

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

First Appeal No. 420 of 2015

In the matter of:

Mahbubur Rahman and others

... Appellants

-Versus-

Md, Abdul Haris and others

... Respondents

Mr. Kamal-Ul-Alam, senior Advocate with
Mr. M.A. Halim Chowdhury, Advocate with
Ms. Shahanaj Akther, Advocate

...For the appellants

Mr. Md. Mubarak Hossain, Advocate with
Mr. Rajib Kanthy Aich, Advocate

....For the respondent no 1

**Heard on 22.08.2024 21.11.2024 27.11.2024
28.11.24 and Judgment on 28.11.2024**

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of the defendant nos. 2-4 in Title Suit No. 175 of 2007, this appeal is directed against the judgment and decree dated 25.10.2015 passed by the learned Joint District Judge, 2nd court, (in charge), Sylhet decreeing the suit on contest against the defendant nos. 2-4 and defendant no. 18 and ex parte against the rest.

The salient facts in preferring the instant appeal are :

The present respondent no. 1, Md. Abdul Haris as plaintiff filed the aforesaid title suit for declaration of title and recovery of khas possession against the defendant nos. 1-9 in respect of the suit land measuring an area

of 12 decimals of land which has been described in the scheduled to the plaintiff.

The case of the plaintiff in short is that:

Four brothers namely Shatish Chandra Chakrabarty, Shrish Chandra Chakrabarty, Roshomoy Chakraborty and Romony Mohom Chakrbarty had been enjoying title and possession over the suit land measuring an area of 12 decimals in four *ana* share each. Subsequently, out of these four brothers, apart from Romony Mohan Chakrabarty all other three brothers (on the death of Shires Chandra Chakraborty his two sons in his place) transferred their respective portion of land to one, Monai Miah. Thereafter, Monai Miah vide registered sale deed dated 11.09.1973 sold out the said portion of land in favour of one, Khalilur Rahman, Asrak Ahmed, Abdur Razzaque and Abdul Latif. Then out of the 4 purchasers three purchaser in their turn vide registered sale deed dated 25.07.1979 transferred 9 decimals of land to one, Abdus Salam while another purchaser, Abdul Latif transferred 3 decimals of land also to Abdus Salam vide registered sale dated 10.09.1979 and thereby Abdus Salam got 12 decimals of land in suit plot no. 1857. It has further been stated that after the demise of Abdus Salam, his wife Hamida Khatun and her 2 children vide registered sale deed dated 20.02.1993 transferred that 12 decimals of land in favour of the plaintiff and on the date of said transfer, the plaintiff by demarcating the suit land started erecting homestead in some portion of the purchased land and repair the rest and also planted different kind of trees by accumulating earth on the suit land as well as erected a tin-shed house in the south-eastern part thereof. In the

western part of the suit land, he also erected partial work of house and let out the same to one Delowar Hossain Chowdnury as tenant at monthly rent of taka 2,000/- who then used to live in the house. It has also been stated that out of the heirs of Abdus Salam, since two children were minor at the time of transferring the suit land to the plaintiff dated 20.02.1993, then those children on 03.07.1996 (exhibit 5) then registered a no-objection deed (নাদাবী পত্র) on 03.07.1996 (exhibit-5) in faovur of the plaintiff. Since the plaintiff used to live in London so he went back to London soon after erecting the house by inducting the tenant on the suit land. Subsequently, in the middle part of the year 1996, when the plaintiff returned to the country, her mother disclosed that the tenant did not pay rent to her since September, 1995 when the plaintiff looked after the tenant, Delowar Hossain Chowdhury and came to learn that the father of the defendant no. 1, Sona Mia drived out the said tenant from the suit land by exerting death threat and after finding Sona Mia when he claimed arrear rent, he then on 20.06.1993 threw out some document towards him (plaintiff) and denied title of the plaintiff in the suit land and hurled abusive words and also gave death threat to him compelling the plaintiff to file a GR case no. 790 of 1996. But as the plaintiff had to leave the country shortly thereafter the said criminal case was ultimately dismissed for default. It has lastly been stated that, since the defendants denied title and possession of the plaintiff in the suit property of the plaintiff on 20.06.1996, he filed the suit seeking reliefs as aforesaid .

