

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

Present:

Mr. Justice Md. Moinul Islam Chowdhury

Civil Revision No. 3012 of 2002

Naya Mia Sikder and another

--- The defendant Nos.2 and 3 respondent-
petitioners

=Versus=

1(ka) A. Rahim and others

--- The defendant No.1 opposite-parties

Mr. Sabya Sachi Mondal, Advocate

----- For the petitioners.

Mr. Md. Shahidul Islam with

Mr. M. Riaz Hossain Sikder and

Ms. Naharin Begum, Advocates

----- For the opposite-parties.

Heard on 02.02.2017 and

Judgment on 06.03.2017

At the instance of the present defendant Nos.2 & 3-respondent-petitioners, Naya Mia Sikder and another, this Rule has been issued calling upon the opposite-party Nos. 1(ka)-7 to show cause as to why the judgment and decree dated 28.04.2002 passed by the Joint District Judge, 2nd Court, Jhalakati in Title Appeal No.111 of 1993 reversing the judgment and decree dated 01.08.1993 passed in Title Suit No.92 of 1990 by the Assistant Judge, Nalchity should not be set aside.

The relevant facts for disposal of the Rule, inter alia, are that the present opposite-party Nos.1-7 as the plaintiffs filed the Title Suit No.92

of 1999 in the Court of the learned Senior Assistant Judge, Nalchity for declaration of title by way of inheritance regarding the land described in the plaint as schedule 'ka' property.

The plaint case is that $46 \frac{1}{3}$ decimals of land appertaining to R.S. khatian No.527 corresponding to S.A. khatian No.567 in Dag Nos.2621, 2611, 2614 $\frac{2621}{3751}$ and 2592 of Mouja kotwali, G.L 84 within P.S. Nalchity, District-Jhalakati is the suit land. The land in C.S. khebot No. 328 measuring 4.98 acres was auction sold in a rent suit in favour of one Khadem Ali Sikder because of the khajna default. The property was again put on auction sale through the Rent Suit No.295 of 1932 in favour of one Upendra Nath Paul. After purchasing the land said Upendra settled the land in favour of Dulal Uddin @ Afsar Ali, Yeasin, Muslem Uddin on 12 Baisak 1343 B.S. through executing a kabuliot nama in their favour. They subsequently settled some portions of land and the suit land remained in their own possession. The said Dalil Uddin @ Afsar died leaving behind his wife Joygun Bibi and brother Yeasin and Moslem Uddin as he did have any child from his marriage. The said widow Joygun Bibi married one Azim Uddin Mredah wherein there were sons and 2 daughters who jointly sold 16 decimals of land on 20.02.1982 in favour of the plaintiff No.7. The plaintiff Nos.1 & 2 were legal heirs of Moslem Uddin and the plaintiff Nos.3-6 are the legal heirs

of the said deceased Yeasin, therefore, they have ownership by way of purchase and inheritance of the suit land but the land was recorded in the name of one Charag Ali illegally.

The suit has been contested by the defendant Nos.2 & 3 by filing a written statement contending inter alia that the suit land mentioned in the plaint was owned by Tofayel, Akkel, Ayenuddin, Imam Uddin, Amir Hossain and Abul Hossain and the C.S. record of right as khotian No.328 of Mouja Katakhalī was published in their names. The aforementioned Amir Hossain and Ismail died leaving behind no children, therefore, their full brother Abul Hossain as the full brother got $\frac{1}{3}$ share of land. Abul Hossain died leaving behind 4 sons namely Dalil Uddin, Yeasin, Moslem Uddin and Wahajuddin. Daliluddin died leaving behind only wife and 2 brothers and he had no children from his marriage. Wahajuddin died leaving behind only son Charag Ali and the record of right in R.S. and S.A. khatians was published as khatian Nos.527 and 567 respectively.

The said Charag Ali sold 24 decimals of land to his wife on 18.06.1962 who sold the same land to the defendant Nos.2 & 3. The said Charag Ali and Moslemuddin sold 43 decimals of land on 23.04.1957 to one Insan Ali Sikder, who thereafter sold to the suit land to the father of the plaintiffs on 18.04.1962. The said Yeasin died leaving behind his

