

District: Khulna

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 2859 of 2022

In the matter of :

Fatema Rahman and others

... Petitioners

-Versus-

Abul Kalam Molla and others

...Opposite parties

Mr. Purnindu Bikash Das, Advocate on behalf of
Ms. Sakila Rawsan, Advocate

...For the petitioners

Mr. Mahamud Zahid Al Quadir, Advocate with
Mr. Md. Nasir Uddin, Advocate

...For the opposite parties

Heard on: 27.10.2024, 03.11.2024
and 11.11.2024

Judgment on: 25.11.2024

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite parties to show cause as to why the judgment and decree dated 27.08.2007 passed by the Joint District Judge, Forth Court, Khulna in Title Appeal No. 115 of 1997 affirming those of dated 25.02.1997

passed by the Senior Assistant Judge, Terokhada, Khulna in Title Suit No. 34 of 1989 decreeing the suit should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

Present opposite parties as plaintiffs filed Title Suit No. 34 of 1989 before the Assistant Judge, Terokhada, Khulna impleading the present petitioners as defendants for declaration of title, confirmation of possession and for further declaration that the auction sale dated 08.04.1936 held in pursuant to Rent Execution Case No. 877 of 1935 and auction sale dated 07.07.1943 held in pursuant to Rent Execution Case No. 79 of 1943 of the Court of Second Munsif, Khulna are illegal, fraudulent, collusive, void and not binding upon the plaintiffs.

The case of the plaintiffs briefly are that the land measuring an area of 3.85 acres appertaining to C.S. Khatian No. 532 was belonged to Keyamuddin and Fayek Mollah in equal share and their names were endorsed in the possession column of the said C.S. khatian. Fayek Mollah died intestate issue less leaving behind

uncle, Keyamuddin, the only legal successor. Keyamuddin died intestate leaving behind 2(two) sons, Abul Kalam and Sukur Mollah, 3(three) daughters, Asia Khatun, Chhironnessa and Baru Bibi(daughter) and one wife Baru Bibi. The plaintiffs along with their mother Baru Bibi acquired title over 3.68 acres of land by way of inheritance. During latest Survey, the plaintiffs were minor and as such, their mother assigned father of defendant No.1, Bedan Mollah to pursue the preparation of record in favour of the plaintiffs and said Bedan Mollah assured them that the record has been prepared in their name duly. Recently, the plaintiffs got a notice of Title Suit No. 98 of 1987 of the Assistant Judge, Terokhada, Khulna issued upon the Boru Bibi and on query they came to know that the father of defendant No.1 recorded the property in the S.A. record, in the name of his sons and others, instead of the plaintiffs' name. It is further claimed that though the property was recorded wrongly, but it did not create any hindrance/obstacle in the way of their enjoyment and possession and as such they had no knowledge about such recording before

getting the notice of Title Suit No. 98 of 1987. The defendants have no possession over the suit land. Through an amendment dated 23.01.1995, the plaintiffs incorporated an additional prayer, a further declaration that the auction sale dated 08.04.1936 held in pursuant to Rent Execution Case No.877 of 1935 and the auction sale dated 07.07.1943 held in pursuant to Rent Execution Case No. 79 of 1943 of the Second Court of Munsif, Khulna were illegal, fraudulent, collusive, mere paper transaction, void and not binding upon the plaintiffs, incorporating necessary statements further asserted that the plaintiffs did not get any notice of the aforesaid rent suits.

The defendant Nos. 1, 22 and 29 filed 3(three) separate sets of written statement to contest the suit. It was the claim of defendant No. 1 that the suit is not maintainable in its present form; the suit is barred by limitation. Further case of the defendant No.1 is that while Asiruddin Sakati, Keyamuddin and others were in enjoyment over the suit land along with others, measuring in total an area of 15.60 acres, failed to pay the rent to the Zaminder,

