

District: Magura

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 3535 of 1991

In the matter of :

Moniruddin Shaik and others

... Petitioners

-Versus-

Md. Shahajan Shaik and others

...Opposite-parties

Mr. Bivash Chandra Biswas, Senior Advocate

...For the petitioners

Mr. Mr. A.H.M Obaidul Kabir, Advocate

...For the opposite-parties

Heard on: 30.10.2024

Judgment on: 05.11.2024

Rule was issued on an application under section 115 of the Code of Civil Procedure calling upon the opposite party Nos. 1-8 to show cause as to why the judgment and decree dated 03.07.1989 passed by the Sub-ordinate Judge, Magura in Title Appeal No. 17 of 1988 affirming those of dated 28.12.1987 passed by the Assistant Judge, Mohammadpur, Magura in Title Suit No. 778 of 1984 should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The present petitioners as plaintiffs filed Title Suit No. 525 of 1981 before the Court of First Munsif, Magura subsequently on transfer the suit was renumbered as Title Suit No. 778 of 1984 and was heard by the Upazila Munsif, Mohammadpur, Magura, wherein the plaintiff sought for declaration of title and confirmation of possession contending, *inter-alia*, that the suit land was originally belonged to Kazem Shaik; Kasimuddin got the property through settlement from the aforesaid Kazem Shaik and thereby enjoying the property peacefully. Kasimuddin died intestate leaving behind a son Tasiruddin, who inherited his paternal property. Thereafter on 23.11.1959 Tasiruddin transferred the property to Saleha Khatoon wife of plaintiff No. 1 and mother of plaintiff Nos. 2-5 through registered kabala dated 23.11.1959. Saleha Khatoon died intestate leaving behind the plaintiffs as legal heirs. Plaintiffs are in possession in the suit land. The defendants have no title or possession into the suit land. The defendants threatened the plaintiffs to dispossess denying their title into the land on 10.11.1981 and upon such cause of action the plaintiffs instituted the suit.

The defendant Nos. 1-8 contested the suit by filing written statement denying all the material averments of the plaint contending, *inter-alia*, that the suit land was originally belonged to Kazem Shaik; while Kazem Shaik was in peaceful possession and enjoyment of the suit property died intestate leaving behind

only son Falu Shaik as legal heir. Falu Shaik transferred the property to Narendra Nath Basu by registered kabala dated 07.11.1959. Subsequently, the said Narendra Nath Basu transferred 25 decimals of land from the suit property to Abdul Gani and Gafur Mollah by registered kabala dated 28.11.1962. Gafur Molla died intestate leaving behind defendant Nos. 1-3 as his legal heirs and Abdul Gani Molla died intestate leaving behind defendant Nos. 4-8 as his legal heirs. Narendra nath Basu also transferred the rest 37 decimals of land to defendant No. 1 and inducted him into the possession, but due to insufficient fund the said defendant could not get the kabala registered. The plaintiffs have no right, title possession over the suit land and as such the suit is liable to be dismissed.

During hearing the plaintiffs examined 3(three) witnesses and adduced documentary evidences and exhibited kabala dated 23.11.1959 as Exhibit-‘Ka’ and ‘Khazna Dakhilas’ as Exhibit-‘Kha-series’. On the other hand, the defendants also examined 3(three) witnesses and exhibited 2(two) kabalas dated 7.11.1959 (Exhibit-1) and kabala dated 28.11.1962 (Exhibit-2).

On conclusion of hearing learned Judge of the trial Court by his judgment and decree dated 28.12.1987 dismissed the suit, on the findings that the plaintiffs’ suit is barred by limitation, hit by section 42 of the Specific Relief Act, 1877 and the plaintiffs also failed to prove their title over the suit land.

Having been aggrieved by the aforesaid judgment and decree dated 28.12.1987, the plaintiffs preferred Title Appeal No. 17 of 1998 before the District Judge, Magura, which on transfer ultimately heard by the Sub-ordinate Judge, Magura and learned Sub-ordinate Judge by his judgment and decree dated 03.07.1989 dismissed the appeal affirming those of the trial Court.

On being aggrieved by and dissatisfied with the aforesaid judgment dated 03.07.1989 of the Sub-ordinate Judge, Magura, the plaintiffs-petitioners filed this revisional application and obtained the Rule.

Mr. Bivash Chandra Biswas, learned Senior Advocate appearing for the petitioners submits that the Court of appeal below failed to discuss all the evidences on record and thereby arrived at any independent findings as per Order XLI, rule 31 of the Code of Civil Procedure. He next submits that the Exhibit-‘Kha series’ proved the chain of title of the plaintiffs, the defendants even did not challenge the dakhilas as forged and created, thus, the dakhilas stand. He further submits that if it is proved that the title of the property was transferred to Tasiruddin from Kazem Shaik through settlement, thus the predecessor of the defendants, named Falu Shaik would be title less person and in that case Exhibit-‘1’ and ‘2’, the deeds dated 07.11.1959 and 28.11.1962 would be baseless and conferred no title upon the

defendants. He continues to submit that if the settlement is not proved then the defendants could have a case.

He again submits that the plaintiffs-appellants on 10.04.1989 filed an application sought for sending back the suit on remand to the trial Court contending, *inter-alia*, that the plaintiffs with due diligence could not produce the registered kabuliyats, the basic documents of settlement, dated 12.06.1925 and 11.01.1927. On 31.01.1988 and 22.02.1988, they could manage to obtain the certified copies of those kabuliyats and now through the application they were filing those documents and thereby prayed for sending back the case on remand. The Court of appeal below failed to deal with the said application in accordance with law and thereafter, before this Court the plaintiffs-petitioners by way of supplementary affidavit submitted certified copies of those kabuliyats. In such facts and circumstances he sought for sending back the case on remand for ends of justice to enable the petitioners to establish their title over the suit land.

