

**IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION**

(CIVIL REVISIONAL JURISDICTION)

Present:

**Mr. Justice Md. Emdadul Huq**

**Civil Revision No. 3453 of 1998.**

Md. Wahed Miah.

.....Petitioner.

-Versus-

Abdul Khaleque being dead his heirs Firoja  
Begum and others.

.....Opposite parties.

Mr.Md. Abul Kalam Patwary, Adv.

..... For the petitioner.

Mr. Abul Kuddus Miah, Advocate.

..... Fort the Opposite parties.

**Heard on:**18.2.14, 5.3.14, 11.3.14, 28.4.14 and  
6.5.2014.

**Judgment on:** 22.05.2014.

This Civil Revision has arisen from Title Suit No.59 of 1986. In that suit, the learned Assistant Judge, Additional Court, Sadar, Comilla, by judgment and order dated 28.02.1987, allowed to the petitioner-plaintiff a decree of permanent injunction in respect of some land. But, in Title Appeal No.118 of 1987, the learned Subordinate Judge, 1st Court, Comilla, by his judgment and order dated 28.04.1998, reversed the decision of the trial court and thereby dismissed the said suit.

The Rule issued in this Revision was earlier disposed of by another Single Bench of this Court by judgment dated 10.08.2010.

But, in Civil Petition for Leave to Appeal (CPLA) No.113 of 2010, the Appellate Division has sent this Revision on remand for fresh hearing and disposal by this Bench with some observations and direction as quoted in the findings and decision portion of this judgment.

Accordingly the matter has been heard afresh in presence of the learned Advocates for both sides. For convenient disposal of the Rule, the relevant aspects of the matter are presented below under proper headings.

**Plaintiffs' Case.**

Petitioner Md. Wahid Miah, as plaintiff No.1 and his paternal uncle's wife (চাচী) Rajaban Nesa, as plaintiff No.2, filed the above noted suit for permanent injunction for protection of their possession over the suit land measuring 5 decimals.

During pendency of the suit, plaintiff No.2 Rajaban Nesa died without leaving any heir. Her name was deleted by the trial court by order dated 13.01.1987 and plaintiff No.1(petitioner) was substituted as her successor-in-interest on the basis of a claim that she had made an oral gift of the suit land to plaintiff No.1.

Plaintiff claims that the suit land is part of C.S. Plot No.161 measuring 19 decimals appertaining to C.S. Khatian No.23. The land of this khatian and that of No.37 belonged to C.S. recorded tenant Mon Gazi who had orally gifted the suit plot No. 161 to his two domestic servants in two portions, namely 12 decimals to Golam Ali and 7 decimals to Nowab Ali.

The said 7 decimals of Nawab Ali was inherited by his son Yakub Ali who sold the same to one Hafizuddin. Deceased plaintiff No.2 Rajaban Nesa had purchased the suit land from the said Hafizuddin by a registered kabala dated 20.02.1954 and had been in possession thereof.

Plaintiff No.2 was a childless old lady. So plaintiff No.1, as the nearest relative, used to take care of her. Before her death she orally gifted the suit land to plaintiff No.1. Thus plaintiff No.1 acquired the suit land and has been in possession.

The remaining property of Mon Gazi devolved upon his only son Hari Dhon and, on his death, upon his three daughters including defendant Nos. 3 and 4 Amena and Abeda. These grand daughters of Mon Gazi had sold 68 decimals to one Tamiz Uddin and 32 decimals

to his brother Sayed Ali, both being residents of the suit village and they have been possessing the same.

The grand-daughters of Mon Gazi were given in marriage with residents of different villages. So they used to look after their remaining property through one Abdus Salam of the suit village. This Abdus Salam, at one stage, threatened plaintiffs' possession over the suit land. So the plaintiff got a registered a Nadabi Deed dated 27.08.1982 executed by the said Amena and Abeda, the two grand-daughters of Mon Gazi. In this deed they have admitted the fact of oral gift of the suit plot 50 years back by their grand father Mon Gazi to the two domestic servants and they have further stated that they do not claim the suit land.

Defendant No.1, Abdul Khaleque, being grandson of the said Nowab Ali, with the assistance of defendant No.2 Abdul Khaleque son of Abdur Rahman, threatened plaintiffs' possession on 16.09.1982 on the basis of some forged documents showing a false certificate case and auction sale therein. Hence the suit.

