

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO.3595 OF 2013.

IN THE MATTER OF:

An application under Section 115 (1) of the
Code of Civil Procedure.

- AND -

IN THE MATTER OF:

Krishna Prashad Dhar and others
..... Defendant-Appellant-Petitioners

-Versus-

Naresh Chandra Chakraborty
..... Defendant-Opposite parties.

Mr. Md. Ekramul Islam, Advocate
..... For the petitioners.

Mr. Md. Zakir Hossain, Advocate
.... For the opposite party.

Heard on: 06.03.2024 and
Judgment on: 24.04.2024.

On an application of the petitioner Krishna Prashad Dhar and others under section 115 (1) of the Code of Civil Procedure, 1908, the Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and decree dated 15.09.2013 (decree signed on 22.09.2013) passed by the learned Additional District Judge, (in charge) Bankruptcy Court, Chattogram in Other Appeal No.518 of 2005 disallowing the appeal and hereby affirming the judgment and decree dated 05.09.2005, (decree signed on 11.09.2015), passed by the Assistant Judge Court, Boalkhali, Chattogram in Title Suit No.17 of 2002

decreeing the suit should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the opposite party No.1 as plaintiff instituted Other Class Suit No.17 of 2002 in the Court of Assistant Judge, Boalkhali, Chattogram against the defendants for declaration of title and confirmation of possession and further seeking prayer for declaration that the P.S and B.S record, prepared in the name of the predecessor of the defendants, are illegal, wrong and incorrect and contending *inter-alia*, that the suit land as mentioned in the plaint originally belonged to Rakhal Chandra that at the time of R.S. operation, the suit land has been recorded in the name of Rakhal Chandra in R.S. khatian and the column for remarks contained in the said khatian has recorded in the name of Rakhal Chandra as tenant of that land of which recently the plaintiffs came to know from the defendants Nos.1, 2 and 4 that at the time of P.S. and B.S. operation, the suit land, instead of being recorded in the name of Rakhal, was wrongly recorded in the names of predecessor of the defendants Nos.1-7. Rakhal Chandra died, leaving his only son, the plaintiff, with his property that the plaintiff claimed to have acquired interest in the suit land and asserts that he is in the possession of this entire land; that the plaintiffs emphatically stated that the record of the suit land in favour of the predecessor of the defendant no.7 is false and wrong and hence the plaintiffs filed the suit.

The suit was contested by the defendant Nos.1, 2 and 4 by filing joint written statement denying all the material assertions made in the plaint, contending, *inter-alia*, that the suit land originally belonged to Rakhai Chandra, who sold the suit land to one Kali Kumar by a kabala deed dated 17.12.1936 and thereafter Kali Kumar sold the suit land to Jogesh Chandra Chowdhury, the predecessor of defendant Nos.5-7 by kabala deed dated 02.12.1954 and accordingly P.S. record was correctly recorded in his name and thereafter Jogesh Chandra Chowdhury sold the suit land to Jhunu Ram Sarder and Sona Ram Sarder by kabala being Nos.6277 and 6178 deed dated 13.10.1969 and Jhunu Ram and Sona Ram Sarder sons of Kali Kumar Sarder, while in possession, sold the suit land to Moti Bala Dhar by kabala deed being No.1363 dated 29.4.1974 the predecessor of defendant Nos.1-4 and accordingly B.S. record was prepared in her name correctly; that the defendants have been possessing the suit land peacefully with the full knowledge of the plaintiff more than 12 years that the plaintiff has/had no right, title and possession over the suit land and the suit is false which is liable to be dismissed with cost.

The defendant No.3 also contested the suit by filing separate written statement denying all the material assertions made in the plaint admitting the case of the defendant Nos.1, 2 and 4.

Thereafter, the trial Court framed 05 (five) issues for disposal of the suit.

At the time of trial, the plaintiff examined three witnesses as P.Ws and the defendant examined two witnesses as D.Ws and both the parties exhibited some documents to prove their respective cases.

The trial Court, after hearing the parties and considering the evidence on record, decreed the suit by its judgment and decree dated 05.09.2005.

Against the said judgment and decree of the trial Court the defendants preferred Other Class Appeal No.518 of 2005 before the learned District Judge, Chattogram. The said appeal was heard and disposed of by the learned Additional District Judge and Bankruptcy Court, Chattogram.

