

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 4631 of 2001

Eraton Bibi being dead her heirs:

1(a) Md. Nazmul Islam Mridha and others

.....petitioners

-Versus-

Mazibar Rahman Talukder being dead his  
heirs: 1(a) Shahanara Begum and others

.....opposite parties

Ms. Chowdhury Nasima, Advocate

..... for the petitioners

Mr. Kamruzzaman Bhuiyan with

Mr. Md. Moniruzzaman, Advocates

..... for opposite parties 1 and 2

Judgment on 06.05.2024

At the instance of the plaintiff this Rule was issued calling upon defendant-opposite parties 1 and 2 to show cause as to why the judgment and decree of the then Subordinate Judge, Court No.1, Patuakhali passed on 25.07.2001 in Title Appeal No.166 of 1999 allowing the appeal reversing the judgment and decree of the Assistant Judge, Kalapara, Patuakhali passed on 27.07.1999 in Title Suit No.29 of 1994 decreeing the suit should not be set aside and/or such other or further order or orders passed to this court may seem fit and proper.

The plaint case, in brief, is that Amzad Hossain Talukder was the recorded tenant of RS *khatian* 106 comprising 6 plots measuring an area of 8.93 acres. During his possession and enjoyment he transferred it to his sister Eraton Bibi (the plaintiff)

through a registered *patta* dated 05.08.1952 fixing salami at Taka 500.00 and annual rent of Taka 33.00. Eraton Bibi took *pattan* 15 annas share in her name and 1 anna in the name of Mominuddin Gazi in banami. She remained in possession by paying rents firstly through her brother Amzad Hossain Talukder and subsequently her nephew defendant 1. SA *khatian* 486 was accordingly prepared in the names of Eraton Bibi and Mohiuddin Gazi showing their respective shares to the extent of 15 annas and 1 anna. She had another sister named Aysa Khatun who acquired land through another deed. Her father Kazi Abul Kashem Talukder made a waqf deed in respect of huge property on 05.05.1939. In 1992 plaintiff's son went to the tahshil office for payment of rent and came to learn that the suit land recorded in her name in SA *khatian* 486 has been mutated in the name of her father Abul Kashem Talukder and nephew Mojibur Rahman through Miscellaneous Case No.89-K/65-66. The plaintiff then filed Miscellaneous Case No.3-K/92-93 before the Assistant Commissioner Land, Kalapara for correction of the record of rights. In the said miscellaneous case defendant 1 Mojibur Rahman filed objection and claimed that the land of SA *khatian* 486 was put into auction in Certificate Case No.5356-K/62-63 for arrear of rent and her father Abul Kashem Talukder and nephew Mojibur Rahman purchased it in auction on 01.02.1964 at Taka

225.00. Subsequently the defendants mutated their names on 10.05.1966 through the aforesaid miscellaneous case. The Assistant Commissioner Land rejected the plaintiff's miscellaneous case with the finding that the dispute between the parties need to be resolved through civil Court. It is further stated that no rent of the suit land was unpaid and no certificate case was filed for it; that no notice as required under Sections 7 and 46 of the Public Demands Recovery Act, 1913 (the Act, 1913) was served upon the plaintiff; that no notice of auction and delivery of possession was served upon her and possession of the land was never handed over to the auction purchasers; that no price of auction was deposited in the Government exchequer. The *boinama* and writ of delivery of possession are created. After performing the holy hajj plaintiff's father did never deal with any property and her nephew was a child of 3-4 years at the time of so-called auction. The claimed auction, therefore, cannot be believed. In order to grab the plaintiff's property the defendants used a non existing certificate case and mutated their names. On search the plaintiff failed to find out the existence of the certificate case, therefore, the instant suit for declaration that proceedings of the certificate case described in schedule-'Ka' in respect of the property described in schedule-'Ga' to the plaint is illegal, collusive, inoperative and not binding upon her with further prayer

that mutation in the name of the defendants described in schedule 'Kha' to the plaint shall be declared collusive and illegal and be cancelled.

