

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.1322 of 2023

In the matter of:

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

And

Farhad Hossain and another

... Petitioners

-Versus-

Waresh Ali and others

... Opposite parties

Mr. Md. Zainul Abedin, Advocate

...For the petitioner.

Mr. Golam Nabi, Advocate

....For the opposite party Nos.1-2

and 4-6.

Heard and Judgment on 11.12.2024

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 impugned judgment and decree dated 15.06.2022 passed by the learned Senior District Judge, Jamalpur in Title Appeal No.120 of 2019 dismissing the appeal and thereby affirming the judgment and decree dated 31.07.2019 passed by the learned Senior Assistant Judge, Sorishabari, Jamalpur in Title Suit No.92 of 2014 decreed the suit 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 the petitioners as plaintiffs instituted above suit for declaration of title and recovery of possession for 4 decimal land alleging that the plaintiffs acquired 18 decimal land including above 4 decimal by purchase from Moqbul Hossain and Abdul Karim and 1 decimal land out of above 18 decimal was acquired for road and plaintiffs transferred $11\frac{1}{2}$ decimal land to his two sons namely Forhad and Fazlul Hoque by registered deed of Heba-bil-ewaz dated 14.02.2001. Plaintiffs kept disputed 4 decimal land vacant for future construction. On 09.09.2012 at 9.00 A.M. defendants forcibly dispossessed the plaintiffs from above 4 decimal land and constructed a half building.

Defendant No.1 contesting the suit by filing a written statement alleging that Sadek Ali transferred his share in the disputed plot to his grandson Abu Bakkar by a registered deed of Heba-bil-ewaz dated 06.05.1970. As such the plaintiffs did not acquire any title and possession in the disputed land by way of purchase from the daughters of above Sadek Ali. Defendant No.1 acquired disputed land by purchase from Mofiz Uddin and from Khalilur Rahman. Defendant No.1 acquired 17 decimal land in the disputed plot and he is possessing above land by constructing his dwelling house and in the disputed 4 decimal land he constructed 6 semi pacca shops and possessing the

same by renting out to tenants namely Sabur, Aminul, Rabiul, Masud and Shahjahan. Plaintiffs did not have any title and possession in disputed 4 decimal land nor the defendant dispossessed the plaintiff.

At trial plaintiffs examined 2 witnesses and documents of the plaintiffs were marked as Exhibit Nos.1-3 and defendants examined 3 witnesses and the document of the defendants were marked as Exhibit Nos.'Ka' - 'Cha'.

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

Being aggrieved by above judgment and decree of the trial Court plaintiffs preferred Title Appeal No.120 of 2019 to the District Judge, Jamalpur who dismissed above appeal and upheld the judgment and decree of the trial Court.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of Appeal below above appellants as petitioners moved to this Court and obtained this Rule.

Md. Zainul Abedin, learned Advocate for the petitioners submits that admittedly plaintiffs acquired 18 decimal land by two registered documents, a registered deed of exchange dated 18.10.1989 and a registered kabala deed dated 07.01.1989. It is admitted that the

executants of above deed of exchange Rabiul Alam and Rokeya Begum acquired 12 decimal land by registered kabala deed dated 25.09.1986 from two S.A. recorded tenants namely Mokbul Hossain and Abdul Karim and the executants of registered kabala deed dated 07.01.1993 Zohura and Fazila are admitted B.S. recorded tenants of the disputed land. As such the plaintiffs acquired 18 decimal land by way of successive purchase and exchange from the admitted owners of disputed C.S. Plot No.1127 and B.S. Khatian No.579. But the learned Judges of both the Courts below most illegally held that the plaintiffs do not have any lawful title in the disputed khatian or plot which is not tenable in law. As far as the possession and dispossession of plaintiffs from disputed 4 decimal land is concerned in the plaint the plaintiffs have stated the date, time and mode of dispossession of the plaintiffs by defendant No.1 and above claims have been proved by oral evidence of two competent witnesses namely PW1 Haider Ali and PW.2 Moznu Miah. On consideration of above consistent evidence of competent witnesses the learned District Judge should have allowed the appeal, set aside the flawed and erroneous judgment and decree for the trial Court and decreed the suit. But the learned District Judge failed to appreciate above evidence on record properly and most illegally

dismissed the appeal and upheld the flawed and erroneous judgment and decree of the trial Court which is not tenable in law.