wife Johura Bibi who sold 10 decimals of land on 22.03.1960 to one Yousuf Ali who then sold on 24.01.1959 to one Sadek Ali. Sadek Ali sold 23 decimals of land to one Yousif Ali, who thereafter sold 33 decimals of land to the father of the defendant Nos.2 & 3 by the deed dated 25.05.1965. The said Mosleuddin, the father of the plaintiff Nos.1 & 2 sold 33 decimals of land to Rahela Khatun and Afsar by the deed dated 13.04.1959. Afsar, Rahela and Moslemuddin sold 37 decimals of land on 04.04.1953 in favour of one Mozaffor Sikder. The aforementioned Yeasin's daughter Sbanu died leaving behind a son namely Yousuf Ali who sold 10 decimals of land in favour of the defendant No.2 on 12.03.1998. Yeasin's daughter Sonaban sold 8 decimals of land on 12.02.1988 to the defendant Nos.2 and 3. Adom Ali sold $9\frac{1}{2}$ decimals to the father of the defendant Nos.2-3 the present petitioner became the land owner of 1.85 acres in the 'ka' schedule property the present defendant Nos.2 & 3 claimed entitlement upon the land measuring 46 and $\frac{1}{3}$.

After hearing the parties the learned Court of the Assistant Judge, Nalchity, Jhalakati dismissed the suit by his judgment dated 01.08.1993. Being aggrieved the present opposite-party preferred the Title Appeal No.111 of 1993 in the Court of the learned District Judge, which was heard by the learned Joint District Judge, Court No.2 Jhalakati who

allowed the appeal by his judgment and decree dated 28.04.2002. This revisional application has been filed challenging the said decree and the Rule was issued thereupon.

This matter has been appearing in the list for a long period of time and the Rule was heard from the learned Advocate for the opposite-party. The learned Advocate Khan Saifur Rahman (now dead) and also the learned Advocate Md. Shahjhan Ashraf were appointed for the petitioners but he never appeared. After conclusion of the hearing, this Court fixed on 06.03.2017 for delivery of judgment. After fixing the date for judgment when the matter was kept for judgment the learned Advocate Mr. Sabya Sachy Mondal appeared and sought permission to file a fresh Vokatnama on behalf of the petitioners but found some defects in Vokatnama and asked to make submission on the same day. To-day he filed the Vokatnama properly but failed to make any submission in support of this Rule.

However, after considering the revisional application filed under section 115(1) of the Code of Civil Procedure the petitioners have taken the ground that the learned Appellate Court most illegally and without assigning any reason made some forged document as exhibits which were not filed in the lower Court and thereby committed an error of law resulting in an error in the decision occasioning failure of justice. The

plaint was unspeaking of the Rent Suit, its number as to auction sale, the auction sale for the second time, details of sale certificate and certificate of delivery of possession but even then the additional evidence were entertained by the Court without amendment of the plaint and as such the documents imported for the first time in the appeal are not be legally admissible documents and to have any legal bearing on the merit of the suit.

The Rule has been opposed by the present opposite-party Nos.1 to 7 by filing a counter affidavit contending inter alia, that after the death of Daliluddin alias Apser Ali above mentioned joygun Bibi married to Azimuddin and there she gave birth two male children namely A. Kalam and A. Salam and two female child namely Saleha Begum and Asia Begum. Thereafter the above mentioned A. Kalam, A. Salam, Saleha Begum and Asia Begum jointly sold 16 acres of land infavour of the plaintiff No.7 by a kabala dated 20.02.1982. Thus the plaintiffs got the entire land of S.A. khatian 567 and plaintiff's are residing in the homestead portion and cultivating Nal land. In R.S. khatian No. 527 corresponding to S.A. $\frac{1}{3}$ share comprising an area 0.46 acres of land wrongly recorded in the name of Charag Ali, son of Daliluddin (a fictitious name). Alleged wrong record clouded the title of the plaintiffs

and defendants denied plaintiffs title in respect of the suit land measuring an area .46 acres on 18th Sraban, 1397 B.S.

Mr. Md. Shahidul Islam, the learned Advocate appearing with the learned Advocate Mr. M. Riaz Hossain Sikder for the present opposite-parties submits that the impugned judgment and decree of the learned lower appellate Court is a proper judgment of reversal. The learned Advocate also submits that the lower appellate Court did not commit any error of law in his decision in passing the impugned judgment and decree. The impugned judgment and decree is legal and justified. The learned trial Court without considering the plaint case and without considering and assessing the evidence on record both oral and documentary came to an erroneous decision in dismissing the Title Suit. He further submits the lower appellate Court after considering and assessing the evidence on record both oral and documentary came to a correct decision in allowing the Title Appeal.

The learned Advocate also submits that the finding of the learned trial Court regarding the documents and papers submitted by the present opposite-parties as the plaintiffs have been wrongly interpreted and misread by the learned trial Court but the learned appellate Court below came to a wrongful conclusion after properly examining the document, in particular, exhibits 1, 2, 3 and 8, in particular, the learned appellate

Court rightly pointed out that the exhibit 8 has been written on the proper paper which was confirmed by calling the required volume of the concerned authority being P.W. from the concerned registry office, thus the learned trial Court committed an error, but the learned appellate Court below passed the impugned judgment lawfully, therefore, the Rule issued by this Court should be discharged.

