, Advocate.

-----*For the petitioner.*

None appears.

-----*For the opposite parties.*

Heard on 03.07.2024 and

Judgment on 08.07.2024.

A.K.M. Asaduzzaman, J.

These 02(two) rules were arisen out of same judgment and decree dated 13.07.2017 passed by the Additional District Judge, 3rd Court, Khulna upon hearing analogously 02 (two) appeals being no. Title Appeal No. 83 of 2012 and Title Appeal No. 87 of 2012 allowing the appeal on reversing the judgment and decree dated 09.01.2012 passed by the Joint District Judge, 3rd Court, Khulna in Title Suit No. 04 of 2002.

On 03.03.2002 present petitioner as plaintiff instituted Title Suit No. 04 of 2002 before the Court of Joint District Judge, Khulna against the opposite parties of both the rules for declaration of his title to the suit land.

Plaint case in short inter alia is that 32.39 acres of land described in the schedule no. 1 of the plaint appertaining to C.S. Khatian No.55 corresponding S.A. Khatian No. 84 of Mouza-Barunpara, Police Station- Batiaghata within district- Khulna was recorded by the names of Jadab Halder, Kalipada Halder, Rangobawa, Rajendranath Halder, Nagendra Nath Halder, Sebika Ratrimoni, Surendra Halder, Biren Halder, Bhabonath Halder, Adhir Halder, Harendra Nath Halder and Makhon Halder in their respective shares and 1.37 acres of land described in the schedule no. 2 of the plaint appertaining to C.S. Khatian No.54 corresponding S.A. Khatian No. 82 of Mouza-Barunpara, Police Station- Batiaghata within district- Khulna was recorded by the names of Jadab Halder, Raho Halder and Kalipada Halder in equal shares. While the recorded tenants had been and have been owning and possessing their respective shares, Jadab Halder died leaving behind one son Krisnapada Halder. Rajendra Halder died leaving behind two sons namely Jagannath Halder and Orabinda Halder. One recorded tenant namely Rongo Bewa sold 2.93 acres

of land on 11.06.1970 and another 2.93 acres of land on the same day through two separate deeds of kabala dated 11.06.1970 to Jahurul Haq Sarder, the father of the plaintiff. Zahurul Haq Sarder purchased that land in names of Benamdar sister Zobeda Khatun and cousin sister Amena Khatun with his own money and for his own interest. Jagannath Halder, Orabinda Halder, Nogendra Nath Halder, Surendra Nath Halder, Birendra Nath Halder, Makhan Chandra Halder, Harendra Nath Halder, Bhaba Nath Halder and Odhir Kumar Halder sold their 14.94 acres of land from which Jaharul Haque Sarder purchased 4.98 + 4.98 acres of land by the name of his Benamder Quddus Sarder and his own name with his own money and interest along with Moslem by way of a kabala dated 16.06.1970. Here Zohurul purchased his portion and portion of Kuddus by his own money and interest. But he used name of Kuddus as his Benamder. Kuddus was dumb, he had no earnings. Therefore, Zohurul got 2/3 shares that is 9.96 acres of land. Once defendant No. 1 Zahurul Haque Sarder became ill and the plaintiff brought out his so Zahurul Haque Sarder being satisfied and pleased upon plaintiff gifted out 5.86 acres of land, which was purchased on 11.06.1970 in names of Zobeda and Amena and 1/3 shares out of 14.94 acres of land, which was purchased in the name of the Benamder Kuddus Sarder to plaintiff and delivered possession therein. Defendant No.1 denied plaintiff's title on the

suit land in the month of Magh of 1408 B.S. and raised cause of action of the suit.

Defendant Nos. 1-4, defendant nos. 7-9 and defendant nos. 10-11 contested the suit by filing separate written statement denying the plaint case, alleging, inter alia, that Rongo Bewa receiving an amount of Tk. 2500/- from Amena Khatun, sold 2.93 acres of land on 11.06.1970 vide deed No.3735 to her and delivered her possession there in and she was not Benamder of Zahurul. Zobeda Khatun also purchased 2.93 acres land from same Rango Bewa on 11.06.1970 through registered deed with her own money and for her own interest. She also got possession on her land. Zobeda Khatun died leaving behind defendant No.4. Defendant No.3 possesses her land through share-cropper. Recorded tenant Kalipado Halder filed title suit No. 373 of 1984 before the Court of learned Assistant Judge, Batiaghata, Khulna for declaration of these two deeds as forged and collusive, where these defendants were defendant Nos. 1/2 and Zahurul Sarder was defendant no. 3 and Moslem Ali was defendant No.4. All those defendants contested that suit. Zahurul Haque Sarder claimed his land stating that he purchased it in Benamders names and those Benamders are Amena and Zobeda. Suit was dismissed and it was decided that the suit land was of instant defendants. Plaintiffs preferred Title Appeal No.386 of 1993, which was also

disallowed. Therefore there was no scope to gift out suit land to plaintiff.

