

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3229 of 2002

In the matter of:

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

And

Mowlavi Siddique Ahamad and others
... Petitioners

-Versus-

Kabir Ahamad and others
... Opposite parties

None appears

... For the petitioners.

Mr. A.K.M. Foiz, Senior Advocate with
Mr. Mahbubur Rahman, Advocate

... For the opposite party Nos.1(a)-
1(f).

Heard on 29.10.2024 and Judgment on 10.12.2024

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party Nos.1-9 to show cause as to why the impugned judgment and decree dated 24.04.2002 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Other Appeal No.96 of 1999 allowing the appeal setting aside/reversing the judgment and decree dated 18.03.1999 passed by the Senior Assistant Judge, Sadar, Cox's Bazar in Other Suit No.126 of 1996 dismissing the suit should not be set aside and/or pass such other or further order or as to this Court may seem fit and proper.

Facts in short are that the opposite party as plaintiff instituted above suit alleging that as the heirs of deceased Amzad Hossain plaintiffs were in lawful possession in 2.46 acres land as described in the schedule to the plaint and defendant Nos.1-3 forcibly dispossessed the plaintiffs from 1 acre land on 03.01.1994. After above dispossession plaintiffs lodged a complaint to the Thana Nirbahi Officer on 24.01.1994. In above report (Exhibit No.5) defendants possession in above land was found and the case of the plaintiffs was dismissed. It was alleged by the defendant that on 08.12.1987 plaintiffs agreed to sale 1.20 acres land to the defendant and on receipt of advance payment of Taka 30,000/- delivered possession of above land to the defendants. But above claims of the defendants were not proved by any evidence and defendants Case No.66 of 1994 was dismissed. But the defendants refused to return possession of the disputed 1 acre land on 10.11.1994.

Defendant No.1-3 contested the suit by filing a joint written statement denying all claims and allegations made in the plaint and alleging that the plaintiffs offered to sale the disputed land and the defendants agree to purchase the same at a price of Taka 48,000/- and on receipt of Taka 30,000/- on 08.12.1987 plaintiffs delivered possession and since then defendants are possessing above land by cultivating salt. It was stipulated that within next 4 months plaintiffs would on receipt

of remaining consideration money execute and register a kabala deed and no written bainapatra was made or executed. Defendants purchased stamp paper for writing of the sale deed and gave it to deed writer Mustaq Ahmed but in the meantime plaintiff No.3 got the job of Tahshilder and went to another thana which delayed the execution of a sale deed. During devastating cyclone of 1991 above stamp paper was lost from the possession of Mustaq Ahmed and on 10.12.1993 plaintiffs denied above transaction and refused to execute a sale deed for above land.

At trial plaintiffs examined 2 witness and documents of the plaintiffs were marked as Exhibit Nos.1-6. On the other hand defendants examined 4 witnesses and their documents were marked as Exhibit Nos.'Ka' and 'Kha' series.

On consideration of facts and circumstances of the case and evidence on record the learned Senior Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree of the trial Court above plaintiffs as appellants preferred Other Appeal No.96 of 1999 to the District Judge, Cox's Bazar which was heard by the learned Joint District Judge, 1st Court who allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of Appeal below above respondents as petitioners moved to this Court and obtained this Rule.

Mr. Md. Alamgir Kabir, learned Advocate for the petitioners submits that this is a case for declaration of title and recovery of possession for 1 acre land which is the possession of the defendants. The defendant Nos.1-3 claim possession in 1.20 acres land on the basis of an oral bainapatra for purchase of above land for Taka 48,000/-. The defendants examined 4 witnesses and they have given mutually consistent evidence as to above oral bainapatra and receipt of Taka 30,000/- by the plaintiffs and delivery of possession. Despite extensive cross examination by the plaintiffs their above evidence remained consistent, mutually supportive and credence inspiring. Since both the plaintiffs and defendants were inhabitants of the same locality and they had very good relation and there was an agreement for execution of a sale deed within 4 months the plaintiffs did not seek any written bainapatra. On the other hand plaintiffs could not prove by legal evidence that the defendants forcibly dispossessed them from the disputed land. PW1 Kabir Ahmed was in Chattogram at the time of the alleged dispossession and PW2 Mukter Ahmed has given contradictory evidence as to the names and number of bargaders of the plaintiffs who

were in possession of the disputed land. Moreover, PW2 Mukter Ahmed stated in his cross examination that he could not recognize the persons who dispossessed them. On consideration of above facts and circumstances of the case and evidence on record the learned Judge of the trial Court rightly dismissed the suit. But the learned Judge of the Court of Appeal below without reversing above findings of the trial Court most illegally allowed the appeal, set aside the lawful judgment and decree of the trial Court and decreed the suit which is not tenable in law.

