

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Ali Reza

First Appeal No. 299 of 2007

Bilquis Jahan being dead her legal representatives

1(a) Syed Mozammel Huq and another
.....appellants

-Versus-

Syed Abdul Hafiz being dead his legal representatives

1(a) Syeda Shammi Sultana and others
.....respondents

with

First Appeal No. 309 of 2007

Syed Abdul Hafiz being dead his legal representatives

1(a) Syeda Shammi Sultana and others
.....appellants

-Versus-

Bilquis Jahan being dead her legal representatives

1(a) Syed Mozammel Huq and another
.....respondents

Mr. Mrinal Kanti Biswas with

Mr. Md. Aktaruzzaman,

Mr. Binoy Krishna Poddar,

Mr. Abdullah-Al-All-Afzal and

Ms. Biroza Mala, Advocates

.....for the appellants

Mr. Mansur Habib with

Ms. Shimul Sultana, Advocates

.....for the respondents

Judgment on 29.11.2022

Md. Ali Reza, J:

These two appeals are taken up together for analogous hearing pursuant to order dated 25.11.2008 and accordingly are disposed of by this common judgment.

Sole defendant Bilquis Jahan has preferred First Appeal No. 299 of 2007. On the other hand plaintiffs Syed Abdul Hafiz and Mijanur Rahman have preferred First Appeal No. 309 of 2007. Those two appeals arose out of the judgment and decree dated 18.06.2007 passed by the Joint District Judge, Additional Court, Dhaka in Title Suit No. 34 of 2005. Initially Title Suit No. 44 of 2002 was filed in the Court of Joint District Judge, 5thCourt, Dhaka on 17.03.2002 and subsequently on transfer on 09.06.2005 it was registered as Title Suit No. 34 of 2005.

The suit was filed for declaration of title on the basis of purchase and adverse possession, confirmation of possession, alternatively for recovery of khas possession and also for permanent injunction. The case of the plaintiffs, in short, is that the suit land measuring 0.1093 acres appertaining to RS plot 8187 of RS Khatian 926 corresponding to SA plot 5329 of SA khatian 2132 originated from CS plot 143 of CS

khatian 13021 of mouja Lalbag belonged to Sheikh Nanna. CS plot 143 contains 0.2256 acres of land from which Sheikh Nanna transferred 0.1163 acres of land to the father of plaintiff 1 before SA operation. While Nanna was owner in possession in remaining 0.1093 acres died leaving behind 05(five) sons named Chand Miah, Chunnu Miah, Sona Miah, Bachchu Miah and Suruj Miah. Chand Miah died leaving behind 02(two) sons named Tara Miah, Pier Ali and 02(two) daughters named Dulari Begum and Kosturi Begum. Tara Miah died leaving behind 03(three) sons named Rahman Miah, Badal Miah and Iqbal Miah. Chunnu Miah died leaving behind 01(one) daughter Anarzadi Begum. Sona Miah died leaving behind 01(one) son Babul Miah and 01(one) daughter Piyari Begum. Bachchu Miah died leaving behind 01(one) son Solaiman Miah and 01(one) daughter Nurjahan Begum. Suruj Miah died leaving behind wife Irani Begum, 03(three) sons named Tara Miah, Kalu Miah and Abdul Kader and 05(five) daughters named Jabeda Begum, Meherun Begum, Hasna Begum, Rashida Begum and Rehana Begum. All the descendants of late Nanna Miah executed an unregistered agreement for sale of the suit land on

