IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Obaidul Hassan, *Chief Justice*
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.304 OF 2016

(From the judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009).

Babru Mia ……..….**Appellant**

-Versus-

Mosammat Noorjahan Begum and others ……..….**Respondents**

For the appellant	**:**	Mr. Md. Nurul Amin, senior Advocate with Mr. A.M. Amin Uddin, senior Advocate and Mr. Khair Ezaz Maswood, senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For respondents No.1-2	**:**	Mr. Probir Neogi, senior Advocate with Mr. Taposh Kumar Biswas, Advocate and Mr. Sk. Shaifuzzaman, Advocate instructed by Mr. Sayed Mahbubur Rahman, Advocate-on-Record.
For respondents No.3-7	**:**	Not represented.
Dates of hearing	**:**	**The 10th day of October, 2023 and 14th day of November, 2023**
Date of judgment	**:**	**The 20th day of November, 2023**

JUDGMENT

Obaidul Hassan, C.J. This Civil Appeal by leave granting order dated 06.03.2016 in Civil Petition for Leave to Appeal No.496 of 2012 is directed against the judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009 allowing the appeal and thereby setting aside the judgment and decree dated

23.02.2009 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No.213 of 1998 decreeing the suit.

The relevant facts necessary for the disposal of this Civil Appeal are that the appellant as plaintiff instituted Title Suit No.213 of 1998 for declaration of title and recovery of possession of the land described in schedule 'C' to the plaint. The averment of the plaint are, in a nutshell, that the land of C.S. Plots No.129 and 130 measuring an area of .24 acre of land as described in schedule 'A' to the plaint belonged to Khargo Gowala who gifted the same to his son Deokumar Gowala on 29.11.1912 and delivered possession to him. Deokumar transferred the same to Norendra Nath Ghosh, who purchased in the *benami* of Satish Chandra by registered document dated 15.07.1914. Subsequently Satish Chandra executed a registered '*Nadabipatra*' in favour of Narendra Nath on 27.02.1921. Said Narendra Nath transferred the same to one Prodyut Kumar Ghosh by registered gift dated 19.11.1937 and said Prodyut subsequently transferred the 'A' schedule land to one Satya Ranjan by registered sale deed dated 18.12.1947. Said Satya Ranjan granted permanent lease of the said land to one Hazi Md. Arif by registered deed dated 19.09.1950 and on the same day Satya Ranjan also transferred the rent receiving interest to Ziaul Haque, who again transferred the rent receiving interest to Hazi Md. Arif by registered sale deed dated 24.03.1951. Thus, Hazi Md. Arif became the owner of schedule 'A'

land and got mutated his name by paying rent and accordingly had been possessing the same for more than twelve years. Thereafter, Hazi Md. Arif orally settled the land to the plaintiff Babru Mia on 04.01.1953 at annual rent of Tk.150.00 and put him into physical possession thereof and subsequently the terms and conditions of the tenancy were embodied in an agreement dated 15.01.1953 and the same was renewed by another agreement dated 30.12.1958.

The plaintiff erected several huts in Plot No.129 for the residence of his family and for running business. He also filled up the pond of C.S. Plot No.130 and constructed huts and single-roofed tin-shed house thereon and let out one tin-shed room situated on the schedule-'B' land to one Mohiuddin Ahmed by registered deed of lease dated 09.05.1960 for a period of 8 years. On the same date the plaintiff let out the schedule-'C' property to Abul Kashem, the predecessor of the defendants by registered lease deed for a period of 8 years. The then Government of East Pakistan acquired some land out of schedule-'A' through L.A. Case No.25 of 1959-60 and prepared award for the structures in the names of the plaintiff and others. But the plaintiff raised objection against preparation of award in the names of others and as such the authority stayed the payment of compensation money till final decision regarding the right and title of the land in question by the civil Court. After expiry of the lease period of Mohiuddin Ahmed in schedule-'B' land, he handed over

possession to the plaintiff and the plaintiff constructed three-storied building thereon and has been in possession of the same.

