

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 6554 of 2023

With

Civil Rule No. 58 (vio) (R) of 2023

Askor Ali Sikder @ Anfor Ali

.....Petitioner.

-Versus-

Hafizur Rahman and others

.....Opposite parties.

Mr. Md. Furuque Ahmed, Advocate

.....For the petitioner.

Mr. Md. Abdul Jabbar Thafadher, Adv.

..... For the opposite parties.

Heard and judgment on 11<sup>th</sup> June, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 25.10.2023 passed by the Additional District Judge, 3<sup>rd</sup> Court, Sylhet in Title Appeal No. 12 of 2023 reversing those dated

01.12.2022 passed by the Assistant Judge, Kanaighat, Sylhet in Title Suit No. 43 of 2020 decreeing the suit should not be set aside.

Petitioner as plaintiffs filed Title Suit No. 43 of 2020 against the opposite parties for permanent and mandatory injunction before the Court of Assistant Judge, Kanaighat, Sylhet.

Plaint case in short, inter alia, is that .1600 acres land under B.S. khatian No. 405, B.S. plot 2101 was paternal property of plaintiff and defendant No. 2-3. By amicable family arrangement plaintiff got .1066 acres of land and defendant No.2 got the rest .0533 acres of land from the aforesaid khatian. Defendant No.3, brother of plaintiff got some other plots from paternal property, which he sold out vide deed No. 1051 dated 20.03.2006 and deed No. 1904 dated 04.04.2017. The plaintiff alone purchased .10 decimals of land from B.S. khatian No.275 B.S. plot No. 2101 from Abdus Salam vide registered deed No. 914 dated 24.02.2020 and thus the plaintiff became the owner in respect of .1066 acres of land under B.S. khatian No. 405 B.S. plot No. 2101 and 10 decimals of land under B.S. khatian No.275 B.S. plot No. 2101, which is the land of serial No.1 land of the plaint. Rest land i.e.

the land of serial No.2 under B.S. khatian No. 405 is also paternal land of the plaintiff and defendant No.2-3. Plaintiff got the land of serial No.2 of the plaint by amicable settlement with his two brothers. Land of serial No.3, khatian No. 665 of the plaint purchased by the plaintiff from Morakib Ali vide registered deed dated 19.02.2020. Thus the plaintiff became the owner of the entire suit land mentioned in serial No. 1-3 of the plaint. The defendant No.2 made a gift vide registered deed No. 4696 dated 04.10.2016 and transferred his entire land in favour of Sikdar Foundation College including .0533 acres of land under B.S. khatian No. 405, B.S. plot No. 2101. Thus he had no share in respect of B.S. plot No. 2101. Defendant No.3, Rashid Ahmed Sikdar, brother of the plaintiff relinquished his claim in respect of B.S. plot No.2101 and 2105 in favour of the plaintiff by accepting other paternal land which he ultimately sold out vide registered deed No. 1501 of 2006 and 1904 of 2017 in favour of Abdul Jalil and Shafiqun Begum. On 25.07.2020 defendant No.1 abruptly started construction work upon the land of the plaintiff and he continued construction work within the aforesaid land. Thus the plaintiff filed the suit on 07.09.2020.

Opposite party No.1 Hafizur Rahman Principle-in-charge of Sikdar Foundation College alone contested the suit by filing written statement, denying the plaint case alleging, inter alia, that 16 decimals of B.S. plot No. 2101 under B.S. khatian No. 405 was the paternal property of three brothers i.e. plaintiff and defendant No.2-3. By amicable family arrangement defendant No.2 got 1/3 share i.e. .0533 acres of land in respect of B.S. plot No. 2101. He gifted the aforesaid land including other non-suited property in favour of Sikdar Foundation College vide registered deed No. 4969 dated 04.10.2016. Sikdar Foundation College mutated their name in respect of total 1 acres land and constructed a tinshed mosque in respect of .0533 acres of land under B.S. khatian No. 405 B.S. plot No. 2101. Subsequently started pucca construction of the old mosque situated upon the land of B.S. Plot No. 2101 on the land measuring .0533 acres. Defendant never encroached any land of the plaintiff but the plaintiff started Criminal Case No. 16 of 2020 under section 144 of the Cr. P.C. On 07.09.2020 he filed the present suit out of grudge an enmity. Suit is false and is liable to be dismissed.

