

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No.937 of 2014

Ramendranath Mondal being dead his heirs:

1(a) Narayan Roy and others

.....petitioners

-Versus-

Begum Fatema Khatun and others

.....opposite parties

Mr. Ahmed Nowshed Jamil with Mr. HM
Borhan, Advocates

..... for the petitioners

Mr. Muhammad Rayhan Uddin for Mr.
Mohammad Humayun Kabir, Advocate

..... for opposite party 1

Judgment on 04.06.2024

The plaintiffs obtained this Rule where defendant 1 was called upon to show cause as to why the judgment and decree of the Additional District Judge, Court No.3, Khulna passed on 28.01.2014 in Title Appeal No.136 of 2009 allowing the appeal reversing the judgment and decree of the Senior Assistant Judge, Dacope, Khulna passed on 10.04.2003 in Title Suit No.27 of 2002 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 predecessor of the petitioners Sarbeshwar Mondal and Provash Chandra Mondal as plaintiffs instituted the aforesaid suit. The plaint case, in short, is that the suit land appertaining to CS *Khatian 57* of Koilashgonj mouza within Dacope police station

measuring an area of 12.07 acres originally belonged to Dharani, Jibon, Bhuban and Rakhal in equal shares. Dharani died leaving behind his wife Shreemoti Dasi who during possession and enjoyment settled 2.85 acres therefrom to Surendranath Datta through a *patta* dated 08.10.1945 for legal necessity. Surendranath sold out the land to Ramesh Chandra and Debendra through a *kabala* dated 18.05.1949. Jibon sold out 0.50 acres therefrom to Ramesh and Debendra through *kabala* dated 23.10.1951. Bhubon and Rakhal also sold 1.33 acres to Ramesh and Debendra through a *kabala* dated 01.05.1952. In this way Ramesh and Debendra acquired total 4.68 acres of land. Ramesh died leaving behind 3(three) sons Adhir, Samar and Kamal. Adhir himself and on behalf of his minor two brothers sold out 2.34 acres to plaintiffs 1 and 2 for legal necessity. Debendra sold out 2.34 acres to plaintiffs 1 and 2. Thus plaintiffs 1 and 2 acquired title in 4.68 acres by way of purchase. Jibon, Bhuban and Rakhal jointly sold out 3.96 acres to Arjun Mondal, father of the plaintiffs. Jibon further sold 1.00 acres to Arjun through a *kabala* dated 21.07.1957. Bhuban and Rakhal jointly sold 0.33 acres through a *kabala* dated 16.11.1959 and 0.33 acres through another *kabala* dated 18.06.1960 to Arjun. Thus Arjun acquired title of 5.62 acres of land in the suit holding. He died leaving behind 2(two) sons, the plaintiffs. Thus the plaintiffs acquired 4.68 acres by way of purchased and 5.62 acres

by inheritance *i.e.*, in total they became owner in possession of 10.30 acres. The land of CS *Khatian 57* was subsequently recorded in RS *Khatian 65* and SA *Khatians 96* and 276. In the last part of Ashar 1387 BS defendants 1-4 denied the title of the plaintiffs in the suit land and claimed that they got the suit land from the heirs of Bidya Sundari, the daughter of Dharani. But practically Dharani had no daughter in such name. Hence, the suit for declaration of title and partition claiming their *saham* to the extent of 10.30 acres as described in the schedule to the plaint.

The case of defendant 1 is that 12.07 acres of land of the aforesaid *khatians* originally belonged to Dharani, Jibon, Bhupon and Rakhal in 4 annas share each. Dharani married Dayabati. Dayabati died leaving behind a daughter Bidya Sundari. After Dayabati's death Dharani married Shreemoti Dasi. Subsequently Dharani died leaving behind one daughter Bidya Sundari and second wife namely Shreemoti Dasi. During SA operation Bidya Sundari was a minor and some interested quarters managed to record the land in the name of Shreemoti Dasi. Bidya Sundari had two sons Rabin and Ashim. They got the land by way of inheritance and sold it to defendant 1 through a registered *kabala*. Defendant 1 is the owner in possession of the land through his *borgader*. The plaintiffs' *patta* dated 08.10.1945 is forged,

collusive, ineffective and not binding upon the defendant. Therefore, the suit would be dismissed.

The case of defendants 7-9, in brief, is that defendant 7 is the son of CS recorded tenant Jibon and defendants 8 and 9 are the sons of Bhuban. Dharani died leaving behind one daughter Bidya Sundari and second wife Shreemoti Dasi. Bidya Sundari had two sons Rabin and Ashim. In CS *Khatian* Jibon and Bhuban had 8 annas share out of which they sold out 2.66 acres and remaining 3.38 acres were being possessed by them. They have been possessing the aforesaid quantum of land by amicable partition with other co-sharers. The suit has been filed on false averments and as such it would be dismissed.

On pleadings the trial Court framed 5 (five) issues; on point of limitation, defect of parties, maintainability, title and possession of the parties. In the trial, the plaintiffs examined 3(three) witnesses and their documents were produced as exhibits 1-27 (Kha). On the other hand the contesting defendant also examined 3 (three) witnesses and his documents were exhibits A-D(2). However, the learned Assistant Judge relying on evidence and other materials on record decreed the suit declaring plaintiffs' title over the suit land allocating share to them as prayed for. Defendant 1 then preferred appeal before the District Judge, Khulna. The Additional District Judge Court No.3, Khulna heard

the appeal on transfer and allowed it setting aside the judgment and decree passed by the trial Court. Being aggrieved by the plaintiffs approached this Court with this revision upon which the Rule was issued and an ad interim order of stay passed.

Mr. Ahmed Nowshed Jamil, learned Advocate for the petitioners taking me through the judgments passed by the Courts below and other materials on record submits that the impugned judgment passed by the appellate Court is the clear violation of the provisions of Order 41 Rule 31 of the Code of Civil Procedure. No specific reason has been assigned in allowing the appeal. The lower appellate Court did not at all advert the findings of the trial Court upon which the suit for declaration of title and partition was decreed. Mr. Jamil then submits that the findings of the learned Additional District Judge that the suit is bad for defect of parties is totally wrong and result of misreading of the judgment passed earlier by the appellate Court through which the suit was sent on remand. The defendants in their written statement did not state who were the necessary parties left out in the suit, and as such the decision taken by the appellate Court on point of defect of parties is beyond the materials on record. The decision that the suit is barred by limitation for not mentioning the cause of action also suffers from non reading of the materials on record. The plaintiffs specifically mentioned the date of cause action in the plaint which

was corroborated by the evidence of PW1. Mr. Jamil then submits that since the plaintiffs are not parties to those deeds through which the defendants claimed title there is no necessity to seek any declaration against those. He relied on the *ratio* laid in the case of Dudu Mia and others vs. Ekram Miah Chowdhury and others, 54 DLR (AD) 7. He then refers to the case of Safaruddin and others vs. Fazlul Huq and others, 49 DLR (AD) 151 and submits that no suit can fail by reason merely of non-joinder of parties. The findings and decision of the lower appellate Court is perverse and beyond the evidence, materials on record and law, and as such the same should be set aside and the judgment and decree passed by the trial Court be upheld, he concludes.

Mr. Muhammad Rayhan Uddin appearing for Advocate Mr. Mohammad Humayun Kabir, learned Advocate for opposite party 1 on the other hand opposes the Rule and supports the judgment and decree passed by the appellate Court. He submits that although the Court of appeal below passed a precised judgment but it correctly decided the point of limitation and defect of parties against the plaintiffs. The defendants in evidence proved that Dharani had another wife with a daughter and the defendants got a part of the property from the sons of that daughter. As sons of the daughter they inherited the property which was not at all considered by the trial Court. The plaintiffs claimed that the

kabalas in the name of defendant 1 clouded their title in the suit land and, therefore, they ought to have sought for cancellation of those. Without such prayer the suit is not maintainable. The Court of appeal below being the last Court of fact correctly assessed the evidence of the parties and allowed the appeal by setting aside the judgment and decree passed by the trial Court which may not be interfered with by this Court in revision. The Rule, therefore, having no merit would be discharged.

I have considered the submissions of both the parties, gone through the materials on record and *ratio* of the cases cited by the petitioners. It is admitted fact that Dharani, Bhuban, Jiban and Rakhal were CS recorded tenants of land measuring 12.07 acres described in the schedule to the plaint in equal shares. Defendant 1 claimed that Dharani had first wife Dayabati with a daughter Bidya Sundari but the plaintiffs disowned it. For the sake of argument if defendant's case of Bidya Sundari's existence is admitted in that case also the transfer made by Shreemoti through a *patta* dated 08.10.1945 (exhibit-1) to the predecessor of the plaintiffs if found is previous to the Bidya's marriage then the aforesaid transfer stands. The defendant did not make out any case that at the time of transfer by Shreemoti through exhibit-1 Bidya Sundari had his son but they admitted that Shreemoti was Dharani's wife. In the evidence of the defendant I do not find that

they have been able to prove that Dharani had any wife named Dayabati or she had a daughter namely Bidya Sundari or that Bidya had/has sons as claimed. The above fact was elaborately discussed and addressed by the trial Court. The learned Assistant Judge further held that the *kabala* in favour of defendant 1 dated 01.05.1980 through which the defendant claimed the land has not been proved by examining Bidya Sundari or his sons as witness. The Court of appeal below did not advert the aforesaid findings of the trial Court which is a deciding factor of the case. The appellate Court in a *slipshod* manner allowed the appeal, set aside the judgment and decree passed by the trial Court and dismissed the suit on the grounds of non disclosure of cause of action, bad for defect of parties and for not challenging the deed in the name of defendant 1. In dealing with the matter the learned Additional District Judge did not at all discuss evidence of either of the parties which is very unwarranted. In passing the judgment the Court of appeal did not follow the provisions of Order 41 Rule 31 of the Code.

On perusal of the record, I find that earlier this matter was sent on remand by the appellate Court to the trial Court permitting the plaintiffs to incorporate partition in the plaint, if the parties desires so, nothing was there about defect of parties. In the record I do not find that any specific statement in the written statement

was brought to the Court about defect of parties. The appellate Court in the judgment did not tell who were necessary parties were to be brought in the suit. Therefore, the findings of the appellate Court to that effect is baseless and unfounded. In the plaint the plaintiff asserted the fact that the defendants disowned the title of the plaintiffs in the suit land in the last part of Ashar 1387 BS. PW 1 in evidence corroborated the above statements made in the plaint which was not at all challenged by the defendants. Therefore, it is found that the suit has been filed within the statutory period of limitation. It further appears that in the suit the plaintiffs prayed for declaration of title and partition of the suit land claiming their *saham* to the extent of 10.30 acres out of 12.07 acres by way of inheritance and purchase. The defendant claimed the suit land through purchase from titleless person. Moreover, in the *kabala* dated 09.05.1980 the plaintiffs were not parties. Therefore, there is no necessity to challenge or sought relief against the deed. The *ratio* of the case report in 54 DLR (AD) 07 referred to by Mr. Jamil is found befitting here.

Since the plaintiffs proved their title in the suit land by way of purchase and inheritance they are entitled to get a decree of declaration of title and partition. The trial Court on elaborate discussion decreed the suit declaring plaintiffs' title and allowing their *saham* in the suit land which was not reversed by the

appellate Court on reasoning. The appellate Court thus committed serious error of law in allowing the appeal which has resulted an erroneous decision occasioning failure of justice.

Therefore, 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 Courts is hereby set aside and those of the trial Court are restored.

The order of stay stands vacated.

Communicate the judgment and send down the lower Court records.