It is further stated that one Tara Ram filed Title Suit No.79 of 1964 in the 3rd Court of the then Sub-Judge, Dhaka impleading Kashem Mia, Mohiuddin Ahmed and the plaintiff as defendants No.1-3 for declaration of title and recovery of possession in respect of the land of C.S. Plot No.130. The defendants No.1-3 jointly filed written statement wherein Kashem Mia and Mohiuddin Ahmed admitted the plaintiff as their lessor. The said suit was dismissed on 31.05.1968. Fulbashia Muchi, the wife of Tara Ram Jahoara also filed Pauper Suit No.87 of 1962 in the 3rd Court of the then Sub-Judge, Dhaka impleading Manik Chand and the plaintiff along with others for declaration of title and recovery of possession of the land of C.S. Plot No.129 claiming to be the heirs of Algu Muchi and the said suit was also dismissed. It is further stated that Manik Chand and others dispossessed the plaintiff from the hut measuring 18 cubits X 13 cubits situated in Plot No.129 resulting into filing of Title Suit No.05 of 1972 in the 3rd Court of the then Sub-Judge, Dhaka for declaration of title and recovery of possession and the same was decreed *ex parte* and the plaintiff got possession through Court. The land measuring 3 decimals appertaining to C.S. Plots No.129 and 130 was wrongly recorded in the name of Government in S.A. *Khatian* against which the plaintiff filed Title Suit No.273 of 1964 in the 1st Court of the then

Munsif, Dhaka for declaration of title which was decreed *ex parte* on 22.05.1969.

The further case of the plaintiff is that after expiry of the lease period of Abul Kashem he did not vacate the suit property and as such the plaintiff filed SCC Suit No.02 of 1974 in the then 3rd Court of Munsif, Dhaka which was subsequently renumbered as SCC Suit No.01 of 1982. On the other hand, Abul Kashem filed Title Suit No.07 of 1985 in the then 4th Munsif Court, Dhaka against the plaintiff for cancellation of registered deed of lease dated 09.05.1960 alleging that the same was obtained fraudulently and the said suit was dismissed on 30.03.1985. During S.A. operation, the entire land of C.S. Plots No.129 and 130 was recorded in the name of Hazi Md. Arif in S.A. Plots No.140-142 and in the remark column of the said *Khatian* the possession of the property was noted in the name of the plaintiff under Hazi Md. Arif. Subsequently, during R.S. operation R.S. *Khatian* No.188 was correctly prepared in the name of the plaintiff. The SCC Suit No.01 of 1982 was decreed on contest on 29.08.1990 and Md. Abul Kashem filed Civil Revision No.424 of 1991 before the High Court Division against the said judgment and obtained Rule. During the pendency of the said Civil Revision Md. Abul Kashem died leaving behind the defendants and ultimately the Rule was made absolute by the judgment and decree dated 06.06.1995 and thereby the decree passed in SCC Suit No.01 of 1982 was set aside. The

plaintiff preferred Civil Petition for Leave to Appeal No.585 of 1995 before this Division and the same was dismissed by judgment and order dated 16.05.1996 with the observation that since serious question of title is involved in the case simple SCC suit was not maintainable. Meanwhile Abul Kashem and his wife Nurjahan Begum and son Abdul Matin filed Title Suit No.495 of 1985 in the 3rd Court of Subordinate Judge, Dhaka against the plaintiff for declaration of title in the suit property and the suit on transfer was renumbered as Title Suit No.94 of 1988 and the same was dismissed for default on 03.06. 1997. The defendants have no title and interest in the suit property. Abul Kashem was a tenant under the plaintiff and the defendants are sub-lessee under the plaintiff.

The defendants No.1-3 contested the suit by filing a written statement denying the averments made in the plaint and contended, *inter alia*, that while owned and possessed the suit property by Monu Mia and Algu Muchi, Abul Kashem entered into possession of the same in the year 1952 and started a business thereon in the name and style 'Matin Restaurant'. Abul Kashem developed the land by earth filing and made construction thereon at his own cost. A portion of the suit land along with structures was acquired in L.A. Case No.25 of 1959-60 for construction of the road and notice of acquisition was issued upon Abul Kashem and his wife and son and they were accordingly paid compensation. Abul Kashem purchased possession

of the suit land from Monu Mia by registered deed dated 10.05.1955. The plaintiff and Mohiuddin also enjoyed some other lands in the similar way without any title deed. The plaintiff asked Abul Kashem and Mohiuddin to pay him so that he could bring a title deed from the real owner migrated to India. Taking advantage of such trust the plaintiff by practicing fraud and forgery created some false documents and suggested Abul Kashem and Mohiuddin to make an amicable deed of partition of the land. But the plaintiff instead of preparing the partition deed, created the lease deed dated 10.09.1968. with a view to deceive the illiterate Abul Kashem. The lease deeds in respect of 'B' and 'C' schedule property in favour of Mohiuddin and Kashem were false, fraudulent and void. In fact, the plaintiff and Mohiuddin and Kashem took possession of three different pieces of land from its existing possessors Monu Mia and the wife of Algu Muchi named Fulbashia and subsequently after the death of Mohiuddin the plaintiff took possession of the land as he died leaving behind no issue. The alleged decrees passed in Title Suit Nos.273 of 1964 and 05 of 1972 are fraudulent and collusive. Taking advantage of simplicity and ignorance of Abul Kashem and Mohiuddin, the plaintiff got filed written statements by them in Title Suit No.79 of 1964 and Title Suit No.87 of 1962 against their interests. The plaintiff obtained *ex parte* decree in Title Suit No.05 of 1972 fraudulently on false claim that Abul Kashem never entered into the

