

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No. 805 of 2015**

Gulshana Jannat

... Petitioner

-Versus-

Hasiba Bibi and others

...Opposite-parties

Ms. Farhana Siraj Ronie with

Mr. Monishankar Sarkar, Advocates for

Mr. Surajit Bhattacharjee, Advocate

...For the petitioner

Mr. Md. Faruque Ahmed, Advocate

...For the opposite-party Nos. 1 and 2.

**Judgment on 23<sup>rd</sup> January, 2025.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioner calling upon the opposite party Nos. 1 and 2 to show cause as to why the impugned judgment and decree dated 01.03.2015 passed by the learned Special District Judge, Sylhet in Title Appeal No. 11 of 2012 disallowing the same and thereby affirming the judgment and decree dated 25.09.2011 passed by the learned Assistant Judge, Kanaighat, Sylhet in Title Suit No. 337 of 2007 dismissing the suit 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 petitioner along with her brothers and daughters, as plaintiff, filed Title Suit No. 159 of 2005 in the Court of Assistant Judge, Sylhet against the opposite party Nos. 1-2 and proforma opposite parties, as defendant, for declaration of title in respect of the suit land. Said Title Suit No. 159 of 2005 transferred in the court of learned Assistant Judge, Kanaighat, Sylhet and re-numbered as Title Suit No. 337 of 2007. Plaintiff case is that the suit land along with other undisputed land appertaining to 4966/138 Taluk Gora Ahmed, C.S. Plot Nos. 244, 245, 292 and 295 belonged to Md. Kasem Ali who while had been possessing northern half Kedar of land from Plot No. 245 transferred the same to his son, Abdus Sobhan who transferred the same land to his wife Tamija Banu in lieu of her dower money on 22<sup>nd</sup> Magh 1316 B.S. One Kirtti Narayan Dutta purchased some property including Plot No. 292 from original owner. Kasim Ali died leaving his son Abdul Bari who took settlement of 2 Kedar, 2 Powa, 2 Jasti of land from C.S. Plot Nos. 244, 245, 292 and 295, which are homestead, pond and chon kind of land from Kirtti Narayan Dutta by Kabuliyat

dated 25<sup>th</sup> Badra 1326 B.S. The suit land is C.S. Plot No. 292 which is pond.

Abdul Bari while had been possessing the land of Plot Nos. 244, 245, 292 and 295, by constructing houses on Plot Nos. 244 and 245, using pond water for their everyday works and planting chan in Chankhola of Plot No. 295, Khirode Mohan Dutta and others legal heirs of Kirtti Narayan Dutta filed Rent Suit No. 293 of 1928 in the court of Munsif, First Court, Sadar, Sylhet against Abdus Sobhan and others for recovery of arrear rents in respect of the property. The suit was decreed and decree holders transferred the same land to Abdul Bari by registered Kabala dated 28<sup>th</sup> Baishak 1354 B.S. Abdus Sobhan died leaving his son Eklasur Rahman alias Sunu Miah, two daughters Taslimunnessa, Aklimunnessa and wife Tamija Baun. Abdul Bari died leaving two daughters, Amirunnessa, Shamsunnessa. Tamija Banu transferred 1 powa land from Plot No. 245 to Abdul Bari by Kabala dated 1<sup>st</sup> Jaista 1344 B.S. Amirunnessa transferred her share to Hamdu Miah, Mokhlesh Miah and Nur Miah by Kabalas dated 05.03.1978, 17.04.1978 and 25.04.1978 respectively.