During the pendency of the appeal the appellants after procuring the certified copy of kabala being No.769 dated 22.03.1937 and registered on 22.03.1937 executed on 17.12.1936 and registered on 22.03.1937 executed by the R.S recorded owner, Sree Rakhal Chandra, in favour of Sree Kali Kumar Sarder and accordingly submitted the same with an application to exhibited the said deed of certified copy and also file an application for calling the balam book on 04.10.2009 but the Appellate Court, in order No.22 dated 04.10.2009, passed an order mentioned that as the respondent did not raise any objection regarding the genuineness of the certified copy and accordingly took view that no requirements of calling for the balam book.

Thereafter, the Appellate Court after hearing the parties and considering the evidence on record dismissing the appeal and thereby affirming the judgment and decree of the trial Court by its judgment and decree dated 15.09.2013.

Being aggrieved by and dissatisfied with the impugned judgment and decree of the Courts below the defendant-appellant-petitioners filed this revisional application under Section 115(1) of the Code of Civil Procedure, 1908 and obtained the Rule.

Mr. Md. Zakir Hossain, the learned Advocate entered appear on behalf of the plaintiff-opposite parties through vokalatanama to oppose the Rule.

Mr. Md. Ekramul Islam, the learned Advocate appearing on behalf of the defendant petitioners submit that both the Court committed serious error in law resulting in an error in the decision occasioning failure of justice in not considering the facts that the predecessor of the plaintiffs, the original R.S recorded owner Rakhai Chandra Chakraborti, sold the schedule land in favour of one Sree Kali Kumar Sarder. He further submits that though the defendant side stated the said facts in their written statement but did not exhibit any documents and accordingly the trial Court decreed the suit but in the appellate stage that defendant-appellants submitted the said certified copy of the said deed with an application to exhibit the same and made a prayer for calling the balam book to prove the genuinity of the deed

and though the plaintiff side did not raise any objection about the same, thus the Appellate Court, by its order No.22 dated 04.10.2009, passed an order that no requirements to call for the balam book, whereas the Appellate Court without considering the said facts erroneously passed the impugned judgment, taking the view that the defendant-appellants did not take any step to prove the certified copy of the said deed by calling the balam book which is clearly reflecting a failure to consider the evidence on record and also did not apply its judicial mind as such the finding of the Appellate Court is error in law resulting in an error in the decision occasioning failure of justice. He further submits that the Appellate Court shifted the burden of proof to the defendant whereas it is the settled principle that the plaintiff should prove his case by adducing sufficient evidence. He further submits that the said property was transferred and the predecessor of the defendant exhibited the original deeds of the transfer but the Appellate Court also did not consider the same and erroneously passed the impugned judgment. He further submits that the defendant also exhibited the series of rent receipts but the Appellate Court took view that in the said rent receipts it appears that the rent was paid in favour of the original R.S recorded owner which is also erroneous decision of the Court. He further submits that, regarding the possession, both the Courts took view that P.W-2 and 3 corroborated the case of the plaintiff that the plaintiff is in possession of the suit land whereas in the plaint

as well as in the deposition of P.W-2 the said facts has not been disclosed that they possesses the suit land through their borgader P.W-2 and 3 which is beyond the pleadings, whereas both the Courts did not consider the said vital facts and wrongly evaluated the evidence of the witnesses thus the impugned judgment of the Courts below is erroneous one and the same is committed error in law resulting in an error in the decision occasioning failure of justice. He prayed for making the Rule absolute.

On the contrary, Mr. Md. Zakir Hossain, the learned Advocate, appearing on behalf of the plaintiff-opposite parties, submits that this is a case of affirmation of the judgment and both the Courts, after proper consideration of the evidence on record, found the right and title of the plaintiff over the suit land. He further submits that both the Courts below after making proper discussions of the provisions of law that the alleged deed in the Year of 1936 was not proved by the examination of the balam book and rightly found that the secondary evidence should not be considered in case of establishing the title. He further submits that the Court also consider the provision of Section 28 of the Registration Act, 1908 that the suit property under the sub-registry office of Boalkhali whereas the deed was registered in the Potia sub-registry office without any satisfactory explanation and as per provision of Section 28, the said deed should not be considered as genuine and the Court, after making an elaborate discussion, following a thorough

examination of the provisions of law and the decision of our Apex Court, rightly took a view that the genuinity of the said deed was not proved by the defendants by adducing sufficient evidence and rightly passed the impugned judgment. He prayed for discharging the Rule.

