

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.2796 of 2023

In the matter of:

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

And

Mst. Taslima Khatun

... Petitioner

-Versus-

Most. Momtaz Begum

... Opposite party

Mr. Shasti Sarker with

Mr. Laxman Biswas, Advocates

... For the petitioner.

Mr. Ahmed Nowshed Jamil with

Ms. Sayeda Showkat Ara, Advocates

... For the opposite party.

Heard on 11.12.2024 and Judgment on 12.12.2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 31.01.2023 passed by the learned Additional District Judge, 4th Court, Khulna in Title Appeal No.68 of 2017 and thereby affirming the judgment and decree dated 19.04.2017 passed by the learned Senior Assistant Judge, Fultola, Khulan in Title Suit No.11 of 2015 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 opposite party as plaintiff instituted above suit under Section 9 of the Specific Relief Act, 1877 for recovery of possession of 0.05 acres land. It was alleged that the plaintiff was the rightful owner and possessor of above land and she agreed to sale the same to the defendant for a consideration of Taka 1,20,000/- and on receipt of Taka 40,000/- she executed and registered a bainapatra on 03.05.2006. The defendant further paid Taka 30,000/- on 04.06.2006 and again Taka 30,000/- on 10.07.2006 and the plaintiff gave permission to the defendant to construct a dwelling hut in above land. But the defendant did not pay the remaining consideration money nor obtained a sale deed from the plaintiff. The plaintiff asked the defendant to remove above structure and hand over to her the vacant possession of the disputed land in December, 2014 but the defendant refused to do so.

The suit was contested by defendant No.1 by filing a written statement denying all claims and allegations made in the plaint and stating that the plaintiff executed and registered a bainapatra for sale of disputed land to the defendant on receipt of Taka 40,000/- on 03.05.2006 and delivered possession. The defendant asked the plaintiff to receive the remaining consideration money and execute a sale deed. But above land was enlisted as enemy property and recorded in S.A. Khatian No.1 in the name of the Government. As such the plaintiff

could not execute and register a sale deed. The defendant was ready to pay remaining Taka 20,000/- get a sale deed executed by the plaintiff.

At trial plaintiff examined 1 witness and documents of the plaintiffs were marked as Exhibit Nos.1-10 and the defendant examined 3 witnesses and documents of the defendant were marked as Exhibit No."Ka" to "Cha".

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

Being aggrieved by above judgment and decree of the trial Court above defendant as appellant preferred Title Appeal No.68 of 2017 to the District Judge, Khulna which was heard by the learned Additional District Judge, 4th Court who dismissed the appeal and affirmed 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 appellant as petitioner moved to this Court and obtained this Rule.

Mr. Shasti Sarker, learned Advocate for the petitioner submits that admittedly the plaintiff contracted to sale disputed 5 decimal land to the defendant for Taka 1,20,000/- and on receipt of Taka 40,000/- he executed and registered a bainapatra on 03.05.2006. The plaintiff subsequently receipt Taka 60,000/-. The plaintiff's name was not

mutated for the disputed land and above land was recorded in the name of the Government of Bangladesh and enlisted in 'Ka' schedule of the Arpito Sampatti Protterpon Ain, 2001 and published in official gazette in 2012 (Exhibit No.Uma). Due to above reasons the plaintiff was unable to execute and register a sale deed for above land. Defendant was always ready to pay remaining Taka 20,000/- and get a sale from the plaintiff but the plaintiff failed to comply with the terms of the registered bainapatra dated 03.05.2006. But the learned Judge of the Court of Appeal below has miserably failed to appreciate above facts and circumstances of the case and evidence on record and most illegally dismissed the appeal and affirmed the flawed judgment and decree of the trial Court which is not tenable in law.

Mr. Ahmed Nowshed Jamil, learned Advocate for the opposite party submits the title of the plaintiff in disputed 5 decimal land is admitted by the defendant. As such the plaintiff was not required to seek any relief as to his title. It is also admitted that plaintiff allowed the defendant to erect a hut in the disputed land since he paid some money. But the defendant instead of payment of remaining Taka 20,000/- and getting a sale deed from the plaintiff continued possession in above land disregarding the request of the plaintiff to hand over possession. The possession of the defendant in above land became unauthorized in

December, 2014 and within the statutory period of time the plaintiff has filed this suit on 15.01.2015. On consideration of above facts and circumstances of the case and evidence on record the learned Judges of both the Courts below concurrently found that the defendant is an unlawful occupier in the disputed land and rightly decreed the suit and dismissed the appeal respectively which calls for no interference.