**Defendant's Case:**

The opposite party-defendant No.1, Abdul Khaleque son of Yakub Ali, in his written statement denies plaintiffs' title and possession and the alleged threat to their possession.

However he admits that Mon Gazi was the original owner of the suit khatian No.23 including the suit land and non-suit khatian No.37 and that Mongazi had a son named Hari Dhon. But Hari Dhon died during the life time of Mon Gazi. So Hari Dhon or his daughters inherited nothing from Mon Gazi, rather the surviving three daughters of Mon Gazi, being Arafaner Nesa and two others inherited the interest of Mon Gazi.

Defendant further claims that, due to arrears of rent, Certificate Case No.1227 of 1952-53 was initiated against the said daughters of Mon Gazi and others in respect of the properties left by Mon Gazi. In this case, one Salamat Ullah and 5 others auction purchased the entire land of C.S. khatian Nos. 23 and 37 and got delivery of possession thereof. The S.A. khatian No. 44 has

accordingly been prepared in the names of the auction purchasers in respect of the land of C.S khatian No.23 and they paid rent to Government.

There was an amicable partition among the auction purchasers and the suit plot No.161 fell in the share of auction purchaser Salamat Ullah from whom defendant No.1, by registered kabala dated 20.07.1981, purchased the suit land and has been in possession thereof.

Defendant No.2, Abdul Khaleque son of Abdur Rahman has also purchased 7 decimals of the suit plot by a registered kabala dated 20.07.1981 from another auction purchaser named Idris Miah and defendant No.2 has been in possession thereof.

### **Deliberation in the Revision.**

At the hearing of this Revision, Mr. Md.Abul Kalam Patwary, the learned Advocate for the petitioner (plaintiff), submits that the appellate court committed an error of law in holding that the vendor of defendant No.1 had acquired title and possession on the basis of the auction sale in a certificate case initiated in 1952-53, because, at that time, the State Acquisition and Tenancy Act, 1950 (**shortly the Act, 1950**) was not in force and that this Act came into the force in April, 1956 in Comilla district and therefore the Certificate Officer had no legal authority to initiate that case or to transfer the land by auction sale.

Mr. Patwary, the learned Advocate, next submits that prima facie title and exclusive possession of the plaintiff has been proved by the local witnesses, who clearly stated the fact of possession of Nowab Ali the domestic servant of Mon Gazi and also by the Nadabi Deed executed by the grand daughters of Mon Gazi admitting the oral gift made by their grand father Mon Gazi to Nowab Ali and Golam Ali and by the document of purchase of deceased plaintiff Rajaban Nassa from the successor-in-interest of Nowab Ali and

lastly by the oral gift by deceased plaintiff Rajabon Nessa to plaintiff No.1

In reply, Mr. Abdul Kuddus Miah, the learned Advocate for the plaintiff opposite party, submits that, irrespective of the weakness of the defendant's evidence, the plaintiff must prove his own case, but he has totally failed to prove his prima title, as he was a mere care taker and not even an heir of the other plaintiff being deceased Rajabon Nessa, and also failed to prove his exclusive possession.

Mr. Kuddus Mia, the learned Advocate, next submits that neither the oral gift allegedly made by Mon Gazi in favour the two domestic servants, Nowab Ali and Golam Ali, nor the oral gift allegedly made by deceased plaintiff Rajabon Nessa to plaintiff No.1 was proved any credible testimony.

Mr. Kuddus Mia, the learned Advocate, next submits that the Nadabi Deed executed by the daughters of Hari Dhon does not help establish plaintiff's title, as the executants themselves had no title, because of the alleged oral gift by Mon Gazi to Nawab Ali and the auction sale held in the certificate case.

Mr. Kuddus Mia, the learned Advocate, next submits that the documents of auction purchase (Exhibit-B, C and D) remain valid until those are set aside in a proper legal proceedings, that the auction purchase has been reflected in the S.A. Khatian (Exhibit-E) prepared in the names of the auction purchasers and that this khatian is to be presumed as correct unless rebutted by better evidence and the khatian read with the rent receipts (Exhibit-F, F(1) and F(2)) and the oral evidence of the D.W's sufficiently prove possession of the defendant.

### **Findings and decision in Revision**

**Principal controversies:** The only fact admitted by both sides is that the entire holding of C.S. khatian No. 23 including suit plot No. 161 belonged to C. S. tenant Mon Gazi.