Baroda Prasad Roy Chowdhury and others. The estate manager, Babu Boikuntho Chandra Sen, on behalf of the Court of Wards filed Rent Suit No. 1985 of 1932 and obtained a decree. In pursuant to the said decree, Decree Execution Case No. 877 of 1935 was filed, wherein the aforesaid property was sold in auction. The father of defendant No.1 along with Abul Khayer Sakati, Hanif Gazi and others purchased the said 15.60 acres of land on 08.04.1936 and the auction purchasers were inducted into possession through Court and thereby were in peaceful enjoyment of the property. Since the auction purchasers also failed to pay the rent to the Zaminder, the manager of the estate filed Rent Suit No. 181 of 1950 which was also decreed and in pursuant to said decree, Decree Execution Case No. 79 of 1943 was filed, wherefrom the defendant No.1 by his own fund and for own interest on 07.07.1983 purchased the auctioned property and thereafter, he is in peaceful possession and enjoyment over the said property. The suit property in respect of 3.85 acres of land was recorded in S.A. khatian in the name of the defendant No.1. It

is further claimed that the plaintiffs and defendant Nos. 2-7 in collusion with each other instituted Title Suit No.11 of 1987. The plaintiffs of Title Suit No.11 of 1987 had no right, title and possession over the suit land. The present suit is liable to be dismissed.

Defendant No. 22 filed a written statement supporting the case of defendant No. 1.

On the other hand, defendant No. 29 filed a written statement supporting the case of the plaintiffs.

Apart from those, the defendant Nos. 8-18 contested the suit by filing a separate written statement contending, *inter alia* that while Keyemuddin and Fayek Uddin, the original C.S. recorded tenant, were in peaceful possession and enjoyment over the suit property, transferred .17 decimals of land on 23.05.1932 from plot No.195 through lease deed being No. 2584 of 1932 and thereby gave settlement to Dudu Mollah, the predecessor of defendant Nos. 8-18 and handed over the possession thereof. While the heirs

of Dudu Mollah were in peaceful possession the S.A. khatian in respect of the .17 decimals of land has been duly prepared and published in their name.

During hearing, the plaintiffs examined 4(four) witnesses and exhibited documentary evidences as Exhibit-‘1’ to ‘6’; defendant No.1 also examined 4(four) witnesses and exhibited documents to prove his case, which were marked as Exhibit- ‘Ka’ and ‘Kha’ and defendant No.22 examined only one witness and exhibited, Exhibit-‘A’ and ‘B’ to ‘B-6’. Defendant Nos. 8-18 although cross-examined the witnesses, but did not adduce any oral or documentary evidence. Defendant No. 29 did not examine any witness, or produce any documentary evidence or cross-examine the witnesses. On conclusion of hearing, learned Assistant Judge, Terokhada, Khulna by his judgment and decree dated 25.02.1997 decreed the suit on contest against the contesting defendants.

Having been aggrieved by the aforesaid judgment and decree of learned Assistant Judge dated 25.02.1997, the defendant Nos. 1 and 22 preferred Title Appeal No. 115 of 1997 before the District Judge, Khulna. On transfer, the said appeal was heard by the Joint District Judge, Fourth Court, Khulna and by his judgment and decree dated 27.08.2007 dismissed the appeal affirming those of learned Assistant Judge, Terokhada dated 25.02.1997.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree of learned Joint District Judge, the heirs of defendant-appellants preferred this revisional application and obtained the Rule.

Mr. Purnindu Bikash Das, learned Advocate appearing on behalf of Ms. Sakila Rowshan, learned Advocate for the petitioners submits that entry of name of the predecessors of plaintiffs in the possession column of C.S. khatian was unfounded. On the other hand, entry of name of the defendants in the S.A.

record is an admitted fact, thus, the plaintiffs are not entitled to a declaration of their right, title over the suit property on the basis of said unfounded C.S. record. He next submits that having regard to the plaint, it transpires that no where in the plaint the plaintiffs disclosed the cause of action of the suit against the auction sale held in pursuant to the rent suits and thus, without having any specific cause of action against the rent suits, the suit in its present form is not at all maintainable. He further submits that the appellate Court below committed error of law in shifting the onus upon the defendant No.1 to prove the rent suits as well as the auction sales and thereby decreed the plaintiffs' suit, relying upon the weakness of the defendant, resultant occasioning failure of justice. He again submits that both the Courts below illegally relied upon the averment of Abul Khair Sakati, defendant No. 29 made in his written statement without any formal proof whatsoever and thereby committed error of law in taking into consideration the not proved averments of defendant No. 29 and thereby shifted the onus upon the defendant No.1 to prove the rent

suits and auction sales, held in pursuant to the decree of said rent suits.

Referring to the paragraph 2(two) of the plaint, he further submits that on such an averment the plaintiffs' case are not maintainable without seeking partition.

