

District: Pirojpur

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 3324 of 1997

In the matter of :

Abdur Rob Howlader being dead his heirs 1(a)
Most Hasina Begum and others

... Petitioners

-Versus-

Abdul Jalil Khan and others

...Opposite parties

Mr. Sk. Sharifuddin, Advocate

...for the petitioners

No one appears

...For the opposite parties

Heard on: 11.11.2024, 03.12.2024,
05.01.2025 and 06.01.2025
Judgment on: 13.12.2024

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1 to 29 to show cause as to why the judgment and order dated 13.07.1997 passed by the Sub-ordinate Judge, Second Court, Pirojpur in Title Appeal No. 105 of 1991 setting aside the

judgment and decree dated 26.05.1991 passed by the Senior Assistant Judge, Pirojpur in Title Suit No. 46 of 1988 and thereby sending back the suit on remand should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The predecessor of the opposite party Nos. 1-13 along with opposite party Nos. 14-29 as plaintiffs filed Title Suit No. 46 of 1988 before the Senior Assistant Judge, Pirojpur Sadar, Pirojpur for declaration of title and partition and for a further declaration that the auction sale dated 19.09.1946 held in pursuant to Rent Execution Case No. 69 of 1946 of the First Court of Munsif, Pirojpur is illegal, void, collusive, fraudulent and not binding upon the plaintiffs.

The case of plaint briefly are that 4.02 acres of land appertaining to C.S. Khatian No. 188, plot Nos. 811 and 812 of

previous mouza- Tagra, latest mouza- Charakhali under Police Station- Pirojpur Sadar was originally belonged to Paban Kha, Labon Kha, Rabon Kha and Jharu Kha in 16 gonda share each; Ramjan and Rahim Kha having 3 anna and 4 gonda share each and Jangu Kha had 6 anna and 4 gonda share therein. Rahim Kha died intestate leaving behind sister Arabjan and paternal cousin Elemdar Kha. Arabjan died intestate leaving behind son, plaintiff No. 1, Jolap Kha; Elemdar Kha died intestate leaving behind one son, Anwar Ali who died intestate leaving behind 4 sons, plaintiff Nos. 2-5 and 2 daughters, plaintiff Nos. 16 and 17. Ramjan Kha died intestate leaving behind 3 sons, Annat Ali, Karam Ali and Mohabbat Ali and one daughter, Alirunnessa. Annat Ali died intestate leaving behind son, plaintiff No. 14 and 2 daughters,

plaintiff Nos. 11 and 12. Mohabbat Ali died intestate leaving
 behind son, plaintiff No. 10. Alirunnessa died intestate leaving
 behind son, plaintiff No. 9 and daughter, plaintiff No. 15. Karam
 Ali died intestate leaving behind 2(two) sons, plaintiff Nos. 6, 7
 and 2(two) daughters, plaintiff Nos. 8 and 13. It was also stated
 that Karam Ali had other son, Mohammad Ali and 3 daughters
 Arful, Sabura and Amena who died before their father and as
 such, they did not inherit Karam Ali's left property. The plaintiffs
 being heirs Ramjan and Rahim Khan, amongst other claimed 6
 anna 8 gonda share of the said property of Khatian No. 188, plot
 Nos. 811 and 812 measuring an area of 1.62 acres. It is further
 claimed that the plaintiffs are in possession in the said nall land
 through 'borgader' and 'nagad bandha' and also by erecting a

homestead with adjacent fruits garden. While the plaintiffs were in exclusive possession and enjoyment of the property, they entrusted one Jaje Ali Kha to take initiative for preparation of the revisional settlement record in their name, but said Jaje Ali Kha intentionally did not cause the preparation of record in the name of plaintiffs and the S.A. khatian was wrongly prepared in favour of his close relations. It was also mentioned that R.S. khatian was prepared in accordance with the S.A. Khatian and thus, the name of the plaintiffs were not included in the R.S. record also. The property was not partitioned and was an undivided one. The plaintiffs are in possession of their respective share. On 15 Ashwin, 1394 B.S. they claimed partition but the defendants denied. Since the property was not recorded in the name of

plaintiffs or their predecessors, thus, the plaintiffs filed the suit with the aforementioned prayer.