During trial following issues were framed:

- i) Whether the suit is maintainable to its present form or not?
- ii) Whether there is any bad for defect of parties?
- iii) Whether the suit is barred by limitation or not?
- iv) Whether the plaintiff is entitled to get injunction as prayed for?
- v) Whether the defendant has encroached the land in plot No. 2101 and as such the plaintiff is entitled to get a mandatory injunction or not?

In order to prove their respective cases both the party adduced evidences and one Advocate Commissioner was examined in court after investigation, whose report is exhibited in court.

By the judgment and decree dated 01.12.2022, the Assistant Judge, Kanaighat, Sylhet decreed the suit on contest.

Challenging the said judgment and decree, defendant preferred Title Appeal No. 12 of 2023 before the Court of District Judge, Sylhet, which was heard on transfer by the Additional District Judge, 3<sup>rd</sup> Court, Sylhet, who by the impugned judgment

and decree dated 25.10.2023 allowed the appeal and after reversing the judgment of the trial court and dismissed the suit.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant rule.

Mr. Md. Furuque Ahmed, the learned advocate appearing for the petitioner drawing my attention to the deposition given in the suit submits that defendant No.1 since while deposing in court and admitted that the land on which it was alleged that defendant has encroached i.e. on .0866 acres of land on plot No. 2101 is not the land, which the college and the mosque obtained from the original owner by way of the deed of gift. Which proved the allegation of the plaintiff that defendant has encroached the land of the plaintiff. Noticing the same trial court has rightly gave a decree for permanent injunction in favour of the plaintiff. But the appellate court upon travelling beyond the pleadings of the suit and decided the suit as if he was deciding a partition suit and dismissed the suit most arbitrarily without proper reversing the findings of the trial court. The impugned judgment and decree thus violates the mandatory provision as laid down under Order 41

Rule 31 of the Code of Civil Procedure, which is not sustainable in law, and is liable to be set aside.

Mr. Md. Abdul Jabbar, the learned advocate appearing for the Opposite Party, on the other hand drawing my attention to the judgment of the trial court submits that appellate court has rightly found that in a suit for injunction it is essential to prove whether the plaintiff has got valid title over the suit land and specific possession there or not and on assessing the same, the appellate court being the last court of fact has rightly found that plaintiff has got no valid title over the suit land and as such dismissed the suit. The impugned judgment contains no illegality and the rule may be discharged.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for permanent injunction wherein admittedly plaintiff is the owner of his property. In the plaint plaintiff has prayed that:

"১১। অতএব বাদীর প্রার্থনা যে,

ক) বাদীর স্বত্ব দখলীয় নালিশা নিম্ন তপশীল বর্ণিত ভূমিতে কিংবা ইহার কোন অংশে ১নং মূল বিবাদী যাহাতে ২নং মোকাবিলা বিবাদী কলেজের মসজিদ নামা করণীয় কোন বিল্ডিং এর নির্মান কার্য্য করিতে না পারেন কিংবা নালিশা ভূমির আকৃতি প্রকৃতির কোন পরিবর্তন করিতে না পারেন সেই মর্মে ১নং মূল বিবাদী বিরুদ্ধে স্থায়ী নিষেধাজ্ঞার এক ডিক্রি দিতে;