On the contrary, the present appellants who are the defendant nos. 2-4 entered appearance in the suit and in order to contest the same filed a

joint written statement denying all the material averment so made in the plaint contending *inter alia* that, out of 25 decimals of land comprising plot no. 1857 12 decimals of land belonged to one Jogandra Mohan, who had been enjoying title and possession and the same was recorded in SA khatian no. 119 in his name and rest 13 decimals of land out of the same suit plot was prepared in SA khatian no. 286 in the name of Shatis Chandra Chakrabarty and others. While Jogindra Mohan had been enjoying title and possession over 12 decimals of land died leaving behind son, Joshoda Mohon Dhor and that very Joshoda Mohon Dhor by executing power of attorney dated 06.11.1995 authorized one Md. Ajir Uddin to look after the suit property along with other properties. By virtue of that power of attorney, Ajir Uddin then vide registered sale deed dated 04.07.1996 transferred 12 decimals of land out of plot no. 1857 and 51 decimals of land out of plot no. 1850 in total 63 decimals to one, Abdul Hannan and Sona Mia and accordingly those recipients got possession from the western side of plot no. 1857 and one, Fonilal Chakraborty and others used to enjoy title and possession from eastern part who in the year 1973 transferred the same in favour of one, Monai Miah. Subsequently, Monai Miah upon acquiring the said property sold out 9 decimals of land out of S.A plot no. 1857 to Rokonuddin Ahmed Chowdhury. Thereafter while one, Abdul Hannan and Sona Miah had been enjoying title and possession over 12 decimals of land of plot no. 1857 and 51 decimals of land of plot no. 1850 totaling 63 decimals, Sona Mia got 12 decimals of land out of plot no. 1857 and 19.50 decimals of land out of plot no. 1850 totaling 31.50 decimals amicably. Sona Miah then erected two semi-paca

house by taking electric connection therein. Subsequently, Sona Mia transferred 19.50 decimals of land in favour of one, Azadur Rahman and others. It has further been stated that, the lands of the plaintiff measuring 13 decimals of land is located in the eastern side of suit plot no. 1857 and since the predecessors of the plaintiff had earlier only transferred 9 decimals of land out of plot no. 1857 to Rokonuddin Ahmed Chowdhury and another and that very Rokonuddin Ahmed Chowdhury and another have still been enjoying title and possession over that 9 decimals of land and the suit is thus liable to be dismissed.

Though in the suit, the defendant no. 18 filed written statement but admitted the case of the plaintiff. However, in order to prove the case, the plaintiff examined as many as 3 witnesses while the defendant nos. 2-4 examined 4 witnesses. Apart from that the plaintiff exhibit several documents which were marked as exhibit nos. 1-6 to 11 series while the documents produced by the defendant nos. 2-4 were marked as exhibit 'ka' to 'cha'. The learned judge of the trial court after considering the evidence and materials on record, decreed the suit as has been stated herein above. It is at that stage, the defendant nos. 2-4 as appellants preferred this appeal.

Mr. Kamal-Ul-Alam, the learned senior counsel appearing for the appellants at the very outset submits that, the learned judge of the trial court erred in law in not taking into consideration that the plaintiff has utterly failed to prove title and possession in the suit property yet he decreed the suit which cannot be sustained in law.

To fortify the said assertion, the learned counsel then submits that, it is the definite case of the plaintiff that by successive transfers the plaintiff got 12 decimals of land but the trial court failed to appreciate the fact that, out of 4 SA recorded tenants, Romoni Mohom Chakrabarty did not transfer his portion of land, so there had been no scope for the plaintiff to acquire 12 decimals of land and therefore no title has been passed to the plaintiff in respect of 12 decimals of suit land.

The learned counsel further contends that, though the predecessor of the plaintiff, Abdus Salam transferred 9 decimals of land out of suit plot no. 1857 in favour of one Md. Rokonuddin Ahmed Chowdnury and another by sale deed dated 28.09.1985 which was also marked as exhibit 'Cha' (☞) so the successor of Abdus Salam that is, the vendors of the plaintiff had no sellable right to transfer 12 decimals of land to the plaintiff and in spite of asserting that very fact in the written statement by the defendants and substantiated by the respective sale deed, the learned judge of the trial court did not take into account of that very vital fact and thus the trial court erred in law in decreeing the suit.

