

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

Present:

**Mr. Justice Md. Mozibur Rahman Miah
and
Mr. Justice Mohi Uddin Shamim**

First Appeal No. 484 of 2014

In the matter of:

The Impulse Builders, represented by the
Managing Director Mohiul Islam Chowdhury,
V.I.P Road, Rikabir Bazar, P. S. and District:
Sylhet.

... Defendant-appellant

-Versus-

Haji Sheikh Hasina

... Plaintiff-respondent

Lokman Bhuiyan and others

... Defendants-proforma respondents

Mr. M. Khaled Ahmed, Advocate with

Mr. Ms. Nasrin Ferdous, Advocate

... For the defendant-appellant

Mr. Moinul Islam, Advocate with

Mr. Mridul Datta, Advocate

... For the plaintiff-respondent

Mr. Nur Mohammad Azami, Advocate

... For the defendant- pro forma respondent

No.18

Judgment on 7th March, 2024.

Mohi Uddin Shamim, J.

At the instance of the added defendant in Title Suit No.37 of 2012,

this appeal is directed against the judgment and decree dated 28.10.2014

(decree signed on 06.11.2014) passed by the learned Joint District Judge, Additional Court Sylhet in Title Suit No.37 of 2012, decreeing the suit.

Facts relevant for proper adjudication of the appeal, in short, are that the present respondent as plaintiff instituted Title Suit No.37 of 2012 in the Court of Joint District Judge, Additional Court Sylhet for declaration of title and also for declaration that the lease deed No.14062 dated 21.08.2005 and deed No.18522 dated 24.12.2006 are collusive, forged, fabricated, illegal, and ineffective. It is stated that the suit land along with other non-suit lands belonged to one Harenga Lusai, Chairman of the Lusai Girza Samity, who mutated the suit land in his name as a Chairman of the Lusai Girza Samity. Thereafter, said Harenga Lusai died, leaving behind the defendants Nos.17-22 who possessed the land as there was no family or member of Lusai Community in Sylhet area. On 10.02.1992, the defendant Nos.17-22 leased out 0.0385 acre of land to Md. Askar Ali, resident of Kazal Shah, for a period of 99 years and handed over possession thereof to him. Besides, Md. Askar Ali got 0.0078 acre of land from Johohin Hanga by executing a registered exchange deed dated 20.09.1995. He also got 0.0138 acre of land on lease from Jewel Lusai by executing a lease agreement dated 30.09.1996.

Thereafter, Askar Ali also got 0.0033 acres of land by registered deed being No.15038 dated 21.12.1998. Accordingly, Askar Ali got in total 0.0005 acre of land by lease and exchange and had been in possession within the knowledge of all the local people including the defendants.

Thereafter, Askar Ali transferred his 0.0005 acre of suit land in favor of the plaintiff by registered deed being No.1956 dated 24.08.2000.

During revisional survey, the plaintiff was found in possession of the suit land mentioned in the 1st schedule; as such, the land was recorded in her name in Bujarat Khatian No.18098. The defendant Nos. 1-16 was aware of the possession and recording of the suit land. Although the defendant had no title over the suit land, they, through their attorney defendant No.22, leased out the suit land to defendant No.1 Lokman Bhuiyan vide registered lease deed No.14062 dated 21.08.2005. Subsequently, the defendant Nos.17-22 again through their attorney transferred the same to the appellant, The Impulse Builders Limited vide registered deed No. 18522 of 2006 dated 24.12.2006. The defendants, in collusion with each other, fraudulently created the deeds and on the basis of said forged documents threatened the plaintiff to oust her from her land, for which the plaintiff preferred the present suit.

On the other hand, the defendant Nos.1-9, 17-22, and 23 (i.e. the present appellant) contested the suit by filing written statements contending inter alia that the plaintiff has no cause of action and according to waiver & acquiescence, the suit is legally barred and also barred by limitation and defect of parties. The defendant Nos.1-9 stated in their written statement that Lusai Girza Samity was the owner and possessor of the disputed land, i.e., the defendant Nos.17-22. Askar Ali took the lease of scheduled land but he could not manage to pay the rent in violation of the lease agreement; thereafter he left the disputed land and surrendered his right, possession and interest to the defendant Nos.17-22. Then the suit land was leased out to defendant Nos.1-9 on 21.08.2005 by executing a lease deed. The husband of the plaintiff and his companions, claiming title to the land, had threatened the defendants for which defendants filed a suit being No.510 of 2005 before the Assistant Judge for permanent injunction upon them and on 20.11.2005, a show cause notice was issued against the plaintiff. In spite of that show cause order, the plaintiff with his associated terrorist persons on 15.07.2007 ousted the defendant No.3 from the house illegally. Thereafter, the said suit for permanent injunction was transferred to the

Court of Assistant Judge, Kanighat Sylhet and numbered as Title Suit No. 253/2007 which is still pending.