25.06.1991 to the plaintiffs at a consideration of tk. 5,00,000/-(five lac) from which tk. 1,00,000/-(one lac) was paid as earnest money. Subsequently, the rest tk. 4,00,000/-(four lac) was paid on 19.06.1993, 15.06.1995, 10.06.1997, 13.01.2000 and ultimately document in favour of the plaintiffs was executed and registered on 13.01.2000. On 15.01.2001 plaintiffs came to know from the settlement office that defendant mutated and separated her name in respect of the suit land. The vendors of the plaintiffs gave the photo copy of the SA record prepared in the name of Sheikh Nanna. Meanwhile, the city survey record was prepared in the name of Jahanara against which plaintiffs filed Miscellaneous Case No. 651 of 2000 under Rule 30 of the State Acquisition Rules but plaintiffs failed in the case on 07.06.2000. Then they preferred Miscellaneous Appeal No. 13149 of 2000 which was also disallowed. Defendant threatened the plaintiffs with dispossession on 25.01.2001. Then plaintiffs filed Title Suit No. 103 of 2001 for permanent injunction in the 3rd Court of Assistant Judge, Dhaka. The suit was withdrawn on 07.03.2002 with liberty to sue afresh. Now the present Title Suit No. 44 of 2002 was filed on

17.03.2002 and the same was renumbered as Title Suit No. 34 of 2005 showing cause of action arose in the suit on 07.06.2000, 15.01.2001, 25.01.2001 and 07.03.2002.

Sole defendant appeared and contested the suit by filing a written statement denying all material statements made in the plaint contending, *inter alia*, that Devendra and Surendra filed Mortgage Suit No. 09 of 1919 against Satyendra and Monosha in the Court of 4th Subordinate Judge, Dhaka and got decree. Decree-holders filed Decree Execution Case No. 154 of 1919 and auction was held on 03.06.1920 and Birendra alias Dhirendra purchased the same in the benami of Jogendra which was confirmed by the Court on 10.07.1920. Thereafter, Jogendra executed a deed of relinquishment on 20.03.1922 to Birendra who sold 06(six) kathas from the west side of CS plot No. 143 to Ram Gopal by kabala dated 29.08.1923 and delivered possession. Ram Gopal sold the suit land to Jahanara by kabala dated 29.09.1942 and delivered possession. SA khatian 2132 was correctly prepared in the name of Jahanara in respect of suit land measuring 0.1090 acres in SA plot 5329 with reference to holding number 4 Hosseni Dalan Road, Dhaka. Then

Jahanara died on 10.02.1965 leaving behind husband Abdul Majid, 03(three) sons named Tariqul, Reazul, Enamul and 03(three) daughters named Khurshid Jahan, Kamar Jahan and defendant Bilquis Jahan. Majid then died on 10.12.1976. Khurshid Jahan also died in 1987. Thereafter, defendant and Enamul filed Title Suit No. 235 of 1989 for partition in the 2nd Subordinate Judge Court, Dhaka against Tariqul, Reazul, Kamar Jahan which ended in compromise on 24.03.1991 and the suit land exclusively fell into the saham of the defendant. Subsequently, she mutated her name in separate khatian No. 2132 on 19.11.1991 by Separation Case No. 1992 of 1991-92 and has been maintaining title and possession upon payment of rent and other taxes. Subsequently in Certificate Case No. 17 of 1997-98 defendant paid tk. 10,222.45/- on 13.06.1999 by rent receipt 496817. It is further stated that enhanced rate was realised from the defendant considering the suit land as commercial for which defendant filed Land Development Case No. 30 of 1999 to reduce the rent treating the suit land as residential and the case was allowed. During liberation war the original documents of Mortgage Suit, sale certificate, writ of delivery of possession, nadabi document, 1923

document, 1942 document, rent receipt, holding taxes were lost. The city survey DP khatian 5140 was prepared in the name of the defendant against which plaintiff filed Objection Case No. 651 of 2000 under Rule 30 which was rejected on 07.06.2000. Then plaintiffs filed Appeal Case No. 13149 of 2000 under Rule 31 which was also rejected on 24.01.2001. Plaintiffs admitted the address of defendant in 4 Hosseni Dalan Road, Lalbag in the memorandum of Miscellaneous Appeal. The second schedule of plaint and decree of Mortgage Suit No. 9 of 1919 attracts the land covered by CS plot 143. Defendant and her predecessors have been maintaining title and possession in the suit land upon payment of taxes and all utility bills for more than 80(eighty) years within the knowledge of others. Plaintiffs have no title and possession in the suit land and the suit being false is liable to be dismissed with cost.