According to defendant nos. 7, 8 and 9 alleging inter alia, that two sons of recorded tenant Rajendra Nath, namely Jagannath and Orobinda and other recorded tenants namely Surendra, Birendra, Makhan, Harendra, Nagendra, Bhabanath and Odhir sold their 14.94 acres of land on 16.6.1970 to Zohurul Sarder, Moslem Ali Sarder and A. Quddus Sarder. On 09.12.2001 A.Quddus Sarder sold 2.94 acres of land out of his 4.98 acres of land to Ashok Ray, Purnendu Kumar Halder and Prosen Kumar Ray and delivered possession therein and they have been possessing the same through amicable partition.

According to defendant nos. 10-11 alleging inter alia that two sons of recorded tenant Rajendra Nath, namely Jagannath and Orobinda and other recorded tenants namely Surendra, Birendra, Makhan, Harendra, Nagendra, Bhabanath and Odhir sold their 14.94 acres of land on 16.6.1970 to Zohurul Sarder, Moslem Ali Sarder and A. Quddus Sarder and thereafter on 09.12.2001 A.Quddus Sarder sold 2.94 acres of land out of 4.98 acres of land to Azizur Rahman Halder, who has been possessing the same through amicable partition.

Trial Court framed the following issues-

- a. Whether the suit is maintainable in its present form ?

- b. Whether the suit is bad for defect of parties?
- c. Whether the suit is barred by limitation?
- d. Whether the plaintiff has got title and possession over the suit land ?
- e. Whether Jahurul Haque Sardar purchased 5.86 acres of land on 11/06/1970 through deeds in names of banamdar Amena Khatun and Zobeda Khatun?
- f. Whether plaintiff can get any decree as prayed for ?

Both parties adduced oral and documentary evidences.

Learned Joint District Judge, 3rd Court, Khulna after hearing the parties and considering the evidences decreed the suit on contest by the judgment and decree dated 09.01.2012.

Challenging the said judgment and decree, 02(two) appeals were filed one is filed by defendant nos. 7-9 being Title Appeal No. 83 of 2012 and another is filed by other defendants being Title Appeal no. 87 of 2012 before the Court of District Judge, Khulna. Both the appeals were heard on transfer by the Additional District Judge, 3rd Court, Khulna, who by the impugned judgment and decree dated 13.07.2017 allowed the appeal and after reversing the judgment of the trial court dismissed the suit.

Challenging the said judgment and decree plaintiff-petitioner obtained the instant 02(two) rules, which are heard together and disposed of by this single judgment.

Mr. F.M. Mizanur Rahman, the learned advocate appearing for the petitioner drawing my attention to the judgment of the courts below submits that the original documents by which plaintiff claimed his title, which has alleged to have been purchased by the plaintiff as Banamdar in the name of Amena Khatun, Zobeda Khatun and A. Quddus Sardar were lying and submitted before another court in an earlier instituted suit being Title Suit no. 373 of 1984 instituted between the same parties and also marked exhibited thereon. The Trial Court has accepted the said contention and after accepting the certified copy thereof as well as considering the other documents found that plaintiff's father Jahurul Haque Sardar is the valid purchaser of the suit property and got title and possession over the suit land but the Appellate Court totally failed to appreciate this aspect of this case.

Learned advocate further submits that when the defendants claimed that Amena Khatun, Zobeda Khatun and A. Quddus Sardar are not the Banamdar but the property was purchased on their own money and for their own interest but it has not been proved by any evidence and accordingly Trial Court decreed the

suit against them but the Appellate Court misguided himself on shifting the onus of proving the case upon the plaintiff and dismissed the suit most arbitrarily. He finally prays that since the impugned judgment suffers from error of law resulting error in the decision occasioning failure of justice. The impugned judgment is thus not sustainable in law, which is liable to be set aside and the rule may be made absolute.

Although the matter is posted in the list mentioning the name of the learned advocate appearing for the opposite parties but no one is found to oppose the rule.

Heard the learned advocate of the petitioner and perused the impugned judgment and the lower court' record.

