

Present:

Mr. Justice Md. Kamrul Hossain Mollah

Civil Revision No.3116 of 1998

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Metu Mia and others

.... Plaintiff-Respondent-Petitioners

-Versus –

Jaheda Khatoon and others

... Defendant-Appellant-Opposite Parties

Mr. Mohammad Ayub Ali, Advocate

....For the petitioners

Mr. Rezina Mahmud, Advocate

...For the Opposite Parties

**Heard on 10.08.2023, 21.08.2023 and
28.08.2023 and Judgment on 30.08.2023**

Md. Kamrul Hossain Mollah, J:

On an application filed by the petitioner, under section 115(1) of the Code of Civil Procedure, this Rule was issued calling upon the defendant-opposite parties No.1-9 to show cause as to why the judgment and decree dated 21.04.1998 and 28.04.1998 passed by the learned Subordinate Judge Artha Rin, Cumilla passed in Title Appeal No.12 of 1990 reversing the judgment and decree dated 30.03.1989 and 03.07.1989 respectively passed by the learned Sadar Assistant judge, Cumilla in Title Suit No.208 of 1987

should not be set-aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, are that Zinnaternessa was the owner of the property of 1st schedule land, which was recorded in her name in the khatian No.114 of Chakla Roushanabad operation (C.R.) and she died leaving behind only one son Monohar Ali who being owner and possessor of the said land. Thereafter, he transferred entire property of the plots No.2043, 2044, 2045 of the said jama to Janab Ali by executing a registered deed dated 12.09.1903 A.D. corresponding 15th Aushin of 1310 B.S. and accordingly the possession was delivered, but due to before purchase of the said land prior permission of the land lord was not obtained and the land lord on 12th Aushin of 1316 B.S. noticed the purchaser Janab Ali as well as Monohar Ali to surrender the possession of the land in favour of land lord and in that circumstances Janab Ali considering the fact again took settlement of the land of scheduled along with other lands from the landlord by a registered lease deed on 8th Falgoon, 1321 B.S. with consent of the Monohar Ali and thus the Janab Ali became the owner and possessor of the land of 1st schedule land and Janab Ali possessed the plot No.2045 of homestead, plot No.2043 as contiguous land of homestead by filing up it at the level of homestead and by digging a 'Kua' (small pond) on plot No.2044. Janab Ali being the owner and possessor of the land of 1st schedule land and died leaving behind on wife Karimunnasha, two sons plaintiff No.1 and Ali Hossain and two daughters plaintiff No.3 and 4. At this stage, the landlord again demanded kabuliat for the property of the 1st schedule land from the above mentioned heirs of

the Janab Ali and then, for those heirs of the Janab Ali, plaintiff No.1 and his brother Ali Hossain on 31.07.1936 A.D. executed a kabuliyat which was registered on 12.09.1936 A.D. and thus a new khatian was created for the 1st schedule land. Thereafter, Karimunnasha died leaving behind 2 sons plaintiff No.1 and Ali Hossain and two daughters plaintiff No.3 and 4 who inherited as per their share of the 1st schedule land of the plaint. Then, Ali Hossain sold 8 decimals of land from plot No.2044 and 2045 to Shfique Mia and handover the possession thereof and plaintiff No.1 sold 8 decimals of land from plot No.2045 to Matu Mia and hand over the possession of the said land and the plaintiff No.1 sold $4\frac{1}{2}$ decimals of the land from the south east corner of plot No.2043 to Golam Nabi by a registered kabala of 1352 B.S. Thereafter, Ali Hossain died leaving one daughter (from the womb of the 1st wife) plaintiff No.2, 2nd wife defendant No.9 and a son Rupa Mia (from the womb of 2nd wife) and Rupa Mia died leaving behind her mother defendant No.9 consanguine sister plaintiff No.2, uncle plaintiff No.1 as heirs. Before 23/24 years (the plaint was filed on 26 April, 1969) defendant No.9 married for the 2nd time and at that time defendant No.9 sold another bhiti of chalk bazaar with other co-sharer and in lieu of money of that consideration she left her share of land of 1st schedule of plaint in favour of plaintiff No.1 and thus plaintiff No.1 got the share of defendant No.9 in the schedule No.1 of the plaint and possessing the land more than 12 years. Matu Mia, his purchased 8 decimal of land from plot No.2045 from plaintiff No.1, sold to Sultan Mia by a registered deed dated 29.05.1058 A.D. Thereafter, Sultan Mia sold by a registered deed to defendant No.10

and plaintiff No.3, but by mistake in that deed plot No.2043 was written instead of plot No.2045. Golam Nabi his purchased 4 decimals land of plot No.2043 from plaintiff No.1 sold to Hossain box by a registered deed which Hossain Box sold to Sher Ali by a registered deed and then Sher Ali sold it to defendant No.8 Rabia Khatoon and at present defendant No.8 being owner possessing that land. Shafique Mia, his purchased land of 8 decimals from plot No.2044 and 2045 transferred to plaintiff No.1,3 and 4 and now they are possessing the same as owner and plaintiff No.1 transferred 2 decimals of land (one ganda) from plot No.2043 and 2045 to one Fatema Khatoon.