Defendants 1 and 2 contested the suit by filing written statement denying the averments made in the plaint. They further contended that SA *khatian* 486 was prepared in the names of plaintiff and Mominuddin Gazi showing their respective shares correctly. The land of the aforesaid *khatian* was put to auction in Certificate Case No.5356-K/62-63 for arrear of rent. The notice of the certificate case under the relevant provisions of law was served upon the plaintiff. The auction notice was published on 01.02.1964 and defendant 1 Mojibur Rahman purchased 15 annas share while Abul Kashem Talukder purchased 1 anna. The defendants took possession of the suit land on 27.06.1964 through Court. The defendants have *bainama* and writ delivery of possession and they took possession by beating drum complying with the formalities as required by the law. The defendants have been owning and possessing the suit land by growing crops and paying rents to the concerned authority. The plaintiff and Mominuddin have no title and possession over the suit land. The auction purchased land is within the land of wakf estate. After the death of Amzad Hossain defendants 1-3 have been possessing the same. Defendant 1 furnished statement in respect of his 15 annas

share in the suit land as per law. The certificate case and the auction register No.19B maintained by Khepupara certificate office is lying with District Anti Corruption Office, Patuakhali in connection with a case. In the register there is description of the certificate case. The tahshilder submitted a report in the miscellaneous case that Abul Kashem and Mojibur Rahman possessed the suit land through auction purchase. The present suit only for declaration without any prayer for recovery of possession is also not maintainable, and liable to be dismissed.

On pleadings the Assistant Judge framed 6 issues. During trial the parties examined 4 witnesses each. The documents produced by the plaintiff were exhibits-1-1Ka, 2, 3 and 4 and the documents of the defendants were exhibits-Ka, Kha, Ga-1-5, Gha, Uma, Cha, Cha-1 and Chha. However, the Assistant Judge decreed the suit deciding the issues framed in favour of the plaintiff. Being aggrieved by the defendants preferred appeal before the District Judge, Patuakhali. The appeal was heard on transfer by the then Subordinate Judge, Court No.1, Patuakhali. The transferee Court allowed the appeal, set aside the judgment and decree passed by the trial Court and dismissed the suit which prompted the plaintiff-petitioner to approach this Court upon which the aforesaid Rule has been issued.

Ms. Chowdhury Nasima, learned Advocate for the petitioners takes me through the judgments passed by the Courts below and other materials on record and submits that the Court of appeal below in deciding the issue of limitation against the petitioner misread the evidence of PW1. She refers to the evidence of PW1 and submits that in cross-examination he stated that he went to the *tahshil* office for payment of rent for the years 1965-66 but he did not tell that he went there in those years for payment of rent. She then submits that no notice of the certificate proceeding was served upon the plaintiff. Furthermore, she was not a party in the mutation case filed by the so-called auction purchasers. Defendant 1 Mojibur Rahman did not put his signature on the mutation petition although he purchased major part of the land in auction. She pointed the *bainama* exhibit-‘Ka’ and submits that the name of Amtali was penned through and Kalapara was inserted but there is no initial on such correction. She then refers to the signature of the Certificate Officer put on the *bainama* and submits that at that time ballpoint pen was not available but the officer put his signature with such pen which creates a serious doubt about the genuineness of exhibit-‘Ka’. She then refers to the evidence of DW4 and submits that in evidence he stated that possession of the auctioned land was handed over without making any measurement which proves that possession was not at all

