

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No. 924 of 2004

Sree Binoy Krisna Saha and others

...Petitioners

-Versus-

Sree Reboti Mohon Saha being dead his legal
heirs Sree Rathindra Mohan Saha and others

...Opposite Parties

Mr. Md. Nurul Islam, Advocate

...for the petitioners

Opposite parties are not represented

Judgment on 21.11.2011

This Rule at the instance of defendant-respondents was issued to examine the legality of judgment and decree dated 21.1.2004 (decree signed on 27.1.2004) passed by the Additional District Judge, First Court, Bogra in Other Appeal No.217 of 1994 allowing the same on setting aside those dated 31.5.1994 of the Subordinate Judge (now Joint District Judge), First Court, Bogra passed in Other Suit No.237 of 1982 and remanding the suit to the trial Court.

The plaintiffs [predecessors-in-interest to opposite party Nos.1(a)-3(c)] instituted the suit for declaration and partition on the averments, *inter alia*, that their father late Ramoni Mohan Saha was a

tenant in the suit land under the landlord Praddut Kumar Tagore. Because of arrear rents, the landlord instituted a rent suit against Ramoni Mohan Saha and got a decree. In a subsequent execution case, the suit land was auctioned and late Ramoni Mohini Saha purchased the same in *benami* of his wife Manjury Mohini Saha, which was confirmed on 22.9.1938. After so purchase, Ramoni Mohan Saha constructed two buildings on the suit land and rented it to the Government for setting up a Sub-Registry Office there. He also constructed a separate house on the southern part of the suit land and was running his business of herbal medicine there. After his death, his four sons inherited the suit land and were enjoying the same in *ejmaili*. Among them plaintiff No.1 was in management and control of the property. Later on there was an amicable partition between the said heirs and successors of late Ramoni Mohan Saha. After so partition, the plaintiffs took initiative to construct buildings on the lands in their respective shares, when defendant No.1 along with his two sons (defendant Nos.2-3) obstructed them and disclosed that he got the suit land from their mother Manjury Mohini Saha by way of a registered gift deed. On enquiry the plaintiffs came to know about two deeds, namely, a gift deed dated 3.3.1960 and another sale deed dated 10.9.1960, which were allegedly executed and registered by Manjury Mohini Saha in favour of defendant No.1 and his wife. As defendant No.1 was a deed-writer in the Sub-Registry office, he had created those documents in collusion with a Sub-Registrar named

T. P. Das, who had a good relation with his (defendant No.1) daughter Sapna Rani Saha. The said deeds were concocted, false and fraudulent having no binding effect upon the plaintiffs, and were never acted upon.

Defendant Nos.1-3 (herein petitioners) contested the suit by filling a joint written statement denying the material allegations of the plaint and contending, *inter alia*, that Manjuri Mohini Saha was the original owner of the suit land and was not a *benamdar* of her husband. She purchased the suit land on auction and was in possession thereof. She herself paid rents against the suit land. She transferred 91 decimals of land along with the structures standing thereon to her son Binoy Krishna Saha by a gift deed dated 3.3.1960 and subsequently transferred another 8 decimals of land to his (Binoy Kumar Saha) wife Hasi Rani by way of a registered sale deed dated 10.9.1960. The plaintiffs had no right, title and interest over the suit land. Earlier they had instituted Other Suit No.277 of 1977 in the Second Court of Munsif, where the present petitioners were made defendants and filed written statement on 3.4.1978. The plaintiffs had withdrawn from the said suit.

On the aforesaid pleadings, trial Court framed the issues namely, (1) whether the suit was maintainable in its present form, (2) whether the valuation of the suit was correct and the Court fees paid thereon were adequate, (3) whether the suit was bad for defect of parties, (4) whether Manjuri Mohini Saha, auction purchaser in the

Rent Execution Case, was a *benamdar* of Ramoni Mohan Saha, (5) whether the gift deed dated 3.3.1960 and sale deed dated 10.9.1960 were genuine, (6) whether the plaintiffs were co-sharers in the suit land by way of inheritance, and if so, to what extent, (7) whether the plaintiffs were entitled to a declaration of title and decree for partition, and (8) what other reliefs they were entitled to.

In order to prove their case, the plaintiffs examined six witnesses including plaintiff No.1 and adduced some documentary evidence in support of their case. On the other hand, the defendants examined two witnesses including defendant No.1 and also adduced some documentary evidence. After conclusion of trial, the learned Subordinate Judge dismissed the suit by his judgment and decree dated 31.5.1994.

Challenging the said judgment and decree of the trial Court, the plaintiffs preferred Other Appeal No.217 of 1994 before the District Judge, Bogra. After hearing the appeal, the learned District Judge allowed the same remanding the suit to the trial Court by his judgment and decree dated 21.1.2004, against which the petitioners moved in this Court with the instant civil revision.

Mr. Md. Nurul Islam, learned Advocate appearing for the petitioners submits that the appellate Court being the last Court of fact did not independently assess the evidence and arrive at its own findings in passing the impugned judgment, and thus committed error

of law. He further submits that the appellate Court without reversing the findings of trial Court remanded the suit on the ground that the trial court did not frame and adjudicate a vital issue to the effect whether the plaintiffs father was entitled to a declaration as *benamdar*. But as a matter of fact, the trial Court framed issue on the *benami* character of the suit land and adjudicated the same against the plaintiffs. Mr. Nurul Islam, learned Advocate concludes with a prayer for remand of the appeal to the appellate Court to meet the ends of justice.

It appears from the record, that a copy of the Rule has been served upon the opposite parties, but none of them has appeared to contest the Rule.

I have considered the submissions of learned Advocate for the petitioners and gone through the record including the judgments of the Courts below. The judgment of trial Court shows that it had framed issue No.4 on *benami* character of the suit land and adjudicated the same in following manner:

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The appellate Court in remanding the suit suggested to frame an issue on the same point of controversy in a different language. When the trial Court discussed the evidence, considered the same and arrived at a definite finding that Manjuri Mohini Saha was not a *benamdar* of her husband, the lower appellate Court would have assessed the material evidence and arrived at its own findings whether she was a *benamdar* or not. The appellate Court also could have re-examined the witnesses and take additional evidence either to affirm or reverse the judgment passed by the trial Court after

assigning reasons, but without doing so it remanded the suit for adjudication of an issue which was already framed and decided on evidence. The impugned judgment and decree of the lower appellate Court, therefore, do not appear to be legally sustainable. Under the facts and circumstances of the present case, it would be just and proper, if the appeal is remanded to the appellate Court to be decided finally.

Accordingly, the Rule is made absolute. The impugned judgment and decree dated 21.1.2004 (decree signed on 27.1.2004) passed by the Additional District Judge, First Court, Bogra in Other Appeal No.217 of 1994 is hereby set aside. The Other Appeal No. 217 of 1994 is remanded to the Additional District Judge, First Court, Bogra for disposal in accordance with law within shortest possible time. In doing so, the appellate Court will independently assess the evidence and arrive at its own findings on the issues including issue No.4 as framed by the trial Court. It will also have the liberty to call for any document, recall or re-examine the witnesses and take additional evidence, if it is so required.

Send down the lower Courts records.