I have heard the learned Advocate of both the sides, perused the impugned judgment of the Courts below and the papers and documents as available on the record.

It appears that the plaintiff filed this suit for declaration of title and confirmation of possession of the suit land and further prayed for a declaration that the subsequent record of rights that is P.S and B.S was illegally or wrongly prepared in the name of the defendant, claiming that the suit land originally belonged to their predecessor, Sree Rakhil Chandra, and the R.S record in the area of Chattogram was rightly prepared in his name and the said property has not been transferred but the record was prepared in the names of the defendants without any supporting documentation.

But the defendant claimed that the said R.S recorded owner, Sree Rakhil Chandra, transferred the said property through registered deed No.769 dated 22.07.1936 in favour of Sree Kali kumar Sardar and subsequently the said suit land was also transferred by registered deed No.6314 dated 02.12.1954 in favour of Jogesh Chandra Chowdhury. Their further case is that subsequently the said Jogesh Chandra Chowdhury also transferred the suit land in favour of Jodunam Sardar

wife of Sona Ram Sardar by two separate deeds dated 13.10.1969 and the predecessor of the plaintiff also purchased the said land from them through registered deed and accordingly the P.S and B.S were prepared rightly in their name. To prove the said case the defendant side exhibited the certified copy of the deed being No.6314 dated 02.12.1954 as Exhibits-C and the original deeds and all the subsequent original deeds exhibited as Exhibit-d, e and f and claims that their predecessor subsequently purchased the said suit land and regularly paying the rents to the Government and in support of the same also submitted the rent receipts.

It appears at the Appellate stage that the defendant-appellant filed an application with a certified copy of the deed being No.769 executed on 17.12.1936 and registered on 22.03.1937, for exhibiting the same along with an application for calling the balam book to prove the said secondary evidence regarding the transfer of the suit land by the R.S recorded owner, Sree Rakhal Chandra. It appears that the Appellate Court, by its order No.22 dated 04.10.2009, passed an order that no requirements of calling for the balam book since the plaintiff side did not raise any objection about the genuineness of the certified copy of the deed and the same is as follow:

“শুনলাম । নথি দেখলাম । আপীলকারীর পক্ষগত ২২-০৩-১৯৩৭ তারিখ
রেজিস্ট্রিকৃত ৭৬৯৯ দলি-লর একটি জা-বদা নকল-ক প্রমা-নর ব্যবহা-রর স্বা-র্থ
স্বাক্ষী ভলিয়ম বহি তব-লর প্রার্থনা ক-রন । উভয় পক্ষের বক্তব্য পাওয়া যায় যে

উক্ত জাবেদনা নকলটির যথার্থতা সম্পর্কে রেসপন্ডেন্ট পক্ষে কোন আপত্তি বর্তমান নাই। সেই ক্ষেত্রে জাবেদা নকলটি প্রমানে ব্যবহা-রর জন্য সংশ্লিষ্ট ভলিয়ম বহি তল-ব আইনগত কোন প্র-য়াজন না থাকা হেতু আপীলকারীর প-ক্ষ ভলিয়ম তল-বর দরখাজ্টি বি-বচনা করা গেল না।”

The learned Advocate Mr. Md. Ekramul Islam, submits that as the plaintiff respondents have acknowledged the transfer deed, in such a case there is no question of genuinity of the said deed, whereas the Appellate Court without applying its judicial mind and the earlier order though exhibited the certified copy as exhibit No.N but took view that the defendant-appellant did not take any step to prove the same by recalling the balam book which is a clear error in law resulting in an error in the decision occasioning failure of justice.

Mr. Md. Zakir Hossain submits that the order above does not say that the plaintiff respondent side admitted the execution by the aforesaid order, of the deed; rather, it merely indicates their lack of objection to the application for recalling the balam book.