handed over to the alleged auction purchasers. The delivery of possession in a certificate case is symbolic, actual/physical possession is a part and parcel of the proceeding itself and it has no separate entity. She further submits that Mojibur Rahman, one of the auction purchasers was a boy of 2-3 years at that time and as such his purchase cannot be believed. She refers to the cases of Md. Abdus Sukur and others vs. Bhasani Mandal and another, 53 DLR 452; Nur Ahmed Chowdhury vs. Ruhul Amin Chowdhury, 13 DLR 101; Sufia Khanam Chowdhury vs. Faizun Nesa Chowdhury, 39 DLR (AD) 46; Jainuddin Howlader and others Vs. Nabab Ali Mollah and others, 34 DLR 274; Chinmoy Chowdhury and another vs. Sree Mridul Chowdhury and other, 1 ADC 124 and relying on the *ratio* laid therein finally submits that the plaintiff proved that no auction as claimed by the defendants was held. The onus of proving the auction purchase and delivery of possession was shifted upon the defendants but they failed to prove it. The appellate Court misdirected and misconstrued in its approach of the matter and thereby committed error of law resulting in an error in such decision occasioning failure of justice which is required to be interfered with by this Court, she concludes.

Mr. Kamruzzaman Bhuiyan, learned Advocate for opposite parties 1 and 2 on the other hand opposes the Rule. He refers to

the evidence of PW1 and submits that in cross-examination he admitted his visit to the *tahshil* office every year for payment of rent and as such he had full knowledge about the auction sale and mutation since 1966. The instant suit was filed on 06.06.1994 which is beyond the statutory period of limitation under Article 120 of the Limitation Act. The Appellate Court correctly assessed the evidence of the parties and came to the conclusion that the suit is barred by limitation. Mr. Bhuiyan then takes me through the prayer of the suit and submits that the suit has been filed under section 42 of the Specific Relief Act and in such a suit the plaintiff has to prove his title and possession in the suit land but she did not seek declaration of title and as such the suit is not maintainable. He refers to the evidence of witnesses and submits that the plaintiff failed to prove her possession in the suit land by adducing evidence both oral and documentary. On the other hand, the defendants led corroborative evidence of DWs 1-4 and proved possession in the suit land which is supported by the rent receipts exhibits-Ga-Ga5. Since the plaintiff has no possession in the suit land she ought to have prayed for recovery of possession also. Therefore, without any prayer for declaration of title and recovery of possession in the suit land the present suit itself is not maintainable. The Court of appeal below correctly decided this issue in favour of the defendants. He refers to the case of Ratan



Chandra Dey and others vs. Jinnator Nahar and others, 61 DLR (AD) 116 on point of maintainability and relied on the *ratio* laid therein. Mr. Bhuiyan then submits that it is well settled principle that he who alleges fraud is to be proved by him. The plaintiff brought allegation about existence of certificate case and auction purchase through it and that the defendants committed forgery in procuring those but failed to prove element of fraud. He refers to the case of Abdul Jalil and others vs. Islami Bank Bangladesh Limited and others, 64 DLR (AD) 107 and submits that the allegation of fraud cannot be accepted without strict proof. The lower appellate Court on correct assessment of fact and law allowed the appeal and dismissed the suit. It left no stone unturned in deciding the issues in favour of the defendants, and as such the judgment and decree passed by the Court of appeal below may not be interfered with. The Rule, therefore, having no merit would be discharged.

I have considered the submissions of both the sides, gone through the judgments passed by the Courts bellow, the materials on record and *ratio* of the cases cited by the parties.

The plaintiff claimed that she got 8.93 acres of suit property appartainng to RS *khatian* 106 from his brother Amzad Hossain through *pattan* dated 05.08.1952 exhibit-2. She took *pattan* of 15 annas share in her name and 1 anna in Mominuddin's name as her

benamder. The salami and annual rent of it was Taka 500.00 and 33.00 respectively. The defendants admit that Amzad Hossain gave *pattan* to the plaintiff and Mominuddin in respect of 15 annas and 1 anna share respectively. But they claimed that a certificate case for arrear of rent was filed against the plaintiff which was decreed and they purchased the property in auction in execution case. In this suit the declaration was sought that the certificate proceeding and auction are baseless, inexistent, illegal, *mala fide* and inoperative. They further prayed that the mutation in defendants' name on its basis is also illegal, collusive, inoperative and for cancellation of the same. The defendants raised serious objection as to the maintainability of the suit. The learned Advocate for the opposite parties vehemently argued that as per prayer the suit is under section 42 of the Specific Relief Act and as such the plaintiff had to pray for declaration of title also. On the contrary, the learned Advocate for the petitioner submits that the suit is under section 39 of the same Act and as such no declaration of title in the suit land is required.

