

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 3202 of 2003.

Abdur Rahim Khan being dead his heirs 1(ka)
Parvez Quayum and others
.....Petitioners.

-Versus-

Md. Abdus Samad and others
.....Opposite parties.

Mr. Md. Abdul Haque, Advocate
..... For the petitioners.
Mr. Monjurul Karim Kajal, Advocate.
..... Fort the Opposite partes.

Heard on: The 9th 10th, 21st, 22nd July and 3rd
September, 2014.

Judgment on: The 11th September, 2014.

The Rule issued in this Civil Revision under section 115(1) of the Code of Civil Procedure, 1908 (**shortly the Code, 1908**) is about sustainability of the judgment and decree dated 16-04-2003 by which the learned Joint District Judge, 2nd Court (In-charge), Nilphamari dismissed Other Class Appeal No. 97 of 2001 and thereby affirmed those dated 04-9-2001 passed by the learned Senior Assistant Judge, Sayadpur, Nilphamari dismissing Other Class Suit No. 33 of 1996

Plaintiff's Case.

Predecessor of the present petitioners as plaintiff filed the above noted suit for a decree of permanent injunction against the defendants in respect of possession of the suit land measuring 43 decimals of land as described in Kha schedule to the plaint. Plaintiffs case is that one Bholanath being the original owner of the suit land died leaving wife Shudhi Barmonee and a married daughter Abishwari Barmonee. Thus Shudhi Barmonee alone

inherited the property left by Bholanath. But, to meet the legal necessities namely the expense of the shradha of her deceased husband Bholanath and to repay the loan taken by him, widow Shudhi Barmonee sold the suit land by a registered kabala dated 10-8-1959 to defendant No. 3 Kunju Behari. During his possession and title Kunju Behari sold the suit land by kabala dated 7-04-1969 to Gafuran Bibi and her son Shukurullah who subsequently sold it to Momtaz Ali and Monsur Ali by kabala dated 05-10-1978.

Monsur Ali and Momtaz Ali during their possession and title sold the suit land to the plaintiff by three kabalas dated 19-12-1985, 31-05-1990 and 07-7-1992. Since purchase, plaintiff has been possessing the suit land, obtained mutation and paid rent. However he allowed Kamalakanta and three others to possess part of the suit land for their residential purpose.

But the defendant No.1, by creating some fraudulent kabala, threatened plaintiff's possession. Hence the suit for permanent injunction.

Case of defendant No. 1.

This defendant, in his written statement, denies plaintiff's title and possession. He contends that the suit is not maintainable and that it is bad for defect of party.

However he admits that the suit land belonged to Bholanath, that Shudi Barmonee was the second wife of deceased Bholanath and that defendant No. 2 Abishwari Barmonee is the daughter of Bholanath born from the marriage with the deceased first wife.

Defendant claims that, at the time of the death of Bholanath the second wife Shudhi Barmonee was only 16 years old and she left her husband's house and got married to one Basonta Kumar. So she was not entitled to inherit any property left by her husband Bholanath. Abishwari Barmonee, as the daughter having a son, inherited the property left by Bholanath. During her possession and title, Abishwari sold the suit land to defendant No.1 by registered kabala dated 24-08-1995. Since then he has been in possession thereof.

Proceedings and decisions of the courts below

The trial court framed five issues, namely on (1) maintainability of the suit, (2) limitation, (3) defect of party, (4) plaintiff's title and possession, and (5) the relief prayed for.

At the trial, plaintiff adduced oral and documentary evidence through four witnesses including himself as P.W. 1. His documents were marked as Exhibit-1 (series) and Exhibits-2 to 7.

The defendant No.1 also produced oral and documentary evidence through 4 witnesses including himself as D.W. 1. His documents were marked as Exhibit. Ka-ka(1).

Upon discussion of the evidence on record the trial Court decided the aforesaid issue Nos. 1, 2 and 3 in favour of the plaintiff. But the trial court decided that the plaintiff failed to prove his prima facie title and possession and accordingly dismissed the suit.

In the appeal preferred by the plaintiff, the appellate court found that the plaintiff could prove prima facie title, but failed to prove his possession. Accordingly the appellate court dismissed the appeal and affirmed the judgment of dismissal passed by the trial court.

Deliberation in Revision

At hearing of this Revision, Mr. Md. Abdul Haque, the learned advocate for the petitioner (plaintiff), submits that the courts below failed to consider the material evidence on record, namely the initial transfer document executed by Sudhi Barmonee being the admitted widow and second wife of the admitted original owner Bholanath in favour of Kunja Bhehari (defendant No.3) and the subsequent transfer documents Exhibits 2 to 7 leading to clear title of the plaintiff to the suit land.

Mr. Haque, the learned advocate, next submits that the courts below also failed to consider the material evidence on record with regard to plaintiff's possession, namely the aforesaid title documents (Exhibit-2 to 7) and the DCR and rent receipts Exhibit-1 (series) and the oral evidence adduced by the plaintiffs through P.W.2-4.

In reply Mr. Monjurul Karim Kajal, the learned Advocate for the defendant opposite parties, submits that the courts below upon discussion of all material evidence recorded concurrent finding with regard to the vital aspect of possession against plaintiff and therefore no interference is necessary in this Revision.

Mr. Karim, the learned advocate next submits that the plaintiff himself in his plaint stated that some other persons are in possession of part of the suit land as licensees, but he did not produce any of these persons to support of his case.

Mr. Karim, the learned advocate lastly submits that the plaintiff's title to the suit land has been correctly discarded by the trial Court in view of the statement of Shudi Barmonee herself as P.W.4 to the effect that her husband Bholanath died in 1966 and that she allegedly transferred the suit land to plaintiff's alleged predecessor-in-interest Kunja Behari in 1959 when she was not even entitled to inherit.