This is a suit for declaration of title. Plaintiff claimed that Jahurul Haque Sardar purchased the suit property from the original owner by way of 03(three) registered sale deeds in the name of Amena Khatun, Zobeda Khatun and Abdul Quddus Sardar, who are practically Banamdar of Jahurul Haque Sardar and by these 03(three) deeds dated 11.06.1970 and 16.06.1970, plaintiff acquired valid title over the suit land and remaining in possession thereon. The said land was subsequently transferred to the plaintiff by way of a gift, who is owning and possessing the suit land. On the other hand, defendants claimed that Amena

Khatun, Zobeda Khatun and Abdul Quddus Sardar are not the Banamdar of the plaintiff into the suit land rather it was validly and legally been purchased by them on their own money as well as of their own interest, suit is false. Trial Court upon discussing the evidences on record found that plaintiff has got valid title and possession over the suit land, Amena Khatun, Zobeda Khatun and Abdul Quddus Sardar are the Banamdar of the plaintiffs in the said deed dated 11.06.1970 and 16.06.1970. Accordingly trial court decreed the suit in favour of the plaintiff. Appellate Court reversed the said findings. Mainly Appellate Court allowed the appeal on the following accounts.

- 1) Since the original sale deed dated 11.06.1970 and 16.06.1970 were not been placed before this court and not formally been proved but by way of mere placing the photostat copy thereon plaintiff tried to prove their title but which are nothing but a secondary evidence through which plaintiffs acquired no title over the suit land.
- 2) Plaintiff failed to prove the source of money through which the property was purchased in the name of Amena Khatun, Zobeda Khatun and Abdul Quddus Howlader and as such he presumed that suit land was purchased

with the own money of Amena Khatun, Zobeda Khatun and Abdul Quddus Howlader and for their own interest.

Learned Appellate Court further held that Amena Khatun, Zobeda Khatun and Abdul Quddus Howlader possessed the suit land through defendant nos. 3-4 and lastly Appellate Court found that suit was bad for defect of parties.

Now let us see, how these findings are legally acceptable.

Judgment of the Title Suit No. 373 of 1984 is available in the lower courts record wherein it appears that the original copy of the sale deed no. 3636 dated 09.06.1970 was exhibited in court as Exhibit No. Ka, sale deed No. 3915 dated 16.06.1970 was exhibited in court as Exhibit No. Kha, sale deed No. 3735 dated 11.06.1970 was exhibited in court as Exhibit No. Ga and deed no. 3736 dated 11.06.1970 was exhibited in court as Exhibit No. Gha by defendant no. 3 Jahurul Haque Sardar in the said suit in Title Suit No. 373 of 1984. Trial Court while deciding the suit has noticed the same and thus accepted photostat copy thereof in the suit. On the queries, the learned advocate appearing for the petitioner, has produced that the said documents before this court, which were filed and exhibiting in court in Title Suit No. 373 of 1984 and has now taken back by the plaintiff (defendant no. 3 of the earlier suit) and lying on his custody, which he now placed

before this court for consideration of this court. Upon examination of the said documents, it is apparent that the said documents were practically and legally been placed and proved before that court and the learned Judge of the presiding court put his signature on the exhibited documents thus there is no question about the existence or proof of the said documents as being questioned by the Appellate Court. Appellate Court further shifted the onus of proving the case. In that suit defendants claimed that they are not the Banamdar of Jahurul Haque Sardar rather the property was purchased into their name from their own accounts but trial court upon considering the evidences on record found that Amena Khatun, Zobeda Khatun, and Abdul Quddus Howlader (who is a dumb man) was not in a possession to pay any amount of money for purchasing any land and thereby they have totally failed to prove their contention that the said deeds were at all been purchased by them and they are not the Banamdar rather it was proved that plaintiff has purchased the property on his own money and the defendants are his Banamdar.

Regarding the possession, trial court has found that all the P.Ws in a voice has asserted that plaintiff's father Jahurul Haque Sardar was in possession in the suit land and now present plaintiff, who is the son of Jahurul Haque Sardar, who obtained the

property by way of registered deed of gift from his father is now possessing the suit property. Since the plaintiff is the son of Jahurul Haque Sardar and claiming the property to have obtained the same by way of gift from his father and as such Trial Court found that suit is not bad for defect of parties. Moreover, as per Order 1 Rule 10 for misjoinder and nonjoinder no suit shall fail. The impugned judgment on bad for defect of parties is thus obtained on error of law.

Regard being had to the above law, facts and circumstance of the case, I am of the opinion that Appellate Court totally failed to reverse the judgment of the trial court and passed the impugned judgment illegally in violating the mandatory provision of Order 41 Rule 31 of the Code of Civil Procedure. The impugned judgment is thus not sustainable in law, which is liable to be set aside.

In that view of the matter, I find merit in both the rules.

Accordingly both the Rules are made absolute and the judgment and decree passed by the appellate court is hereby set aside and the judgment and decree passed by the trial court is hereby upheld and both the suits are decreed.

Send down the L.C. Records and communicate the judgment to the court below at once.