I have considered the submissions of the learned Advocate for the respective parties and carefully examined all materials including the pleading, judgments of the Courts below and evidence on record.

It is admitted that the plaintiff was the owner of possessor of disputed 5 decimals land on receipt of Taka 40,000/- and she executed and registered a bainapatra on 05.03.1984 for sale of above land to the defendant for a consideration of Taka 1,20,000/- and delivered possession. On 04.06.2006 and 10.07.2006 the plaintiff admittedly received Taka 60,000/- out of the remaining consideration money.

Admittedly the plaintiff inducted the defendant into the possession of above land willingly and also gave consent to construct a dwelling hut. The plaintiff did not mention in the plaint or in her evidence as PW1 the date when she handed over possession of the disputed land to the defendant. PW1 admitted that she delivered

possession to the defendant due to partial payment of the consideration money and the defendant paid Taka 40,000/- on 10.07.2006.

Learned Advocate for the petitioner strenuously submits that this is a suit under Section 8 of the Specific Relief Act, 1877 but erroneously no relief was sought as to title of disputed 5 decimal land.

Admittedly the only relief sought in this suit was recovery of possession of above 5 decimal land after demolishing the dwelling hut of the defendant. The Specific Relief Act, 1877 provides two separate provisions in Sections 8 and 9 for recovery of possession of immovable property. When a decree for recovery of possession is sought on determination of title or a relief as to declaration or determination of title is sought with the recovery of possession in the plaint then the suit falls under Section 8 of above Act but if in the plaint the sole relief is recovery of possession then that suit falls under Section 9 of the Specific Relief Act, 1877. As mentioned above in this suit plaintiff has sought a decree for recovery of possession.

The learned Advocate for the petitioner submits that in December, 2014 the plaintiff asked the defendant to remove her hut from the disputed land and hand over vacant possession to the plaintiff. But she did not comply with above request and from above date the possession of the defendant became unlawful.

Section 8 or Section 9 of the Specific Relief Act, 1877 deals with the facts of previous possession and the subsequent date of dispossession of the plaintiff from the disputed land and not with the date of request of the plaintiff to hand over possession of above land. Admittedly the date of entry into the possession of the defendant in disputed 5 decimal land was 10.07.2006. This suit has not filed within six months from above date of entry of the defendant in the possession of the disputed land.

There is no claim in the plaint or in the evidence of any PW that that the defendant entered into possession of above land “without the consent” of the plaintiff. No suit for recovery of possession under Section 9 of the Specific Relief Act, 1877 is legally tenable unless the plaintiff claims that the defendant entered into possession of the disputed land without his consent.

While giving evidence as DW1 the defendant produced the Government Gazette Notification dated 1705.2012 which shows that the disputed land was enlisted in ‘Ka’ schedule of the Arpito Samptti Protterpon Ain, 2012. It was further stated by DW1 that he requested the plaintiff to receive remaining Taka 20,000/- and execute and register a kabala deed. But the plaintiff could not do that since the

disputed property was enlisted as enemy property and name of the plaintiff was not mutated for above land.

While giving evidence as PW1 the plaintiff has admitted in her cross examination that her name was not mutated for the disputed land in 2006.

The learned Judges of both the Courts below miserably failed to realize that since the defendant got possession pursuant to a contract of sale of above land and the plaintiff had laches in not executing a sale deed and above possession of the defendant was protected by Section 53A of the Transfer of Property Act, 1882. The defendant was entitled to continue possession in above land until above admitted registered bainapatra for sale was cancelled by a competent Court on the findings that the defendant failed to perform his obligation under above bainapatra.

In above view of the facts and circumstances of the case and evidence 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 31.01.2023 passed by the learned Additional District Judge, 4th Court, Khulna in Title Appeal

No.68 of 2017 affirming the judgment and decree dated 19.04.2017 passed by the learned Senior Assistant Judge, Fultola, Khulan in Title Suit No.11 of 215 is set aside. Above suit is dismissed on contest with cost.

However, there is no order as to costs.

Send down the lower Courts record immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER