

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 3928 of 1994

IN THE MATTER OF :

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

-And-

In the Matter of:

Nirmal Chandra Modhu and others

..... Petitioners

-Versus-

Mofizur Rahman Gazi and others

.....Opposite parties

None appears

Judgment on: 31.10.2018

By this Rule, opposite parties were asked to show cause as to why the impugned judgment and decree dated 07.08.1994 (decree signed on 13.08.1994) passed by the Sub-ordinate Judge, 2nd Court, Gopalganj in Title Appeal No. 38 of 1993 should not be set aside.

At the time of issuance of Rule, the operation of the impugned judgment and decree was stayed for a period of 3(three) months and the order of stay was extended till disposal of the Rule on 22.02.1995.

The brief facts, relevant for the purpose of disposal of this Rule are that, the opposite parties as plaintiffs filed Title Suit No. 142 of 1983 before the Assistant Judge, Kotalipara, Gopalganj for declaration of Title and for further declaration that a sub-kabala deed being No. 489 dated 23.01.1978 is collusive, fraudulent, null and

void, inoperative and not binding upon the plaintiffs. It is stated in the plaint that the original owners of the suit land were Felu Baidya and Rashik Baidya and R.S. record was correctly prepared in their names in equal share. Thereafter Rashik Baidya died leaving behind his only brother Felu Baidya as his legal heir and said Felu Baidya while was in possession of the suit land died leaving behind his only son Krishna Chandra Baidya as his legal heir. Thereafter said Krishna Chandra Baidya sold the suit land to the plaintiffs at a consideration of Taka 4,500/- and to that effect on 15.04.1972 Krishna Chandra Baidya received Taka 4,300/- as baina (earnest money) from plaintiff No.1 and Majed Gazi, the predecessor of plaintiff Nos. 2-5. But later on Krishna Chandra Baidya refused to give registry of sub-kabala deed for which the plaintiffs filed Miscellaneous Case No. 246 of 1973 for specific performance of contract and ultimately got an exparte decree. Thereafter on 30.07.1976 said Krishna Chandra Baidya executed a registered Sub-kabala deed being No. 3035 in favour of plaintiff No.1 and the predecessor of plaintiff Nos.2-5. The plaintiffs on 15.10.1980 came to know that S.A. record was wrongly prepared in the name of Krishna Kanto as 08 ana share and Paban Modhu and Iswar Modhu rest 08 ana. After being kwon about the wrong S.A. record the plaintiffs filed the suit for declaration of title over the suit land.

The defendant Nos. 1, 3-5 and 6 filed written statement and contested the suit. Their case as stated in their written statement are that the suit land along with other non-suited land were owned and

possessed by Krishna Kanto Baidya, Paban Chandra Modhu, Iswar Chandra Modhu, Pandit Chanrda Bala and Adu Ram Barai and accordingly R.S. and S.A records were prepared in their names correctly. While they have been in possession in the suit land, Paban Modhu died leaving behind 2 sons as his heirs namely Nirmal Kumar Modhu and Parimal Chandra Modhu who became the owners and were in possession of the suit land. Iswar Chandra Modhu died leaving behind 2 sons namely Indrajit Modhu and Eshan Chandra Modhu as his heirs who have been in possession of the suit land according to their share. Thereafter on 23.01.1978 Nirmal Kumar Modhu (defendant No.1), Parimal Chandra Modhu (defendant No.3), Indrajit Modhu (defendant No.4) and Eshan Chandra Modhu sold 0.42 acres of land from the plot of the suit property through a registered sub-kabala deed being No.489 dated 23.01.1978 to one Abdul Hakim Hazra (added defendant No.6) and delivered possession. That said Hakim Hazra mutated his name and paid rent to Government accordingly and have been living on the suit land by erecting dwelling house from date of his purchase and the rest .16 acres of land along with other non-suited lands have been owned and possessed by other defendants more than 12 years by paying government rent and taxes duly. Krishna Kanto never executed any baina or did not execute the registered deed dated 30.07.1976 in favour of the plaintiffs and in the facts and circumstances the defendants prayed for dismissal of the suit.

After hearing both the parties and considering both oral and documentary evidence, the learned Assistant Judge was pleased to dismiss the suit by his judgment and decree dated 30.12.1987 (decree signed on 06.01.1988). Against the said judgment and decree the plaintiffs as appellants filed Title Appeal No. 22 of 1988 and upon hearing, the learned Appellate Court allowed the appeal and sent back the case on remand for re-trial on the finding that since Abdul Hakim Hazra was not a party to the suit and did not file any written statement, he was not entitled to cross-examine the P.Ws or adduce any D.Ws. After receiving the case record the learned trial court started the case afresh. Then he allowed Abdul Hakim Hazra as defendant No.6 under Rule 10 of Order-1 of the Code of Civil Procedure and thereafter Abdul Hakim Hazra was permitted to file written statement which he filed on 04.04.1983.

Thereafter the plaintiff-opposite parties adduced 3 witnesses including plaintiff No.1 Mofizur Rahman. The defendants though cross-examined P.W-1 but did not cross-examine other two P.Ws and even they did not adduce any D.Ws to prove their case during the trial afresh.

The learned Assistant Judge, Kotalipara, Gopanganj, by his judgment and decree dated 17.05.1993 (decree signed on 23.05.1993) after considering all the evidences both oral and documentary, submitted by the parties, was pleased to dismiss the suit.

Against that judgment and decree the plaintiffs filed Title Appeal No. 38 of 1993 which was ultimately heard by the Sub-ordinate Judge, 2nd Court, Gopalganj who after hearing both the parties, was pleased to allow the appeal by his impugned judgment and decree dated 17.05.1993.

Being aggrieved by and dissatisfied with the said judgment and decree of the lower appellate court the defendant-respondents filed this Civil Revision before this Court and obtained the Rule and order of stay as stated at the very outset.

No one appears to support or oppose the rule.

This is a Civil Revision of the year 1994. It appears from record that on behalf of the defendant-petitioners Mr. Tufail Ahmed along with Mr. A.K.M. Shamsul Haque and Mr. Zamirul Akhter, learned advocates appeared and obtained the instant Rule. Thereafter, on behalf of the Opposite party No.1 Mr. Hasan Foiz Siddique, now a judge of the Honourable Appellate Division of this court and Mr. Shosti Sarker, learned advocates appeared for the opposite parties. It also appears from the Vokatnama of the opposite parties that two other advocates namely Md. Amirul Islam and Sirajul Islam accepted the Vokalotnama of the opposite parties.

I have gone through the revisional application and examined the judgments passed by the courts below. Since it is an old civil revision of the year 1994 and the original Title Suit is of the year 1983, I am inclined to pass judgment though no one appears for the parties.

In their revisional application the petitioners took 07 grounds. They have submitted that the learned appellate court erred in law and on facts in not considering the possession of the suit land, R.S and S.A records and rent receipts of the suit land which are in the names of the defendant-petitioners. They further submitted that the learned appellate court did not consider the depositions of the defendant witnesses which was recorded earlier by the trial court. They next submitted that the learned appellate court misread and misunderstood the provision of section 64 of the Evidence Act regarding the proof of the Sub-kabala deed dated 30.07.1976.

I have gone through the judgments passed by the trial court as well as the lower appellate court and I have also considered the evidence on record adduced by the parties and the exhibited documents with the case record. It appears from the record that the plaintiff-opposite parties claimed that a bainapatra (agreement for sale) was executed on 15.10.1972 by R.S. recorded tenant Krishna Kanto Baidya in favour of the plaintiff No.1 and the predecessor of the defendant Nos. 2-5 but plaintiffs did not submit any such bainapatra before the court. The further claim of the plaintiff-opposite parties is that they obtained an exparte decree in the title suit being No. 246 of 1973 but they did not file any certified copy of such judgment and decree and even did not call for the record of that title suit to prove that they have got an expartee decree in their favour. Their further claim is that Krishno Kanto executed a registered kabala deed dated 30.07.1976. Though it has been

exhibited as exhibit No.3 but this document has not been proved by adducing any attesting witnesses or by the writer of that deed. The defendants raised serious objection regarding the exhibit-3. The lower appellate court held that since it was original document, it is admissible in evidence according to section 64 of the Evidence Act and hence it is assumed that it is proved. This finding of the lower appellate court is misconceived. Section 64 of the Evidence Act says that documents must be proved by primary evidence except in the case mentioned in section 65. It does not mean that if a party submits a primary document it is deemed to have been proved but the party must prove the said primary document. In the present case the plaintiffs failed to prove the same.

Regarding the possession of the suit land, it appears from the deposition of the P.W-1 that he has stated that he is in the possession of the suit land and P.Ws-2 and 3 also supported his possession but it transpires from the deposition that PW-3, Manik Miah is the nephew of P.W-1 (Plaintiff No.1). So in my view, he is not an independent witness. Moreover, the plaintiffs did not produce rent receipts before the trial court to show that they are in possession though both the courts below relying on the oral depositions of the P.Ws found possession of the plaintiffs.

Both the courts below found that the defendants could not prove their case by adducing any witness and I do not find any reason to disagree with the said concurrent findings of the courts below. But the title cannot be decided in favour of the plaintiff on the

weakness of the defendant. It is settled principle of law that the plaintiff has to prove his case by adducing witnesses and producing documents in favour of his claim. In the present case, the plaintiffs claimed that they came to know about the wrong record of S.A. Khatian on 15.10.1980 after going to the local C.O. Office but it appears from the deed dated 30.07.1976 (exhibit-3) that in that deed said R.S. and S.A Khatian have been mentioned in describing the scheduled land. So, the plaintiffs did not know about the wrong S.A. record for more than 12 years has no legs to stand. Since the plaintiffs have failed to prove the cause of action only on this ground they are not entitled to get a decree of title. Moreover, the plaintiffs have measurably failed to prove their title deed dated 30.07.1976 and its basis. Regarding the possession of the suit land, it appears from the evidences that both the parties claimed possession. Even the P.Ws adduced earlier admitted the possession of Abdul Hakim Hazra. On the other hand, the D.Ws adduced earlier also admitted the possession of the plaintiffs or their predecessor. In such circumstances, the possession of the suit land cannot be ascertained. However, since the plaintiffs have failed to prove their title over the suit land and also failed to prove the possession of the suit land by adducing believable witnesses and documents, their suit is liable to be dismissed. I find substance in the judgment of the learned trial court and I am inclined to set aside the impugned judgment and decree passed by the court of appeal below.

In the result, the Rule is made absolute. The judgment and decree dated 07.08.1994 (decree signed on 13.08.1994) passed by the Sub-ordinate Judge, 2nd Court, Gopalganj in Title Appeal No. 38 of 1993 is hereby set aside and the judgment and decree dated 17.05.1993 passed by the Assistant Judge, Kotalipara, Gopanganj, in Title Suit No. 142 of 1983 is hereby affirmed.

Send down the copy of the judgment and L.C.R. at once.