Hamdu Miah, Mokhles Miah and Nur Miah transferred the same land to Asad Ali by Kabala dated 04.12.1978. Amirunnessa transferred her remaining share to Asad Ali by kabala dated 05.12.1978. Eklasur Rahman alias Sunu Miah son of Abdus Sobhan transferred his share to Moulana Md. Samsul Islam by kabala dated 09.10.1978. Aklimunnessa, Taslimunnessa, daughter of Abdus Sobhan transferred their respective share in favour of Moulana Md. Shamsul Islam by kabalas dated 24.12.1978 and 12.02.1981. Md. Asad Ali died leaving plaintiffs Md. Shamsul Islam who transferred his share of land to plaintiffs and Ataul Karim and others, heirs of Asad Ali by registered kabala dated 28.12.1978. Ataul Karim, brother of plaintiff died leaving plaintiff as his legal heirs. In the year 2003 the plaintiffs came to know that land of C.S. Plot Nos. 244, 295 recorded in S.A. Plot Nos. 290, 289 and C.S. Plot No. 245 recorded in S.A. Plot No. 361, C.S. Plot No. 292 recorded S. A. Plot No. 399 in the names of Eklasur Rahman and others which are absolutely wrong and collusive. Defendants cannot claim the suit property on the basis of wrong record of right. Thus, the plaintiffs were compelled to file the suit praying for the reliefs stated above.

The defendant Nos. 36 and 76 contested the suit by filing a joint written statement contending inter alia, that C.S. Plot No. 292 under Khatian No. 126 corresponding to S. A. Plot No. 359 under Khatian No. 134 comprising an area of .25 acres pond recorded in the name of Osman Ali owner in possession of .04 acres of land from .25 acres. Osman Ali died leaving Sowab Ali who died leaving daughter defendant No. 36. Defendant No. 76 has been possessing .01 acres of land out of .25 acres on the basis of deed dated 05.11.2004 and have been possessing total .05 acres of land. The defendants on 30.12.2006 asked the present plaintiffs to partition the suit land but they refused the same, thus they were compelled to file Title Suit No. 78 of 2007 for partition of the suit land which is still pending. The plaintiffs have no right, title over whole of the suit property, as such, the suit is liable to be dismissed with costs.

The trial court framed 4(four) issues for determination of the dispute. In course of hearing, the plaintiffs examined 5 witnesses as P.Ws and the defendants examined 5 witnesses as D.Ws including defendant No. 76. Both the parties submitted some documents in

support of their respective claim which were duly marked as Exhibits. The trial court after hearing by its judgment and decree dated 25.09.2011 dismissed the suit.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the plaintiff preferred Title Appeal No. 11 of 2012 before the District Judge, Sylhet which was transferred to the Court of learned Special District Judge, Sylhet for hearing and disposal who after hearing by the impugned judgment and decree dated 01.03.2015 disallowed the appeal affirming the judgment and decree passed by the trial court. At this juncture, the petitioner, moved this Court by filing this revision and obtained the present Rule and order of status-quo.

Ms. Farhana Siraj Ronie with Mr. Monishankar Sarkar, learned Advocates appearing for the petitioner at the very outset submits that as per C.S. record Md. Kasem Ali and others owned the property jointly in ejmali possession. In support of such claim the plaintiff submitted C.S. khatian. A portion of the property was transferred by Md. Kasem Ali to his son Abdus Sobhan. Abdus Sobhan transferred the same to his wife Tamija Banu in lieu of her

dower money on 22<sup>nd</sup> Magh 1316 B.S. One Kirtti Narayan Dutta purchased the suit property along with other property from original owners. Kasim Ali died leaving sons Abdul Bari and Abdus Sobhan. Abdus Sobhan took settlement of 2 kedar, 2 powa and 2 jasti land from C.S. Plot Nos. 244, 245, 292 and 295 from Kirtti Narayan Dutta by a Registered Kabuliyat No. 3497 dated 04.09.1919. Heirs of Kirtti Narayan Dutta for arrear rents filed Money Suit No. 293 of 1928 in the Court of Munsif, 1<sup>st</sup> Court, Sadar, Sylhet against Abdus Sobhan. The suit was decreed and pursuant to decree, the property was acquired by decree-holder. Among the decree-holder, Sree Lal Mohon Dutta transferred the suit property along with other property to Md. Abdul Bari son of Md. Kasim Ali by a Registered Deed No. 333 dated 03.06.1947. Tamija Banu wife of Abdus Sobhan transferred 1 powa land from Plot No. 245 to Abdul Bari by a Deed No. 1349 dated 17.08.1937. Abdus Sobhan died leaving son Eklasur Rahman alias Sunu Miah, 2 daughters Taslimunnessa, Aklimunnessa and wife Tamija Banu. Abdul Bari died leaving 2 daughters Amirunnessa, Shamsunnessa. Said Amirunnessa transferred her share to Hamdu Miah, Mokhlesh