The learned counsel by taking us through three different schedules preceding to purchase the suit land by the plaintiff from the heirs of Abdus Salam also contends that, from the schedule of the sale deed dated 19.08.1973 which was marked an **exhibit 1** (Page No. 173 of the paper book) it is clear that, there has been no specification in that schedule of plot no. 1857 other than of northern side having no scope to find the plaintiff to got possession from western part of plot no. 1857.

The learned counsel by referring to the subsequent sale deed dated 11.09.1973 marked **exhibit 1ka** also submits that, in that schedule of the deed there has been also no specification from which side of plot no. 1857 the recipient of the deed got 12 decimals of land. Likewise, the learned counsel by taking us to another schedule of sale deed dated 25.07.1979 (**exhibit 1kha**) through which the predecessor of the plaintiff Abdus Salam got 9 decimals of suit land from one Hazi Khalilur Rahman and another, there is also no specification in its schedule (page 184 of the paper book) and then submits that, in absence of any specification in the schedules of the successive three deeds, through which the predecessor of the plaintiff, Abdus Salam claimed to have acquire 12 decimals of land, the schedule given in the sale deed dated 20.02.1993 (**exhibit 4**) through which the heirs of Abdus Salam sold out the suit land to plaintiff cannot simply stand and by virtue of that, plaintiff also cannot claim to get possession from the western side of suit plot no. 1857. Apart from that, the learned senior counsel further submits that, there appears clear distinction between the schedule of the suit land described in the plaint and that of the schedule described in the sale deed dated 20.02.1993 marked as **exhibit 4** (63 of the paper book) and concludes that, the observation and reasoning so have been given by the learned judge of the trial court finding the plaintiff to possess from the western side of suit plot no. 1857 clearly without any material basis.

The learned counsel goes on to contend that, apart from exhibit 2 and 4 the plaintiff produced the certified copy of the deeds which were also marked as exhibits 1, 1ka 1 kha giving no explanation why he could

not produce the original copy of those deeds as the certified copy of a document is considered to be a secondary evidence and in that case the learned judge should have come to a conclusion that by those documents no title has been passed in favour of the plaintiff. The learned senior counsel by drawing our attention to the sale deed dated 20.02.1993 (marked as exhibit 4) through which the plaintiff claimed to have acquired title in the suit land also contends that, since all the heirs of Abdus Salam admittedly had not transferred the suit property to the plaintiff so he is not entitled to claim title and possession over entire 12 decimals of suit land. To supplement the said submission the learned counsel further submits that, even if two heirs of Abdus Salam namely, Md. Zakir Ahmed and Nargis Begum subsequently registered a *nadabi potro* on 30.07.1996 (**exhibit -5**) but no title can be passed by virtue of alleged Nadabi potro (নাদাবি পত্র) and by that the earlier sale deed dated 20.02.1993 can not get validation in acquiring title by the plaintiff over the suit land. However, in support of his such submission the learned counsel placed his reliance in the decisions of the Appellate Division reported in 14 BLC (AD) 132, 4XP (AD) 1 and 47 DLR (AD). Insofar as regards to the evidentiary value of secondary evidence in relation to annexure 1, 1 ka 1kha which are all the certified copies of the relevant documents, the learned counsel then placed his reliance in the decision reported in 20 BLC (AD) 257 and submits that in absence of any explanation with that regard to the whereabouts of original copy of those documents their certified copies cannot be taken into evidence. In reference to the observation arrived at by the trial court where he found that the plaintiff has been in possession

from the western part of the suit plot no. 1857, the learned counsel submits that, the purported assertion is totally counter to the schedule of previous four different sale deeds through which the predecessor of the plaintiff and the plaintiffs got the suit land and therefore the alleged assertion of the trial court bears no basis nor it is based on evidence on record.