The trial Court framed as many as 06(six) issues as to maintainability, whether the suit is barred under Article 144 of the Limitation Act, whether the plaintiffs have title in the suit land, whether the plaintiffs have possession until

dispossession, whether the plaintiffs are entitled to get the relief as prayed for.

During trial plaintiff examined 03(three) witnesses and defendant examined 06(six) witnesses and both the parties adduced documentary evidence in order to prove their respective cases.

The trial Court dismissed the suit by judgment and decree dated 18.06.2007 on the finding that the certified copy of the SA khatian (exhibit-2) was not issued by the proper authority but the certified copy of the SA khatian (exhibit-C) prepared in the name of Jahanara was duly issued and it supports possession of Jahanara and further found that admittedly the suit land is situated at 4 Hosseni Dalan Road, Dhaka for which rent and taxes are paid by the defendant through series of exhibits and those are evidence of possession and collateral evidence of title which prevail over RS khatian (exhibit-3). The Court found that plaintiffs failed to prove their or their predecessors' possession and RS record has no basis. The Court further found that the plaintiffs also failed to prove their dispossession from the suit land and the suit is not maintainable and also found that exhibit-2 does not

correspond to CS khatian 13021 (exhibit-1) and again found that exhibit-6 shows that execution was done on 16.01.2000 but the document was presented for registration on 13.01.2000 which is absurd and also found that defendant did not file the sale certificate and writ of delivery of possession and the nadabi document does not confer title and since plaintiffs or their predecessors were not parties to Title Suit No. 235 of 1989, Jahanara Begum did not acquire any title and accordingly both the parties have failed to prove their title over the suit land.

As against the same defendant Bilquis Jahan preferred First Appeal No. 299 of 2007 and plaintiffs Syed Abdul Hafiz and Mijanur Rahman preferred First Appeal No. 309 of 2007.

Mr. Mrinal Kanti Biswas, learned Advocate appearing with Advocates Mr. Md. Aktaruzzaman and Ms. Biroza Mala for the appellant (hereinafter be called as defendant) of First Appeal No. 299 of 2007 submits that the trial Court was wrong in finding that the defendant failed to prove her title to the suit land and such finding is apparently illegal and uncalled for and required to be reversed. The finding on the

deed of relinquishment dated 10.12.1921 is a blunder and the Court misjudged the document which is not tenable in the eye of law. He further submits that the trial Court failed to appreciate that many documents including the sale certificate and writ of delivery of possession were lost during liberation war and adverse finding upon such documents are misconceived when long possession of the defendant in the suit land is evidently found. He also submits that the observation along with the finding arrived at by the Joint District Judge in respect of title of defendant is against the evidence on record and the same being misconceived and illegal is liable to be reversed and set aside. He lastly submits that there are good grounds in the appeal and the same might be allowed. In support of his submission he referred the cases of Golzar Ali Pramanik Vs. Saburjan Bewa, reported in 6 BLC(AD) 41; Moksed Ali Mondal Vs. Abdus Samad Mondal, reported in 9 BLC(AD) 220; Government of Bangladesh and others Vs. Md. Sharif Uddin and others, reported in 22 BLC(AD) 204; Shishir Kanti Pal and others Vs. Nur Muhammad and others, reported in 55 DLR(AD) 39.

Learned Advocate Mr. Mansur Habib, appearing on behalf of the appellants (hereinafter called as plaintiff) of First Appeal No. 309 of 2007 submits that the trial Court erred in law in dismissing the suit beyond the evidence and law. He submits that the trial Court ought to have decided that plaintiffs being purchaser from the successive heirs of CS tenant Sheikh Nanna hold good title and the finding on possession of the plaintiffs is wrong and beyond the evidence on record. The witnesses of plaintiffs prove the possession in accordance with the law and the finding that the suit is not maintainable for want of possession is wrong. He submits that the SA record submitted by the defendant has got no basis and defendant has no title and possession in the suit land. He finally submits that since there is merit in the appeal the same would be allowed.

We have heard the learned Advocates and perused the pleadings of the parties and the evidence on record and also gone through the grounds taken in the appeals as well as the judgment passed by the Court below.