Mr. A.K.M. Faiz, learned Senior Advocate for the opposite party Nos.1(a)-1(f) submits that admittedly the petitioners were the lawful owner and possessor of 2.46 acres land including disputed 1 acre. Plaintiff No.1 while giving evidence as PW1 has corroborated all claims and allegations made in the plaint and stated that the defendants forcibly dispossessed them from the disputed land on 03.01.1994. PW2 Mukter Ahmed who is a owner of the land contiguous to the disputed land has corroborated above evidence of PW1 as to forcible dispossession. PW1 Kabir Ahmed and PW2 Mukter Ahmed were subjected to intensive cross examination by the defendants. But their above evidence remained consistent, mutually corroborative and credence inspiring. As far as the claim of the defendants that the

plaintiffs contracted to sale above land to the defendants and on receipt of an advance consideration money of Taka 30,000/- delivered possession on 08.12.1987 is concerned above claims remained not proved. The defendants could not produce any written bainanama or money receipt nor they have instituted any case for enforcement of above contract till date. On consideration of above facts and circumstances of the case and evidence on record the learned Judge of the Court of Appeal below has rightly allowed the appeal, set aside the flawed judgment and decree of the trial Court and decreed the suit which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record including the pleadings, Judgments of the Courts below and evidence on record.

It is admitted that the plaintiffs were the owners and possessors of 2.46 acres land as described in the schedule to the plaint and now defendant Nos.1-3 are in possession in 1 acre land out of above 2.46 acres.

It has been alleged by the plaintiffs that they have been forcibly dispossessed from above land by defendant Nos.1-3 on 03.01.1994. In this suit under Section 8 of the Specific Relief Act, 1877 in addition to

prove lawful title in the disputed land the plaintiff must prove his previous possession and subsequently dispossessed by the defendant by legal evidence and further prove that this suit has been filed within the statutory period of 12 years from the date of alleged dispossession.

In a civil litigation the initial onus to prove always lies on the plaintiffs and above onus shifts upon the defendants only after successful discharge of the same by the plaintiff and a suit cannot be decreed on the basis of failure of the defendant to establish his case by legal evidence. The plaintiff must stand on his own feet and prove his case by legal evidence to get a decree.

As far as previous possession and subsequent dispossession is concerned it has been alleged in the plaint that the plaintiffs possessed 2.46 acres land separately not jointly. It has not been stated as to how disputed 1 acre land was possessed by 9 plaintiffs. Plaintiff No.1 while giving evidence as PW1 stated that disputed 1 acre land was barga cultivated by Syed Ahmed and in fact he was dispossessed by the defendants. As such it is clear that at the time of alleged dispossession plaintiffs were not in actual possession but their borgader was in possession of disputed land. PW1 has further stated that he was informed about above dispossession by his nephew while he was in Chattagram. As such PW1 did not see the occurrence of forcible

dispossession of the plaintiffs from the disputed land by defendant Nos.1-3.

Above nephew who informed PW1 about above forcible dispossession was not examined as a witness. Nor the plaintiffs examined above Syed who was the borgader of the plaintiffs and who was allegedly dispossessed by the defendants. No explanation has been provided by the plaintiffs as to non examination of above important witnesses at trial.

PW2 Mukter Ahmed has contradicted PW1 by stating in his cross examination that Liakat Ali and Syed were the borgaders of the disputed land at the time of alleged dispossession. Above Liakat Ali was also not examined in this suit as a plaintiff witness. Above witness further stated that above borgaders stated to him about alleged dispossession but he did not know any persons who dispossessed the plaintiffs. PW1 Kabir Ahmed did not endorse PW2 Mukter Ahmed as a witness of possession or dispossession of the disputed land.

On a detailed analysis of above evidence on record the learned Judge of the trial Court rightly held that the plaintiffs could not prove by legal evidence that they were forcibly dispossessed from disputed 1 acre land by the defendants on 03.01.1994.

On the other hand defendants have examined 4 witnesses who have given consistent evidence about possession of the defendants in the disputed land. They have also given evidence as to receipt of Taka 30,000/- by the plaintiffs as advance money for 1.20 acres land which they agreed to sale for Taka 48,000/-.

On consideration of above evidence the learned Judge of the trial Court held that the defendants have succeeded to prove their claim that the possession of 1.20 acres land was delivered by the plaintiffs peacefully and defendants did not dispossess the defendants forcibly from the above land. The learned Judge of the Court of Appeal below allowed the appeal and set aside the judgment and decree of the trial Court but the learned Judge could not reverse above material findings of the trial Court.

On consideration of above facts and circumstances of the case and materials on record I hold that the learned Judge of the Court of Appeal below committed serious illegality in allowing the appeal and decreeing the suit which is not tenable in law.

In above view of the materials on record I find substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 24.04.2002 passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Other Appeal No.96 of 1999 is set aside and the judgment and decree dated 18.03.1999 passed by the Senior Assistant Judge, Sadar, Cox's Bazar is restored

However, there is no order as to costs.

Send down the lower Courts record immediately.

*ZMD. MASUDUR RAHMAN
BENCH OFFICER*