To address the submissions of the parties both the sections of the Specific Relief Act is quoted below:

39. **“When cancellation may be ordered-**Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it

adjudged void or voidable; and the Court, in its discretion, may, adjudge it and order it to be delivered up and cancelled.”

Whereas Section 42 of the same Act is as follows:

42. “**Discretion of Court as to declaration of status or right**-Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

**Bar to such declaration**-Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

On going through the relief sought in the suit it is found that the certificate proceeding and auction sale arising out of it have been challenged here being baseless, illegal and inoperative with further prayer that the mutation in the name of the defendants is collusive, illegal and be cancelled. Therefore, I am of the view that the instant suit having been filed for declaration that the certificate proceeding and auction are baseless, without any existence, null and void and for cancellation of the mutation case arising out of it on the assertion that she is the owner in possession of the suit land is well maintainable and no further relief is required to be sought in addition to the declaration as prayed for. In the case of *Sufia Khanam Chowdhury vs. Faizur Nessa Chowdhury*, 39 DLR (AD) 46 it has been held, “A suit for mere

declaration that an instrument was void is maintainable without a prayer for its cancellation.” Mr. Bhuiyan further argued that as the defendants are not in possession in the disputed land the suit in the present form without any prayer for recovery of possession is not maintainable. It is found that the defendants produced rent receipts to prove their possession in the suit land. Undoubtedly, the rent receipts are evidence of possession and may be used as collateral evidence of title. But here the plaintiff claimed that they came to learn that defendants’ names have been mutated in the suit land and then filed the suit seeking cancellation of the order passed in the mutation case mutating the name of the defendants. The rents have been deposited in the name of the defendants after mutation was done in 1966 and afterwards and as such those cannot be taken into account. Both the parties claimed possession in the suit land. The defendants claimed possession through *bargaders*. Considering the evidence of defendants’ witnesses as a whole I find no reason to believe possession in defendants’ favour. The specific case of the plaintiff is that she paid rent through his brother Amzad Hossain, father of defendant 1 which has been corroborated by the evidence of PW1 Md. Nazrul Islam. He stated “উক্ত সম্পত্তি ১৬ আনা অংশে আমার মা ভোগদখল করেন। জমির খাজনা আমার মা তার ভাই ও ছেলেদের মাধ্যমে পরিশোধ করিতেন।” Since the defendants are the brother and nephew of the plaintiff and they paid rent in the name

of the plaintiff there could be no reason to have rent receipts with her. Moreover, delivery of possession is symbolic in auction purchase and DW4 in evidence stated that possession has been delivered without measurement of the land. The evidence of PWs is found corroborative for holding possession of the land to the plaintiff. Therefore, no prayer for recovery of possession is required to be sought in this case.

Mainly it is to be decided here whether the certificate proceeding through which the defendants have been claiming the suit land is genuine and proved as per law. In the *bainama* exhibit-‘Ka’ the certificate officer put his signature through ballpoint pen although in 1964 ballpoint was not so available in this Country. A suggestion was put to DW 1 that the signature of the Certificate Officer was put by ballpoint pen which he did not deny. The papers used in the *bainama* and writings on it appears not so old of the year of 1964. In the certified copy of writ of delivery of possession exhibit-‘Kha’ I find no date of submission of the application for obtaining certified copy. The date of submission of the requisite number of folio and date of delivery were also not mentioned. Only the Court fees used has been canceled putting date and signature. Therefore, the basis of the claim of the defendants relying on the *bainama* and writ of delivery of possession cannot be believed. It is admitted by the parties that