The parties differ on the two fundamental questions of facts namely:- (1) whether Mon Gazi orally gifted the suit land to his

domestic servant Nawab Ali, and whether this gift ultimately led to acquisition of the suit land by the plaintiff, and (2) whether the interest of the successors-in-interest Mon Gazi extinguished because of a Certificate Case initiated in 1952-53 due to arrear of rent, and whether the auction sale therein led to acquisition of the suit land by the defendant.

The principal legal issue is whether the Certificate Officer had the lawful authority to initiate the certificate case and to transfer the suit land by the alleged auction sale.

**Opposite decision of the Courts below:**

The trial court, upon discussion of the evidence on record believed the case of the plaintiff and decreed the suit. But the appellate court upon independent assessment of the evidence on record reversed the decision of the trial court and dismissed the suit.

The appellate court, however, recorded a finding that the documents of auction sale are valid until set aside by competent court, but without making any discussion or recording any finding on the above noted legal issue about the legal authority of the Certificate Officer.

**Direction of the Appellate Division:**

As pointed out earlier, in CPLA No.2113 of 2010, the Appellate Division has sent the Revision on remand with the following observations and directions:

*“More so, while interfering with a judgment of reversal, it is expected that the High Court Division should have made a cursory glance of the evidence on record for ascertaining as to which findings of fact arrived at by the courts below are correct and also to decide as to whether there is any misreading or non-consideration of the material evidence on record by the court of appeal below, which are legal grounds for interference against the findings of fact in exercise of its revisional jurisdiction.”*

**Points to be considered and decided in Revision:**

In consideration of the facts of the case, the issues raised in this Revision and the direction of the Appellate Division the following issues are to be addressed and decided in this Revision:

- a. Prime facie title and exclusive possession of the plaintiff vis-à-vis the title and possession claimed by the defendant.
- b. The legality of the auction sale in a Certificate Case initiated in 1952-53.
- c. Whether there is any non-consideration or misreading of material evidence by the appellate court.

However the nature of controversy between the parties is such that even if the plaintiff is able to prove his prima facie title, it will not yield any result if it is found that the suit land was legally auctioned as claimed by the defendant. So it is convenient to first look into the documents relating to auction sale and the S A Khatian and the legal issues involved in the matter.

**The disputed auction sale and the S.A. khatian:**

About the auction sale, Defendant No.1 has filed three documents being Exhibit-B,C and D.

Exhibit-D is the original Certificate of Sale signed by the Certificate Officer on 18-07-1955 in Certificate Case No. 1227/1952-53. The case was initiated against (1) Arfaner Nessa, (2) Safarun Nessa, (3) Saydun Nessa, (4) Sayed Ali (5) Tamizuddin and several others. It is stated in Exhibit-D that the said three women were daughters of Mon Gazi.

Exhibit-D further shows that the auction purchasers are Ahmed Ullah, Salamatulla, Siddiquir Rahman, Idris and two others and that the sale was confirmed.

Exhibit-C shows that the auction purchasers, on 23-04-1954, filed an application stating that there was an amicable partition of the land auction purchased by them and that the land specified in the

various schedules to the application were allocated to specified purchasers.

Exhibit-B shows that, in Misc. Case No. 24 of 1956-57, the said auction purchasers filed requisites (তলবানা-১) for delivery of possession. and that an order was passed on 9-8-1956 stating that “*possession delivered on 29-6-1956 and the case is disposed of*”.

The certified copy of S.A. Khatian No. 44 (Exhibit-E) shows that the land of C.S khatian No.23 including suit plot no. 161 was recorded in the names of the auction purchasers i.e. Ahmed Ullah and others, including a certificate debtor Sayad Ali.

Exhibit-F, F (1) and F(2) show that rent was paid against the said S.A. khatian for several years beginning from 1977.

It is noted that the Certificate of Sale (Exhibit-D) is silent as to whether it was initiated for arrears of rent or for other reasons. However Exhibit-C contains a reference to the case number as কেস নং ১২২৭ নং ১৯৫২-৫৩ ইং “খাং ডিং”. The expression “খাং ডিং” is not very clear, but it at best indicates that the abbreviation stands for খাজনা ডিক্রি.

The defendant No.1, as D.W.1, in the line of his written statement, stated that the Certificate Case was initiated due to arrears of rent.

In the absence of any better evidence to the contrary, it appears that the certificate case was purportedly initiated for arrears of rent.