The defendant Nos. 23-33 by filing a written statement and additional written statement contested the suit denying all the material assertions of the plaint. The specific case of this defendants are that the 9 anna and 12 gonda share of the 4.02 acres of land of the aforesaid khatian regarding the shares of Paban Kha, Labon Kha, Raban Kha, Jharu Kha, Ramjan Kha and Rahim Kha was put in auction in pursuant to a decree of Rent Suit No. 1732 of 1946 of the Court of First Munsif, Pirojpur, was filed at the instance of the rent receiver and through the Rent Execution Case No. 696 of 1946, the predecessor of the defendants, Hachen Ali intended to purchase the property in auction. Hachen Ali

entrusted one Nishikanta Shil to pursue the auction on his behalf and Nshikanta purchased the property in auction in his own name.

Thereafter, Nishikanta executed a Nadabinama in favour of

Hachen Uddin on 09.11.1953 and acknowledged the title of

Hachen Uddin. Hachen Uddin took possession through

Jatendranath Shil, his agent. Thereafter, he gave settlement to the

judgment-debtor No. 5, Hashem Ali Kazi and husband of

judgment-debtor No. 3, Afejuddin for 'barga chash' by 2 sets of

kabuliyat on 03.10.1950 and 20.09.1952. While Hachen Uddin

was in exclusive possession transferred 7 kathas of land to the

father of defendant No. 1, Jaje Ali Kha, on 18.11.1957 and on

20.04.1963 he also transferred 7 kathas of land to Moslem Kha

and Sohrab Kha and thereafter also transferred $3\frac{1}{2}$ kathas of land to

the defendant No. 6 and Ahmmad Ali Jamader through 2 deeds of sale dated 05.12.1966 and 08.12.1966. The contesting defendants purchased the aforesaid property from them. One Priya Bala Shil purchased the right and interest regarding 6 anna and 8 gonda of shares of Jangu Kha in the aforesaid property and thereafter, she leased out .42 decimals of land to Hachen Uddin and rest of the property was settled to Jangu Kha again. That 0.36 decimals of land was wrongly recorded in the name of Priya Bala Shil and as such Jaru Kha, the heirs of Jangu Kha, filed Title Suit No. 363 of 1958 and obtained a decree on 16.12.1958. Jharu Kha transferred the land to defendant No. 23 and his father and mother by 2(two) deeds of sale dated 16.02.1966 and 18.02.1967.

In this way as stated in above, the defendant Nos. 23-33 acquired title and are in enjoyment and possession of the entire 4.02 acres of land, the plaintiffs have no title and possession; hence the suit is liable to be dismissed.

During trial the plaintiffs examined 3(three) witnesses and adduced documentary evidences. On the other hand, the defendant examined 5(five) witnesses and also adduced their respective documentary evidences as exhibits. On conclusion of trial, learned Senior Assistant Judge, Pirojpur Sadar, Pirojpur by his judgment and decree dated 26.05.1991 dismissed the suit.

Having been aggrieved by the aforementioned judgment and decree, the plaintiffs preferred Title Appeal No. 105 of 1991 before the District Judge, Pirojpur. On transfer the said appeal was

heard by the Sub-ordinate Judge, Second Court, Pirojpur and by his judgment and order dated 13.07.1997 sent the case on remand to the trial Court upon setting aside the judgment and decree dated 25.05.1991.

On being aggrieved by and dissatisfied with the judgment and order of learned Sub-ordinate Judge, Second Court, Pirojpur dated 13.07.1997, the defendants preferred this revisional application and obtained the Rule.

Mr. Sk. Sarifuddin, learned Advocate for the petitioners submits that the Court of appeal below without at all considering the provisions of Order XLI, rule 23 and 25 of the Code of Civil Procedure illegally and arbitrarily passed the impugned order of remand and or even without considering the entire evidences on

record together with the judgment of the trial Court in view of the provision of Order XLI, rule 31 of the Code of Civil Procedure.

He next submits that the order of remand cannot be passed arbitrarily or fancifully, when the trial Court after framing all the necessary issues and providing the parties ample opportunity to adduce their respective evidences and after considering and assessing the entire evidences-on-record decided the suit on merit, to hear the suit afresh on merit, which tantamount to give an opportunity to the plaintiffs to fill up the lacuna in the case and in view of above, he submits that the judgment and order of remand passed by the appellate Court below cannot be sustainable in law in view of the provision of Order XLI, rule 24 of the Code of Civil Procedure.