Considering the above submissions made by the learned Advocate for the opposite-party Nos.1-7 and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with annexures therein and also considering the materials in the lower Courts, it appears to me that the present opposite-parties as the plaintiffs filed the title suit for a declaration of title on the basis of right of inheritance in respect of the land described in the schedule 'ka' of the plaint. The plaintiff-opposite-party in the suit claimed title upon $46 \frac{1}{3}$ decimals of land on the basis that the suit land was auction purchased by one Upendra Nath Paul through the Rent Suit No.2 of 1934 which have exhibited as exhibit Nos.2 & 3. Regarding those 2 exhibits, the learned trial Court disbelieved the genuinity of the said exhibit by finding that no supporting documents had produced for proving the exhibits. The trial Court also considered that those documents were forged because “পুরাতন কাগজের উপর নতুন কালি দ্বারা লেখা একটি তর্কিত কাগজ”. On the

other hand, the learned appellate Court below lawfully examined the said exhibit No.8 which is a kabulyot issued by Upendra in favour of Daliluddin @ Aksar Ali, Yeasin and Moslemuddin on 12 Boisakh 1343 Bangla Sal. The appellate Court considered the document as proper and considered that the documents of the plaintiff-opposite-parties have substantiated and supported by the other documents which have been exhibited. In particular, the plaintiff-opposite-party brought the volumes of the registered office through the Court witness No.1, C.W.1 Abdul Mannan, who confirmed the kubulyot No.1174 as record in page Nos.183-185 of volume No.13 for the year of 1936 which is exhibit 1. Therefore, I consider that the learned appellate Court after considering the documentary evidence filed on behalf of the present plaintiff-opposite-No.1 was satisfied by evidence in order to prove the case successfully.

Regarding the case of the present-defendant-petitioners as to the auction sale for the 2nd time and the sale certificate of delivery of possession, I am certain that the learned appellate Court considered all the relevant documents in order to come to a lawful conclusion. In this regard the learned trial Court failed to apply judicial mind for considering the documents and depositions on behalf of the plaintiff-opposite-parties, because he wrongly stated that the plaintiffs adduced

no evidence in support of their claims. However, the learned appellate Court received further evidence in support of the case of the present opposite-party and came to find that the plaintiffs have successfully proved the case regarding the entitlement through succession upon the suit land.

Regarding the record of right in the name of Charag Ali, I have considered the documents produced by the parties which certainly show that Charag Ali was the son of Waziuddin, but the khatian contains Charag Ali as the son of Daliluddin, which is admittedly a wrong record of right, because Daliludding died without any children but only leaving behind his wife Joytun Bibi. It is also contains that Charag Ali was not born under the marriage between Joygun and Daliluddin which is also not a case for the defendant-petitioners, therefore, the present defendant-petitioner falsely claimed that the record of right in favour of Charag Ali has been published lawfully.

In view of the above discussions, I consider that the learned appellate Court below committed no error of law by finding that the present plaintiff opposite-parties successfully proved their case with sufficient documentary and oral evidence by way of testimony in the Court, However, the learned trial Court came to a wrongful conclusion

by non-considering or misinterpreting the documents submitted by the present plaintiff-opposite-parties.

Now, I am inclined to examine the judgment and decree passed by the learned Courts below. The learned trial Court came to a wrongful conclusion to dismiss the suit filed by the present opposite-parties on the basis of the following findings:-

“নালিশী জমির স্বত্ব দখল সংশ্র-ব বিবাদী কো-র্ট তিন জন -মৌখিক সাক্ষী-ক উপস্থাপন করিয়া-ছেন। এই সাক্ষী-দর সাক্ষ্য পর্য্য-লাচনা করিয়া দেখা যা-ছে যে, সাক্ষীরা পরস্পর সংগতিপূর্ণ ও সমর্থন যোগ্য সাক্ষ্য প্রদান করিয়া নালিশী জমি-ত বিবাদীপ-ক্ষর স্বত্ব দখল প্রমা-ণ সক্ষম হইয়া-ছ। জেরা-ত সাক্ষীরা নিজ নিজ বক্তব্যে দৃঢ় থাকি-ত সক্ষম হইয়া-ছ। তদুপরি বিবাদী পক্ষের বিজ্ঞ কৌশলী মিঃ খান, এ, করিম ও মিঃ দে-লায়ার হো-সন তা-দর যুক্তিতর্ক আ-রাপকা-ল বক্তব্য পেশ ক-রন যে, বাদীপ-ক্ষর পরবর্তী মছেল উদ্দিন চেরাগ আলীর স্বত্ব দখল স্বীকার করিয়াই চেরাগ আলীর সহিত একত্রে মছেলউদ্দিন ইং ২৩/০৪/৫৭ তারি-খ ইনছা-নর কা-ছ রেজিস্ট্রি কোবালা-ত জমি হস্তান্তর করিয়াছিল এবং পরবর্তী-ত এম-ত দেখা যায় যে, নালিশী জমির বাবদ চেরাগ আলীর নামীক আর,এস, এবং এস,এ রেকর্ড সঠিক ও শুদ্ধ ব-ট। বর্ণিত আ-লাচনার আ-লা-ক ও সাক্ষ্য প্রমাণ দৃ-ষ্ট সিদ্ধান্ত করা যাই-ত-ছ যে, নালিশী জমি-ত বাদীপ-ক্ষর স্বত্ব দখল নাই এবং মামলাটি বর্তমান আকা-র ও প্রকা-র রক্ষণীয় ন-হ। ”