In the instant case, on considering the Exhibit-N, it is found that the predecessor of the plaintiff the original R.S recorded owner, Sree Rakhil Chandra, transferred his property through a registered deed No.769, executed on 17.12.1936 and registered on 22.03.1937. After considering the said facts it is also found that the defendant has tried to prove the facts that the original R.S recorded owner, the predecessor of

the plaintiff, Sree Rakhal Chandra, transferred his right, therefore, the plaintiff has lost his rights and title over the suit land.

Mr. Md. Ekramul Islam submits that in addition to the aforementioned deed, the defendant's side presented a certified copy of the subsequent transfer executed by the purchaser, Sree Kali Kumar, which was also exhibited. Furthermore, it is noted that he subsequently transferred the property to another person and the defendant also exhibited the original deed dated 13.10.1969, which, being 30 Years old, does not require any formal proof.

I have also examined the record and the Exhibit, C to F, consists of original deeds, specially the Exhibit-C and D are more than 30 Years old documents. But if the initial transfer has not been proved, the defendant cannot seek relief based on subsequent claims. Later in this case, the defendant filed an application for recalling the balam book and the Court took view that there is no requirement to call the balam book since the plaintiff did not raise any objection about the genuineness of the certified copy. Whereas, in the judgment, the Appellate Court took view that the defendant-appellant did not take any step to prove the certified copy, which was secondary evidence, by calling the balam book. After considering consideration the order No.22 dated 04.10.2009, it is my view that the Appellate Court without applying its judicial mind took such view. In this case, the Appellate Court also considered the Section 28 of the Registration Act, 1908 that the said

deed was registered in the Potia Sub-registry office instead of Boalkhali sub-registry office and the Appellate Court also took view that the defendant failed to prove their possession over the suit land and the rent receipts, submitted by the defendant, favored the original owner of the land.

Since in the instant case, the learned Advocate Mr. Md. Ekramul Islam, submits that the defendant tried to prove the said transfer by the original R.S recorded owner and also submitted the certified copy and which was also exhibited as Exhibit-N and in such a case it is my view that since by the order No.22 dated 04.10.2009, the Appellate Court took view that the calling for balam book is not required so from the aforesaid facts and circumstances of the case it is my view that the Appellate Court, without applying its judicial mind and also without considering the earlier order, took view that the defendant did not take any step to prove the genuinity of the deed which is a purely erroneous decision and committed serious error in law resulting error in the decision occasioning failure of justice. But since the Appellate Court also took view regarding the registration of the deed and the possession, in such a case, it is my view that the case should be sent back on remand to the Appellate Court, with a direction to give opportunities to the parties to prove their respective cases and specially the defendant's prayer to recall the balam book in order to

prove the transfer of the original R.S recorded owner, who is the predecessor of the plaintiff, Sree Kali Charan.

As per the provision of Section 107 of the Code of Civil Procedure, 1908, the Appellate Court, being the final Court of facts, shall have the same powers and duties as nearly as may be the said duties are conferred and imposed by this Code on the Courts of original jurisdiction in respect of suits instituted therein. And also shall have the powers to determine a case, to remand a case, to frame issues and refer them for trial, to take additional evidence or to require such evidence to be taken.

Considered the aforesaid facts and circumstances of the case it is my view that the judgment of the Appellate Court is erroneous one and thus I find merit in the Rule.

In the result, the Rule is made absolute. The impugned judgment and decree dated 15.09.2013 (decree signed on 22.09.2013) passed by the learned Additional District Judge (in charge), Bankruptcy Court, Chattogram in Other Appeal No.518 of 2005, disallowing the appeal and hereby affirming the judgment and decree dated 05.09.2005 (decree signed on 11.09.2015) passed by the Assistant Judge Court, Boalkhali, Chattogram in Title Suit No.17 of 2002 are hereby set-aside.

The Other Class Appeal No.518 of 2005 is sent back on remand to the Appellate Court to dispose of the appeal afresh in accordance with law.

The Appellate Court is also directed to give opportunities to the parties to prove their respective cases and also consider the application for recalling the balam book.

The Appellate Court is directed to dispose of the appeal as early as possible preferably within 06 (six) months from the date of receipt of this judgment considering the observations as made above and in accordance with law.

The order of *status-quo* granted earlier by this Court should continue till disposal of the appeal.

Send down the Lower Court's Records at once.