The plaintiffs stated in their plaint that thus, as described above, remaining properties of plot No.2044 and 2045 and except 30 hand long and 27 hand broad of land from south-east corner of plot No.2043 of 1st schedule being owner the plaintiff had been possessing for more then 12 years, but 1st party defendants (as per plaint defendants No.1-4) in collusion with took attempt to forcibly dispossessing the plaintiff from the property of plot No.2043 by constructing houses there on then the plaintiff No.1 lodged a case under section 144 of the Code of Criminal Procedure in the Court of Sub-Divisional Officer (South) Cumilla bearing the No.372 of 1963 and an injunction was obtained, but the 1st party defendant in collusively for disputed property of 2nd schedule out of the property of 1st schedule of plaint created some fraudulent, illegal, fictitious deed and constructed some houses on the disputed land of the 2nd schedule and let out those to defendants No.5-7 and thus the defendants are possessing the disputed land of 2nd schedule, but after the transfer by Monohar Ali of the

entire property of 1st schedule in the year 1310 B.S. to Janab Ali, the predecessor of plaintiffs there after no title or possession of Monohar Ali or his successors, whatsoever was in that land and for this reason subsequent transfer made by Idris Ali, the son of Monohar Ali to the said defendants by said deed does not create any title of the said defendants in the land of 1st schedule of its portion, in the disputed land of 2nd schedule and the said defendants after creating the said type of documents on 21.01.1963 in collusion with violating the above mentioned injunction order forcibly dispossessed the plaintiffs from the disputed land of 2nd schedule and constructed 3 houses there on and plaintiffs No.1/2 earlier filed a title suit in the Court of 3rd Munsif, Cumilla bearing the Number T.S. 121 of 1965, but due to its formal defect plaintiffs withdrawn that suit with a permission of the Court to file a fresh one and the plaintiffs again filed this suit. Hence, the plaintiffs case.

The defendants No.1, 10 and 11 contested the suit by filing two separate written statements, but the defendant No.10 and 11 did not contest the suit. The facts of the defendant No.1, who was contested the suit and denying the all material facts of the plaintiff and contending inter-alia that the land in C.R. khatian no.114 was correctly recorded in the name of Zinnaternessa who died leaving behind only son Monohor Ali and his properties developed upon his vendor Janab Ali, younger brother of Kazim Ali father of Monohar Ali. Janab Ali taking the advantage of helpless condition of Monohar Ali created a saf kabala deed dated 5th Aswin, 1310 B.S. using the name of Monohar Ali, but at the relevant time Monohar Ali was 12/13 years old and he did not executed such deed. The homestead of

Janab Ali was by the side of Zinnaternessa and after the death of Zinnaternessa, Janab Ali came to the homestead of Monohar Ali and taking the advantage of relationship executed the said saf kabala deed beyond the knowledge of Monohar Ali and by that deed Monohar Ali did not sell any land of 1st schedule. At the instance of Janab Ali, Monohar Ali got marriage and used to live with his wife in the homestead of 1st schedule, thereafter, the said Janab Ali in collusion with the employers of Moharaja created a lease deed beyond the knowledge of Monohar Ali and such lease deed is null and void, collusive and by this deed no title has been accrued to Janab Ali. But Monohar Ali was in possession of the 1st schedule land by asserting his own right, title and interest and died leaving behind son Idris Mia. Janab Ali died leaving behind two sons plaintiffs No.1 and Ali Hossain and two daughters plaintiffs No.3 and 4. Idris was minor when Monohar Ali died and taking this advantage sons of Janab Ali tortured Idris Mia and plaintiff No.1 and Ali Hossain to grab the 1st schedule land by created a kabuliyat in the year 1936 A.D. which is illegal, void and by the said kabuliyat no title has been accrued to plaintiffs.

