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

Present
Madam Justice Kashefa Hussain

Civil Revision No. 4165 of 2004

Md. Muslim Master
.....petitioner
-Versus-
Md. Hadis and others
…… Opposite parties

Mr. Mohammad Shamsul Alam, Advocate
…… For the petitioner
Mr. Sankar Chandra Das, Advocate
…… For the Opposite Parties

Heard on: 18.07.2023, 23.07.2023,
30.07.2023 and
Judgment on 06.08.2023

Rule was issued calling upon the opposite parties No. 1 and 2 to show cause as to why the impugned Judgment and decree dated 12.04.2004 passed by the learned Joint District Judge, 1st Court, Bhola in Title Appeal No. 88 of 1997 allowing the appeal and thereby reversing the judgment and decree dated 29.06.1997 passed by the learned Senior Assistant Judge, Bhola Sadar, Bhola in Title Suit No. 5 of 1996 should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The instant petitioner as plaintiff instituted Title Suit No. 5 of 1996 in the court of Senior Assistant Judge, Bhola Sadar, Bhola inter alia praying for declaration of title in the suit land

impleading the instant opposite parties as defendants in the suit. The trial court upon hearing the parties allowed the suit by its judgment and decree dated 29.06.1997. Being aggrieved by the judgment and decree passed by the trial court dated 29.06.1997, the defendant filed Title Appeal No. 88 of 1997 which was heard by the court of Joint District Judge, 1st Court, Bhola. The appellate court upon hearing both sides however allowed the appeal by its judgment and decree dated 12.04.2004 and thereby reversed the judgment and decree of the trial court passed earlier. Being aggrieved by the Judgment and decree of the appellate court the plaintiff as petitioner in the suit filed the instant civil revisional application which is presently before this court for disposal.

The plaintiff's case inter alia is that Mozammel Hoque and others being owner of the suit land agreed to transfer the same in favour of Ratanpur Jame Mosque and on receipt from the Mutawalli handed over possession of the suit land on 15.03.81 to Ratanpur Bazar Jame Mosque and that defendant Nos. 1 and 2 could not execute and register the deed of sale for not being able to take leave from their office and that it was settled that the deed of sale would be registered on 13th /14th may but on that date, the deed was not executed and registered and the date was fixed on 04.06.81 for registration and that on the same date, defendant

No. 3 executed and registered the deed in respect of his share but defendant Nos. 1 and 2 did not come to execute the deed and that Ratanpur Bazar Jame Mosque has been possessing the suit land for more than 12 years and the same has been enlisted in the office of the waqf commissioner and that defendant Nos. 1 and 2 claimed Title of the suit land on the first part of Poush, 1402 B.S. and hence the case.

The instant opposite party Nos. 1 and 2 (defendant No. 1 and 2) contested the suit by filing a joint written statement denying the material allegations made in the plaint and their further case in brief is that defendant No. 3 was interested to look after the suit land and he used to give the usufructs of the suit land to them after 2/3 years and that defendant Nos. 1 and 2 having been residing abroad did not come to home and never sold any land to the Mosque and that defendant No. 3 created the alleged deed in collusion with the plaintiff and hence the suit is liable to be dismissed.

The trial court framed issues, witnesses were examined by both sides and produced documents marked as exhibits.

Learned Advocate Mr. Mohammad Shamsul Alam appeared for the petitioner while Mr. Sankar Chandra Das represented the opposite parties.

The learned Advocate Mr. Mohammad Shamsul Alam for the petitioner submits that the trial court upon correct appraisal of facts came upon a correct finding and the judgment of the trial court be upheld. He submits that the appellate court upon misappraisal of facts came upon a wrong finding and the judgment of the appellate court be set aside. He argues that the trial court correctly relied upon the oral and documentary evidences on both issue of title and possession in the suit land. He contends that the trial court relied on the oral evidences of the issue of tenancy and by which the PW-1 prove that the suit land is in possession of the plaintiff by way of the tenancy. He submits that the trial court correctly found that the defendant No. 3 one of the brothers admittedly received the money and therefore title validly passed upon the plaintiff by transferring the land by way of the impugned deed. He further draws attention to the findings of the trial court wherein the trial court made observation that upon assumption that since one of the brother the defendant No. 3 admittedly received the money and transferred the land therefore it is most unlikely that the other brothers will not agree to transfer the land.