The learned counsel with regard to possession and dispossession of the plaintiff from the suit land also contends that, though the plaintiff asserted in paragraph no. 7 to the plaint that after purchasing the suit property from the heirs of Abdus Salam dated 20.02.1993 erected homestead and planted different types of trees in the suit property and inducted one, Md. Delowar Hossain (PW 3) as a tenant but that very tenant who also stood as scribed in the sale deed of the plaintiff in his cross-examination asserted that, the house he took rent had not been erected by the plaintiff rather it was erected earlier which clearly falsify the assertion of the plaintiff in regard to erect house on the suit land vis-à-vis holding possession. In regard to dispossession, the learned counsel by taking us to paragraph no. 10 to the plaint also contends that, though in the said paragraph the plaintiff claimed to have dispossessed on 20.06.1996 by the father of the defendant no. 1, Shona Mia on denying his title but there has been no actual case of dispossessing in the plaint by the predecessor of the defendants, Sona Mia in this particular paragraph. The learned counsel then contends that, since a suit has also been filed for recovery of khas possession, the plaintiff must prove holding of possession before dispossession and the case of dispossession by

sufficient evidence but with the above aspect of the case the plaintiff has utterly failed to prove so yet the learned judge decreed the suit and thereby erred in law. The learned counsel then by referring to the provision of Order 7 Rule 3 of the Code of Civil Procedure contends that, it is the mandatory provision provided therein that in order to get a decree where the subject matter of the suit is immovable property it must be identified by drawing boundary which clearly lacks in the schedule to the plaint even though the schedule described in the plaint does not conform with the schedules of four sale deed through which the predecessor of the plaintiff acquired title in the suit land. With those submissions, the learned senior counsel finally prays for allowing the appeal by setting aside the impugned judgment and decree.

On the contrary, Mr. Md. Md. Mubarak Hossain, the learned counsel appearing for the plaintiff-respondent no. 1 very robustly opposes the contention so taken by the learned senior counsel for the appellant and submits that, since 12 decimals of suit land of plot no. 1857 prepared in SA khatian No. 286/287 is a compact land so there has been no necessity to give any specification thereof and the learned judge of the trial court has rightly decreed the suit.

The learned counsel next contends that, since the predecessor of the defendants Sona Miah stood as attesting witness in the sale deed registered in favour of the plaintiff, so there has been no scope to disbelieve the registration and execution of the same as well as acquiring title through that very deed by the plaintiff in the suit property, and

therefore the learned judge has perfectly decreed the suit which calls for no interference by this Hon'ble court.

With regard to the submission made by the learned counsel for the defendants-appellants about dispossession from the suit land, the learned counsel also submits that, since in paragraph 10 to the plaint, it has also been asserted that, the plaintiff also made some repair work after purchasing the suit property which construe that, before purchasing the suit land there had been establishment and for that reason the PW-3 has asserted in his cross examination that, earlier there had been house in the suit land so such testimony rather corroborated the assertion made in the plaint and therefore holding of possession by the plaintiff and dispossession therefrom has clearly been substantiated having no deviation in the evidence of PW-3. In addition to that, the learned counsel also contends that, since the predecessor of the defendants, Sona Miah had admittedly been appointed as a caretaker for the plaintiff, and he was assigned to look after the suit property and at his instance the tenant was inducted so it is rather admitted that Sona Miah had been in possession in the suit property having no reason to formally disposes the plaintiff by that Sona Miah from the suit land on 20.06.1996 rather mere denying title of the plaintiff in the suit property is enough to prove dispossession of the plaintiff basing on which incident the plaintiff had been compelled to file a criminal case. In regard to holding possession in the western part of the suit plot the learned counsel then contends that, the assertion to that aspect made by the learned judge of the trial court proved that, since Sona Miah purchased 12 decimals of land from the eastern side of plot no. 1857 and

51 decimals of land from non-suited plot no. 1850 thus proved that the plaintiff has been in possession of 12 decimals of land from the western side of suit plot no. 1857. With those submissions, the learned counsel finally prays for dismissing the appeal.