suit land on the basis of alleged agreement with the plaintiff. In fact, Abul Kashem had been in possession of the suit property since the year 1952. The *Khatian* prepared in the name of Hazi Arif and the entry regarding possession of the suit land in the name of the plaintiff in the remark column was wrong. Abul Kashem and upon his demise the defendants have been maintaining possession on the suit property asserting their own right and title therein. They paid rent and taxes to the city corporation and they never accepted the plaintiff as landlord nor paid any rent to the plaintiff. The plaintiff is not entitled to any relief in the instant suit. A competent Court decided the matter in SCC suit wherein this Division found in Civil Petition for Leave to Appeal No.585 of 1995 and in Civil Review Petition No.18 of 1996 that the alleged agreement for lease as claimed by the plaintiff was not acted upon. Abul Kashem was in possession of the suit land and upon his demise the defendants have been in exclusive possession and enjoyment in the suit property within the knowledge of all. Thus, they have acquired an indefeasible title in the suit property.

The defendants No.1-3 filed additional written statement contending that the alleged deed of gift dated 29.11.1912 and the alleged sale deed dated 15.07.1914 as stated in the plaint do not relate to the suit property rather those relate to other non-suit land. Deo Kumar Gowala did not acquire any right, title and possession in the

suit property by the alleged deed of gift dated 29.11.1912. The plaintiff, Mohiuddin and Abul Kashem possessed the land of suit plots No.l29-130 in equal share claiming independent title under different persons. Abul Kashem and Mohiuddin entrusted the plaintiff to get their names recorded in the *Khatian,* but the plaintiff fraudulently recorded the suit plot in the name of Hazi Md. Arif showing his name in the column of possession.

Subsequently, the defendants filed two separate additional written statements wherein they reiterated the facts already stated in the written statements and additional written statements filed earlier.

The trial Court framed four issues during the trial of the case. The plaintiff examined himself as only P.W. while the defendants examined four witnesses as D.Ws. No.1-4. The documentary evidences adduced by the plaintiff had been marked as Exhibits-1 series to 13 series while those adduced by the defendants had been marked as Exhibits-A series to K series.

The trial Court on completion of the trial decreed the suit by judgment and decree dated 23.02.2009. Being aggrieved by the judgment of the trial Court the defendants No.1-3 preferred First Appeal No.92 of 2009 before the High Court Division against the judgment and decree dated 23.02.2009 passed by the trial Court. Upon final hearing the High Court Division was pleased to allow the appeal by judgment and decree dated 22.02.2011.

Being disgruntled with the judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009 the plaintiff as petitioner filed Civil Petition for Leave to Appeal No.496 of 2012 before this Division and leave was granted on 06.03.2016, hence the instant appeal.

Mr. Md. Nurul Amin along with Mr. A.M. Amin Uddin and Mr. Khair Ezaz Maswood, all learned senior Counsel appearing on behalf of the appellants taking us through the judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009, judgment and decree of the trial Court as well as the other materials on record contended that the High Court Division has committed illegality in totally misconceiving the case of the appellant upon misreading and misconstruing the evidence and materials on record and thereby misdirected beyond the law and facts of the case in passing the erroneous decision allowing the appeal which caused serious miscarriage of justice and as such the impugned judgment and decree is liable to be set aside. The learned senior Counsel for the appellant contended next that the plaintiff filed bundle of documents to prove his right, title and possession in the suit land and the trial Court also, on examination and consideration of all those documents as well as other evidences on record came to clear finding that the defendants are the lessees under the plaintiff, but the High Court Division being appellate Court without reversing the findings of the

