

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 2156 of 2010

Dinesh Chandra and others

..... Petitioners

-Versus-

Jaitun Bibi and others

.... opposite parties

with

Civil Revision No. 2804 of 2010

Meherjan Bibi alias Proli Bibi and others

..... Petitioners

-Versus-

Jaitun Bibi and others

.... opposite parties

Mr. Chanchal Kumar Biswas, Advocate

... For the Petitioners

Mr. Sk. Shaifuzzaman, Advocate

... For the Opposite Parties

Judgment on 19.03.2025

These two Rules have arisen from same judgment and decree of the appellate court and taken up for joint consideration and disposal by a single judgment, given that these pertain to the same parties and involve common facts and issues of law.

In these applications under section 115(1) of the Code of Civil Procedure, Rules were issued at the instance of the petitioners calling upon the opposite party Nos. 1 to 8 to show cause as to why the impugned judgment and decree dated 05.04.2010 passed by the learned Special

District Judge, Sylhet, in Title Appeal Nos. 50 of 1985 allowing the same and thereby reversing the judgment and decree dated 30.12.1984 passed by the learned Munsif, (now Assistant Judge), Balaganj, Sylhet in Title Suit No. 23 of 1984 dismissing the suit should not be set aside or pass such other or further order or orders as to this court may seem fit and proper.

Facts relevant for disposal of these Rules, in short, are that predecessor of the opposite party Nos. 1-8 Abdul Barik as plaintiff filed Title Suit No. 147 of 1974 in the court of Munsif, Sadar, Sylhet, renumbered as Title Suit No. 23 of 1984 on transfer to the court of Munsif, Balagonj (now Assistant Judge) against the predecessor of the petitioners and opposite party Nos. 9-29 for declaration of title stating that the suit land pertaining to Taluk No. 37294/6 Haris Chandra Roy and Taluk No. 37295/7 Bishnu Prasad Roy originally belonged to Sree Gopal Deity and one Paresh Chandra Das was the secretary of the Akhra. The suit land was settled with the predecessors of the defendant Nos. 1-8 Hara Mohan Das and Bijoy Chandra Das and afterwards the defendant Nos. 1-8 became tenants under the Government. They, while in possession sold one and half kedar land to the plaintiff and his father Forman Ullah by three

kabalas dated 28.12.1962, 13.09.1963 and 5 Magh 1363 B.S. The names of defendant Nos. 9, 10 were wrongly included in the S.A. khatian. One Ashekur Rahman filed Title Suit No. 06 of 1966 (subsequently renumbered as Title Suit No. 137 of 1966) at the instance of defendant Nos. 9, 10 in which the plaintiff and his father contested as defendant Nos. 7 and 8 by filing writing statement. Ultimately the suit was dismissed for default in 1973. The said suit and the wrong record in the name of defendant Nos. 9, 10 created cloud over the plaintiff's title in the suit land, hence, the present suit.

The defendant Nos. 9 and 10 contested the suit by filing two written statements and contended inter alia, that the suit is barred by limitation, bad for defect of parties and that predecessors of defendant Nos. 1-8 had no right, title and interest in the suit land and therefore, the plaintiffs kabalas are forged and antedated. They further contended that they took jote settlement of the suit land from Moulvi Aptor Miah in the year 1947-48 and since then have been possessing the same by paying rents and the land was duly recorded in their names in S.A. khatian. Defendant Nos. 1-8 permanently residing in India and the plaintiffs have created the kabalas to grab the suit land. The answering defendants had no knowledge about

Title Suit No. 137 of 1966 and no notice was served upon them, they did not file written statement and they prayed for dismissal of the suit.

The trial court framed five issues for adjudication of the matter in dispute. The plaintiff examined four witnesses as P.Ws. and the defendant examined six witnesses as D.Ws. Both the parties submitted documents in support of their respective claim which were duly marked as exhibits.

The learned Munsif (now Assistant Judge), Second Court, Sadar, Sylhet, by judgment and decree dated 24.01.1976 decreed the suit in part against which the contesting defendants filed Title Appeal No. 113 of 1976 before the learned District Judge, Sylhet, which on transfer was heard by the learned Additional Subordinate Judge, Sylhet, who by Judgment and decree dated 15.08.1978 allowed the appeal and remanded the suit to the trial court to cure the defect of parties since defendant Nos. 12-14 were not served with notice, to cure defect in vague schedule and for fresh trial.

On remand the suit was renumbered as Title Suit No. 23 of 1984 and heard by the learned Munsif (now Assistant Judge) Balaganj, Sylhet,

who by judgment and decree dated 30.12.1984 dismissed the suit mainly on the reasoning:-

- a) The suit is bad for defect of parties since defendant Nos. 13-14 was not served notice and plaintiff's co-sharers were not impleaded and some other persons were not substituted;
- b) Exhibit-7, the rent receipt, cannot be believed since it does not prove the status of Paresh Chandra Roy as secretary of the Akhra; The farog also got over writing and it does not prove plaintiff's tenancy.
- c) Exhibit-5 series could not prove plaintiff's title or possession since they do not attract the suit land;
- d) From exhibit 1, 2 and 3 it appears that the cause of action arose in the year 1966 and not in 1973 and hence the suit is barred by limitation;
- e) The registered kabalas submitted by plaintiff could not prove his title since exhibit 6 is unregistered, exhibit 6 (a) does not attract suit land and exhibit 6 (b) admit possession of Durjomoni Shill. Moreover, exhibit 6 (b) shows that there are two minor

transferors but they were not properly represented, so their shares were not transferred;

- f) The plaintiff claims 45 decimals of land but the plaint schedule contains 50 decimals. Thus the suit land is unspecified.
- g) The PWs made contradictory statements and the cause of action did not arise.

Being aggrieved, the plaintiff preferred Title appeal No. 50 of 1985 before the learned District Judge, Sylhet which on transfer was heard by the learned Special District Judge, Sylhet who by the impugned judgment and decree dated 05.04.2010 allowed the appeal and thereby reversed the Trial Courts decision mainly on the reasonings;

- a) Exhibit 7, the farog proves that the suit land belongs to Taluk No. 37294 and 37295 and that Paresh Chandra was the Secretary;
- b) The suit is not barred by limitation;
- c) The unregistered deed submitted by the plaintiffs cannot be disbelieved since the executants do not deny the same and since no expert opinion sought on the same;

d) The suit is not bad for defect of parties and the PWs supported the plaintiffs case.

At this juncture, heirs of defendant No. 10, Durjamani moved this Court by filing Civil Revision No. 2156 of 2010 and heirs of defendant No. 9 moved Civil Revision No. 2804 of 2010 and obtained these Rules and order of status quo.

Mr. Chanchal Kumar Biswas, learned Advocate appearing for the petitioners in both the rules at the very outset submits that the suit is not maintainable in its present form as the plaintiffs claimed $1\frac{1}{2}$ kedar or 45 sataks of land out of 50 sataks of the suit plot without specification of their claimed property, as such, the appellate court failed to find that a decree cannot be passed on an unspecified and vague schedule. He submits that title of the plaintiff based on a farog (exhibit-7) which is not proved in accordance with law and the trial court found the same written by different ink with interpolation, but the appellate court unfortunately held that there was no interpolation or writing in different ink.

He submits that the suit property is a tank and come within the mischief of non-agricultural land, as per Section 23 of Non-agricultural

Tenancy Act, transfer should be made by a registered instrument, but a large portion of the suit property alleged to have been purchased by the plaintiff by an unregistered sale deed which is void ab initio and by the said deed the plaintiff acquired no title in the property. It is argued that the plaintiffs claimed title in the property on the basis of three sale deeds (exhibit- 6 series). Unregistered sale deed dated 28.12.1962 alleged to have been executed by Sree Barindra Kumar Das and Sree Nalini Kumar Das (exhibit-6), Deed No. 666 dated 22.01.1957 executed and registered by Sree Birendra Kumar Das, Sree Nalini Kumar Das in favour of Abdul Barek [exhibit-6(a)], deed No. 2666 dated 23.09.1963 executed and registered by Sree Binode Chandra Das, Barindra Chandra Das, Ulangla Bala Das herself and on behalf of two minor sons Badal Chandra Das and Gopal Chandra Das [exhibit-6(b)]. Out of three deeds, deed No. 666 dated 22.01.1957 [exhibit-6(a)] does not attract suit Plot No. 280 as per Advocate Commissioner's report held at the instance of the plaintiff in suit and accepted by the court. Deed No. 2666 dated 23.09.1963 attracts only one poa or $7\frac{1}{2}$ sataks land. Unregistered sale deed dated 28.12.1962 though alleged to have been transferred one kedar or 30 sataks of land, but that deed is being not valid in law, the plaintiffs acquired no title by the

said deed, consequently, the plaintiffs at best entitled to get one poa equal to $7\frac{1}{2}$ decimals land. The trial court after considering all the evidences both oral and documentary held that neither the plaintiff nor the defendants could able to prove their case by proper evidence, consequently, dismissed the suit.

The appellate court without adverting and controverting findings and observations of the trial court in respect of rent receipt (exhibit-7), sale deed No. 666 dated 21.01.1957, unregistered sale deed dated 28.12.1962, possession of the parties in the suit property most unfortunately allowed the appeal and decreed the suit in its entirety where the plaintiff only claimed $1\frac{1}{2}$ kedar or 45 decimals of land out of 50 decimals in Plot No. 280 and also failed to consider that local investigation was held at the instance of the plaintiff to ascertain whether deed No. 666 dated 22.01.1957 [exhibit-6(a)] covers the suit Plot No. 280, wherein, learned Advocate Commissioner in his report clearly stated that the deed No. 666 dated 22.01.1957 does not attract the suit plot, but the property transferred by the said deed covers other plots under the same chak.

It is argued that one Ashekur Rahman along with eight others, as plaintiffs, filed Title Suit No. 6 of 1966 against the plaintiff Abdul Barek and his father Abdul Forman along with others, as defendant, in which Abdul Barek and A. Forman filed written statement claiming the suit property, but they did not mention existence of unregistered sale deed dated 28.12.1962, the unregistered sale deed was not in existence in the year 1966, but subsequently created by the plaintiff for the purpose of filing of the suit. It is submitted that the suit is barred by limitation as the plaintiffs were fully aware about S.A. khatian in 1966, stand recorded in the name of defendant Nos. 9 and 10 and predecessor of defendant Nos. 1-8, as such, the trial court found that the suit is barred by limitation but the appellate court wrongly decided the question of maintainability, acquisition of title by the plaintiff and wrongly found possession in the property, hence, the appellate court committed error of law in the decision occasioning failure of justice.

It is argued that the sale deed No. 2666 [exhibit-6(b)] in its schedule clearly stated that Durjamani is in possession on the south which proved that a portion of the property is in possession of the heirs of

Durjamani, as such, the plaintiff failed to prove possession in the suit property.

Mr. Sk. Shaifuzzaman, learned Advocate appearing for the opposite party Nos. 1-8 submits that this suit was filed in the year 1974 and it was decreed in part on 24.01.1976 declaring title of the plaintiff in $37\frac{1}{2}$ sataks land. Thereafter, the defendants filed Title Appeal No. 113 of 1976 which was allowed on 15.08.1978 and remanded the suit to the trial court for fresh trial by correcting the defect as observed by the appellate court. On remand the trial court without considering earlier judgment and decree of the trial court dismissed the suit in its entirety finding that the suit is barred by limitation and defect of parties. The plaintiff failed to prove title and possession in the suit property both by adducing oral and documentary evidence.

He submits that the plaintiff preferred appeal before the District Judge, against the judgment and decree of the trial court, but none of the contesting defendants preferred any appeal against the judgment and decree of the trial court, meaning thereby, they unconditionally conceded that they have no title and possession in the suit property. In the absence of any appeal by the defendants, the appellate court had no occasion to

consider the case of the defendants, but considered the case of the plaintiff and rightly held that the suit is not barred by limitation as earlier Title Suit No. 6 of 1966 was ended on 24.05.1973 being abated. Thereafter, the plaintiffs filed the instant suit on 02.05.1974, as such, the suit was filed very much within the time.

He submits that (exhibit-7), rent receipt is a document of more than 30 years old not required to be formally proved by any evidence under Section 90 of the Evidence Act, and on the basis of rent receipt (exhibit-7) vendors of the plaintiff possessed and enjoyed the property and by registered deed No. 666 dated 22.01.1957, unregistered sale deed dated 28.12.1962 and deed No. 2666 dated 23.09.1963 transferred the suit plot to the predecessor of present opposite parties. Long existence of exhibit-7 and exhibit-6 series and payment of rents by the plaintiffs (exhibit-5 series) established that the plaintiffs acquired right, title and possession in the suit property. Writing of rent receipt (exhibit-7) with two different ink does not mean that the rent receipt has not been proved in accordance with law.

He argued that unregistered sale deed dated 28.12.1962 (exhibit-6) is valued at Tk. 95 (ninety five) only which is not denied by the

executants or their heirs by appearing in suit. Moreover, under Section 17 of the Registration Act before its amendment in the year 2004, a deed valued below taka hundred was not required to be registered under Registration Act, irrespective of agricultural or non-agricultural land, as such, the trial court though misinterpreted the law and the documents but the appellate court rightly held that unregistered sale deed valued below taka hundred is not compulsorily registerable under the law, as such, by a deed more than 30 years old the plaintiff legally acquired title in the suit property. He tried to impress upon the court that in Sylhet, one kedar is equal to 33 decimals in some places and 30 decimals in some places, but in the area in question one kedar is equal to 33 decimals, accordingly, S.A. khatian stand recorded measuring 50 sataks of land covered by Plot No. 280, the plaintiffs since claimed the Plot No. 280 in its entirety need not give any specification of the same by giving boundary, as such, the schedule given in the plaintiff is not unspecified and vague as observed by the trial court.

He finally submits that the property in question was settled by Poresh Chandra in favour of Binode Chandra Das, Barindra Chandra Das, Badal Chandra Das, Birendra Kumar Das, Nalini Kumar Das and Makhon

Chandra Das, by rent receipt dated 02.05.1360 B.S. who while in possession and enjoyment by registered deed No. 666 dated 22.01.1957, unregistered sale deed dated 28.12.1962 and registered deed 2666 dated 23.09.1963 transferred $1\frac{1}{2}$ kedar equal to 50 decimals of land to the plaintiffs Abdul Barek and his father Forman Ali. In the absence of any contrary evidence on the part of the defendants, the appellate court rightly allowed the appeal and decreed the suit in favour of the plaintiff-appellant. As such, it has committed no error of law in the decision occasioning failure of justice.

Heard the learned Advocates of both the sides, have gone through the revisional application in both the revisions under section 115(1) of the Code of Civil Procedure, plaint in suit, written statement, evidences adduced by both the parties and the documents submitted and exhibited, available in lower court records and impugned judgment and decree of both the courts below.

As per plaint the plaintiff claimed that the property originally belonged to Sree Gopal Jeo Deity, represented by its Secretary, Sree Poresh Chandra Dutta Purakayesta who settled the suit property in favour of Binode Chandra Das and five others by a rent receipt dated 02.05.1360

B.S. (exhibit-7). On the face of exhibit-7 it appears that Chandpur Estate Akhra, Sree Gopal Jeo Deity and Secretary on the top and at the bottom written with a different ink and the ink used for issuing the rent receipt No. 3. Because of writing the form and correcting the same by inserting word Sree Gopal Jeo Deity (শ্রী গোপাল দেবভৌর) and Secretary with different ink does not mean that the rent receipt is forged or created. Subsequent payment of rents by Abdul Barek vide exhibit-5 series and execution and registration of two sale deeds No. 666 dated 22.01.1957 and 2666 dated 23.09.1963 by settlement holders Binode Chandra Das and others support the fact that the executants of those sale deeds were tenant under zaminder. On the other hand, the defendant Nos. 9 and 10 claimed that the property originally belonged to Aptor Miah from whom they obtained settlement on 10.11.1962 B.S. by rent receipt (exhibit-C-1 with objection). From perusal of said exhibit C-1 it appears that the same has been written by ball pen in the year 1962 B.S. There was no scope to use ball pen at that time and the said exhibit-C-1 rent receipt is the basis of claim of the defendant Nos. 9 and 10.

The trial court giving cogent reasons held that the defendants failed to prove the settlement in their favour by alleged rent receipt dated

10.11.1362 B.S. and finally held that the defendants did not acquire title and possession in the suit property. The contesting defendant Nos. 9 and 10 did not prefer appeal before the appellate court against the judgment and decree of the trial court, meaning thereby, their right, title and interest whatever claimed by them was set at rest after passing judgment and decree by the trial court, as such, their case is not required to be discussed again.

The question before this Court is whether by exhibits-1-7, the plaintiffs in suit could prove their title and possession in the suit property. Basis of title of the plaintiff starts from a rent receipt (exhibit-7) dated 02.05.1360 B.S. allegedly issued by Sree Gopal Jeo Deity (শ্রী গোপাল দেবজ্যোতীর) through his Secretary Sree Poresch Chandra Dutta Purakayesta. The trial court disbelieved the rent receipt on the ground of writing on it with two different ink and interpolation in figure 1358 B.S. Because of the fact and observations made hereinabove by lapse of time and subsequent act and conduct of the settlement holder Binode Chandra Das and others by transferring the property by two registered sale deeds and unregistered sale deed, question about its genuineness has become extinct though the title of Sree Gopal Jeo Deity apparently is not clear. Executants of sale

deeds [exhibits-6-6(b)] or their heirs did not challenge the same by appearing in suit and filing written statement. Where the execution and registration of the sale deed has not been challenged by the executants or their heirs those deeds remain unchallenged. However, the deed No. 666 dated 22.01.1957 has no plot numbers, but it has a boundary of the property transferred to the predecessor of opposite party Abdul Barek. For this reason, to ascertain whether the sale deed [exhibit-6(a)] at all attracts the property of Plot No. 280, the plaintiffs sought for local investigation by appointing a survey knowing Advocate Commissioner. The trial court allowed the application and appointed one Md. Abu Lais, Advocate Commissioner to investigate the property under deed dated 22.01.1957 [exhibit-6(a)] who after holding local investigation submitted report on 07.11.2000 stating that the deed dated 22.01.1957 [exhibit-6(a)] does not attract Plot No. 280, but it covers other plots of land under the chak No. 17 and by a sketch map, learned Advocate Commissioner delineated actual position of Plot No. 280.

As per report, the suit Plot No. 280 is a pond. Said survey report does not show possession of the property under defendant No. 9 or 10. Deed No. 2666 dated 23.09.1963 specifically in its schedule mentioned

that the predecessor of plaintiff Forman Ali purchased one poa of land from Plot No. 280 equal to $7\frac{1}{2}$ decimals, unregistered sale deed dated 28.12.1962 covered one kedar equal to 30 decimals of land. The petitioner vigorously raised objection about validity of said unregistered sale deed (exhibit-6) referring to Section 23 of the Non-Agricultural Tenancy Act, which provides that Non-Agricultural land can be transferred only by a registered instrument. As the said deed is unregistered one and existence of the said deed has not been disclosed and stated in the written statement filed by the plaintiffs in earlier Title Suit No. 6 of 1966 obviously it has been created just before filing of the suit.

This Court finds substance in the submission that the existence of unregistered deed was not disclosed earlier, however, the other side argued that non mentioning of existence of unregistered sale deed in the written statement filed by the plaintiff in earlier Title Suit No. 6 of 1966 as defendant does not mean that the deed is invalid or created subsequently for the purpose of filing of the suit, as Section 17 of the Registration Act, before its amendment clearly stipulates that the deed valued hundred to upwards required to be compulsorily registered, but the unregistered deed (exhibit-6), in the instant case is valued at Tk. 95/-

(Ninety five) only was not compulsorily registered under the Registration Act. Therefore, though the deed in question is under challenge because of its non-registration it cannot be said that the deed is invalid in law as observed in the case of Raj Bahadur and others vs. Babu Lal reported in AIR 2011 Allahabad 48.

From perusal of endorsement on the back side of the stamp valued two rupees twelve annas was purchased on 08.10.1962 in the name of one Mobarak Ali of Laxmipur District. From the face of the deed, I find no nexus of that person either as purchaser or seller of the property. Therefore, it was incumbent upon the defendants to get the signature verified by sending the deed to the handwriting expert for opinion whether signature of Barindra Kumar Das, Nalini Kumar Das contain on the deed No. 666 dated 22.01.1957 and deed No. 266 dated 23.09.1963 are of the same persons, as on the unregistered deed executant signed as Sree Barindra Kumar Das, but on the register sale deed No. 2666 dated 23.09.1963 signed as Sree Barindra Chandra Das. Had the signature of two persons Barindra Kumar Das and Nalini Kumar Das as contained on the unregistered deed (exhibit-6) compared with the two registered deeds [exhibits-6 and 6(b)] genuineness of the said deed could be ascertained,

but because of taking no step for sending the said deed to the handwriting expert for opinion it remain undecided.

The trial court held that the suit is barred by limitation, as the plaintiff was aware of record of S.A. khatian in the name of other persons in the year 1966, but did not come forward seeking any relief against the khatian, but filed the instant suit after six years of limitation. The Appellate court held that the suit is not barred by limitation as their right, title and interest has not been threatened by anybody before filing of the suit. Moreover, earlier Title Suit No. 6 of 1966 ended on 24.05.1973, the instant suit is filed on 02.05.1974 within time, as such, the appellate court rightly held that the suit is not barred by limitation.

Now the question has come whether in the event of finding validity of three sale deeds (exhibit-6 series) the plaintiff can claim only $37\frac{1}{2}$ decimals of land by two sale deeds dated 28.12.1962 and 23.09.1963, out of 50 sataks without specifications of the same and without bringing a suit for partition.

The petitioner submits that since the plaintiff is entitled to a fraction of property there must be a specification of the same. Unless the property is specified with definite boundary a decree cannot be given on vague

schedule. I find substance in the submission, but admittedly, the suit property is a pond. In usual course of business a pond cannot be partitioned and in respect of pond in every partition suit the share of the party given in ejmali. Therefore, for declaration of title in an ejmali property jointly a simple declaration is maintainable. Therefore, the suit is maintainable for simple declaration for a portion of land jointly with other co-sharers. In earlier Title Suit No. 6 of 1966 the defendant Nos. 9 and 10 filed written statement wherein they relinquished their claim stating that they have no title in the property and they do not claim the same though the present petitioner denied that they did not appear in the earlier suit and filed any written statement disclaiming title in the property. Mere denial in the absence of other supportive evidence does not prove that they did not contest the earlier suit by filing written statement.

The trial court decided title of the defendant in the negative, but they did not prefer any appeal. In this situation, the trial court though rightly decided the title of the defendant Nos. 9 and 10 in the suit property but the appellate court did not properly address the matter in dispute taking proper recourse to law by sending the signature of the executants of the unregistered deed dated 28.12.1962 to the hand writing expert for

opinion as the said deed is under challenge. Therefore, I think that the unregistered deed dated 28.12.1962 is required to be sent to the handwriting expert for opinion whether Barindra Kumar Das and Nalini Kumar Das executed the sale deed in favour of Abdul Forman comparing the same with the signatures contain on the registered deed No. 666 dated 22.01.1957 and deed No. 2666 dated 23.09.1963. In the event of finding the signature of two persons mentioned above after comparison with the signatures contain on deeds dated 22.01.1957 and 23.09.1963 are the same person in that case the plaintiff will be entitled to get $37\frac{1}{2}$ decimal of land out of 50 decimals from Plot No. 280 in ejmali and in the event of finding that signature of Barindra Kumar Das not matched with the signature of Barindra Chandra Das contain in exhibit-6(b), Nalini Kumar Das with the signature contain in registered deed No. 666 dated 22.01.1957 defers from each other the plaintiff will be entitled to get only $7\frac{1}{2}$ decimals of land from Plot No. 280. Remaining land of Plot No. 280 shall vest in the government and the Deputy Commissioner, Sylhet shall take over possession of the same and deal with the property in accordance with law and policy of the government in this regard.

In view of the above observations, I find substance in the rule and in the submissions of the learned Advocate for the petitioners.

In the result, both the Rules are made absolute, however, without any order as to costs.

Judgment and decree of the appellate court is hereby set aside and the suit is sent back on remand to the appellate court, only to get an expert opinion by sending unregistered sale deed dated 28.12.1962 to compare with the signatures contain in registered deed No. 666 dated 22.01.1957 and deed No. 2666 dated 28.09.1963 and obtain opinion whether all those deeds have been executed by same executants and after obtaining opinion pass judgment a fresh in the light of the observations made hereinabove within a shortest possible time considering age of the suit preferably within 04 (four) months from the date of receipt of this judgment and order.

The order of status quo granted at the time of issuance of the Rule shall continue till disposal of the appeal.

Communicate a copy of this judgment to the court concerned and send down the lower court records at once.