Be that as it may, we have considered the submission of the learned senior counsel for the appellants and that of the respondent. We have also gone through the documents so appeared in the paper book and the decisions cited by the learned senior counsel in support of the case of the defendants- appellants. First of all, on going through the prayers made in the plaint, we find that the suit was filed for declaration of title and of recovery of khas possession so for obvious reason it is incumbent upon the plaintiff to prove acquiring title vis-à-vis holding possession and dispossession from the suit land by convincing evidence. On going through the documents produced and marked exhibits by the plaintiff-respondent we find that the predecessor of the plaintiff, Abdus Salam claimed to have acquired 12 decimals of land but materials on record reveals that all the SA recorded tenant had not transferred that 12 decimals of land in favour of the predecessor of Abdus Salam as from the plaint, we find that out of 4 recorded tenant Romoni Mohan Chakrabarty did not transfer his share of land though he got 3 decimals out of 12 decimals of land. But that very point has not been taken into consideration by the learned judge of the trial court. Anyway, though the predecessor of the plaintiff, Abdus Salam claimed to have acquired 12 decimals of land but record shows during his life time, he transferred 9 decimals of land by registered sale deed 28.09.1985 to one Md. Rokanuddin Ahmed and his

wife which has been as annexed as of Annexure 'Cha' (ছ) and in the written statement, the defendant nos. 2-4 asserted that very facts having no sellable right of the predecessor of the plaintiff, to transfer 12 decimals of land to the plaintiff. And in view of such denial of acquiring title of the plaintiff by the defendants, onus invariably lies upon the plaintiff to disprove the claim of the said defendants through evidence asserting that, in spite of transferring 9 decimals of land from suit plot still vendors (the heirs of Abdus Salam) had 12 decimals of land in the suit plot but the plaintiff did not bother to assert it nor the trial court has discussed anything in his entire judgment. So we got ample substance to the submission of the learned senior counsel of the appellants that the vendors have no sellable right at the time of transferring the suit property to the plaintiff, even though the sale deed dated 28.09.1985 was marked as exhibit no. 'cha' (ছ) without any objection from the plaintiff. Furthermore, by virtue of the sale deed dated 20.02.1993, **exhibit-4** though some of the heirs of Abdus Salam transferred 12 decimals of land but those vendors had no sellable right even to transfer 12 decimals of land because following registering the sale deed, 2 other heirs of Abdus Salam executed and registered a 'নাদাবি পত্র' on 30.07.1986 through exhibit-5. But it is settled from the decision of our Appellate Division that, by নাদাবি পত্র no title can be passed in favour of its recipient nor it gives any validation to earlier sale deed. So on those two scores, the plaintiff acquired no title in the suit land even then the learned judge of the trial court did not bother to take into account of that material fact despite of the fact that, all the materials was put in place. But what we find from the

entire judgment, the learned judge of the trial has placed his entire reliance on the evidence put forward by the defendants. Insofar as regards to the schedule of the suit land described in the plaint and that of the registered sale deed dated 20.02.1993, and on examining the two, we clearly find no nexus with them let alone with the schedules of three sale deeds (Annexure 1 to 1kha) made in favour of the predecessor of the plaintiff. So, since in the successive four sale deeds there remains no specification specifying that the respective recipients got possession of 12 decimals of land from western side of plot no. 1857 so the plaintiff can never claim to get possession from the western part of suit plot no. 1857. However, the learned judge of the trial court while finding the plaintiff possess from the western part of the suit plot no. 1857 gave following observation :

“ অন্যাদি-ক বিবাদীপক্ষ জবা-ব দাবী ক-র-ছন যে, সোনা মিয়া ও আব্দুল হান্নান একত্রে প্রদর্শনী-গ মূ-ল ১৮৫৭ দা-গর ১২ শতক এবং ১৮৫০ দা-গর ৫১ শতক মোট ৬৩ শতক ভূমি খরিদ ক-র আ-পাষ বন্ট-ন মোঃ সোনা মিয়া ১৮৫৭ দা-গর ১২ শতক এবং ১৮৫০ দা-গর ১৯.৫০ শতক মোট ৩১.৫০ শতক ভূমি প্রাপ্ত হ-য়-ছন এবং ১৮৫০ দা-গর অবশিষ্ট ৩১.৫০ শতক ভূমি মোঃ আব্দুল হান্নান প্রাপ্ত হ-য়-ছন । প্রদর্শনী-গ পর্যালোচনায় দেখা যায়, উক্ত দুই দাগের মোট ৬৩ শতক ভূমি একটিমাত্র চৌহদ্দি উল্লেখে খরিদ করা হয়েছে । এ খে-ক বুঝা যায় যে, ১৮৫০ দা-গর লাগ পশ্চিমাংশ এবং ১৮৫৭ দা-গর পূর্বাংশ ১২ শতক ভূমি মিলি-য় মোট ৬৩ শতক ভূমি সোনা মিয়া ও আব্দুল হান্নান খরিদ ক-র-ছন । এ খে-ক প্রমানিত হয় যে, বাদীর খরিদা ১২ শতক ভূমি ১৮৫৭ দা-গর পশ্চিমাংশ-শর ভূমি ।”