Thus, Idris Mia being in possession of 1st schedule land entered into a contract to sell the 6 gandas of plot No.2043 along with other properties in the year 1952 to the contesting defendant No.1 and delivered possession of the same. It was further mentioned in the written statement that the plaintiffs were in possession of some lands in plot No.2045 since the time of Monohar Ali without having any right, title and interest and rest of plot No.2045 is in possession of defendants. Idris Mia delivering the possession of suit land along with other lands 16/17 years ago and left for the village

Nur Pur. Since, the defendant No.1 has been possessing the suit land along with other lands and accordingly S.A. khatian has been recorded in his name. Idris Mia after the contract of sell, delivered possession over the suit land and other also 16/17 years ago but could not pay the consideration money at that time, afterwards on 18.02.1960 A.D. corresponding to 5th Falgoun 1366 B.S. according to the previous contract Idris Mia executed and registered a saf kabala deed in favour of defendant No.1. In the said kabala plot No.2045 has been wrongly inserted in place of plot No.2043, but in fact the defendant has been possessing the lands in plot No.2043 for 17 years by asserting their right title and interest and the boundary of the lands in kabala and area has been correctly recorded therein.

The plaintiff and their predecessors tried to grab the 1st schedule land by creating kabalas one after another in favour of their relatives but failed. Thereafter, the plaintiffs by their relative defendant No.10 filed a criminal case under section 379 of the Code of Criminal Procedure in the Court of S.D.O. (S) being No.2696/1961 against the defendant No.1 in which the defendant No.1 was acquitted. Thereafter, the plaintiff No.1 again filed a criminal case in the 1963 under section 144 alleging falsely that the defendant No.1 has illegally encroaching the suit land erected house over the suit land and managed an order of injunction beyond the knowledge of defendant No.1 and thereafter, the plaintiff No.1 filed another case under section 188 of the Code of Criminal Procedure alleging that the defendant No.1 violated the injunction order but as the defendant No.1 was in possession of the land, he was acquitted. Thereafter, the plaintiffs filed a suit being No.121/1965 alleging that they got the suit land and other lands

by lease from Moharaja. The defendant No.1 denying the said lease by filing a written statement then plaintiffs withdraw the suit and filed this suit. The defendant No.1 has been possessing the suit land along with other lands for 16/17 years, the plaintiffs never possessed the suit land and defendants never dispossessed the plaintiffs. So, the plaintiff suit is liable to be dismissed with cost.

After hearing the learned sadar Assistant Judge, Cumilla by his judgment and decree dated 30.03.1989 and 03.07.1989 decreed the Title Suit No.208 of 1987 against the defendant No.1(Ka)-1(Ga) and established the plaintiffs right, title over the suit land and directed to vacate the suit land within 65 days from the pronouncement of the judgment and decree.

Being aggrieved by and dissatisfied with the judgment and decree dated 30.03.1989 and 03.07.1989 passed by the learned Assistant Judge, Cumilla in Title Suit No.208 of 1987 filed Title Appeal No.12 of 1990 before the learned District Judge, Cumilla. Thereafter, after hearing, the learned Subordinate Judge, Artha Rin Adalot, Cumilla by his judgment and decree dated 21.04.1998 and 28.04.1998 allowed the appeal and set-aside the judgment and decree dated 30.03.1989 and 03.07.1989 passed by the learned Sadar Assistant Judge, Cumilla in Title Suit No.208 of 1987.

Being aggrieved by and dissatisfied with the judgment and decree dated 21.04.1998 and 28.04.1998 passed by the learned Subordinate Judge, Artha Rin, Cumilla in Title Appeal No.12 of 1990, the petitioners filed this revisional application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

Mr. Goni Md. Mohsin, the learned Advocate with Mr. Mohammad Ayab Ali, the learned Advocate for the petitioners submits that in pursuance of the judgment and decree of the appellate court failed to consider the evidence of P.Ws even the defendant failed to prove their case by non produced the documents, the trial Court clearly found the whole exhibits and found that the defendant was dispossessed the plaintiff from the suit land, but the appellate court wrongly discussed without applying his judicial mind to the above facts and circumstances and accordingly, he reversed the judgment of the trial court and as such the judgment and decree of the appellate court is liable to be set-aside.

He further submits that the trial court clearly found and also discussed in his judgment that the plaintiff was in possession of the 1st schedule land as well as 2nd schedule land by valid documents which is marked as exhibit-3 and 4 and the defendant could not prove and nor produce any papers to disprove the said exhibit No.3 and 4. Even could not prove that Idris Mia was in possession of the suit land, but the appellate court failed to discussed in his judgment that the defendants dispossessed the plaintiffs and to defect the plaintiffs right, title create any kabala and which is not produce before the Court, so there is a settle principle of law that there is invalid transfer in favour of a person holds possession of the property transferred as transferee his possession in his own right and adverse to the transferee. The trial court also discussed that if any person continuous in possession of the immovable property for more than 12 years he will acquire an indefensible title, but the appellate court could not believed the said facts.