Referring to the averments of the plaint, he again submits that the suit for declaration of title simplicitor is not maintainable, without challenging the deed of kabala being No.2133 dated 09.09.1987. He next submits that from the deposition of P.W. 1, it transpires that he attained at his majority during the period of S.A. operation and the properties other than the suit land was recorded in their name in the S.A. record, wherefrom, he tried to draw an inference that the plaintiffs would have knowledge regarding the S.A. record from the time of it's preparation and as such, the suit filed in the year 1989, is barred by limitation. He lastly submits that the defendants are in possession and plaintiffs failed to prove their possession by any independent witness and as such, both the

Courts below committed error of law in the decision occasioning failure of justice in decreeing the suit.

In support of the submissions he cited the case of Md. Abul Kasem Vs. Government of Bangladesh and others reported in 16 MLR(AD) 32, the case of Tayeb Ali Vs. Abdul Khaleque reported in 43 DLR(AD) 87, the case of Rustom Ali Bhuiyan Vs. Md. Tasar Ali and others reported in 10 MLR(AD) 85, the case of Nuruzzaman Sarker Vs. Seraj Mia reported in 41 DLR(AD) 107, the case of Dudu Mia Vs. Ekram Miah Chowdhury reported in 54 DLR(AD) 7, the case of Md. Fazlur Rahman and others Vs. Bani Rahman and others reported in 39 DLR 339, the case of Abdul Hamid and others Vs. Abul Hossain Mir and others reported in 35 DLR 295 and the case of Md. Hossain and others Vs. Dilder Begum and others reported in 9 MLR(AD) 361.

On the other hand, Mr. Mahamud Zahid Al Quadir, learned Advocate for the opposite parties submits that the submissions, so far has been advanced on behalf of the petitioners, is

misconceived and beyond the pleadings, because the defendant-petitioner in his written statement claimed his title admitting the C.S. record as well as the C.S. recorded tenants and as such, the C.S. record was prepared in the name of the plaintiffs predecessor is an admitted fact, which needs no proof. He next submits that the plaintiffs initially on 04.11.1989 by filing the suit sought for declaration of title challenging only the wrong recording of the S.A. record. Thereafter, the defendant No.1 filed written statement on 07.04.1990, introducing the specific and particular fact that the defendants are claiming the right and title on the basis of auction sales held in pursuant to Rent Execution Case Nos. 877 of 1935 and 79 of 1943 and upon getting the copy of the written statement, the plaintiffs for the first time came to know about the alleged auction sales and thereafter, the plaintiffs by way of amendment incorporated the relevant denial and sought for a new declaration challenging those auction sales by depositing Tk.100/- as Court fees on 23.01.1995. Thus, the submission as has been advanced on behalf of the petitioners that the plaint does not disclose any cause

of action against the aforesaid rent suits or rent execution cases, bears no merit. He further submits that under section 101 and 103 of the Evidence Act, 1872, the burden of proof as to any particular fact lies on that person who wishes the Court to give judgment as to his legal right or title over the suit property depending on the existence of the fact. Meaning thereby, the defendants for the first time claimed the existence of the particular fact of rent suits as well as the rent execution cases and the auction sales held in pursuant thereto and thereby claiming their title on the basis of the said auction sales, thus, they must prove the existence of the aforesaid facts by adducing adequate evidence before the Court of law. And as such, both the Courts below committed no illegality in holding that the onus is upon the defendants to prove the claim of the auction sales. He next submits that the plaintiffs in the plaint at paragraph No.1 categorically stated that the predecessor of the plaintiffs namely, Keyemuddin and Fayek Uddin Mollah along with Asiruddin Sakati, Barik Sakati, Somed Sakati and others were under raiyat of the land measuring in total an area of

15.60 acres, appertaining to C.S. Khatian No. 532, 533, 535, 538, 547, 548 and 549 and out of which the plaintiffs only claimed the property of C.S. Khatian No. 532, which is all together separate from the property of other khatians. Thus, without seeking partition, the suit as has been framed in the present form is quit maintainable. Regarding the maintainability of the present suit, without challenging the kabala deed No. 2133 dated 09.09.1987 is concerned, learned Advocate for the opposite parties submits that the said deed was the fruit of an ex-parte decree dated 12.08.1987 passed in Title Suit No. 11 of 1987 and later on the said ex-parte decree was set aside and the said suit has been dismissed on contest. Thus, the vendor of the said deed namely, Abu Taleb Gazi have/had no title to transfer through the said deed, thus, those deeds are void and need not to challenge any more.