The defendant Nos.17-22 in their written statement stated that they were the owners and possessors of the disputed land. They leased out of the land to Askar Ali. Later on, when he breached the terms of the lease and became a defaulter for nonpayment of rents, he surrendered the leasehold land to the defendants and transferred its exclusive possession to them. Thereafter they leased out the said land to defendant Nos.1-9 through mutual negotiation on 21.08.2005 vide lease deed No.14062 for 99 years. The defendant Nos.17-22, being the owners and possessors, transferred the land to the Impulse Builders Pvt. Ltd. Company through lessee vide registered kabala being No.18522 dated 24.12.2006 and relinquished their ownership and as such the suit is liable to be dismissed.

Defendant No.23 stating the same facts as of defendant Nos. 17-22 filed written statement and thereby prayed for dismissal of the suit.

On the above pleadings of the parties, the learned Judge of the trial Court framed the following issues in the suit: -

- i) whether the suit is maintainable in its present form
- ii) whether the suit is barred by defect of parties

- iii) whether the suit is barred by limitation
- iv) whether the plaintiff has right, title, interest and possession in disputed land in question
- v) whether Reg. Deed No.14062/05 dated 21.08.05 and Reg Deed No.18522/06 dated 24.12.06 are forged, fabricated, concocted, illegal and void, inoperable and voidable
- vi) whether the plaintiff can get a decree as prayed for or any other relief or reliefs

Trial was, thereafter, conducted before the Court of Joint District Judge, Additional Court, Sylhet and eventually, upon hearing the parties and on perusal of the materials on record decreed the suit by the impugned judgment and order.

Being aggrieved by and dissatisfied with the said judgment and decree, the defendant as appellant preferred this appeal. At one point during the hearing of the appeal, the appellant and respondent no.1 filed 2 (two) separate application for compromise, which has not been considered and kept with the record, and the instant case has been considered on merit.

Mr. M. Khaled Ahmed, the learned Advocate appearing for the defendant-appellant, upon reading out the impugned judgment at the very outset, submits that the judgment is not a proper judgment in the eye of law. He submits that the so-called lease between the vendor of the

plaintiff and the defendant Nos.17-22 is a private lease and giving of such private lease is not allowed after the State Acquisition and Tenancy Act 1950 came into force. In this respect, he has relied on the provision of section 3, 75A, 81A, and 93 of the State Acquisition and Tenancy Act and also as per the decisions reported in 33 DLR 260, 16 DLR (SC) 667, 21 DLR 429. Accordingly, he submits that the plaintiff-respondent could not establish her right, title, and interest over the scheduled land because plaintiff's (Hasina's) vendor has no right and title in the suit land as after the above-mentioned gazette notification published in 1956, private lease has no value in this regard including the right of transfer like ownership after the dissolution of the 'Zamindari' system and a wholesale acquisition came into effect and a gazette notification published in this regard in 1956 the so-called lease became baseless after the said notification as such Askar Ali's so-called leasehold right transferred (reversed back) to the owner; as such, transferred by Askar Ali to Sheikh Hasina (plaintiff-respondent No.1) is not valid and not in accordance with law.

Moreover, referring to section 105 of the Transfer of Property Act, the learned Advocate submits that, leasehold property cannot be

transferred to anybody else because by lease deed the lessee has a right only to enjoy not to transfer the property and as such, transferring of the suit land to the plaintiff by her vendor Md. Askar Ali is unlawful. The trial Court ought to have considered first this legal position regarding transfer of the suit land by Md. Askar Ali. Without considering this very aspect of the fact, the learned Court has committed illegality in passing the judgment and decree in favour of the plaintiff.

The learned Advocate also submits that Jemin Thenga, A. Lura Lusai, Jusaliana Lusai, and Jadia Lusai were given a lease to one Askar Ali on 10.02.1992, land measuring an area of 0.385 acres, with the condition that if the rent is not paid in 3 consecutive years, the lease will be canceled and when Askar Ali was a defaulter as per his lease deed and thereafter he surrendered to the lessor and lessee admitted that surrender (lease land) in his deposition (D.W-2) and subsequently they first of all gave monthly "bhara" to Lukman Bhuiyan and others and while they are in possession by erecting a shed on the suit land and Jubel Lusai on behalf of Jemin Thenga and others sold the property to Impulse Builders Ltd. vide registered deed No.18522 dated 24.12.2006 thereby they sold their title with the consent of the lessee Lokman Bhuiyan and others.

He next submits that the suit filed by the plaintiff-respondent No.1 is for declaration of title and also for declaration that deed No.14062 dated 21.08.2005 executed by Jobel Lusai in favor of Lokman Bhuiyan and also deed No.18522 dated 24.12.2006 executed by Jobel Lusai in favor of Impulse Builders Limited are collusive, void, false, and ineffective. As such the suit is not maintainable in its present form. In the case of Jashim Uddin (Kanson) Vs. Md. Ali Ashraf reported in 1991 BLD (AD) 101, 42 DLR (AD) 289, it was held that the plaintiff is not entitled to get a simple declaration that appellant's kabala is false and fraudulent without first establishing his title to the suit land first. It is now well-settled that when any deed is voidable in that case, a cancellation prayer is a must but no such prayer for cancellation was made by the plaintiff in the present suit as such the suit is not maintainable within the meaning of the decision reported in 49 DLR (AD) 96 and 39 DLR (AD) 46.

The plaintiff-respondent's prayer of title in the plaint about .0632 acres, but the trial court canceled the defendant-appellant deed No.18522 dated 24.12.2006, which is not permissible in law because without establishing the title of 80 decimals, the impugned deed cannot

be canceled without establishing the title of 80 decimals land as per the decision reported in 61 DLR (AD) 116 and 42 DLR (AD) 289. The learned Advocate also submits that there is a building in the suit land measuring 80 decimals, but the plaintiff, suppressing the fact, filed the suit and obtaining the decree in a collusive manner, therefore, the impugned judgment is not a judgment in the eye of the law. Furthermore, which is contrary to the decision reported in 10 ADC 160 because the defendant-appellant took a loan from the Islami Bank Sylhet for the construction of the building.

The learned Advocate further contends that the suit is not maintainable because the suit land was not specified as per Order VI rule 3 of the Code of Civil Procedure, and the plaintiff is not entitled to get a decree in unspecified land which finds support in decisions reported in 27 BLD (AD) 8, 17 BLT (AD) 45, 6 ADC 127, 43 DLR (AD) 87, 4 BLC 519, and 10 ADC 160. The learned Advocate also contends that no attesting witness was examined within the meaning of section 68 of the Evidence Act; therefore, plaintiff-respondent No.1's deed dated 24.08.2000 (Ext. 5) has no evidential value in the eye of law. The Learned Judge of the Trial Court has not considered the facts and

evidence in their true perspective and as such the judgment is liable to be set aside. The learned Advocate also contends that from the original owner's side (i.e. the defendants no. 17-22), in their deposition, admitted that Askar Ali surrendered the suit land. Plaintiff did not adduce any evidence that Askar Ali has not surrendered the suit land as such finding of the trial Court is not a correct finding, and not based on material evidence and correct proposition of law, and as such, the impugned decree is liable to be set aside.

The learned Advocate also submits that the respondent earlier filed a cross-objection against the said judgment and decree, which was rejected by the High Court Division, and the record shows that the suit being for the declaration of title to an unspecified portion of undivided land is not maintainable without a prayer for partition. In the present case, the plaintiff filed the suit for declaration of title of .0632 decimals of S.A. plot No.4009, and the total portion of the land of S.A. plot No.4009 is 74.60 acres; the rest of the portion at present belongs to the appellant company, and appellant company's land are in total of 80 decimals (67.68+12.32 from S.A. plot No.4008). As such, the suit filed by the defendant-respondent No.1 is not in form, rather is contrary to

the settled principle of law laid down in 6 ADC 127, 17 BLT (AD) 45, 43 DLR (AD) 87, 4 BLC 519, and as such, the suit is not maintainable. The learned Advocate further submits that normally in the case of a declaration, no execution is required but in the present case, there is no partition in S.A. plot No.4009, and the plaintiff also has not filed the suit for mere declaration simpliciter, therefore execution of decree is necessary in the fact and circumstances of the case, but the plaintiff, after receiving the decree has not filed any execution case within the meaning of section 48 of the Code of Civil Procedure read with article 182 of the Limitation Act, 1908 within the limitation period of 3 (three) years after drawing up of the decree, and as such the impugned judgment and decree passed in Title Suit No. 37 of 2012 became infructuous and execution proceeding is barred by limitation and hence he prays for allowing the appeal.

On the contrary, Mr. Moinul Islam, the learned Advocate along with Mr. Mridul Datta, the learned Advocate appearing for the plaintiff-respondent at the time of hearing, did not make any submission opposing the learned Advocate for the defendant-appellant. Rather, an application for compromise settlement was filed jointly by the appellant

and respondent no. 1, which was not considered and has been kept with the record.

We have considered the submission advanced by the learned Advocate for the defendant-appellant at length. We have also gone through the impugned judgment and decree and all the documents so have been appended in part-I and part-II of the paper books as well as the memo of appeal.

Admittedly, the suit land belonged to Harenga Lusai, Chairman of the Lusai Girza Samity. The plaintiff-respondent herein claims that said Harenga Lusai died leaving behind the defendant Nos. 17-22 to inherit the suit land. Thereafter, on 10.02.1992, the defendant Nos. 17-22 leased out 0.0385 acres of land to Md. Askar Ali and handed over possession to him. Thereafter, Askar Ali got 0.0078 acres of land from Jahmin Henga by registered exchange deed dated 20.09.1995; the plaintiff also claims that Askar Ali also took a lease of 0.0138 acres of land from defendant No. 22 namely Jewel Lusai by executing a lease deed dated 30.09.1996. It is stated that Askar Ali, while in possession of the suit land, transferred the same to the plaintiffs-respondent herein via registered deed no. 9956 dated 24.08.2000.

On the other hand, the defendant-appellant claims that Askar Ali took the lease of the said land for 99 years but subsequently surrendered the land to defendant Nos.17-22 since he had defaulted in paying rent for three consecutive years in violation of the terms and conditions of the lease deed. In the lease deed, there was a specific clause which stated that if the lessee fails to pay the rent of the land for three consecutive years, then the lease shall stand canceled. The defendant-appellant claims that after surrendering the land, they gave it to defendant No. 9 under lease and subsequently they sold title to the land, with full knowledge of the then lessee defendant no. 9, to the defendant No. 23 Impulse Builders Ltd. by registered deed and as such the said Askar Ali cannot transfer the suit land to the plaintiff. In this respect, the defendant by referring to section 111(g)(2) of the Transfer of Property Act stated that if the lessee, claiming his title in the land, transfers to others then the lease itself shall stand canceled and as such the plaintiff has no manner of title, even possessory title as lessee, in the suit land.

It is not disputed that Askar Ali got the land by lease and by exchange from original owners' defendant no.17-22. The plaintiff claims that she got the suit land from her vendor Askar Ali by registered sale

deed. The claim of the defendant-appellant is that Askar Ali having failed to pay rent transferred the lease back to the original owners defendants no. 17-22 who thereafter transferred the property to the defendant no. 23-appellant. For the purpose of proving their claims, the parties have adduced various testimonies and evidence which have been duly considered.

However, since the defendants claimed that Askar Ali surrendered the land to the defendant no. 17-22, the burden of proof lies under Section 103 of the Evidence Act, 1872 on the person who asserts the same or requires the court to believe the existence of the fact, i.e. it lies on the defendants. However, the plaintiffs in the instant case submitted utility bills in the name of Askar Ali (Ext 9 and 10 series), which corroborates the testimonies of PWs 1, 3 and 4 – to the effect that Askar Ali remained in possession, hence the fact of surrendering the property to the defendants no. 17-22 has not been proved, and the defendants did not adduce any oral or documentary evidence with regards to proving the same. As a result, the learned Court below rightly decided that there is no evidence before the Court to simply believe that Askar Ali verbally surrendered the property to the defendant no. 17-22.

Moreover, Section 106 of the Transfer of Property Act, 1882 makes it mandatory for notice to be issued for eviction and for cancellation of lease in the absence of any agreement between the parties to the contrary. Perusal of the exhibited lease deeds do not disclose any specific agreement with regards to termination of lease, hence notice under Section 106 was a mandatory requirement, which has not been followed; hence, there is no cause or evidence before the Court to decide that the lease or the property was surrendered to the defendants no. 17-22 by Askar Ali, which was rightly recognized by the trial Court below.

Thereafter, on the matter of the genuineness of the Deed no. 9956 (Ext 5) executed by Askar Ali in favour of the plaintiff, no evidence is found in the records to disbelieve its existence. Rather Ext 5 appear to have been produced by PW 2 – officer of Sadar Sub-Registry Office by producing their Volume Book before the Court below. The deed is registered and bears presumption of originality under Sections 74, 76 and 77 of the Evidence Act, 1872 unless contrary evidence is proved before the Court, which has not been done.

On the issue of whether Askar Ali had the right to execute such a deed of transfer in favour of the plaintiff, it will be beneficial if we go

through the provisions of section 105, 108 and 109 of the Transfer of Property Act which reads as follows;

105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.”

108. B(j) “...the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transfer of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease....”

109. “If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights....”

On plain and careful reading of the aforesaid provisions of law, it appears that, the legislature defined the lease of immovable property stating that, lease of immovable property means a transfer of a right to enjoy such property for a certain time or in perpetuity in consideration of a price paid or promised or of money, and upon transfer the lessee, in

the absence of agreement to the contrary, shall have all forms of rights and title with regards to the leased property, and perusal of Askar Ali's deeds (Ext 1, 3, 4) reveals no clause that prevents him from transferring the same to another.

The defendant appellant argued, citing 111(g)(2) and various case authorities that transfer of lease by Askar Ali in this case causes his title as leasehold owner to be renounced and extinguished. However, the said argument falls flat as nowhere in the deeds of transfer has it been claimed by Askar Ali or the Deed receiver that Askar Ali is the owner, and the only intention of the deeds of transfer is to transfer the possessory title rather than actual ownership; hence there is no cause for his leasehold title to be extinguished, and no contrary evidence lies before the Court to hold that the deed of transfer in favour of the plaintiff is invalid.

The matter of the plaintiff's possession of the property has also been proved by testimonies of PW1, 3 and 4. Utility bills have been exhibited as Ext 8, 9, 10 series and PW4 as representative of Soldiers' Club has deposed before the Court and has exhibited rent agreement (Ext 12) with the plaintiff. The defendants though have made the claim

that the suit property is in their possession, have failed to adduce any evidence in that regard.

To summarize the above discussion- the parties admit that defendants no. 17-22 leased the land to Askar Ali, and defendant's contention that Askar Ali thereafter surrendered the property back to defendants no. 17-22 has not been proved. Rather, it has been proved that Askar Ali thereafter transferred the land to the plaintiff and that there was nothing legally wrong with the said transfer, and that the plaintiff was thereafter proved to be in possession of the suit property. However, in the meantime, without taking steps to remove the plaintiff's possessory right over the property through issuing valid notice under Section 106 of the Transfer of Property Act, 1882, the defendants no. 17-22 rather unilaterally executed a fresh Registered Deed of Lease no. 14062 dated 21.08.2005 in favour of the defendants no. 1-9 which is invalid and a clear breach of the agreement. In the same vein, since the plaintiff's deed was still valid and in force, the Deed no. 18522 dated 24.12.2006 executed by the defendants no. 17-22 purporting to sell the land to the defendant no. 23 is also therefore invalid due to subsistence of the plaintiff's possessory right by virtue of Deed of Transfer executed

by Askar Ali which could only be abolished in accordance with law primarily by issuing notice under Section 106 of the Transfer of Property Act, 1882.

Moreover, the other arguments put forward by the defendant-appellant that the lease between the vendor of the plaintiff and the defendant Nos. 17 to 22 is a private lease, that such type of private lease is not permitted in view of the provision of State Acquisition and Tenancy Act, 1950 which terminated the Zamindari and rendered the State as the only Lord, is defunct as there is no bar to any type of agreements by any private individual so long as they are not specifically prohibited by law. The defendant appellant has further argued that plaintiff has prayed for declaration on an unspecified and undemarcated suit land without proper boundaries, without first seeking a partition of the same. However, the said argument does not hold water since plaintiff is not claiming ownership over the land and the deeds of the plaintiff does not deny that the defendant no. 17-22 remain the original owners, who can extinguish the plaintiffs' right to the land through following the due process of law and hence the principles of law reported in 6 ADC 127, 17 BLT (AD) 45, 43 DLR (AD) 87, 4 BLC 519 do not apply. The

'title' declared by the court below therefore relates only to 'possessory' title as acquired by Askar Ali and then by the plaintiff through executing valid deeds of transfer, and hence the deeds executed by the defendants no. 17-22 without first taking steps to extinguish the rights of the plaintiff through following the due process of law have been rightly declared invalid by the Court below and principals of law reported in 61 DLR (AD) 116, 42 DLR (AD) 289 do not apply.

Considering the above facts and circumstances and the submissions as noted above, we do not find merit in the submission so placed by the learned counsel for the defendant-appellant and find no reason to interfere with the well-reasoned Judgment and Decree passed by the Court below.

In the result, the appeal is **dismissed** without any order as to costs.

The judgment and decree dated 28.10.2014 (decree signed on 06.11.2014) passed by the learned Joint District Judge, Additional Court, Sylhet in Title Suit No. 37 of 2012 is hereby affirmed.

Let a copy of this judgment along with the lower court records be communicated to the respondents as well as the court concerned forthwith.

Md. Mozibur Rahman Miah, J.

I agree.