Findings and decision in Revision

On perusal of the materials on record it appears that on the possession aspect, both the courts below recorded concurrent decision against the plaintiff to the effect that he has failed to prove possession.

It appears that the courts below recorded this finding on consideration of the evidence on record and I find nothing on record to disagree with the courts below.

The above findings with regard to possession is sufficient to decide the fate of this Revision.

But the title aspect also needs to be examined, because on this issue, the courts below have taken opposite views.

The trial Court disbelieved prima facie title of the plaintiff for two reasons, as follows: firstly, Sudhi Barmonee (P.W. 4) stated that, as the widow of Bholanath she had sold the suit land to Kunja Behari in 1959, but in cross-examination she stated that her husband Bholanath died in 1966 and therefore her sale was illegal, and secondly the plaintiff's vendors Momtaz Ali and Monsur Ali,

by kabala dated 05-10-1978, at best acquired 50% of the suit land from Gofuran Bibi, who had purchased the suit land with her son in equal share by kabala dated 7-04-1969 from Kunju Behari being the purchaser from Shudhi Barmonee.

On the other hand, the appellate Court upon a very brief reference to the documents of the parties, concluded that the plaintiff by virtue of successive kabalas acquired the entire suit land.

On perusal of the materials on record including the kabalas produced by the plaintiff it appears that the first purchaser of the suit land was Kunju Behari by virtue of the kabala dated 10-08-1959 (Exhibit-7) executed by Sudhai Barmonee. Thereafter Kunja sold the suit land two persons being Gofuran Bibi and her son Shukurullah by kabala dated 14-04-1969 (Exhibit-2).

It follows that Gafuran acquired only half of the suit land i.e. 21.5 decimals and the plaintiff's vendors Monsur Ali and Momtaz Ali had at best acquired title only 21.5 decimals by virtue of their kabala dated 05-10-1978 (Exhibit-3) executed by Gafuran Bibi.

Plaintiff has not filed any kabala executed by Shukurullah who was the co-purchaser with her mother Gofurun. So prime facie title of the plaintiff to the suit land is at best partly proved to the extent of 21.5 decimals.

Next comes the other vital aspect, namely whether Shudi Barmonee as widow of Bholanath, was at all entitled to transfer the suit land. This lady deposed as P.W. 4. It is revealed that on the date of her deposition she was 70 years old. Her deposition, considered as a whole, leads me to believe that she made some inconsistent statements. She stated that Abishwari Barmonee, being Bholanath's daughter by the deceased first wife had not given to Shudi Barmonee any property and yet she (P.W.4) did transferred the suit land to Kunja Behari. Then P.W.4 in cross examination stated that at the time of the death of her first husband (Bholanath) she had a son aged 5 or 7 years, but she could not remember the name of that son. .

At one stage of cross examination, this witness P.W. 4 stated that her husband died in the year 1966.

It appears that Sudhi Barmani as P.W. 4 put her L.T.I in her deposition and also in the kabala (Exhibit-7). These facts clearly indicate that she is an illiterate lady of 70 years. So her statement as a whole indicates that on the date of deposition she made some inconsistent statement and her testimony can not be relied upon fully.

The trial Court considered only one sentence of P.W.4 and failed to consider her statement as a whole.

With regard to possession of Kunja Behari, the defendant No.1 himself a D.W.1 and another local witness D.W.3 stated that Kunja Behari possessed the suit land. Such statements of the D.W's considered with the kabala dated 10-8-1959 (Exhibit-7) executed by Shudi Barmonee in favour of Kunja Behari. show that Sudhi Barmani sold the suit land to Kunja Behari. This kabala describes her as the widow of Bholanath. This Kunja is none but husband of Abishwari, the daughter Bholanath as stated by D.W.2.

However with regard to the time of death of Bholanath the defendant as D.W.1 made some statements. He stated that Bholanath died 20 years before his deposition made in 2001 i.e. according to D.W.1 Bholanath died in 1981 and that at that time Shudi Barmonee was only 16 years old. This means according to D.W.1 that in 2001, Shudi Barmonee was only 36 years old in 2001.

But Shudi Barmani personally appeared in court and she stated her age to be 70 years. The defendant did not raise any objection to such age as stated in the court room nor did the presiding judge record any observation. So the statement of D.W. 1 is not credible testimony with regard to the time of death of Bholanath.

Neither of the parties could produce any credible witness to state the exact time of death of Bholanath.

In such circumstances, the aforesaid two kabalas of 1959 executed by Sudhi Barmaini in favour of Kunja Behari and the kabala of 1969 executed by Kunja in favour Gafuran and her son, and the fact of possession Kunja lead me to believe that Shudi Barmonee as widow of Bholanath transferred the land to Kunju Behari in 1959 and she did so out of legal necessity as stated in kabala of 1959. It was a lawful transfer.

So the finding of the trial Court with regard to failure of the plaintiff to prove his title at least to half of the suit land is not based on material evidence on record. The findings of the appellate Court with regard to plaintiff's title to the entire suit land as a whole is also not based on material evidence on record.

The correct finding is that the plaintiff could prove his prima facie title with regard to only half of the suit land. However since he failed to prove possession the courts below took correct decision to dismiss the suit and the appeal.

In view of the above I find no merit in the Rule.

In the result, the Rule is discharged. However if any future litigation arises, with regard to title of the plaintiff, the findings of the trial court and also that of the appellate Court are to be ignored.

No order asto cost.

Send down the lower court records with a copy of this Judgment.

Habib/B.0