plaintiff's father had donated huge land as wakf property in the year 1939 and thereafter performed hajj, therefore, it is difficult to believe that subsequently he purchased a part of the land in 1964 in auction. It is against the nature and conduct of a muslim. The assertion made in the plaint and evidence on that point led by PW1 is not challenged by the defendants. It further appears that defendant 1 Mojibur Rahman alleged to have purchased 15 annas share in auction but he is found to be a child of 3-4 years at the time auction sale in 1964 which has been proved by evidence of PW 2 head clerk of a college through exhibit-4, the testimonial about his age. There is nothing in the written statement or in the defence case that his father or any other guardian arranged the money to purchase the suit land in auction in his name. The initial onus of proving the fact that the certificate proceeding was not in accordance with law or it does not exist or no auction was held or that the notices of the certificate case were not served upon the plaintiff lies upon her which she has done. The onus was then shifted upon the defendants as per section 103 of the Evidence Act but the defendants did not take any step to prove that the certificate proceeding exists, the decree was passed, auction was held, defendant 1 and another purchased the land and possession was delivered. It is found in the record that the original register of the certificate proceeding was lost and subsequently a register was

prepared under section 19B of the PDR Act which the Anti Corruption Officers took away in connection with a case for corruption. The defendants admit the aforesaid fact which creates a serious doubt about the genuineness of the certificate proceeding and existence of any auction sale as claimed by the defendants.

The point of limitation is a mixed question of fact and law. In the plaint it is asserted that in 1993 the plaintiff's son went to the *tahshil* office for payment of rent and came to learn about mutation of the suit land in the name of the defendants. He then filed Miscellaneous Case No. 3-K/92-93 which was rejected on 18.07.1993. There it was observed that question of title is involved in the case and it is to be decided by a competent civil Court. The plaintiff then instituted this suit on 06.06.1994 which is within the period of limitation. The argument made by the learned Advocate for the opposite parties that in evidence PW1, son of plaintiff admitted that he went to the *tahshil* office every year and thus from 65-66 they had knowledge about the mutation in the name of the defendants bears no substance. The evidence of PW1 is to be read as a whole to extract the truth. His evidence cannot be taken in a scattered way for holding that he went to the *tahshil* office every year from 1965-66. PW 1 stated in evidence, “১ বার তহশিল অফিসে গিয়াছি। ৬৫-৬৬ সনের খাজনা দিতে যাই।” It does not mean that he went to *tahshil* office in 1665-66 for payment of rent

but he went there for payment of rent of those years. In cross-examination he stated, “মামাদের কাছে টাকা সাদিয়াছি যখন নেয় নাই তখন গিয়াছি।” On assessing and appraising his evidence as a whole, I find that he has been able to prove that firstly in 1993 he came to learn about the mutation of the suit land in the name of the defendants. Therefore, it cannot be said that the suit is barred by limitation as has been found by the Court of appeal below.

From the above discussion it appears that the main title document of plaintiff is *patta* dated 05.08.1952 upon which the SA record 486 was admittedly prepared in the name of plaintiff. The claim of defence that the title of plaintiff is extinguished because of subsequent auction falls through in the event of auction being held illegal and void. Therefore, it is not necessary to pray declaration of title in the present fact and circumstances specially when the title of plaintiff is admitted and possession is as well found in her favour. Submission on point of mere technicality does not help the defence.

Thus the findings and decision of the lower appellate Court are found perverse and not based on fact, materials on record and law which resulted in an error in such decision occasioning failure of justice and it need to be interfered with. The *ratio* of the cases cited by the parties is found not applicable here except the case of 39 DLR (AD) 46 referred by the petitioners.



In the discussion made hereinabove, I find merit in this Rule. Accordingly, the Rule is made absolute. No order as to costs. The judgment and decree passed by the lower appellate Court is hereby set aside and those of the trial Court are restored.

Communicate the judgment and send down the lower Court records.

Sumon-B.O.