On the issue of possession of the plaintiff in the suit land he points out that the PW-3 particularly gave clear evidence on the possession of the plaintiff through the PW-3 as a tenant. He

submits that the trial court correctly found that the defendant No. 1 and 2 were never in possession of the suit land and they were only in possession through their brother the defendant No. 3. He argues that the trial court correctly made observation that the defendant No. 3 being brother of the defendant No. 1 and 2 it is most unlikely that he will do any act to deceive his brothers. He next argues that the defendant No. 1 in his oral evidences admitted that he was aware of the execution of the impugned deed. He points out that the defendant No. 1 in his cross examination and oral evidences also admits that the defendant No. 3 is in possession of the Mosque in the suit land. He reiterates that from the oral evidences of the PWs and also the DWs it clearly shows that the plaintiffs are in possession of the suit land particularly by way of tenancy and renting out the property.

On the issue of the validity of the impugned deed he submits that since the defendant No. 1 and 2 the brothers of the defendant No. 3 are admittedly aware of the execution of the impugned deed therefore they are in no position to deny the plaintiff's title in the suit land which title was obtained by way of valid purchase.

He next submits that the trial court upon correct evaluation arrived on the conclusion that the deed is a valid deed and also

arrived on the correct finding on the issue of the possession. He argues that the appellate court however upon total misconception declared the deed as invalid and gave wrong finding on the issue of possession. He concludes his submissions upon assertion that the judgment of the trial court be upheld and the judgment of the appellate court ought to be set aside and the Rule bears merit and ought to be made absolute for ends for justice.

On the other hand learned Advocate Mr. Sankar Chandra Das for the opposite party vehemently opposes the Rule and submits that the trial court upon misreading of the evidences and upon surmise and conjecture came upon wrong finding and therefore the judgment of the appellate court was correctly given and needs no interference with.

He points out to the issue of possession and argues that from the oral evidences it is clear that the defendants are in possession of the suit land through tenancy. He particularly points out to the oral evidences of the PW-3 who admits that he is a tenant of the defendant No. 1. He points out that PW-3 further admits that the defendant No. 1 received the rent and also that the tenant paid rent to the defendant No. 1. He submits that the appellate court correctly found that such admission of the PW-3 is enough to prove that the defendants are in possession in the suit land by way of tenancy whatsoever. He next agitates that

the appellate court correctly found that the evidence of possession of the defendants in the suit land is also supported by rent receipts produced by the defendants which is exhibit-2(ক) series. He agitates that the appellate court correctly found that there are no documentary evidences that the Motowally of the Mosque are in possession in the suit land. He submits that although the plaintiff's claim that it is a waqf property but however the waqf committee was not produced as witness in trial nor in appeal. He next draws attention of the bench to the waqf deed wherefrom he points out that although the valuation of land is Tk. 5,000/- (five thousand) in the deed but the claim of the plaintiffs amount is taka 5,00/- (five hundred). He submits that moreover no documentary evidences of any payment was produced by the plaintiff.

He next contends that apart from the issue of possession the trial court also correctly found that the plaintiff has no title in the suit land. He assails that it is admitted fact that two brothers defendant No. 1 and 2 were never engaged in the negotiation for sale between the defendant No. 3 and the plaintiff. There was a query from this bench regarding the admission of the defendant No. 1 that they were aware of the sale of the deed. He submits that mere admission of knowledge of execution of a deed cannot extinguish right and title in the suit land in which they (the

defendants) are co-sharers by way of being ejmaily property. He submits that it is an admitted fact that the defendant No. 1 and 2 were not present during signing of the deed nor during execution of the deed and did not give their signature in the deed. He reiterates that it is an ejmaily property therefore execution of the deed where other co-sharer are not signatory, such deed is void ab nitio and does not create any valid title of the plaintiffs. He concludes his submissions upon assertion that therefore the appellate court correctly reversed the judgment of the trial court and the Rule bears no merit and ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides, also perused the application and materials on records including both the judgments of the courts below. I have examined the trial court's observation particularly addressing on the issue of title to the suit land. The trial court made observation:

> "আর যেহেতু মসজিদ নালিশা ভুমির পূর্নাঙ্গ দখল পায় অতএব ৩ নং বিবাদী ১/২ নং বিবাদীদের বক্রী ভুমির উপস্বত্ব প্রদান করিয়াছে এই রুপ দাবী হাস্যকর ও অবিশ্বাস্য এবং আরো কারণ এই যে, বিশ্বাস্য যোগ্য ৩ নং বিবাদী হঠাৎ কেন প্রতারক বা অবিশ্বস্যের ভুমিকায় অবতীর্ন হইল তাহার কোন ব্যাখ্যা লিখিত বর্ননায় নাই। অবস্থার প্রেক্ষাপটে ইহাই

বিশ্বাস্যরুপ হইয়া দাড়ায় যে, কথিত মসজিদ ১/২ নং বিবাদীদের জ্ঞাতসারেই দ্বাদস বছরের উর্দ্ধে নালিশা ভূমিতে একক এবং চুড়ান্ত ভোগ দখল করে।"

My considered view on this observation is that the trial court came upon such finding totally on its own surmise and conjecture and not based upon any facts or evidence nor on any circumstances or factors. The trial court basically relied on the fact that since the defendant No. 3 is brother of the defendant No. 1 and 2 therefore it is unlikely that he will deceive his own brothers. Such finding of the trial court is an absurdity in itself and not based on any evidences nor any facts.

Admittedly the defendant No. 1, 2 and 3 being brothers are all co-sharers in the suit land. It is also admitted fact that when negotiations for sale were going on between the defendant No. 3 and the plaintiff the defendant No. 1 and 2 were not present on any occasion. It is also admitted by way of the other materials and by the impugned deed itself dated 13.05.1881 that the defendant No. 1 and 2 are co-sharers to the suit land but did not sign in the deed and their signature is not there. My considered view is that even if it is proved that the defendant No. 1 and 2 had knowledge of the execution of the deed that does not establish the fact that the deed becomes a valid deed in absence of the other two co-sharer's signature.

I have examined the materials on issue of possession. It appears from the oral evidences that the PW-3 on the issue of tenancy clearly admitted that the tenants paid the rent to the defendant No. 1. I am of the considered view that the appellate court correctly found that since receiving the rent by the defendant No. 1 is admitted by the PW-3 therefore it also proves that whatsoever deed may have been executed, nevertheless possession was never delivered to the plaintiff. Moreover, the possession of the defendants are supported by the production of rent receipts by way of exhibit-2 (Ka).

However it is an admitted fact that the defendant No. 3, the brother of the defendant No. 1 and 2 consciously and voluntarily transferred the property to the plaintiff. With such fact in mind, I am inclined to draw upon Section 8 of the Transfer of Property Act, 1882. In my considered view the intention of Section 8 of the Transfer of Property Act, 1882 allows transfer by way of any registered instrument whatsoever to be valid up to the amount of interest which the transferor at the time is capable of transferring and the property and the legals incident thereof. I am of the considered view that the defendant No. 3 in this case may transfer the property only up to the amount of his interest in the ejmaily land that is up to the amount

of land which he may obtain if ever such ejmaily property is divided by metes and bounds.

Further for purposes of proper adjudication of the matter I have also drawn attention to section 8 of the Transfer of Property Act, 1882. Section 8 is reproduced here under:

> "Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incident thereof."

Upon perusal of Section 8 of the Transfer of Property Act, 1882 it is clear that an ejmaily property may be transferred up to the extent of sale of concerned transfer.

I have also drawn upon Section 44 of the Transfer of Property Act, 1882 which in my considered view is relevant for proper adjudication of the instant case. Section 44 is reproduced here under:

> "where one of two or more co-owners of immovable property legally competent in that behalf transfers his

> share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.
>
> Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

Section 44 of the same Act it is also clear that upon such transfer such share of ejmaily property is transferred to the transferee and the transferee shall be entitled to only joint possession or other common enjoyment of the property and may as ejmaily co-sharer be also entitled to enforce partition of the

same. Section 44 of the Transfer of Property Act also provides that however the transferee of the property shall be subject to the conditions and liabilities arising out of the property on the deed or sale. I am inclined to dispose of the Rule with directions and observations.

In the result, the Rule is disposed of with directions and the observations made above. The court below is hereby directed to absolve the plaintiff of the cost of Tk. 10,000/- (ten thousand) imposed by the court.

The order of stay and status-quo granted earlier by this court is hereby recalled and vacated.

Send down the Lower Court's Record at once.

Communicate the order at once.

Shokat (B.O)