খ) নালিশা ২১০১ দাগের কতকাংশে মূল বিবাদীগণ কর্তৃক জোর পূর্বক বেইছ ঢালাইসহ ভিটা লেভেল হইতে ১১-০ ফুট উচু যে পিলার নির্মান করিয়াছেন তাহা নিজ খরচে অপসারণ ক্রমে উক্ত ভূমি পূর্বাবস্থায় ফিরাইয়া দেওয়ার জন্য ১নং মূল বিবাদী বিরুদ্ধে এক নির্দেশ শুচক নিষেধাজ্ঞার ( mandatory injunction ) ডিক্রি দিতে এবং;

(গ) মাননীয় আদালতের ন্যায় বিচারে বাদী অপরাপর যে সকল প্রতিকার বা উপকার পাওয়ার যোগ্য বিবেচিত তাহা মঞ্জুর করার এবং;

(ঘ) মামলার ব্যয় সহ বাদী অনুকূলে এবং বিবাদীগণ প্রতিকূলে এক খর্চার ডিক্রি দিতে যেন মর্জি হয় এবং;"

The said suit was challenged by the defendant No.1, who is the principle of the Sikdar Foundation College. Who is neither a



co-sharer in the suit property nor claim the title of the suit of his own. He gave a written statement on behalf of the Sikdar Foundation College, denying the plaintiffs contention. Mainly he try to reply by saying that:

"বা) এখানে উল্লেখ করা আবশ্যিক যে, অত্র মোকদ্দমার ২নং ব্যারিষ্টার কুতুব উদ্দিন আহমদ তাহার মৌরসী সূত্রে প্রাপ্ত ১/৩ অংশের ২১০১নং দাগের ০.০৫৩৩ একর ভূমির অবশিষ্ট ২/৩ অংশের ০.১০৬৬ একর, ২১০৫ নং দাগের ০.০২ একর ভূমির অবশিষ্ট ২/৩ অংশের ০.১০৬৬ একর ও ২১১০ নং দাগের ০.০১ একর ভূমির অবশিষ্ট ২/৩ অংশের ০.০২ একর ভূমি বাদী ও অপর ভ্রাতা রসিদ আহমদের সম্পূর্ণ সম্মতি ও জ্ঞাতসারে কলেজের সীমানার বাহিরে খালি রাখিয়া কলেজ নির্মাণ করিয়াছেন। তথাপি বাদী কলেজ সীমানার বাহিরে প্রত্যেকটি দাগে তাহার ১/৩ স্বত্বাংশে প্রাপ্ত খালি ভূমির বিষয়ে নীরব থাকিয়া কলেজ ও মসজিদের সীমানার ভিতরের ভূমি যাহার উপর মসজিদ নির্মিত হইতেছে তাহা দাবী করিয়া কলেজ ও মসজিদের ভাবমূর্তি বিনষ্ট ও বিতর্কিত করার প্রচেষ্টা চালাইয়া যাইতেছেন। যাহা আপত্তিকারী ১নং বিবাদীকে বিভ্রত অবস্থায় ফেলার অপচেষ্টা মাত্র।"

In view of the respective cases of both the parties in a suit for permanent injunction, in the case in hand, main question is to be decided whether defendant, Sikdar Foundation College encroached any land, and is the land, which the College has obtained by way of gift from Barister Kutubuddin Ahmed Sikder through the deed No. 4969/16 dated 04.10.2016 or not. Defendant No.1 is contested the suit through the Principle-in-charge of the Sikdar Foundation College. The other defendants who are the brother and co-sharers of the suit land along with the plaintiffs did neither come forward to oppose the suit nor oppose the claim of the plaintiffs but only the Principle of the College contested the suit.