Defendant's case starts with a suit for recovery of money of a mortgage of the year of 1917 filed by Devendra

against Satyendra and others. That was Title Suit No. 180 of 1917 filed on 23.04.1917 before the CS record was finally published in the Calcutta Gazette for the concerned area on 26.06.1917. The suit was renumbered as Title Suit No. 240 of 1917 and finally as Title Suit No. 09 of 1919 by Order No. 27 dated 09.01.1919. The identity of the present suit land with boundary is found in schedule 2 of the plaint and decree of that suit which are exhibit-B series wherein it is mentioned that the land within the boundary is “*mudafate* Gobinda Moisal” which in other words means “in the name of Gobinda Moisal”. Title Suit No. 09 of 1919 was decreed on 15.01.1919 and final decree was passed on 21.08.1919 exhibit-B(iii). Decree-holder filed Execution Case No. 154 of 1919 and auction was held on 03.06.1920 and Birendra purchased the same in the benami of his cousin’s son Jagendra which was confirmed by the Court on 17.07.1920. Jagendra acknowledging ownership of Birendra executed and registered a deed of relinquishment on 20.03.1922 (exhibit-T) in respect of all lands including the suit land covered by exhibit-B(iii). Jagendra then sold the suit land situated at the west side of CS plot 143 to Ram Gopal Roy by kabala dated

29.08.1923 (exhibit-U) and delivered possession. Ram Gopal subsequently transferred the same in favour of defendant's mother Jahanara by kabala dated 22.09.1942 (exhibit-V) and delivered possession. Accordingly SA record 2132 (exhibit-C) comprising plot No. 5329 was prepared in her name with reference to holding number 4 Hosseni Dalan Road, Dhaka. Jahanara died in 1965 leaving behind husband Majid and 03(three) sons namely Tariqul, Reazul, Enamul and 03(three) daughters Khurshid Jahan, Kamar Jahan and defendant Bilkis Jahan. Majid and Khurshid Jahan died later on. For the convenience of possession in the joint property defendant and brother Enamul filed Title Suit No. 235 of 1989 for partition against brothers Tariqul, Reazul and sister Kamar Jahan and according to item 4 of the decree (exhibit-D series) the suit land fell in the saham of this defendant. There was arrear of rent for the year 1398 BS to 1405 BS for which Certificate Case No. 70 of 1997-98 started and accordingly notice (exhibit-F) was served and arrear of tk. 10222.45/- was paid on 12.03.1998 by receipt number 896902 and the case was disposed of as evident from exhibit-H. Subsequently defendant filed Land Development Tax Case No. 30 of 1999

for decrease the rent of the suit land and the Assistant Commissioner reassessed the rent which is exhibit-I. City Survey DP khatian 5140 with plot No. 2065 (exhibit-J) was also prepared in the name of the defendant. Plaintiffs filed Objection Case No. 651 of 2000 against exhibit-J but failed (exhibit-L). Plaintiff also failed in the following Appeal Case No. 13149 of 2000 (exhibit-N). Defendant filed rent, tax, utility bills (exhibit-G, O series, P series, Q series).

Plaintiffs claimed that they have entered into an agreement with the descendants of CS tenant Sheikh Nanna on 25.06.1991 wherein consideration was fixed at tk. 5,00,000/-(five lac) and 1,00,000/-(one lac) as earnest money was given on that day. Subsequently, on 19.06.1993, 15.06.1995, 10.06.1997 they paid tk. 3,00,000/-(three lac) and on 13.01.2000 the rest tk. 1,00,000/-(one lac) was paid and the kabala in respect of the suit land was executed and registered on that day.

On 15.01.2001 plaintiff went to the local settlement office and came to know that the suit land was mutated and separated in the name of the defendant. Later on when the city survey khatian was prepared in the name of the

defendant they filed Objection Case No. 651 of 2000 in the settlement office but plaintiffs lost in the said case on 07.06.2000. As against the same plaintiffs filed Miscellaneous Appeal No. 13149 of 2000 and the appeal was also disallowed. On 25.01.2001 defendant threatened the plaintiffs with dispossession for which Title Suit No. 103 of 2001 was filed for permanent injunction and due to formal defect the suit was withdrawn on 07.03.2002 with liberty to sue afresh and the present suit for declaration of title by purchase and adverse possession and for further declaration that the documents, judgment and decree of the defendant are illegal, fraudulent, collusive, inoperative, mere paper transaction and not binding upon the plaintiffs along with confirmation of possession and alternatively for recovery of khas possession and also for permanent injunction was filed on 17.03.2002.