Miah and Nur Miah by registered deeds dated 05.03.1978, 17.04.1978 and 25.04.1978 respectively. Aforesaid purchasers again transferred the property to Asad Ali by a registered deed dated 04.12.1978. Amirunnessa also transferred her remaining share to Asad Ali by 2 registered deeds dated 05.12.1978. Eklasur Rahman transferred his share to Moulana Md. Samsul Islam by registered deed dated 09.10.1977. Admitting said transfer his 2 sisters Aklimunnessa and Tasliimunnessa by deeds dated 24.12.1978 and 12.02.1981, again relinquished their share to Md. Shamsul Islam, Md. Shamsul Islam by a registered dated 28.12.1993 sold 10 sataks of land to the plaintiffs in suit. The plaintiffs also inherited the property left by Asad Ali. S.A. khatian for the land of Plot No. 292 along with other khatians wrongly recorded in the name of Eklasur Rahman and others. One of the recorder's heirs are vendor of defendant Nos. 36 and 76 who claimed 5 sataks of land by purchase from one original owner Osman Ali and possessing the same by purchase vide deed dated 05.11.2004 and raised claim of title in the suit property.



She submits that the trial court as well as the appellate court failed to appreciate that the documents submitted by the plaintiffs showing title of Abdul Bari in the suit property. Subsequently, heirs of Abdus Sobhan and Abdul Bari by different deeds transferred  $13\frac{1}{2}$  sataks of land to Asad Ali and the plaintiffs. She submits that the trial court as well as the appellate court did not even utter a single word regarding a series of documents filed by the plaintiffs and their validity in law. Both the courts below in a very slip shod manner without discussing evidences both oral and documentary dismissed the suit as well as the appeal observing that S.A. khatian admittedly, not recorded in the name of their vendor and the plaintiffs were aware about wrong record of right since 2003, but did not file any suit within the period of limitation, as such, the suit is barred by limitation.

She finally argued that both the judgments and decree passed by the courts below in violation of the provisions of Order 20 Rules 4 and 5 of the Code. Had both the courts below discussed the evidences properly the suit would have been decreed in favour of the plaintiffs. Both they miserably failed to find title of the

plaintiffs in the suit property as well as wrongly held that the suit is barred by limitation. She argued that the court below had ample scope and jurisdiction to decree a suit in full or in part after consideration of the evidences available in record. But in the instant suit both the courts below found no title of the plaintiffs in the suit property on the basis of series of transfer deeds starting from 1910 to 1981, though those deeds have not been challenged by the defendants or adjudged by the court in any other proceedings, as such, committed illegality and error of law in the decision occasioning failure of justice.

Mr. Md. Faruque Ahmed, learned Advocate appearing for the opposite-party Nos. 1 and 2 submits that C. S. Plot No. 292 under Khatian No. 126 corresponding to S. A. Plot No. 359 under Khatian No. 134 measuring 25 sataks of land is a pond recorded in the name of Osman Ali in respect of 1 anna, 8 goandas share. Osman Ali acquired 4 sataks of land out of 25 sataks who died leaving Sowab Ali. Sowab Ali died leaving daughter defendant No. 36. Defendant No. 76 is in possession of .01 satak land out of total land by purchase vide deed dated 05.11.2004, defendants have been

possessing in total 5 sataks of land. Since the property in question is ejmali the defendants requested the plaintiffs to partition the suit property on 30.12.2006 but they refused. Consequently, filed Title Suit No. 78 of 2007 for a decree of partition of the suit property which is pending for disposal and in the said suit present plaintiffs are defendants. Instead of having relief as co-sharer the plaintiffs filed this suit for simple declaration claiming entire property though their purchase as evident from their document only covers  $13\frac{1}{2}$  sataks of land.

He submits that the plaintiffs before the trial court as well as the appellate court could not establish their title in entire suit property both by oral and documentary evidences. Both the courts below concurrently observed and found that the plaintiffs could not substantiate their claim of acquiring 25 sataks of land as claimed by them. And also found that the plaintiffs were fully aware of record of right in the name of predecessor of the defendants, but they did not take any step in time challenging or for declaring their title in the property, as such, the suit is barred by limitation.

He finally argued that from the records and evidences the plaintiffs at best can claim 13 sataks of land out of 25 sataks, but for the said quantum of land the present suit is not maintainable as the property is not specifically mentioned in the schedule to the plaint and they can claim saham for the said land in Title Suit No. 78 of 2007 now pending before the court for disposal, filed by the present opposite-parties, as plaintiff, for partition of the suit property, therefore, both the courts below committed no error in the decision occasioning failure of justice.

Heard the learned Advocates of both the sides, have gone through the application under Section 115(1) of the Code of Civil Procedure, plaint in suit, written statement, evidences both oral and documentary available in lower court records and the impugned judgment and decree of both the courts below.

The plaintiffs claimed that the schedule property covered by Plot No. 292 measuring 25 sataks originally belonged to Kasim Ali, Kasim Ali transferred a portion of the property to his son Abdus Sobhan who transferred some land to his wife Tamija Banu by Registered Deed No. 770 dated 18.03.1910. Subsequently, Abdus

Sobhan obtained settlement of 2 kedar, 2 powa, 2 jasti land by executing a Registered Kubuliyat No. 3497 dated 04.09.1919 from Kirtti Narayan Dutta out of C.S. Plot Nos. 244, 245, 292 and 295. Subsequently, for arrear rents, heirs of Kirtti Narayan Dutta filed Money Suit No. 293 of 1928 and pursuant to decree passed in that suit they acquired the property in execution of decree. Out of decree-holder, one Sree Lal Mohon Dutta by a Registered Deed No. 333 dated 03.06.1947 sold the said quantum of land measuring 2 kedar, 2 powa, 2 jasti to Md. Abdul Bari son of Md. Kasim Ali. Tamija Banu wife of Abdus Sobhan transferred 1 powa land from Plot No. 245 in favour of Abdul Bari by a Registered Deed No. 1349 dated 17.08.1937.

From perusal of C.S. khatian Exhibit-1 and Exhibit-2, it appears that Kasim Ali was owner of 13 sataks land in Plot No. 292. As per plaint, plaintiffs claimed that Kasim Ali transferred the said land to his son and brother. Abdus Sobhan transferred a portion of the property to his wife Tamija Banu. But they could not state how Kirtti Narayan Dutta acquired the property in Plot No. 292 along with other properties. However, admitting Kirtti Narayan

Dutta as owner of 2 kedar, 2 powa, 2 jasti land, Abdus Sobhan by a Registered Kabuliyat No. 3497 dated 04.09.1919 obtained settlement. Said quantum of land was acquired by heirs of Kirtti Narayan Dutta in execution of money decree passed in Money Suit No. 293 of 1928. One of the decree-holder Sree Lal Mohon Dutta sold the said property to brother of Abdus Sobhan named Md. Abdul Bari. Subsequently, heirs of Abdul Bari, heirs of Abdus Sobhan by registered deed dated 28.04.1978 transferred the property to Hamdu Miah, Moklesur Rahman and Nur Miah vide Exhibit Nos. 8, 8(ka) and 8(kha). By the aforesaid 3(three) deeds they transferred  $3\frac{1}{2}$  sataks of land in Plot No. 359 to the aforesaid purchaser. Hamdu Miah and 2 others by a Registered Deed No. 39758 dated 04.12.1978 transferred the same to one Asad Ali (Exhibit-9), Asad Ali and vide Deed Nos. 39770 and 39771 both dated 05.12.1978, Amirunnessa transferred her share to Shmsunnessa wife of Asad Ali from non-suited plot. Son of Abdus Sobhan, Eklasur Rahman transferred 10 sataks of land from suit plot to Md. Shamsul Islam by Registered Deed No. 26047 dated 09.10.1977. His 2(two) sisters by Registered Deed No. 2709 dated

