District: Manikganj

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 1068 of 2003

In the matter of :

Abdul Hakim and others

… Petitioners

-Versus-

Dalimon Bewa and others

…Opposite parties

Mr. Sherder Abul Hossain, Advocate

…For the petitioners

Mr. Alal uddin, Advocate with
Mr. Jalal Uddin Ahmed and
Mafruza Sultana, Advocates

…For the opposite parties

Heard on:21.01.2025, 26.01.2025 and 02.02.2025
Judgment on: 18.02.2025

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite parties to show cause as to why the judgment and decree dated 30.11.2002 passed by the Additional District Judge, Manikganj in Title Appeal No. 145 of 1999 reversing those of dated 30.06.1999

passed by the Senior Assistant Judge, Manikganj Sadar, Manikganj in Title Suit No. 19 of 1991 decreeing the suit should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The present petitioners as plaintiffs filed Title Suit No. 19 of 1991 in the Court of Assistant Judge, Manikganj Sadar, Manikganj for declaration of title, recovery of khash possession and for further declaration of the 'Wasialat' entitling them for the period of dispossession.

The case of the plaintiffs briefly are that the scheduled property was originally belonged to Taraknath Bhattacharjee and Kailash Kamini Debi and they gifted the said property to their daughter, Bisheshari Debi on 23.12.1925. While Bisheshari Debi was in exclusive enjoyment of the property on 11.12.1951 out of legal necessity transferred .66 decimals of land to the plaintiffs. The plaintiffs are in possession of the suit land by giving 'Borga' to their sister and her sons. The S.A. khatian was wrongly prepared in their father's name, taking the said advantage, the defendant No. 1 claimed the property to her own allegedly gifted by their father. In the month of Falgun, 1394 B.S., the plaintiffs

went to bring their borga share, but the defendants refused and thereby dispossessed the plaintiffs by erecting a shop thereon and hence, the plaintiffs filed the suit.

The defendants contested the suit by filing written statement denying all the material averments of the plaint. The specific case of the defendants are that the plaintiffs and defendant No. 1 are full brothers and sister, sons and daughter of Hishu Matbor, who owned about 40 to 45 bighas of land and while was in enjoyment of the property, Hishu Matbor orally gifted the scheduled property to the defendant No. 1 in the Year, 1371 considering her insolvency and thereby handed over the possession to her. The defendants are in possession in the suit property for the last 27/28 years. The R.S. record was duly prepared in the name of defendant No. 1. While the defendant No. 1 claimed a partition to his father's un-partitioned land then the plaintiffs filed the suit with the false allegation.

During hearing, the plaintiffs examined as well as 4(four) witnesses to prove their case and adduced documentary evidences as exhibits. On the other hand, defendants examined as well as 5(five) witnesses and exhibited documentary evidences.

Upon hearing the parties, learned Senior Assistant Judge framed as well as 5(five) issues which are (i) Is the suit suffered from defect the parties? (ii) Is the suit barred by limitation? (iii) Whether the plaintiffs had any title in the scheduled property? (iv) Whether the plaintiffs were dispossessed by the defendants as alleged by them? (v) Whether the plaintiffs are entitled to get the reliefs declaring their title restoring them into the possession upon removing the structure situated therein?

On conclusion of hearing, learned Judge of the trial Court decided the issue Nos. (i) and (ii) in favour of the plaintiffs. The issue Nos. (iii), (iv) and (v) were taken together for discussion and adjudication and thereafter by the judgment it has been found that the plaintiffs have proved their title in the suit property and also held that it is proved that the plaintiffs were dispossessed by the defendants and thereby decreed the suit.

Having been aggrieved the defendants preferred Title Appeal No. 145 of 1999 before the District Judge, Manikganj. On transfer, the said appeal was heard by the Additional District Judge, Manikganj and by his judgment and decree allowed the

appeal reversing those of learned Senior Assistant Judge passed in Title Suit No. 19 of 1991 and thereby dismissed the suit.

In the process of adjudication, learned Judge of the appellate Court upon hearing both the parties and on perusal of the memo of appeal as well as the judgment of the trial Court, framed 4(four) issues. Interestingly both the Courts below including the appellate Court failed to frame issue regarding maintainability of the suit in it's present form.

Learned Senior Assistant Judge while decreeing the suit failed to consider that the suit was for declaration of title and for recovery of possession and it is to be noted here that this Court herein before found that the trial Court at the time of framing issues did not frame any issue regarding maintainability. In a suit for declaration of title together with recovery of possession firstly, the plaintiffs are to prove that they have valid title over the land in question and they were in possession in the suit property and subsequently, they were dispossessed.