The title document of the plaintiffs dated 13.01.2000 is filed in original and the same is exhibit-6. There are as many as 20(twenty) executants in the kabala who are the successive heirs of CS tenant Sheikh Nanna. There is a reference of an agreement dated 25.06.1991 in the kabala. Plaintiff did not

offer any explanation for not filing the agreement in order to prove the passing of consideration money. From perusal of the kabala it comes into view that all the executants reside in different addresses other than the address of the suit land. Exhibit-6 was executed and presented for registration on 13.01.2000 and the document itself shows that the same was registered on 13.01.2000. But it appears that Pear Ali, Soleman Miah and Nurjahan Begum being executants 1, 10 and 11 respectively executed the document on 16.01.2000. The document is shown to be registered without some of the vendors. It is incredible that how the sub-registrar proceeded with the registration process with the endorsement seals and sign violating the registration rules. It is a fraud upon registration. This is not a document registered in accordance with the law and the same is a forged, fraudulent, collusive and void document.

The prayer portion of the plaint shows that the plaintiff made a simultaneous claim of declaration of title on the basis of purchase and adverse possession. It is the settled principle of law that declaration of title on the basis of a document and adverse possession cannot go together because such claim

conflicts with each other. In paragraph 4 of the plaint it has been stated that all the heirs of Sheikh Nanna have been in possession in the suit land. In paragraph 7 it has been stated that defendant might dispossess the plaintiff from the suit land at any time. The last dates of cause of action are 25.01.2001 and 07.03.2002 and the suit was filed on 17.03.2002. PW 1 stated in examination-in-chief that the holding number of the suit land is 4 Hosseni Dalan Road. He further stated that after withdrawal of Title Suit No. 103 of 2001 defendant dispossessed him. He admitted in cross-examination that dispossession was done before filing of the suit. In order to get a decree for recovery of possession a definite case of possession followed by dispossession has got to be made out in the plaint and accordingly evidence has to be led. Plaintiff did not even amend the plaint to the effect that they had been dispossessed on such date and time by such person or persons in such manner. Plaintiffs have no case on possession followed by dispossession and question of decree on recovery of possession does not arise at all under Article 142 of the Limitation Act and their factum of actual position on possession is beyond pleading. From reading of

the deposition of PW 2 and PW 3 it does not appear that plaintiffs or their predecessors had possession in the suit land. PW 2 expressed his ignorance about the possession of DW 6 in the suit land. From the oral evidence of both the parties along with the series of documentary evidence filed by the defendant it transpires that defendant's mother Jahanara had been maintaining title and possession in the suit land till her purchase in 1942 by exhibit-V and after her death defendant Bilkis maintains the same.

Defendant has stated in paragraph 23 (Jha) of the written statement that the original documents of foreclosure suit, sale certificate, writ of delivery of possession, deed of relinquishment, title documents, rent-receipts, khatian, receipts of holding taxes were lost during the war of independence. The trial Court found since no sale certificate, writ of delivery of possession were produced, the predecessor of defendant acquired no title. But the trial Court failed to appreciate that sale certificate is not a document of title and auction can be proved by other evidence independent of sale certificate and writ of delivery of possession. This proposition finds support from the case of Thanda Nessa Bibi