24.12.1978 and Deed No. 12536 dated 12.02.1981 transferred their share in Plot Nos. 259 and 361 to Md. Shamsul Islam. Md. Shamsul Islam by a Registered Deed No. 15268 dated 28.12.1993 transferred 10 sataks of land from suit plot to the plaintiffs. Therefore, the documents so have been filed by the plaintiffs marked as Exhibit Nos. 1-12 shows that the plaintiffs acquired only  $13\frac{1}{2}$  sataks of land by purchase and by inheritance from their father. The plaintiffs claimed entire 25 sataks of land in the suit plot, but they could not prove the same by any evidence. The trial court as well as the appellate court failed to find that the documents submitted by the plaintiffs prove their title in  $13\frac{1}{2}$  sataks of land by purchase though in C.S. khatian their predecessor owned only 13 sataks.

Had the trial court as well as the appellate court gone through the exhibited documents filed by the plaintiffs both the courts below would have found at least title of the plaintiffs in 13 sataks. But without going through the documentary evidences both the courts below dismissed the suit by telegraphic sentences that the

plaintiffs could not prove their title in the suit property and also wrongly held that the suit is also barred by limitation without giving any reason why the suit is barred by limitation.

It is now settled that the cause of action for filing suit against wrong record of right arises when the title of the plaintiff invaded by the defendants. In the present suit the plaintiffs in their plaint specifically stated that they came to know about wrong record of right in the year 2003 and the instant suit was filed on 18.04.2005 very much within time.

Considering all the evidences both oral and documentary, I find that the court below could have decreed the suit in part declaring title of the plaintiffs in  $13\frac{1}{2}$  sataks land, but they did not do so. It is true that for a fraction of land out of 1 plot without giving specification of the same a suit for simple declaration is not maintainable. But the property in question is a pond which cannot be demarcated by giving boundary and the co-sharer of a pond always remain in ejmali possession as per their share. Since the



suit property is a pond it could be decreed that the plaintiffs have title in undivided share of  $13\frac{1}{2}$  sataks.

Therefore, I find no legal impediment in declaring title of the plaintiffs in  $13\frac{1}{2}$  sataks by purchase by Deed No. 15268 dated 28.12.1993 and by inheritance from their father Asad Ali. Both the courts below utterly failed to discuss the evidences on record and written both the judgments in violation of provisions of law in a very slip shod manner dismissing the suit as well as disallowing the appeal, as such, committed illegality and error of law in the decision occasioning failure of justice.

In view of the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioner calling for interference by this Court.

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

The impugned judgment and decree passed by both the courts below are hereby *set aside*. The suit is decreed in part. It is

hereby declared that the plaintiffs have title in the suit property measuring  $13\frac{1}{2}$  sataks in ejmali possession with other co-sharers including the defendant Nos. 36 and 76.

Since Title Suit No. 78 of 2007 is pending before the court for partition of the suit property the plaintiffs as well as the defendant Nos. 36 and 76 will get their saham in the said suit at the time of disposal of the same. Hence, the trial court is hereby directed to dispose of Title Suit No. 78 of 2007 within shortest possible time preferably within 06(six) months from the date of receipt of this judgment and order.

The order of *status-quo* granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.