trial Court and without considering the materials evidence on record, allowed the appeal setting aside the judgment of the trial Court. The learned senior Counsel argued next that the predecessor of defendants entered into possession of immovable property as a tenant of the plaintiff and as such the defendants cannot deny the title of the plaintiff. Moreover, the defendants admitted the plaintiff's title in Exhibits-8(a),10,11 and 11(a), but the defendants self-contradictorily challenged the title of plaintiff, for which the defendants are estopped from denying the title of the plaintiff in the suit land. The learned senior Counsel contented further that the appellate Court as the final Court of facts ought to have discussed all the documentary evidences adduced by the plaintiff which is a clear violation of law under Order XI Rule 33 of the Code of Civil Procedure and the appellate Court as the final Court of facts should have discussed each and every documents and as such the High Court Division erred in law in allowing the appeal. The learned senior Counsel argued next that despite the plaintiff did not plead the case of adverse possession specifically in the plaint and the trial Court did not frame any issue regarding adverse possession, but during trial of the case sufficient evidence was brought on record from which it is crystal clear that the plaintiff acquired title in the suit land by virtue of adverse possession and in the aforesaid circumstances the trial Court did not commit any illegality in finding

plaintiff's title in the suit land by adverse possession but the High Court Division most illegally set aside the said findings of the trial Court on the mere reasoning that the plaintiff did not plead any case of acquiring title by adverse possession ignoring the overwhelming evidence on record proving plaintiff's title in the suit land by adverse possession. The learned senior Counsel submitted next that the findings in SCC suit is not binding in a regular title suit and as such in the case in hand the findings of this Division regarding the previous SCC suit cannot have any negative effect and as such the impugned judgment and decree is liable to be scraped. In support of their submissions the learned senior Counsel for the appellants referred some precedents reported in 24 BLD(AD) 43; 24 BLD(HCD) 243; 8 BLT(AD) 185; 39 DLR(AD) 78; 26 BLT(AD) 375; 16 DLR(SC)287.

Per contra, Mr. Probir Neogi, learned senior Advocate along with Mr. Taposh Kumar Biswas, Advocate and Mr. Sk. Shaifuzzaman, Advocate appearing on behalf of the respondents No.1-2 contended that even the trial Court found that the basic documents of the plaintiff dated 15.01.1953 and 30.12.1958 (Exhibits-3 and 3(a) respectively) did not confer any title to the plaintiff being apparently invalid and void documents and as such the claim of the plaintiff that the property which he acquired through Exhibit-3 series was settled to defendants by Exhibit-4(a) dated 09.05.1960 holding them as lessees under plaintiff falls through. The learned senior

Counsel for the respondents No.1-2 argued next that the case of the plaintiff was denied by the defendants from its very inception and the instant suit for declaration of title and recovery of possession was not corroborated by any oral evidence while P.W.-1 is always considered as an interested witness and nobody came before the Court to prove the documentary evidence filed by the plaintiffs and mere filing of the documents does not *ipso facto* means that those were proved in evidence. Moreover, the finding of the trial Court that the lease deed dated 09.05.1960 (Exhibit-4(a)) is a valid document went against the finding of this Division made in Civil Petition for Leave to Appeal No.585 of 1995 and Civil Review Petition No.18 of 1996. The learned senior Counsel for the respondents No.1-2 contended further that the claim of the plaintiff to the effect that he entered into possession of the suit land in 1953 by virtue of Exhibit-3 from his vendor Hazi Arif but Hazi Arif is neither a witness nor a party to the suit and there is nothing in evidence to show that the plaintiff ever entered into the suit land in 1953 and no time and place is mentioned in the pleading and no evidence is also available on the record to prove the entry of the plaintiff in the suit land. The High Court Division on consideration of Exhibits-7, Exhibits-C,C(1),C(2) & F(1) found that defendants entered into the suit land before the execution of alleged deed dated 09.05.1960 (Exhibit-4(a)) while the possession of the plaintiff since 1953 has not been proved. The

learned senior Counsel for the respondents No.1-2 submitted next that the High Court Division rightly found that declaration of title and claim of adverse possession by the plaintiff cannot run simultaneously and the second thought on the claim of possessory right through the possession of the defendants as lessee or licencee does not arise at all because in such event there would be a definite case of possession followed by dispossession, moreover since Exhibit-3 series were found by both the trial Court and the High Court Division as invalid and void documents the possession of the defendants in the suit land as lessee does not merit consideration and as such the judgment passed by the High Court Division does not warrant interference by this Division. The learned senior Counsel for the respondents No.1-2 submitted next that the trial Court failed to consider that the alleged claim of the plaintiff with respect to getting into possession in the suit land in 1953 from Hazi Arif does never mean hostile, thus the finding of trial Court on adverse possession of the plaintiff in the suit land was misconceived specially when Hazi Arif is not a party to the suit. The learned senior Counsel for the respondents No.1-2 contended lastly that the judgment of the trial Court is patently indicative of non-application of judicial minds to the pleadings and evidences led by the parties in their true perspectives and the High Court Division with the proper scrutiny most legally allowed the appeal and as such the instant appeal is

liable to be dismissed. The learned senior Counsel for the respondents No.1-2 relied on several case laws reported in 42 DLR(AD)154; 51 DLR(AD) 172; 5 BLD(AD)33; 51 DLR(AD) 257; 35 DLR(AD) 182 and 46 DLR(AD) 46.