The learned Advocate lastly submits that the judgment and decree of the appellate court was found that the Jonab Ali taking advantage of minority of Monohor Ali and using his forcible position Jonab Ali created a bogus kabla deed (exhibit-3), but in favour of the above facts the defendants failed to produced any oral or documentary evidence in this regards, even though the learned Subordinate Judge, Cumilla wrongly pronounced the judgment and decree and set-aside the judgment of the trial Court. Accordingly, he prays for making the Rule absolute.

On the other hand, Mr. Rezina Mahmud, the learned Advocate appearing for the opposite parties submits that the land in C.R. khatian no.114 was correctly recorded in the name of Zinnaternessa who died leaving behind only son Monohor Ali and his properties developed upon his vendor Janab Ali, younger brother of Kazim Ali father of Monohar Ali. Janab Ali taking the advantage of helpless condition of Monohar Ali created a saf kabala deed dated 5th Aswin, 1310 B.S. using the name of Monohar Ali, but at the relevant time Monohar Ali was 12/13 years old and he did not executed such kabala. The homestead of Janab Ali was placed by the side of Zinnaternessa and after the death of Zinnaternessa, Janab Ali came to the homestead of Monohar Ali and taking the advantage of relationship executed the said saf kabala deed beyond the knowledge of Monohar Ali and by that deed Monohar Ali did not sell any land of 1st schedule. At the instance of Janab Ali, Monohar Ali got marriage and used to live with his wife in the homestead of 1st schedule, thereafter, the said Janab Ali in collusion with the employers of Moharaja created a lease deed beyond the knowledge of Monohar Ali and such lease deed is null and

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Thus, Idris Mia being in possession of 1st schedule land entered into a contract to sell the 6 gandas of plot No.2043 along with other properties in the year 1952 and delivered the possession of the same. It was further mentioned in the written statement that the plaintiffs were in possession of some lands in plot No.2045, since the time of Monohar Ali without having any right, title and interest and rest of plot No.2045 is in possession of defendants. Idris Mia delivering the possession of suit land along with other lands 16/17 years ago and left for the village Nur Pur. Since, the defendant No.1 has been possessing the suit land along with other lands and accordingly S.A. khatian has been recorded in his name. Idris Mia after the contract of sell, delivered the possession over the suit land and other also 16/17 years ago but could not pay the consideration money at that time, afterwards on 18.02.1960 A.D. corresponding to 5th Falgoon 1366 B.S. according to the previous contract Idris Mia executed and registered a saf kabala deed in favour of defendant No.1. In the said kabala plot No.2045 has been wrongly inserted in place of plot No.2043, but in fact the

defendant has been possessing the lands in plot No.2043 for 17 years by asserting their right title and interest and the boundary of the lands in kabala and area has been correctly recorded therein. The plaintiff and their predecessors tried to grab the 1st schedule land by creating kabalas after another in favour of their relatives but failed. Thereafter, the plaintiffs by their relative defendant No.10 filed a criminal case under section 379 of the Code of Criminal Procedure in the Court of S.D.O. (S) being No.2696 of 1961 against the defendant No.1 in which the defendant No.1 was acquitted. Thereafter, the plaintiff No.1 again filed a criminal case in the year 1963 under section 144 alleging falsely that the defendant No.1 has illegally encroaching the suit land erected house over the suit land and managed an order of injunction beyond the knowledge of defendant No.1 and thereafter, the plaintiff No.1 filed another case under section 188 of the Code of Criminal Procedure alleging that the defendant No.1 violated the injunction order but as the defendant No.1 was in possession of the land, he was acquitted. Thereafter, the plaintiffs filed a suit No.121/1965 alleging that they got the suit land and other lands by lease from Moharaja. The defendant No.1 denying the said lease filed a written statement then plaintiffs withdraw the suit and filed this suit. The defendant No.1 has been possessing the suit land along with other lands for 16/17 years the plaintiffs never possessed the suit land and defendants never dispossessed the plaintiffs. So, the plaintiffs-petitioners' suit is liable to be set-aside. Therefore, he prays for discharging the Rule.