No one appeared for the opposite parties to contest the Rule.

Heard learned Advocate for the petitioners and perused the revisional application together with the lower Courts' record; having gone through the provision of law.

It appears that the trial Court upon hearing the parties framed as well as 8 (eight) issues to adjudicate the cause and controversy between the parties, which are as follows:

- ১) অত্র মোকাদ্দমা বর্তমান আকারে ও প্রকারে চলিতে পারে কি?
- ২) অত্র মোকাদ্দমা পক্ষাভাব দোষে অচল কি?
- ৩) অত্র মোকাদ্দমা তমাদী দোষে অচল কি?
- ৪) অত্র মোকাদ্দমা Hotch potch দোষে বারিত কি?
- ৫) নালিশী ভূমিতে বাদীগনের স্বত্ব স্বার্থ এবং দখল আছে কি?
- ৬) বিবাদীগনের কথিত নীলাম ত্যাক্ত, পন্ড এবং বাদীগনের উপর বাধ্যকর নহে মর্মে ডিক্রী পাইতে পারেন কি?

৭) ‘ঘ’ তপছিল বিরোধী ভূমিতে বাদীগন স্বত্ব সাব্যস্তে বন্টনের প্রাথমিক

ডিক্রী পাইতে পারেন কি? পাইলে বাদীগন কতটুকু ভূমি বাবত?

৮) বাদীগন আর কি কি প্রতিকার কিভাবে পাইতে পারেন?

And after elaborate discussions and upon considering the entire evidences-on-record disbelieved the plaintiffs’ case and on the other hand believed the defendants’ case and thereby dismissed the suit holding that the plaintiffs failed to prove their title and possession over the suit land.

In appeal, learned Judge of the appellate Court below in his judgment categorically found that the plaintiffs-appellants failed to prove the cause of action of their suit. He also found that the plaintiffs filed the suit for declaration of title and partition and as such they have to prove their case by adducing reliable and independent evidence, but failed to do so. Learned Judge of

appellate Court also found that the plaintiffs only examined one borgader to prove their possession and title, allegedly the witness of borga chash, and the appellate Court below categorically held that the aforesaid witness of plaintiffs is not reliable to believe. Despite the appellate Court sent back the case on remand on the finding reproduced herein below:

“বাদী আপীল্যান্ট পক্ষকে ও তাহার পূর্ববর্তীর স্বত্ব দখল সম্পর্কে আদালতে সুস্পষ্ট সাক্ষ্য প্রমাণ প্রদান করিতে হইবে এবং প্রতিদ্বন্দ্বি বিবাদী/রেসপনডেন্ট পক্ষকেও কর মোকদ্দমা হইতে শুরু করিয়া প্রিয়বালা শীলের মালিকানা স্বত্ব প্রথমে আদালতের নিকট প্রমাণ করিতে হইবে। তবেই বাদী/আপীল্যান্ট পক্ষের বিপরীতে তাহাদের স্বত্ব দখল নালিশী তপছিলের ভূমিতে স্বীকৃত হইবে।”

It is settled proposition of law that order of remand should not be passed fancifully, when the parties were given adequate opportunity to lead their respective evidence by the trial Court and

thereafter the suit was decided on merits, moreover when the entire evidences are available before the appellate Court to decide the question of controversy. It is also consistently settled that when the trial Court upon framing proper issues and thereafter passed the judgment on merits upon discussion of the entire evidences on record, the appellate Court cannot send back the case on remand to hear and dispose of the suit afresh. A remand order cannot be made to provide any party to adduce fresh evidence or to fill up his lacuna, who failed to succeed in his case.

In the premise above, the submissions as forwarded by the learned Advocate for the petitioners merits consideration.

Accordingly, the Rule is made absolute.

The judgment and order of remand dated 13.07.1997 passed by the Sub-ordinate Judge, Second Court, Pirojpur in Title Appeal No. 105 of 1991 is hereby set aside and the Title Appeal No. 105 of 1991 is hereby restored in it's original file and number. The Judge of the appellate Court below is hereby directed to hear and dispose of the appeal on merit in accordance with law.

The order of stay granted at the time of issuance of the Rule is hereby recalled.

No order as to cost.

Send down the Lower Courts' Record.

Communicate the judgment and order at once.