

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.2609 2012

In the matter of:

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

And

Tajul Islam and others

... Petitioners

-Versus-

Abdul Aziz being dead his heirs: Nurun Nahar and others

.... Opposite parties

Mr. Mohiuddin Ahmed, Advocate

.... For the petitioners.

Mr. Md. Jahangir Hossain, Advocate

.... For the opposite party Noa.1(kha)

- 1(chha).

Heard and Judgment on 25.08.2024.

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 judgment and decree dated 15.04.2012 passed by the learned Joint District Judge, 2nd Court, Kishoregonj in Other Appeal No.127 of 2002 dismissing the appeal and thereby affirming the judgment and decree dated 19.03.2002 passed by the learned Assistant Judge, Tarail, Kishoregonj in Suit No.39 of 2001 dismissing the suit with cost of Tk.5,000/- 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 a decree of perpetual injunction against the defendants for 18 decimals land appertains to C.S. plot No.639 of C.S. Khatian No.691.

It was alleged that above land belonged to three brothers namely Miahdhor, Miahfor and Nasim in equal shares. Plaintiffs are the heirs of above mentioned Miahfor and they acquired 6 decimals land of Miahdhor by oral exchange and his father purchased the land of Nasir by registered kabala deed dated 06.07.1925. Thus the plaintiffs is in exclusive possession in total 1618 decimal land. But the defendants have threatened the plaintiff with forcible dispossession from above land on 30.06.2001.

Defendant No.1 contested the suit by filing written statement alleging that he purchased $8\frac{1}{2}$ decimals land from Jinnat and Jahed by registered kabala deed dated 04.10.1945 (Exhibit-Ka) and he is in peaceful possession of above land. The plaintiffs do not have lawful title and possession in disputed 18 decimal land.

At trial plaintiffs examined 4 witnesses and defendant examined one. But no document was produced and proved by the plaintiffs and the defendants.

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

Being aggrieved by the above judgment and decree plaintiff preferred Other Appeal No.127 of 2002 to the District Judge, Kishoregonj which was heard by the 2nd Court of Joint District Judge who dismissed the 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 the appellants as petitioners moved to this Court and obtained this Rule.

Mr. Mohiuddin Ahmed, learned Advocate for the petitioners submits that the defendants admit plaintiff's title and possession in the disputed plot and khatian but not in total 18 decimal of land. The learned Courts below rightly found that the plaintiffs have title and possession in part of the disputed land but the learned Senior Assistant Judge most illegally imposed a cost of Tk.5,000/- at the time of dismissing the suit without any lawful basis. The learned Joint District Judge failed to appreciate above aspect of the case and most illegally dismissed the appeal of the petitioners and affirmed the unlawful judgment of the trial Court which is not maintain in law.

On the other hand Mr. Md. Jahangir Hossain, learned Advocate for the opposite party Nos.1(kha) - 1(chha) submits that the defendants admit the registered kabala deed dated 04.10.1945 executed by Zahed and Jinnat (Exhibit-Ka) for undisputed $7\frac{1}{2}$ decimals land of plot No.640 but no more. Both the Court below rightly pointed out above falsity and

inconsistency in the case of the plaintiffs and on the basis of above findings rightly dismissed the suit and the learned Joint District on correct appreciation of materials on record lawfully dismissed the appeal and affirmed the judgment and decree of the trial Court 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.

At the very outset it is to be mentioned that the plaintiffs have filed this suit for a decree of perpetual injunction but in the plaint the disputed land has been described by mentioning the C.S. Plot No. and C.S. Khatian. It is not understandable without the relevant R.S., S.A. or B.S. Khatian and plot No. how the disputed land will be identified and determined and how a decree of perpetual injunction will be implemented. The learned Senior Assistant Judge should have dismissed the suit on above ground alone.

As mentioned above in the disputed plot the quantity of the land is 18 decimals. The plaintiffs claimed total land of the plot. The plaintiffs have claimed 6 decimals land of another co-sharer Miahdhor by way of oral exchange from his heirs but oral exchange does not create lawful title. Moreover, both the Courts below found that above claim of oral exchange could not be proved by the plaintiffs by legal evidence.

As mentioned above defendant No.1 claims $8\frac{1}{2}$ decimals land from the disputed plot on the basis of a registered kabala deed dated 04.10.1945 executed by Jahed Ali and Zinnat (Exhibity-Ka). The plaintiffs admit the correctness and genuinity of above kabala deed for undisputed $7\frac{1}{2}$ decimals land.

In above view of the facts and circumstances of the case and evidence on record I hold the learned Judges of the Courts below rightly found that the plaintiffs could not prove his prima facie title and exclusive possession in 18 decimals land by legal evidence and accordingly dismissed the suit and appeal respectively.

But the learned Senior Assistant Judge committed an error in imposing a fine of Tk.5,000/- upon the plaintiffs without any lawful cause. Undisputedly plaintiffs are co-sharers in the above disputed jama and they have title and possession at least in a part of the land of above plot. As such the learned Joint District Judge should have modified the judgment and decree of the trial Court as far as imposition of above fine is concerned. But the learned Joint District Judge failed to do so which is not tenable in law.

On consideration of the above facts and circumstances of the case and evidence on record I am of the view that the ends of justice will be met if the judgment and decree of the Court of Appeal below Joint District Judge is upheld with modification.

The judgment and decree dated 15.04.2012 passed by the learned Joint District Judge, 2nd Court, Kishoregonj as mentioned above is upheld subject to exclusion of fine of Tk.5,000/- imposed upon the plaintiffs .

In the result, the Rule is hereby discharged with above modification in the impugned judgment of the Court of appeal below.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER