

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION No. 1781 OF 2002.
Abdul Jabbar and another.

...Petitioners.

-Versus-

Md. Abdul Aziz Khan and others.

....Opposite parties.

Mr. Selim Reza with

Mr. Quazi Ferodusul Hasan, Advocate

... For the petitioners

Mr. Md. Jashim uddin with

Mrs. Khadiza Akter, Advocates

... For opposite party No. 01

Heard on: 16.11.2023, 29.11.2023, 30.11.2023

Judgment on: 06.12.2023.

Present:

Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon opposite party No. 01 to show cause as to why judgment and decree dated 15.11.2001 passed by learned Joint District Judge, 2nd Court, Netrokona in Other Class Appeal No. 183 of 1997 allowing the appeal and reversing judgment and decree dated 30.06.1997 passed by learned Additional Assistant Judge, Netrokona Sadar, Netrokona in Other Class Suit No. 49 of 1991 dismissing the suit should not be set aside.

At the time of issuance of Rule this Court vide order dated 27.04.2002 stayed operation of the impugned judgment and decree pending hearing of the Rule.

Facts relevant, for the purpose of disposal of this Rule, are that opposite party No. 01 as plaintiff instituted Title Suit No. 49 of 1991 for a decree of declaration of title to and recovery of khas possession of .25 acre land as described in the schedule of the plaint contending, *inter*

alia, that Harik Khan was the owner in possession of eight anna share out of 5.63 acre land including the suit land of S.A Plot No. 234 and while he was owning and possessing his share died leaving behind four sons namely Mozaffar Khan, Hanif Khan, Jalil Khan, Saral Khan and one daughter Moiuri Bibi. While the heirs of Harik Khan were owning and possessing their shares in the suit property along with other properties Mozaffar Khan transferred .60 acre land including the suit land to his brother Jalil Khan by registered sale deed No. 6799 dated 12.10.1949 and thereafter, Saral Khan instituted Partition Suit No. 41 of 1950 in the Court of 4th Subordinate Judge, Mymensingh against other co-sharers for partition of total 5.63 acre land including the suit land and other land and a preliminary judgment and decree was passed on 24.06.1965. In said suit the ownership and possession of Jalil Khan by way of purchase was established. Thereafter, Jalil Khan transferred .25 acre suit land to the plaintiff (opposite party No. 01 herein) by registered sale deed being No. 464 dated 09.01.1979 and handed over possession thereof to him. While the plaintiff was owning and possessing .25 acre suit land the defendants dispossessed him there from on 11.04.1979 and then the plaintiff filed Other Class Suit No. 226 of 1979 under section 9 of the Specific Relief Act for recovery of possession but unfortunately the suit was dismissed. After dismissal of the suit defendant No. 01 left the suit land but defendant Nos. 2-5 were remained in possession therein forcefully. The plaintiff lastly on 17.03.1991 requested the defendants to hand over possession of the suit land to him but they denied and hence the suit which was filed on 10.04.1991.

Defendant Nos. 1-2 contested the suit by filing written statement denying the material averments of the plaint, contending, *inter alia*,

that while Harik Khan was owning and possessing total 5.63 acre land and other land, transferred .60 acre land including the suit land to Johurjan Bibi (wife of Hanif Khan and daughter-in-law of Harik Khan) in lieu of her dower money by registered *heba-bil-ewaz* deed being No. 1322 dated 17.02.1916 and handed over possession thereof to her. While Johurjan Bibi was owning and possessing said .60 acre land died leaving behind only son Abdul Jabbar (defendant No. 01) to inherit her share. Abdul Jabbar then transferred said .60 acre land to Siraj Khan and Miraj Khan by two registered sale deeds being No. 10048 dated 10.10.1985 and 2479 dated 08.03.1987 and handed over possession to them. Siraj Khan died leaving behind three sons namely, Babul Khan, Rokon Khan (defendant Nos. 4-5), Faruk Khan and two daughters namely Rabia and Parul. On the other hand, Miraj Khan died leaving behind two sons namely, Siddik Khan and Idris Khan (defendant Nos. 2-3), one wife and four daughters. As the heirs of Siraj Khan and Miraj Khan, defendants Nos. 2-5 and others have been owning and possessing entire .60 acre land including the suit land. The plaintiff has or had no title to and possession in the suit land and he never got possession of the suit land and accordingly, the present suit is not maintainable and liable to be dismissed.

Both parties adduced oral and documentary evidence to prove their respective case and the trial Court dismissed the suit by judgment and decree dated 30.06.1997. Being aggrieved by said judgment and decree the plaintiff preferred Other Class Appeal No. 183 of 1997 before the learned District Judge, Netrokona which was transferred to learned Joint District Judge, 2nd Court, Netrokona for disposal who, after hearing the parties, allowed the appeal by reversing judgment and decree of the trial Court by his judgment and decree dated 15.11.2001.

The contesting defendants have challenged the judgment and decree of the appellate Court in this revision and obtained the instant Rule.

Opposite party No. 1 entered appearance by filing Voklatnama to contest the Rule.

Mr. Selim Reza, learned Advocate appearing for the petitioners by taking me to the revisional application, judgments of the Courts below, evidence of the parties and other materials available on record submitted that the Court of appeal upon misreading and non-consideration of the evidence on record came to its findings and decision; that the trial Court upon sifting the evidence and on materials on record came to the conclusion that the plaintiff could not prove title to and possession in the suit land but the Court of appeal without reversing said finding with reference to evidence on record illegally reversed the finding of the trial Court; that the plaintiff could not prove his possession in the suit property before his alleged dispossession and the suit was filed beyond the period of limitation and the suit land is unspecified and accordingly, a decree of declaration of title to and recovery of khas possession is not maintainable but the Court of appeal without considering above aspect of the matter illegally decreed the suit by setting aside the judgment and decree of the trial Court and accordingly, interference is called for by this Court.

As against the above submissions Mr. Md. Jashim uddin, learned Advocate appearing for opposite party No. 1 submitted that the trial Court, upon misreading and non-consideration of the evidence as well as misconception of law dismissed the suit though the plaintiff by adducing sufficient evidence proved his title to and the fact of possession and dispossession and Court of appeal, after sifting the

evidence and materials on record, gave its independent findings and decision and reversed the findings and decision of the trial Court having found that the plaintiff by adducing evidence proved title to and possession in the suit land as well as dispossession by the defendants and also gave clear finding that the suit land is specified as per admission of the defendant and accordingly, came to proper findings and decision and those findings of fact of the Court of appeal based on the evidence and materials on record cannot be interfered with under revisional jurisdiction and as such, interference is not called for by this Court.

Upon hearing the learned Advocates and perusal of the evidence of the parties, it appears that the trial Court decided three issues in favour of the plaintiff i.e the suit is maintainable, not bad for defect of parties and not barred by limitation. The trial Court observed that Mozaffar Khan could not acquire title to .60 acre land by sale deed dated 12.10.1949 (Exhibit-3) because R.O.R Khatian was not prepared in his name and that while passing preliminary decree on 24.6.1965 in Partition Suit No. 41 of 1950 [Exhibit 2(A)] the Court decided that Jalil Khan did not acquire title to any land by oral gift from his mother Karamjan Bibi and as such, transfer of the suit land by Jalil Khan to the plaintiff by sale deed dated 09.01.1979 (Exhibit-1) was not legal and by dint of said sale deed the plaintiff could not acquire title to the suit land. The trial Court also came to the conclusion that the plaintiff could not prove his possession before his alleged dispossession and the fact of dispossession by the defendants and finally dismissed the suit.

On the contrary, the appellate Court upon considering the evidence of the parties came to the finding that title of Jalil Khan in respect of .60 acre land was proved and was devolved upon the plaintiff

by sale deed dated 09.01.1979 (Exhibit-1). Considering the Advocates Commissioner's report as well as the evidence of the plaintiff and defendants the Court of appeal found that the suit land is specified. It also came to the conclusion that the title of Jalil Khan in respect of .60 acre land was established in Partition Suit No. 41 of 1950 and the plaintiff got into possession of the suit land after his purchase and he was dispossessed by the defendants on 11.04.1979 and that there was no bar to file a suit for declaration of title and recovery of khas possession instead of filing suit under section 9 of the Specific Relief Act and also came to the conclusion that the plaintiff filed the suit within the period of limitation. The Court of appeal also found that in Partition Suit No. 41 of 1950, .60 acre land which was purchased by Jalil Khan from Mozaffar Khan by sale deed dated 12.10.1949 (Exhibit 3) was kept out of partition and said deed dated 12.10.1959 was exhibited as Exhibit No. B(2) in that suit and finally, reversed the findings and decision of the trial Court and decreed the suit.

On the face of conflicting decisions of the courts below, I have gone through and examined the pleadings of the parties as well as oral and documentary evidence of the parties meticulously. The Court of appeal elaborately discussed the evidence of the parties, in particular, consulted the judgment and decree passed in Partition Suit No. 41 of 1950 [Exhibits 2 and 2(A)] and found that said partition suit was initiated by Saral Khan against Mozaffar Khan, Jalil Khan (defendant Nos. 1 and 2 in that suit), and others and sale deed dated 12.10.1949 (Exhibit 3) was exhibited therein as Exhibit- B(2) and the land covered by Exhibit-B(2) was kept in the *saham* of defendant No. 1 in possession of defendant No. 02.

I have also perused the preliminary judgment of the partition suit dated 24.6.1965 [Exhibit-2(A)] from which it appears that Saral Khan filed the suit being Partition Suit No. 41 of 1950 in which total land of suit S.A Plot No. 234 along with other land left by Harik Khan was the suit property and heirs of Harik Khan was parties to the suit and the suit was decreed in preliminary form on 24.6.1965. In said suit the Court considered sale deed dated 12.10.1949 [Exhibit-B(2) of said suit]. In that suit the trial Court found that Jalil Khan could not prove oral gift from his mother but he inherited his parent's property i.e. the property left by his father Harik Khan and mother Karomjan Bibi. By admitting the deed of transfer dated 12.10.1949 as genuine, the Court kept .60 acre land (including the suit land) out of partition and allotted the same in the *saham* of defendant 2 (Jalil Khan) and allotted *saham* to the plaintiff and other defendants in respect of other suit land. Admittedly, said preliminary decree was not challenged by any of the parties to the suit before higher forum. Accordingly, I am of the view that the Court of appeal rightly found that Jalil Khan acquired title to .60 acre land including the suit land from Mozaffar Khan by sale deed dated 12.10.1949.

Plaintiff claimed that he purchased .25 acre land from Jalil Khan vide sale deed dated 09.01.1979 (Exhibit-1). The original sale deed was produced before the Court and it's volume was also called for from the Sub-registry Office to prove its genuineness. The defendants did not challenge the genuineness of the deed. On the other hand, Jalil Khan as P.W. 7 deposed that he sold the suit land to the plaintiff. Accordingly, the execution and registration of the sale deed by Jalil Khan to the plaintiff was proved as per provision of the Evidence Act. As such, the

Court of appeal rightly held that the plaintiff acquired title to .25 acre suit land from Jalil Khan.

In regards possession of the plaintiff in the suit land the Court of appeal elaborately and independently discussed the evidence of the parties. In their testimonies Abdul Mojid Khan (P.W.2), Giash Uddin (P.W.3), Rehan Miah (P.W.4), Hafez Shamsuddin (P.W 5) stated that while Jalil Khan was owning and possessing the suit land he transferred the same to the plaintiff on 9.1.1979 and handed over possession thereof to him and the defendant dispossessed the plaintiff at the last part of Chaitra 1385 B.S (corresponding to middle part of April 1979). Jalil Khan (P.W 7), the vendor of sale deed dated 9.1.1979 also deposed in the same language. Defendant No.1 Siddiquir Rahman as D.W.1 deposed that they went into possession of the suit land in Chaitra 1385. D.W 2, Soeb Ali deposed that Jalil Khan was possessing the suit and that Suruj Khan (father of defendant No.1) and Ahmmad dispossessed Abdul Aziz (the plaintiff) after he got possession. Relying upon the testimonies of those witnesses the Court of appeal held that the plaintiff could prove that Jalil Khan was possessing the suit land and after purchase from him, the plaintiff got possession therein and he was forcibly dispossessed by the defendants on 11.04.1979. Admittedly, the present suit was filed on 10.04.1991, within 12 years of dispossession. Accordingly, the Court of appeal rightly concurred with the finding of the trial Court that the suit was not barred by limitation.

In regards question of maintainability of the suit, the Court of appeal observed that as per section 9 of the Specific Relief Act there is no bar in filing a suit for title and recovery of possession instead earlier suit being filed for recovery of possession under section 9 of the Specific Relief Act. Section of 9 of Specific Relief Act provides as follows:

“9. Suit by Person Dispossessed of Immoveable Property :

If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.”

Section 9 of the Specific Relief Act enables the person dispossessed to recover possession without establishing title to the land dispossessed. *“Nothing in this section shall bar any person from suing to establish his title”* employed in section 9 makes it clear that a person entitled to sue under this section is not bound to do so, but he can always go for a regular suit founded on title, either in addition to or instead of a suit under this section.

In that view of the matter I am of the view that the Court of appeal took right view that the present suit for declaration of title and recovery of possession was maintainable instead of earlier suit being filed under section 9 of the Specific Relief Act.

Learned Advocate for the petitioner submitted that the suit land is unspecified and a decree of declaration of title and recovery of possession cannot be passed in an unspecified land and the Court of appeal did not consider this issue at all. This argument of the learned Advocate for the petitioner has no substance at all because of the fact that on perusal of the impugned judgment it appears that the appellate Court specifically addressed the issue and found that upon local investigation of the suit land by Advocate Commissioner it was clearly found that the suit land was specified. The Court of appeal also found that the defendants also admitted that the land which has been brought under the suit is the subject matter of the suit. On perusal of

the Advocate Commissioner's report it reveals that the Advocate Commissioner specified the suit land in his sketch map and the defendants neither denied nor challenged the report. Moreover, D.W.1 (defendant No. 1) himself described the boundary of .25 acre suit land. It appears that upon consideration of the admission of the defendants and Advocate Commissioner's report the Court of appeal held that the suit land was specified.

It appears that the impugned judgment of the appellate Court is based upon proper appreciation of the materials and evidence on record and has been passed after following the relevant provisions of law.

On the other hand, the judgment of the trial Court suffers from misreading and non-consideration of material evidence touching upon the merit of the case and the same has passed upon glaring misconnection of law and contrary to the evidence on record which is apparent on the face of the record and accordingly, the Court of appeal committed no error of law resulting in an error in the decision in setting aside the judgment and decree of the trial Court.

It is settled principle of law that when a finding of fact is based on consideration of the materials on record, those findings are immune from interference by the revisional Court and the High Court Division has no jurisdiction to sit on appeal over a finding of fact [Ref: 33 BLD (AD) 93, 70 DLR (AD) 168].

In that view of the matter, I find no substance in the submissions of the learned advocate for the petitioner and accordingly, I find no merit in this Rule.

In the result, the Rule is discharged, however without any order as to costs.

The order of stay granted earlier by this Court is hereby vacated.
Send down the L.C.R along with a copy of the judgment to the
concerned Court at once.

(Justice Md. Badruzzaman)