Now let us see what he has said as well as try to establish the fact disclosed in the written statement as stated above. While deposing in court D.W.1 Hafijur Rahman, the Principle-in-charge of the Sikdar Foundation College has stated that:

"২০৯৯ দাগ কুতুবের ব্যক্তিগত জায়গা। ২১০১ দাগে ০৮৬৬ শতক জায়গা পড়েছে সম্প্রসারিত/নতুন নির্মাধিন মসজিদের উপর। এই ০৮৬৬ শতক জায়গা যাহা ২১০১ দাগে মোট পরিমান ৩২ শতক। ৩২ শতকের মধ্যে আনফর আলীর ২৭৫ খতিয়ানভুক্ত ২১০১ দাগে ঐ খতিয়ানের মালিক আঃ সালাম গং হতে ১০

শতক জমি খরিদ করে তার দলিল আমি দেখেছি। এই ১০ শতকের চৌহদ্দাঃ উত্তরে ২০৯৯ দাগ দঃ দঃ ২১০৫ দাগ, পঃ এই দাগে বাদি-বিবাদীর এজমালি, পূর্বেঃ ২১০২ এর মালিক আঃ রাজ্জাক গং নতুন মসজিদের নির্মান কাজ বাদির খরিদা + মৌরসী জায়গার উপর পড়েছে।"

Thereby defendant has by himself gave the schedule of the suit land, which is as per his admission not within the property, which was gifted to the college rather the construction was made on the land as been obtained by the plaintiff. Noticing the scenario of this case together with the report of Advocate Commissioner, which is exhibited in court as Ext. A, AA, trial court found that defendant has encroached .0866 acres of land of the plaintiff and accordingly decreed the suit. Appellate court while deciding the suit although found that :

"নালিশি বি এস-৪০৫ এবং ৬৬৫ খতিয়ান ভুক্ত ২১০৭ দাগে বাদী পক্ষ নিজাংশে ৫.৩৩ শত এবং খরিদ মূলে ১০ শতক মোট ১৫.৩৩ শতক ভূমিতে মালিক থাকা প্রমাণে সক্ষম হলেও খতিয়ানের ভূমি নিয়ে ভাইদের মধ্যে বন্টন নামা দলিলের অস্তিত্ব না থাকায় এবং উক্ত দাগে তার খরিদা ১০ শতকের দলিলের পশ্চিমে তার ভূমিত থাকার কোনও বিবরণ না থাকায় উক্ত

১৫.৩৩ শতক ভূমি এই চৌহদ্দিতে দখল করার দাবীও অমূলক এবং বাস্তবতা বিবর্জিত বলে আদালতে নিকট প্রতীয়মান। নালিশি অপর বি এস-৬৬৫ খতিয়ানের ২১০৬ দাগের ৪ শতক ভূমিতে বাদী পক্ষ খরিদ মূলে মালিক হওয়া বিবাদী পক্ষ স্বীকার করেন। কাজেই উক্ত ভূমিতে তার স্বত্ব এবং দখল থাকা প্রতীয়মান হয়।"

When the appellate court as being the last court fact found that plaintiff has got prima facie case over the suit land as well as it was been proved by way of admission of defendant but simply upon making out a presumptive assertion as well as travelling beyond the pleadings and arbitrarily holding that since there is no partition amongst the co-sharer and as such plaintiff is not entitled to get the decree as prayed for.

Moreover when the defendant as D.W.1 has described the schedule of the suit land but the appellate court arbitrarily held that suit property was unspecified since there is no partition amongst the share holder. It is surprising to notice that when the other co-sharer over the suit land did not come forward to raise any objection on the claim made by the plaintiff as well as did not come forward to claim the share or challenged the share it is none

of the business of the court concern to decide the matter arbitrarily in a suit for permanent injunction and to decline the injunction in favour of any claimant holding that property was not been partition. Appellate court totally failed to consider the true aspect of this case and without proper reversing the findings of the trial court and upon violating mandatory provision under Order 41 Rule 31 of the Code of Civil Procedure dismissed the suit most arbitrarily. The impugned judgment is not sustainable in law, which is liable to be set aside.

I thus find merit in this rule.

In the result, the Rule is made absolute and the impugned judgment and decree passed by the appellate court is hereby set aside and the judgment passed by the trial court is up held and the suit is decreed. The Civil Rule No. 58 (Vio)(R) of 2023 is disposed of.

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

Send down the L.C.R along with the judgment to the courts below at once.