But on the issue of the legal authority of the Certificate Officer, I agree with Mr. Abul Kalam Patwary, the learned advocate for the plaintiff-petitioner, that despite the enactment of the Act, 1950, this Act did not commence before April, 1956 and therefore the rent receiving interest had not vested in the Government authorizing the Government functionaries to realize any arrear of rent that might have fallen due to the landlord. Such rent was not a public demand under the Public Demands Recovery Act, 1913 nor was it otherwise realizable through the Certificate Officer. Thus he had no legal authority to initiate the said case in 1952-53.

This legal position is confirmed by section 68C that was inserted in the Act, 1950 by E.P. Ordinance No. XLIV of 1958. This new section conferred a right on the landlord to realize arrear rent by filing a Rent Suit in the Civil Court.

Rent receiving interest of the landlords was acquired by the Government by virtue of section 3 of the Act, 1950. But according to section 3(1) of the Act, 1950 a Gazette Notification was necessary for coming into force of the said section 3 itself. In the district of Comilla and certain other districts, the Act, 1950 including section 3 came into force on 2<sup>nd</sup> April, 1956 by Notification dated 2<sup>nd</sup> April, 1956 published in the Extra Ordinary Gazette (*vide Obaidul Huq's the state Acquisition and Tenancy Act, Third Edition 2001, page-21, published by DLR.*

It follows that the auction sale claimed by the defendant No. 1 has no legal basis. Even if the certificate case was initiated and the Certificate of Sale(Exhibit-D) was issued, the entire proceeding was illegal and this document is void abinitio. The auction purchasers acquired no right or title by virtue of it. The appellate court committed a clear error of law in holding that the auction sale was lawful and that those are valid documents until set aside in a proper suit.

In support of his claim that the auction documents(Exhibits-B,C and D) are forged, plaintiff filed in the trial court an information slip dated 24-02-1987, but it was not admitted in evidence. It contains an information that the records of the Certificate Case No. 1227/1952-53 and of Miscellaneous Case No. 24 of 1956-57 were not available in the Record Room of the Collector.

In consideration of the claim and counter claim of the parties, an order was passed by this Court on 02-05-2013 that additional evidence would be recorded on the matter and accordingly the Deputy Commissioner, Comilla was directed to produce the case record of the said two cases and the concerned registers, and if any or all of those were not available a report should be sent about such non availability

In response, the Deputy Commissioner has sent a report under স্মারক নং- ০৫.২০.১৯০০.০১৭.০৪.০৩৩.১২, তারিখঃ- ২১ জুলাই ২০১৩ to this court to the effect that the case records or the registers were not available in the record room or in the office of the General Certificate officer, Comilla.

In view of such report no witness was summoned for recording additional evidence. Neither of the parties agitated the matter of additional evidence.

It appears that the evidence on record is not sufficient to arrive at a decision about the alleged forgery or otherwise.

However, as pointed out by Mr. Abdul Quddus Mia, the learned Advocate for the defendant opposite party, irrespective of the legality or otherwise of the Certificate Case, the auction sale has some how found place in the S.A khatian (Exhibit-E) prepared in the names of the auction purchasers and even in the name of one of the purported certificate debtor Sayad Ali. It is not clear from the materials on record as to how the name of the said Sayad Ali was included in the S.A khatian.

Be that as it may, according to section 144A of the Act, 1950, the entries in the S.A khatian are to be presumed as correct and it is also a supporting evidence of possession of the tenants, unless rebutted by better evidence. This aspect of the scenario may be examined vis-a-vis the claim of the parties and the evidence led by them on possession.

**Possession:** In support of his claim, plaintiff produced oral and documentary evidence through four witnesses including himself as P.W. 1. His documents have been marked as Exhibits 1(series) and Exhibits 2-4.

These documents show that deceased plaintiff Rajaban Nessa purchased the suit land by kabala dated 20-02-1954 (Exhibit-1(2)) from Hafiz Uddin and that the vendor Hafizuddin purchased the same from Yakub son of Nowab Ali by kabala dated 17-04-1950 (Exhibit-1). Plaintiff also filed a rent receipt (Exhibit-2) showing

payment of rent by Rostom Ali on 31-03-1959 on behalf of Mon Gazi.

It is noted that P.W.3 and 4 stated that Rostom was son of Golam Ali, who according to the plaintiff (P.W.1), was one of the two domestic servants of Mon Gazi.