In support of the submissions he referred the case of Daliluddin Sheikh and others Vs. Alek Sheikh alias Abdul Malek Sheikh and others reported in 14 BLC(AD) 32, the case of Divisional Estate Officer, Bangladesh Railway and others Vs.

Jashimuddin and others reported in 5 LM(AD) 58 and thereby praying for discharging the Rule.

Heard learned Advocates of both the parties, perused the revisional application together with the lower Courts record; having gone through the cited judgments.

It appears that the present suit is for declaration of title, confirmation of possession and for further declaration that the auction sale dated 08.04.1936, held in pursuant to Rent Execution Case No. 877 of 1935 and auction sale dated 07.07.1943 held in pursuant to Rent Execution Case No. 79 of 1943 of the Court of Second Munsif, Khulna are illegal, fraudulent, collusive, void and not binding upon the plaintiffs and the said suit was decreed by the trial Court. The appellate Court below on appeal affirmed the aforesaid judgment and decree of the trial Court. Both the Courts below concurrently found that the plaintiffs have been able to prove their title, since the C.S. record bears a presumption of correctness and their predecessors-in-interest were the C.S.

recorded under raiyat; both the Courts below also concurrently found that the plaintiffs proved their possession by adducing adequate evidences. On the other hand, both the Courts below concurrently found that the defendants failed to prove their possession over the suit land and also disbelieved the existence of the fact of rent suits and rent execution cases in pursuant to the aforementioned rent suits, the basis of claim of the defendants.

Mr. Purnindu Bikash Das, learned Advocate firstly challenged the aforesaid decree of the Courts below on the ground that the suit was decreed on account of taking into consideration the endorsement of the name of plaintiffs' predecessors-in-interest in the possession column of the C.S. Khatian, considering that the plaintiffs' predecessors were under raiyat, but in no manner in the suit, plaintiffs could show or prove the basis of such recording; thus, the recording of the name of said predecessors in the C.S. khatian was unfounded and his further contention is that the record of right does not confer any title upon any person. Regarding the submission of Mr. Das, upon going through the

record, this Court found that the defendants are claiming their right/title admitting the title and possession of the predecessors-in-interest of plaintiffs through their pleadings, thus, this sort of submission of Mr. Das bears no merit at all. Regarding non-disclosure of the cause of action against the rent suits or rent execution cases, which according to him makes the suit not maintainable. From the record, it transpires that the original suit was filed on 04.11.1989, sought for declaration of title simplicitor and confirmation of possession thereof stating, *inter alia* that due to wrong recording of the defendants' name in the S.A. record the plaintiffs' title has been clouded. The plaint does not disclose any fact or a challenge against the fact of Rent Suit No. 1985 of 1932 and Rent Execution Case No. 877 of 1935 and or the Rent Suit No. 181 of 1950 and Rent Execution Case No. 79 of 1943; pursuant to the aforesaid rent suits and the auction sales were claimed to be held. From the original plaint, it appears that the plaintiffs did not disclose their knowledge regarding the aforesaid auction sales, held in pursuant to the aforesaid rent execution

cases and the defendant No. 1 through his written statement on 07.04.1990, first time disclosed and asserted the aforesaid facts of the existence of rent suits and rent execution cases and upon coming to know about the facts of those auction sales and collecting relevant materials the plaintiffs on 23.01.1995 introduced their new averments through amendment of plaint, denying the existence of the rent execution cases and the auction sales, held in pursuant thereto, introducing a new prayer sought for declaration against the aforesaid auction sales by depositing proper Court fees. It is true that the plaintiffs could have incorporated or introduced some more sentences to the effect that for the first time they came to know about the aforementioned facts after submission of the written statement, but non-incorporating the aforesaid statement does not make the suit not maintainable. Moreover, it is consistent view of this Court as well as the Apex Court that the Mufassil pleas should be considered with lenient view.

Learned Advocate Mr. Das further contended that both the Courts below committed error of law in shifting the onus upon the defendant No. 1 to prove the existence of the rent execution cases as well as the existence of rent suits. He also contended that the plaintiffs are to prove their case independently and no suit can be decreed on the weakness of the defendant's case. Section 101 read with section 103 of the Evidence Act, 1872 provides that burden of proof lies on the person who desires to get any relief or a judgment as to any legal right or title over any property on the existence of any particular facts, which he asserts. Meaning thereby, he must prove the existence of the said fact. Under the case in hand, the defendants claimed their title through the alleged auction sales held in pursuant to 2(two) rent execution cases and in support of such claim 2(two) pieces of certified copies were submitted before the Court. The Court of appeal below upon scrutiny of the Exhibit-'Ka' and 'Kha' found discrepancies and thereby disbelieved those two exhibits holding that the defendants

could have prove the aforesaid boynama upon call for the record or producing any reliable or adequate evidence.