and others Vs. Monowar Joarder and others reported in 5 BLC(AD) 189, Bazlur Rahman and others Vs. Sadu Mia and others reported in 45 DLR 391. In the present case the certified copies of most of the lost documents were produced and marked in evidence. The reason for not filing the previous original documents has been explained away by the defendant. From reading of all those documents it appears that the details of the fact are chronologically and very clearly presented in the recital of those documents in consonance with the statements made in the written statement. Trial court also found that Birendra did not acquire any title by the deed of relinquishment (exhibit-T) executed by Jogendra. Trial Court did not appreciate that this deed of relinquishment although is not a document of title but of admission and declaration about the benami nature and transaction. In the instant case Birendra is the real owner and Jogendra is the ostensible owner. The admission made by the ostensible owner is sufficient to prove that Birendra was the real owner and from reading of exhibit-T, it appears that Jogendra admitted that the auction was purchased by Birendra by his own money and for his own interest. This

aspect of the case has been discussed in the case of Mst. Khaleda Razia and others Vs. Mahatub Uddin Chowdhury reported in 30 DLR(SC) 27. Recently in a judgment passed on 26.02.2019 in Civil Appeal No. 535 of 2009 in the case of Lalmon Bibi and another Vs. Mohammad Delwar Hossain and others our Appellate Division only relying upon a nadabi document dismissed the appeal. Exhibit-T is proved by calling the volume book from the concerned office. The trial Court failed to appreciate the preponderance of evidence and being driven by whim made adverse observations and findings against the title of the defendant which is absolutely unwanted because in the instant case plaintiffs failed at possession but even then if they could prove title to the suit land in that case title of defendant might be investigated but it is not wise to disbelieve defendant's title when plaintiffs holding a void document without possession summoned defendant to take a chance on her. Considering the facts and circumstances of the present case even if had the defendant failed to prove her title, her and her predecessor's possession for more than 12(twelve) years would have given birth to her title although she did not specifically claim title by adverse

possession and this aspect of the case has been decided in the case of Nurjahan Begum Vs. Nur Rahaman, reported in 6 ADC 469. Exhibits-C, E series, F, G, H, I, J, K, L, M, N, O series, P series, Q series are good evidence in support of the case of the defendant and those documentary evidence also terminate the case of the plaintiff.

The son of defendant holding a power of attorney Exhibit-A examined himself as DW 1 in support of defence case. DW 2 came from land office and proved SA khatian 2132 exhibit-C prepared in the name of defendant. DW 3 came from the record room with volume book and proved the deed of relinquishment (exhibit-T) dated 20.03.1922. He also proved the kabala dated 29.08.1923 executed by Birendra to Ram Gopal (exhibit-U). DW 3 also proved the kabala dated 22.09.1942 (exhibit-V) executed by Ram Gopal in favour of the mother of the defendant named Jahanara Begum and this document is described in Volume 46 of the year of 1942 at page numbers 27-31. The deposition of DW 3 remained undisturbed in cross. Defendant has successfully proved her title to the suit land. There are series of documents in support of her title and possession in the suit land. DW 4 deposed on

possession. DW 5 is the full brother of defendant and he upheld the relevance of exhibit-D series and stated that defendant acquired the suit land. It is stated in paragraph (Kha) of written statement that Lal Miah and his family have been living in the suit land as care taker. Lal Miah as DW 6 deposed in the suit and in cross examination his position got stronger.

It is an age-old principle of law that plaintiff has got to prove his own case independent of defence weakness. In the instant case plaintiffs have utterly failed to prove their title and possession in the suit land. Exhibit-6 dated 13.01.2000 is a forged, fraudulent, collusive, void document. They did not even make out any case on possession followed by dispossession. Their prayer is vague and their simultaneous claim on title by purchase and adverse possession is not permitted under the law. Plaintiff with a view to grab the suit land filed this false suit.

The title and possession of the defendant in the suit land is evidently proved. The adverse observations and findings arrived at by the trial Court with regard to the title of the defendant being apparently unwanted and misconceived are

hereby set aside and expunged. Accordingly, First Appeal 299 of 2007 is allowed. Since plaintiffs have miserably failed to prove their case First Appeal No. 309 of 2007 is dismissed. The judgment and decree of the trial Court is affirmed in the modified form by expunging the findings of title and possession against the defendant.

There will be no order as to costs.

Communicate this judgment to the concerned Court.

Send down the lower Court's record.

Bhishmadev Chakrabortty, J:

I agree.

B.O. Naher.