But Plaintiff could not produce any direct evidence about the oral gift by Mon Gazi to the two domestic servants Noab Ali and Golam Ali. He produced some indirect evidence, namely the oral testimony through P.W2-4 and the registered Nadabi Patra dated 27-08-1987 (Exhibit-3) executed by the two grand daughters of Mon Gazi.

P.W. 3, Tamijuddin, aged 70/65 years and P.W.4 Bosat Ali Sardar, aged 60 years, both being residents of the suit village, stated that they had seen Nowab Ali and Golam Ali possessing the suit land. They also stated the details about the next generation of the said Nowab and Golam Ali and about the subsequent transfers namely the purchase and possession of Hafizuddin from Yakub son of Nowab and subsequently of Rajabannessa from Hafizuddin and finally of the oral gift by Rajaban Nessa to plaintiff No.1. They further stated that plaintiff No.1 has been in possession.

P.W.4 further sated that he was present when Rajaban Nessa (plaintiff No.2) orally gifted the suit land to plaintiff No.1 before 2/4 days of her death.

In the registered Nadai Pattra dated 27-08-1982 (Exhibit-3) the executants Amena and Abeda have stated that their grand father Mon Gazi had gifted the suit plot to his two domestic servants Golam Ali and Nowab Ali and that they (Amenna and Abeda) did not claim the suit land.

Both P.W. 3 and 4 stated that Mon Gazi had no daughter and that after his death his only son Hari Dhon and finally the grand daughters of Mon Gazi being Amena, Abeda and Sayandan Nessa became the owner of the property left by Mon Gazi. Both the witnesses denied the occurrence of any auction sale.

Another witness P.W. 2, named Abdul Khaleque (defendant No.2) son of Abdur Rahman, stated that plaintiff No. 1 Wahid is in possession of the suit land and that he ( P.W. 2) purchased some land from one of the auction purchasers named Idris Mia, but Idris himself did not get delivery of possession of the auction purchased land and consequently P.W. 2 himself could not get possession from Idris because of the resistance from the plaintiff. He further stated that none of the auction purchasers got delivery of possession of their auction purchase land.

The trial Court, upon discussion of the oral and documentary evidence on record, believed the aforesaid three witnesses (P.W.2,3 and 4) with regard to possession of the plaintiff and also believed the fact of oral gift of the entire suit plot by Mon Gazi to his domestic servants Nowab Ali and Golam Ali and the subsequent transfers that led to acquisition of the suit land by plaintiff Wahid.

The appellate Court however discarded the testimony of P.W. 2, Abdul Khaleque, son of Abdur Rahamn on the fallacious reasoning that P.W.2 himself purchased some land from one of the auction purchasers Idris. Such reasoning of the appellate Court is the result of non consideration of the material part of the statement of P.W.2. The appellate court misread the impact of the testimony of P.W.2, because in disclosing the truth P.w.2 deposed against own interest. For proper appreciation the relevant part of statement of P.W'2 is quoted below: (*underlines added*)

“আমি ২ নং বিবাদী। নালিশী দাগ বাদী দখল করে।-----  
 ..... আমি ঈদ্রিশ মিয়া হইতে খরিদ করেছিলাম। সে বলেছে নিলাম  
 খরিদ সূত্রে মালিক। নিলাম মূলে কোন সম্পত্তি দখল পাই নাই। নালিশী  
 সম্পত্তি কেউ নিলাম খরিদ মূলে দখল করে নাই।  
 .....  
 আমি খরিদ করলে বাদী আমাকে দখল দেয় নাই। উক্ত সম্পত্তি অহিদ  
 (plaintiff) দখল করে। আমি ঈদ্রিস মিয়াকে বলেছি টাকা নয়ত জমি দেও।  
 ঈদ্রিশ বলে মামলা শেষ হলে একটা হবে। আমি খরিদ করার পূর্বে ও নাঃ জমি  
 অহিদ (plaintiff) দখল করিত। ১ নং বিবাদী ২ ½ গন্ডা কিনেছে তাহাতে  
 খালেক (defendant No.1) দখলে নাই অহিদ দখলে আছে”।

The appellate Court discarded the testimony of P.W. 3 Tamijuddin on the reasoning that he (P.W.3) stated that his son

named Khaja Mainuddin had auction purchased some land and thus became owner thereof. This reasoning of the appellate Court is the result of non consideration of the material part of the statement of P.W. 3 as follows:

Exam-in-chief

“নাঃ জমি আমার বাড়ীর পাশে..... রজবন নেসার অংশসহ নাল জমি অহিদ দখল করে।

..... নাঃ জমি বিবাদীরা দখল করে না। নাল খতিয়ানে বহু সম্পত্তি আছে। আমি খরিদ করেছি এবং দখলেও আছি। নাঃ জমি নিলাম হয়নি রজবন নেসার কোন ছেলেমেয়ে ছিল না। অহিদকে তিনি মৌখিক দান করে গেছে। মন গাজীর আরদান, খায়রন নেসা, সৈয়দ নেসা নামে কোন মেয়ে ছিল না। মন গাজী হারিধনকে একমাত্র পুত্র রেখে মারা যায়। হারী ধনের মেয়ে আবেদা, আমেনা, ও পরিমল নেছা এই তিন মেয়ে.....

Cross-examination.....মামলার

জোতে আমার জমি আছে ..... আমি খরিদ সূত্রে মালিক। হারি ধনের মেয়ে আমেনা থেকে সম্পত্তি খরিদ করেছি। দলিল আছে।

..... খাজা মাইনুদ্দীন আমার ছেলে

..... সে নালিশী জোতে মালিক আছে। সে কিভাবে মালিক হয়েছে তাহা জানিনা। আমার ছেলে নিলাম খরিদ করে জমির মালিক আছে।

..... ১৫৭ দাগের সম্পত্তি মন গাজীর । উহা আমি দখল করি ।

আমি ও আমার ছেলে একত্রে থাকি। ১৫৭, ১৫৮, ২৮১, দাগ আমার খরিদ সম্পত্তি ”

It is noted that, in cross-examination, the question of auction purchase of his son was put to P.W.3, in view of the contents of Exhibit-C, being the certified copy of the application filed by the auction purchasers stating that there was an amicable partition among themselves and that Khaja Mian Uddin, son of P.W.3 was allotted plot Nos. 157, 158 and 281.

The appellate court totally misread the evidence of P.W.3. Because P.W.3 admitted the truth about his son's role only as an auction purchase, but P.W.3 eventually denied the title and possession of his son, and asserted his own title and possession over those plots.

The appellate Court discarded the testimony of P.W. 4 Bosot Ali on the reasoning that this witness disowned his signature in the kabala of defendant No.1 (Exhibit-ka) as an attesting witness, but the appellate Court found the signatures of P.W.4 on that document and the one on his deposition sheet to be similar.

It appears that the appellate Court has failed to consider that it is unsafe to come to a conclusion about similarity of two signatures when it is denied by the purported signatory. Moreover even if the signature of an attesting witness is correct, he is not supposed to know the exact content of document. That can not be a sound logic for discarding the credibility of P.W.4, if his testimony is otherwise credible.

The appellate Court also failed to consider the material statement of P.W. 3, with regard to his own continuous possession of part of the land of the suit khatian by virtue of purchase from the heirs of Mon Gazi. This fact was even supported by the defendant D.W. 2, Bosot Ali who was produced by the defendant. D.W.2 stated that his father Syad Ali and Tamijuddin (P.W.3) are full brothers and they purchased some land in the suit khatin from the original owners and that both are in possession of that land.

It is noted that no documents were produced by any of the parties in respect of the aforesaid purchases of P.W.3 or D.W.2's father. However these two witnesses may at best be considered to have some interest in denying the auction sale as they claimed to be purchaser and possessors since before the auction sale.

But the testimony of P.W.3 and 4 is fully credible when considered with that of P.W.2. who in disclosing the truth deposed against his own interest.

These statements of P.W. 2, 3, and 4 prove that even if the auction sale had taken place in paper it was never acted upon in terms of delivery of possession.

The fact of non delivery of possession in consequence of the alleged auction sale is further reflected by the fact that defendant No.1 to prove his possession did not produce his vendor Salamat Ullah or any other auction purchaser. Nor did Defendant No.1 produce any witness to the fact of delivery of possession through court/certificate office.

However to prove his possession defendant himself deposed as D.W.1 and also produced D.W.2 and 3. All these three witness

supported the possession of the defendant. They also stated that they heard about delivery of possession after auction sale.