On the other hand, Mr. A.H.M Obaidul Kabir, learned Advocate appearing for the opposite-party Nos. 1-8 submits that both the Courts below concurrently found that the plaintiffs miserably failed to prove their title and exclusive possession over the suit land. The concurrent findings of fact arrived at by the Courts below upon proper appreciation of the evidences on record is immune from interference in revision. He next submits that the

plaintiffs failed to prove exclusive possession over the suit land and thus, the suit for declaration of title and confirmation of possession is hit by section 42 of the Specific Relief Act, 1877. He further submits that the dakhilas or related documents, the basic title documents of the plaintiffs having not been proved in accordance with law. He also submits that the application filed by the plaintiffs-appellants-petitioners before the appellate Court below on 10.04.1989 was not pressed before the Court concerned, even at the argument stage or any time before pronouncement of judgment and accordingly, the appellate Court below has come to a positive finding that the appellants are not entitled to get any remedy through the aforesaid application and now, the plaintiffs-petitioners cannot be allowed to agitate the same prayer before the revisional Court, because they are barred by Estoppel. He further submits that the order of remand cannot be allowed as a matter of course to fill up the lacuna of plaintiffs' case, thus, the prayer for remand to fill up the lacuna cannot not be allowed legally at this revisional stage. In support of his submission, he referred the case of Abdus Sobhan Vs. Anwar Rahim and others reported in 53 DLR(AD) 110, the case of Md. Abdus Satter and others Vs. Lalon Mazar Sharif and Seba Sadan Committee and others reported in 24 BLD(AD) 125, the case of A.K.M Abu Sayed Chowdhury Vs. A.K.M Abdul Wahed Chowdhury and others reported in 64 DLR 298.

Heard learned Advocate of both the parties, perused the revisional application, the supplementary affidavit filed on behalf of the petitioners, having gone through the cited judgments and lower Courts' record.

It appears that the plaintiffs filed a suit for declaration of title and confirmation of possession, contending that their predecessor-in-interest, named Kasiruddin took settlement of 62 decimals of land from one Kazem Shaik. It is evident from the record that the plaintiffs could not prove the aforesaid settlement, through the basic document of their title by adducing any evidence, oral or documentary before both the Courts below. As a result, the suit was dismissed, against which they took Title Appeal No. 17 of 1988, ultimately which was heard by the Subordinate Judge, Magura. During pendency of the appeal on 10.04.1989, they filed an application before the appellate Court below sought for sending back the case on remand to the trial Court. Thereafter, on the occasion of 28.05.1989 the plaintiffs-appellants took adjournment by filing an application. Thereafter, on 28.06.1989 the appellants placed their argument at length, but surprisingly they did not press the application dated 10.04.1989. Thereafter, on 03.07.1989, the appellate Court below delivered its judgment and rejected the said application stating that the plaintiffs-appellants did not press the application for unknown

reason and as such, the application for sending back the case on remand cannot be considered.

More so, it is the specific findings of learned Assistant Judge that the plaintiffs failed to prove their possession over the suit land and the defendants are in possession into the suit land and as such, without having any prayer of consequential remedy under the proviso to section 42 of the Specific Relief Act, 1877 praying for recovery of possession, the suit for declaration of title and confirmation of possession is not maintainable and hit by section 42 of the Specific Relief Act, 1877. The appellate Court below concurred with the aforesaid findings to the effect that the defendants are also in possession in the suit property.

The proviso to the section 42 of the Specific Relief Act, 1877 contemplated that the plaintiffs are to sue for all reliefs which can possibly be granted, but where the consequential relief is found necessary, but has not been asked for; omission to sought for the said consequential relief makes the suit not maintainable.

In the present case, the plaintiffs are found out of possession of the suit land and at the same time, the defendants are found to be in possession over the said land. In such facts and circumstance, without having prayer of recovery of possession, the suit for mere declaration and confirmation of possession is not maintainable and in such situation, remanding back the case to the

Court of original jurisdiction is amount to allow the plaintiffs to fill up their lacuna.

Moreover, in no point of time, the plaintiffs filed an application sought for adducing additional evidences under the relevant provisions of the Code of Civil Procedure, rather opted to file an application before the appellate Court below on 10.04.1989 sought for sending back the case on remand, but thereafter, they did not pursue or place the said application and accordingly, at time of pronouncement of judgment the appellate Court below came to the specific finding that the application cannot be entertained and rejected as not pressed.

Through supplementary affidavit dated 31.03.1990 the plaintiffs-petitioners submitted certified copies of 2(two) kabuliyats. And now prayed for remanding back the case on remand again without having any explanation what so ever for not placing or pursuing the application dated 10.04.1989. And in view of above, the plaintiffs-petitioners are not allowed to submit the identical application again with identical prayer, which was rejected earlier by the appellate Court below for the allegation of not pressed.

In the premise above, I do not find any reason to interfere into the concurrent findings of fact of both Courts below as to the title and regarding possession of the suit land. Moreover, the suit

is not maintainable, hit by section 42 of the Specific Relief Act, 1877.

In view of above, this Court finds no reason to interfere into the judgment of the Courts below.

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

Send down the lower Courts' record.

Communicate the judgment and order at once.