Learned Judge of the trial Court in his judgment categorically found that by way of purchase on 11.12.1951, the

plaintiffs acquired valid title over .66 decimals of land from their vendor, Bisheshari Debi through a registered kabala and from the recital of the deed, learned Judge also found that there is nothing in the deed that the property was purchased by their father's money or they are benamders of their father and accordingly held that the plaintiffs by their own fund purchased the property from Bisheshari Debi refuting the contention of the defendants that the plaintiffs were benamders of their father and the property was purchased by the fund of their father.

The Court of appeal below in his judgment also categorically found that the deed No. 6322 dated 11.12.1951 produced by the plaintiffs is a deed of more than 30 years old which bears a presumption that the deed has been properly executed. It is to be noted here that the deed of the plaintiffs was produced from their own custody.

On the issue of possession and dispossession, learned Judge of the trial Court in a slip-shod manner without referring any reliable evidence or assessing the evidences-on-record arbitrarily found that the plaintiffs were dispossessed by the defendants and

before the dispossession, the plaintiffs were in possession of the suit property.

The plaintiff No. 2 was examined in the witness box as P.W. 1. In his deposition, he tried to assert that they were in possession of the suit land from 30-32 years since purchased and thereafter, they gave borga the suit property to the defendant No. 1. He also stated in his deposition that the defendants used to provide the plaintiffs' share for 5(five) years and thereafter, on 1394 B.S. the defendants refused to provide their borga share. In the cross, he categorically stated that the suit property was gave borga to defendant No. 1 as back as 8-10 years. The defendants used to provide borga share through 'Paira', Paddy etc. He also stated in cross, in 1394 B.S. in the month of Kartik the defendant's gave paddy as borga crop and in 1395, 1396 and 1397 B.S. they also provided paddy. In cross, he further stated that 1394 B.S. the defendants gave 'Paira' and thereafter for the consecutive 4(four) years they gave kheshari and they also gave jute in 1394 B.S. for 1(one) year.

From the aforesaid evidences of P.W. 1, it is found that the assertion made in his deposition and in cross-examination is full

of contradiction, contradicted with each other, which cannot be relied upon as reliable evidences. Moreover if the defendants provided borga crops in the 1396 and 1397 B.S., then the dispossession of the plaintiffs in the year 1394 B.S. having not been proved.

The evidences of P.Ws. 2 and 3 are also contradicted with each other and in view of the evidence of P.W. 1 it cannot be concluded that the plaintiffs were dispossessed in the year, 1394 B.S.. From evidences of this P.Ws it cannot be decided that the plaintiffs were in possession followed by dispossession within 12 years of filing of the suit.

The Court of appeal below in it's judgment categorically found that the plaintiffs failed to prove that they were in possession just before the dispossession and the defendants dispossessed the plaintiffs from the suit land.

The appellate Court also found that the R.S. record has been prepared duly, observing the physical possession and since at the time of settlement the defendant No. 1 was found in possession accordingly, the R.S. record was prepared in her name.

In the premise above, it transpires that the plaintiffs could not prove their possession and dispossession from the scheduled property and as such, the suit for declaration of title and recovery of possession is not maintainable.

It further appears from the judgments of the trial Court as well as the Court of appeal below that both the Courts below unnecessarily dealt with some other deeds relating with the properties other than those of the scheduled property and thereby travelled and decided beyond the scope of law, as well as beyond the controversy between the parties, as to whether the plaintiffs were benamders of their father or not, regarding the properties specified in 'Exhibit Nos. 14 to 20', which were not issues in the suit.

Learned Judge of the trial Court unnecessarily decided that the property of those deeds has been purchased by the plaintiffs by their own fund. On the other hand, the Court of appeal below illegally decided, without having any evidences, that the properties of those deeds purchased by the plaintiffs from the money earned from their father's property or they were benamders

of their father regarding the properties specified in the deeds, as Exhibits Nos. 14 to 20.

It is settled principle that the Court of law has no jurisdiction to decide or to deal with the controversy or issues out of the pleadings and as such, the aforesaid findings of both the Courts below regarding the deeds other than the deed No. 6322 dated 11.12.1951 is hereby set aside.

This Court already found that the plaintiffs are not entitled to maintain their present suit since, they failed to prove their possession followed by dispossession.

Accordingly, this Court finds no reason to interfere into the judgment of the Court of appeal below as through the same no failure of justice having been occasioned.

Accordingly, the Rule is discharged with the observation made in the body of the judgment.

Send down the lower Courts' record.

No order as to cost.

Obaidul Hasan/B.O.-