The testimony of D.W.1 and 3 is not credible. Because both stated that defendant No.2 Abdul Khaleque (P.W.2) is in possession of the part of the suit plot by virtue of purchase from auction purchaser Idrsh. But this fact was denied by P.W.2 Abdul Khaleque himself as quoted earlier.

The statement of D.W. 2 appears to be dubious. Because on the one hand he supported defendant's possession on the basis of purchase from an auction purchaser and he again he stated about continuous possession of his father Sayad Ali and Uncle Tamizuddin by virtue of purchase from the heirs of Mon Gazi since before auction.

However part of the testimony of D.W.2 about his fathers purchase and possession, when considered with the unimpeachable testimony of P.W.2, appear to be credible to the extent that delivery of possession as a result of the alleged auction never took place.

From the above discussion of the evidence on record I hold that plaintiff has been able to prove his exclusive possession over the suit land by credible testimony of P.Ws. 1-4 and the indirect admission of D.W. 2. Defendant No.1 has failed to prove his possession.

The S.A khatian was prepared in the names of the auction purchaser including one of the certificate debtor Sayed Ali. But the correctness of the S.A khatian as attributed by section 144A of the Act, 1950 is rebutted by better evidence. Because firstly the S.A khatian was so prepared on the basis of an illegal certificate case initiated in 1952-53. Secondly the statement of the P.W's and D.W's prove that the S.A khatian does not reflect the reality on the ground about the alleged delivery of possession in 1956 as per Exhibit-C. Consequently the rent receipts of 1977 and after wards (Exhibit-F-series) do not add any value to the claim of the defendant about possession.

The appellate court failed to consider above legal aspect and the material evidence of P.W.2, 3, 4 and D.W.2 with regard to the possession aspect.

**Prima facie title of plaintiff:**

With regard to prima facie title of the plaintiff, I hold that the following facts constitute his prima facie title:

- a. The credible testimony of P.W.3 and 4 to the effect that they had seen the domestic servants Golam Ali and Noab Ali possessing the suit plot and also seen Hafiz Uddin being the purchaser from Yakub son of Noab Ali possessing the suit land.
- b. The admission made by Amena and Abeda (defendant No.3 and 4) in their registered Nadabi deed dated 27-08-1989 (Exhibit-3) to the effect that their grand father Mon Gazi had gifted the suit plot to the domestic servants named Golam Ali and Nowab Ali and that they do not claim the same. This deed by itself is not a title deed but it credibly supports at least the truth of the oral gift to the said domestic servants.
- c. The subsequent transfers that took place, namely Yakub son of Noab Ali by registered kabala dated 17-04-1995 (Exhibit-1) transferred his portion to Hafizuddin and subsequently Hafizuddin by registered kabala dated 20-02-1954 (Exhibit-1(2)) transferred the suit land to Razaban Nessa.
- d. The credible testimony of P.W.3 and 4 to the effect that they had personal knowledge about the oral gift made by Rajaban Nessa to the plaintiff No.1.

It is noted that the defendant has not produced any direct descendant of Mon Gazi or other descendants with regard to the existence of the three daughters of Mon Gazi named Arfanenssa and two others. However D.W.2 made some statements about the existence of the said daughters. But P.W. 3 Tamijuddin aged 65 years and P.W. 4 Bosot Ali aged 60 years, both denied such existence.

Whatever is the truth about the existence of the daughters of Mon Gazi, plaintiff does not claim his title or possession through those daughters. So their existence need not be decided for the purpose of deciding plaintiff's prima facie title.

**Decision:** In consideration of the above I hold that defendant failed to prove that the interest of the successors in interest of Mon Gazi was extinguished because of the alleged auction sale. On the contrary the plaintiff could prove his prima facie title and exclusive possession and therefore he is entitled to the decree of permanent injunction.

The appellate court committed an error of law resulting in an erroneous decision occasioning failure of Justice in holding that the auction sale was lawful. The said court also failed to consider material evidence with regard to the above noted two vital issues and consequently the judgment and decree passed by the appellate Court is not sustainable.

In the result, the Rule is made absolute. The Judgment and decree dated 28-04-1998 passed by the learned Joint District Judge, 1<sup>st</sup> Court Comilla in Title Appeal No. 118 of 1987 is hereby set aside with the result that the Judgment and decree dated 28-07-1-87 passed by the learned Assistant Judge, Additional Court Sadar, Comilla in Title Suit No. 59 of 1986 is upheld.

No order as to cost.

Send down the lower court records with a copy of this Judgment.