On the other hand Mr. Md. Golam Nabi, learned Advocate for the opposite party Nos.1-2 and 4-6 submits that the plaintiffs have admitted in the plaint that they purchased 18 decimal land from two C.S. Plots Nos.1187 and 1188 and their predecessors acquired title in above two plots but the plaintiffs have claimed that they owned and possessed total 18 decimal land from disputed Plot No.1187. There is no explanation and basis of above unlawful claim of title and possession of the plaintiffs in C.S. Plot No.1187 alone. As far as alleged possession and dispossession in the disputed land is concerned PW1 has admitted in cross examination that in the disputed 4 decimal land there are shops of the defendants which is possessed by his 6 tenants. On consideration of above evidence on record the learned Judges of both the Courts below have rightly and concurrently held that the plaintiffs do not have any title or possession in the disputed land and rightly dismissed the suit and the appeal which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is admitted that Mokbul Hossain, Abdul Karim, Zohura Khatun and Fazila Khatun are all successive heirs or successive purchasers from

the C.S. recorded tenant of the disputed joma and their names have been recorded in B.S. Khatian No.579.

At Paragraph No.2 of the plaint plaintiff stated that above Mokbul Hossain and Abdul Karim transferred 12 decimal land to plaintiffs predecessors Rabiul Alam and Rokeya Begum from two C.S. Plot Nos. 1187 and 1188 and above Rabiul Alam and Rokeya Begum exchanged above 12 decimal land with to the plaintiffs by a registered deed of exchange dated 18.10.1989. Plaintiffs further claimed that Zohura and Fazila transferred 6 decimal land to Plaintiff from above two Plot Nos.1187 and 1188 by registered kabala deed dated 07.01.1993. As such it is crytile clear that the plaintiffs acquired title in 18 decimal land from C.S. Plot Nos.1187 and 1188 but the plaintiffs claimed above total 18 decimal land from the disputed C.S. Plot No.1187.

There is no explanation in the plaint as to how the plaintiffs claimed title and possession of 18 decimal land of Plot Nos.1187 and 1188 from only Plot No.1187. There is no claim that the plaintiffs are in possession in above land by amicable partition with other co-sharers including defendant No.1. It is well settled that amicable partition does not create title nor distinguish the title of the co-sharers who are out of the possession. Admittedly the defendants and plaintiffs are co-sharers in disputed B.S. Khatian No.579 and there is no claim that above

property was partitioned by meets and bounds. The learned Senior Assistant Judge committed serious illegality in holding that the plaintiffs do not have any title in the property of disputed Plot No.1187 and undisputed plot No.1188.

As far as possession and dispossession of the plaintiffs from the disputed land is concerned in the plaint the plaintiffs have stated that disputed 4 decimal land remained vacant and defendants forcibly constructed a half building in above land on 09.09.2012. But the defendants stated in their written statement that in above land they have 6 half pacca shops which have been rented out to six persons. In his cross examination PW2 admitted above fact and stated that Abdur Rouf, Aminur, Masud, Hasan and Shahjahan are tenants of above shops. Above Shajahan gave evidence as DW3 and claimed that he is running one shop in the disputed land as a tenant of defendant No.1 and other 5 shops are being possessed by other tenants of defendant No.1. PW2 Moznu Miah does not have any property contiguous to the dispute land nor he claimed in his evidence that he was present at the time of alleged dispossession of the plaintiffs from the disputed land or he saw plaintiffs possessing above land. He stated that he heard about the alleged dispossession from the defendants.

On consideration of above facts and circumstances and evidence on record I hold that the concurrent findings of the learned Judges of both the Courts below that the plaintiffs could not prove by the legal evidence their previous possession in the disputed land and alleged subsequent dispossession by the defendants on 09.09.2012 are based on evidence on record and this court in its revisional jurisdiction cannot interfere with above concurrent findings of facts.

As mentioned above the plaintiffs and defendants are co-sharers in the disputed khatian and there is a dispute between them with regard to the possession in the land of their respective share. As such the plaintiffs should have instead of filing this suit under Section 8 of the Specific Relief Act, 1877 filed a suit for partition. But due to professional inexperience and lack of skill of the appointed Advocate of the plaintiff this suit has been filed and in my view the ends of justice will be met if the impugned judgment and decree is set aside and the suit is remanded to the trial Court for retrial after giving the plaintiffs an opportunity to convert this suit into a suit for partition by necessary amendments and then proceed with the trial of the suit.

In above view of the materials on record I find substance in this revisional application 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 15.06.2022 passed by the learned Senior District Judge, Jamalpur in Title Appeal No.120 of 2019 affirming the judgment and decree dated 31.07.2019 passed by the learned Senior Assistant Judge, Sorishabari, Jamalpur in Title Suit No.92 of 2014 is set aside and above suit is remanded to the trial Court for retrial after giving the plaintiffs an opportunity to convert above suit into a suit for partition by necessary amendment of the plaint and then proceed with the trial of the suit in accordance with law.

However, there is no order as to cost.

Send down the lower Courts record immediately.