I have perused the revisional application, the impugned judgment and decree of the Courts' below, the submissions of the learned Advocate

for the petitioners and the submissions of the learned Advocate for the opposite parties, the papers and documents as available on the record.

It appears from the record that, it is admitted case of both the parties that including the suit land of 2nd schedule the total property of the 1st schedule of the plaint was in the chakla Roushanabad khatian No.114 which was belong to C.S. recorded owner Zinnaternessa who died leaving behind one son Monohar Ali.

In the plaint case, it is claimed that Monohar Ali transferred the whole property of the disputed C.R. jama including the suit property of 2nd schedule to the predecessor of respondent-plaintiff Janab Ali by a registered kabala deed dated 12.09.1903 A.D. which is marked as exhibit-3.

On the other hand, the defendant-opposite parties case from the written statement is that at the time of death of Zinnaternessa i.e.at the time of inheritance of the schedule property by Monohar Ali through his mother, Monohar Ali was a minor and the property and person of minor Monohar Ali was under the guardianship and custody of his uncle Janab Ali i.e. the predecessor of plaintiffs-petitioners and taking that advantage Janab Ali created the kabala dated 12.09.1903 A.D. which is marked as exhibit-3.

It appears from the case of opposite parties that Monohar Ali died leaving behind one son Idris Mia and regarding this contention there is no dispute between the parties.

Further, it appears from the plaint of the petitioners that after transfer of the properties of disputed jama including disputed property by above discussed exhibit-3 Monohar Ali or his heir Idris Mia has got no possession

in the suit land but 1st party defendant-opposite parties No.1-4 in collusion with Idris Mia son of Monohar Ali for the disputed property of the 2nd schedule of plaint created some fraudulent, illegal and fictitious kabala and constructed some houses there on which are let out to defendants No.5-7 by dispossessing the plaintiff from the disputed land, but plaintiff No.1(a) deposed as P.W.1 and stated in his cross examination that he saw Idris Ali, the son of Monohar Ali who forcibly constructed houses on the disputed land and this statement disproves the above mentioned plaint case and proves that the son of Monohar Ali i.e. Idris Ali remain in the possession through his predecessor Monohar Ali to the disputed property through whom present defendants got the possession in the disputed property and admittedly the defendants at present are in possession of disputed land. The plaintiffs are dispossessed from the suit land by defendant-opposite parties on 21.01.1963 A.D., at the same time they were dispossessed from the disputed land on 21.03.1967 A.D. (as per plaint of the plaintiffs) and thus the plaint case regarding the date of their dispossession from the suit land itself contradictory. Moreover, P.W.1 in his examination in chief stated that they were dispossessed from the suit land in the year 1369 B.S. but P.W.1 contradicted that statement in his cross-examination that, they were dispossessed from the suit land in the year 1363 B.S. In plaint case it is claimed that defendants No.1-4 dispossessed the plaintiffs forcibly from the suit land of 2nd schedule and constructed 3 houses thereon, which are let out to defendants No.57, but P.W.1 in his deposition contradictingly claimed that in the disputed property there are 6 houses, which are constructed by the defendants.

It is established principle of law that in a case of possession followed by dispossession, the onus is on the plaintiff to proof that he was in possession within 12 years from the date of filing of the suit and if he fails to do so he cannot get a decree for declaration of title and recovery of possession. From above discussion it is clearly proved that the plaintiff-petitioners failed to make out or prove any definite case regarding the date of their claimed dispossession from the suit land. Moreover, it is proved that the admitted possession of the defendant-opposite parties in the suit land is continued one from the chronological predecessor of recorded owner of Chakla Roushanabad operation.

Considering the above facts and circumstances, I find that the Subordinate Judge, Artha Rin, Cumilla rightly passed the judgment and decree dated 21.04.1998 in Title Appeal No.12 of 1990 allowing the appeal and thereby reserving the judgment and decree dated 30.03.1989 and 03.07.1989 passed by the learned Sadar Assistant Judge, Cumilla in Title Suit No.208 of 1987 is maintainable in the eye of law and I do not find any substance to interference into the said judgment and order and I find substance in the submission of the learned Advocate for the opposite parties.

Accordingly, I do not find any merit in the Rule.

In the Result, the Rule is discharged.

The judgment and decree dated 21.04.1998 and 28.04.1998 passed by the learned Subordinate Judge, Artha Rin, Cumilla in Title Appeal No.12 of 1990 allowing the appeal is hereby upheld and confirmed.

Send down the L.C.R. with a copy of this judgment and order to the concerned Court below at once.

Md. Anamul Hoque Parvej
Bench Officer