That observation runs totally counter to the schedules described in earlier four sale deeds as mentioned above and therefore such observation bears no substance at all.

Now let us revert to holding possession and dispossession by the plaintiffs in the suit property which is the vital point- in-issue in regard to getting a decree for recovery of khas possession. Because, it is the settled proposition that in order to get a decree for recovery of khas possession before dispossession, the plaintiff must prove of holding possession as well as of dispossession. In regard to holding possession, we find from the plaint in particular from paragraph no. 7 that the plaintiff got the property from the heirs of Abdus Salam on 20.02.1993 and on the same date he started erecting boundary wall of the land and then erected partial structure thereon by setting up a tin-shed house in the north eastern part of the same and then he inducted one named Delowar Hossain as monthly tenant fixing at taka 2,000/- per month and since then, that Delowar Hossain Chowdhury continued to live in that house. But what he has asserted as PW-3 in his cross- examination that, the plaintiff had not erected the homestead in the suit property rather it was erected earlier which is totally contrary to the assertion which the plaintiff made in his plaint. However, in that regard, the learned counsel for the plaintiff-respondent submits that, the plaintiff not solely assert that he erected the homestead soon after taking possession rather he also made repair work of the house already there after taking possession. But we cannot agree with that very submission because since in paragraph no. 7, the plaintiff asserted that he inducted PW 3 in the house, so it is none but the PW 3

who is considered to be a vital witness to support holding of possession for the plaintiff but he totally contradicted to what has been asserted by the plaintiff in his plaint. Insofar as regards to dispossession, it has been asserted by the plaintiff that after purchasing the suit property he went back to London and after 3 years, he again returned to the country and on 20.06.1996 when he claimed rent from his caretaker that is, the predecessor of the defendants, Sona Miah he got furious and by denying the title of the plaintiff he threw some documents towards him and gave threat of his life. Now, it is the contention of the learned senior counsel for the appellants that there has been no assertion in that particular paragraph no. 10 of occurring any incident of dispossession of the plaintiffs by the defendants. In that regard, the learned counsel for the respondent submits that, since it is proved that, Sona Miah had earlier been inducted into the house as his caretaker so the said denial will be construed as dispossession else, the plaintiff would not have lodged a criminal case against Sona Miah. But that very stray incident does not *ipsofacto* mean that Sona Miah who is not any defendant had been in possession in the suit property let alone the defendants dispossessed the plaintiff at all. So until and unless the case of dispossession is proved no decree can be passed in favour of the claimant, here in, the plaintiff to get any decree for recovery of khas possession. But unfortunately that crucial point had not been taken into consideration in the entire judgment by the learned judge of the trial court. It is the universal proposition that, plaintiff has to be prove his/ her own case and thousands of defects of the defendant's case will not cure the plaintiff's case but in the instant case,

with regard to acquiring title, possession as well as dispossession, the plaintiff has utterly failed to prove his case through evidence.

Given the above discussion and observation made hereinabove, we are of the considered view that, the plaintiff has not proved his title and possession in the suit property but the learned judge of the trial court has misconceivedly decreed the suit without taking into consideration of the evidence and materials on record placed before him. Hence, the said judgment and decree cannot be sustained in law.

Resultantly, the appeal is allowed however without any order as to costs.

The impugned judgment and decree dated 25.10.2015 passed by the learned Joint District Judge, 2nd court, (in charge), Sylhet is hereby set aside. Consequently, the suit is dismissed.

Let a copy of this judgment and order along with the lower court records be communicated to the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.