On the other hand, the learned appellate Court below after considering and examining the documents came to a lawful conclusion to allow the appeal and set aside the judgment and decree passed by the learned trial Court on the basis of the following findings :-

“স্বত্ব দখল সংশ্র-ব বাদীপক্ষের সাক্ষী পি,ডব্লিউ ১ নূর মোহাম্মদ হাং তাহার জবানবন্দী-ত আরজী বর্ণিত মামলা সমর্থন করিয়া-ছেন। জেরা-ত এই সাক্ষী স্বীকার করে যে, আবুল হোসেনের পুত্র ওহাজউদ্দিন এবং ওহাজ উদ্দিনের পুত্র চেরাগ আলী । নালিশী জমির রেকর্ড আবুল হোসেনের পুত্রদের নামে এবং পৌত্র চেরাগ আলীর নামে প্রস্তুত হইয়াছে। ১২৩৫ নং খতিয়া-নর (এস,এ) খতিয়া-ন প্রজা হা-তম ও আদম আলী সা-বক রেকর্ডীয় মালিক মোহাম্মদের পুত্র । মামলার জমি কোন সা-ল নিলা-ম বিক্রি হ-য়-ছ জানি না। কত টাকা খাজনার জন্য জমি নিলা-মর বিক্রি হয় জানি না। কে-ট ১ টা বয়নামা জমা দি-য়-ছ । দখলনামা দাখিল করা হয়নি । কবুলিয়তটি গ্রহিতাগণ গ্রহণ করিয়াছিল এই মর্মে অন্য কাগজপত্র কোর্টে দাখিল করা হয়নি। মালিক পক্ষকে কাগজপত্র কোর্টে দাখিল করা হয়নি। মালিক পক্ষ-ক কবুলিয়ত দাতাগণ খাজনা দিত কিনা জানি না। মালিক প্রদও কোন দাখিল কো-ট জমা দি নাই। কো-ট কোন পট্টা দলিল দাখিল করি নাই। চেরাগ আলী ও মছেন উদ্দিন চাচা-ভ্রাতা ছিল। পি,ডব্লিউ (২) হা-তম আলী সিকদার তাহার জবানবন্দী-ত দাবী ক-র -য়, বাদী পক্ষ জমি দখল ক-র বিবাদীপক্ষ দখল ক-র বিবাদীপক্ষ দখল ক-র না। জেরা-ত সাক্ষী স্বীকার ক-র যে, ৭নং বাদী হা-জরা খাতুন আমার বোন এবং নূরমহম্মদ মাস্টার আমার ভাগিনা। চেরাগ আলীর নালিশী জমির বসতবাড়ীর অংশ ঘর আ-ছ। চেরাগ আলী তার জমি মোজাফফর সিকদার-রর কা-ছ বিক্রি ক-রছিল। চেরাগ আলীর জমি এখন মোজাফফর সিকদার খায় কি না জানি না।”

In view of the above two conflicting decisions, I have carefully considered the exhibits in this case along with the depositions, in particular, the Court witness No.1 Abdul Mannan along with other depositions on behalf of the plaintiffs. I am of the view that the learned appellate Court below committed no error of law by setting aside the

judgment and decree passed by the learned trial Court. I therefore, consider that this is not a proper case for interference from this Court.

Accordingly, I do not find merit in this Rule.

In the result, the Rule is discharged.

The interim order of stay granted at the time of issuance of the Rule upon the operation of the judgment and decree passed in Title Appeal No.111 of 1993 by the learned Joint District Judge, Jhalakati is hereby recalled and vacated.

The office is directed to communicate this judgment and decree and also send down the Lower Courts Records at once.