As this Court earlier found that under the provision of sections 101 and 103 of the Evidence Act, 1872, the burden of proof heavily lies upon the defendants to prove the existence of the fact of rent execution cases and both the Courts below categorically found that the defendants miserably failed to discharge their onus.

Regarding maintainability of the suit without seeking partition, on examination of the plaint as well as the written statements, this Court finds that there is large number of area measuring in total 15.60 acres appertaining to C.S. Khatian 532, 533, 535, 538, 547, 548 and 549 and from the Exhibit-‘1’, C.S. khatian No.532 as well as from the plaint, it appears that the plaintiffs sought for declaration of title, regarding the property of C.S. Khatian No.532 only, wherein possession of the predecessors of the plaintiffs having been endorsed in the possession column as

sole possessors and there is no allegation from the defendant side that plaintiffs' claimed property is other than those of C.S. Khatian No.532. The other persons, Asiruddin Sakati and others name were recorded as under raiyat of the other khatians. The property of khatian No. 532 having been specified as different than those of the other khatians. Thus, the suit without seeking partition of the total area of 15.60 acres of total as well as of 7(seven) khatians, can be maintainable in its present form. Regarding the .17 decimals of land transferred in the year 1932 to the predecessor of defendant Nos. 8-18. The property has been transferred by executing a deed in the year 1932 and the possession thereof has been duly handed over and those defendants are enjoying the possession of the said specified property since then. The S.A. record has been duly prepared and published in their name separately. Moreover, there is no dispute between the plaintiffs and defendant Nos. 8-18 regarding their title or possession of over the said .17 decimals of land. Thus, without

seeking partition so far it relates to aforesaid .17 decimals of land, the present suit is quite maintainable.

Mr. Das also contended that without challenging the kabala deed No. 2133 dated 09.09.1987, the suit for declaration of title simplicitor is hit by section 42. The said deed was executed by one Abu Taleb Gazi on the strength of an ex-parte decree dated 12.08.1987 passed in Title Suit No. 11 of 1987, wherein his title was declared. Later on, the suit was dismissed on contest holding that Abu Taleb Gazi had no right, title over the suit land. The said decree of Title Suit No. 11 of 1987 has been exhibited as Exhibit- '6'. Wherefrom, it appears that the vendor of the aforesaid deed had no transferable right or title over the said property, despite he executed the deed in question. When a person executed a deed having no right, title whatsoever, the aforesaid deed confers no right, title upon the vendee and the deed bears no legal value deemed to be an instrument of void-ab-initio. Thus, without challenging the aforesaid deed, the present suit as it has been framed by this plaintiffs is quite maintainable.

The further contention of the petitioner regarding taking into consideration by the Courts below the averment of written statement of defendant No. 29, Abul Khair Sakati. From the record, it appears that apart from the aforesaid averments of defendant No.29, both the Courts below concurrently found that the auction sale having not been proved by the defendants. It is the averments of the defendant No. 1 that Abul Khair Sakati along with his father purchased the suit property in auction, and Abul Khair Sakati, defendant No.29 is the only alive person allegedly who had purchased the interest through the aforesaid auction sales. Thus, the averment of Abul Khair Sakati through his written statement denying the fact of auction sales, supporting the plaintiffs case bears considerable merit under the provision of Order XII of the Code of Civil Procedure and the Court of law may take into consideration such admission, either from the pleadings or otherwise. Under the case in hand, the defendant No. 29 through his separate written statement asserted that the so

called auction sales has no existence and under the Code the Court may take into consideration the aforesaid admission.

From the record, it also appears to this Court that the defendants could not make out any case that the suit is barred by limitation although Mr. Das contended to that effect.

The judgments cited on behalf of the petitioners do not help to improve the petitioners' case.

This Court does not find any merit in the Rule.

Accordingly, the Rule is discharged without any order as to cost.

The order of status-quo granted earlier is hereby recalled.

Send down the lower Courts' record.

Communicate the judgment and order at once.