We have perused the judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009. We have also considered the submissions of the learned Counsel for both sides and gone through the judgment and decree of the trial Court, evidences as well as other materials on record.

The case of the plaintiff-appellant is that Hazi Md. Arif was the owner of the suit land who orally settled the same to the plaintiff Babru Mia on 04.01.1953 at annual rent of Tk.150.00 and inducted him into physical possession of the suit land. Subsequently, the terms and conditions of the tenancy were embodied in an agreement dated 15.01.1953 and the same was renewed by another agreement dated 30.12.1958. The plaintiff filed the lease deed dated 15.01.1953 (Exhibit-3) and lease deed dated 30.12.1958 (Exhibit-3(a)). Those lease deeds appear to be unregistered. The plaintiff claims acquisition of title of the suit land by way of oral lease deeds. Admittedly, the suit land is non-agricultural land and situated within the municipal area. Now an important question arises whether the plaintiff acquired title by virtue of the aforesaid unregistered lease deeds.

In this regard the trial Court referred the case of *Khondker Ansar Ahmed and others Vs. A.T.M. Monsur Ali Mallik and others* reported in *60 DLR(AD) 33* where it was held in the following-

> "It is the settled principle of Law that settlement of Non-Agricultural land within Municipality cannot be effected by unregistered document. The same must be effected by bilateral registered document executed by both the lessor and the lessee."

(underlines supplied by us)

In view of the above proposition of law the trial Court observed as follows:

> "উপরোক্ত নজীরের আলোকে বলা যায় যে, নালিশী সম্পত্তি অকৃষি সম্পত্তি অর্থাৎ মিউনিসিপাল এলাকায় অবস্থিত হইলে registered deed মূলে সম্পত্তি হস্তান্তর করিতে হইবে। বর্তমান মামলায় দেখা যায় যে, বাদী পক্ষ নালিশী সম্পত্তি মৌখিক লীজ মূলে দাবী করে। ফলে উক্ত নজীর অনুযায়ী বাদীর মৌখিক লীজ মূলে স্বত্ব সৃষ্টি হইতে পারে না।"

(underlines supplied by us)

The High Court Division also upheld the same view of the trial Court. Having taking into consideration of the above settled position of law we endorse the findings of the High Court Division on that score. Therefore, it is unerringly found that the plaintiff could not acquire title in the suit land on the basis of unregistered lease agreement.

Moreover, from the recital of the unregistered agreement dated 15.01.1953 (Exhibit-3) it is apparent that by virtue of the so-called oral agreement there was no settlement of the suit land by Hazi Md. Arif

to the plaintiff rather he was merely permitted to use and occupy the said land for six years from the fourth day of January, 1953. Subsequently, the permission to use the land was renewed for further ten years by way of unregistered agreement dated 30.12.1958 (Exhibit-3(a)). Thus, there was no form of settlement at all in favour of the plaintiff by way of Exhibits-3 and 3(a).

The plaintiff claims further that he leased out the 'B' and 'C' schedule property to one Mohiuddin Ahmed and the predecessor of the defendants Abul Kasem by way of two registered lease deeds dated 09.05.1960. Those lease deeds had been marked as Exhibits-4 and 4(a). On plain reading of those lease deeds it appears that those were executed for eight years and although Mohiuddin Ahmed was an attesting witness in Exhibit-4(a), Abul Kasem was not made an attesting witness in the lease deed i.e. Exhibit-4 which creates a suspicion on the aforesaid claim of giving lease by the plaintiff.

Referring the written statement (Exhibit-8(a) filed by Mohiuddin Ahmed and Abul Kasem in Title Suit No.79 of 1964 instituted by one Tara Ram the plaintiff claims that said Mohiuddin Ahmed and Abul Kasem were lessees under the plaintiff Babru Mia. The plaintiff claims further that the predecessor of the defendants Abul Kasem himself instituted Title Suit No.7 of 1985 in the then 4th Court of Munsif, Dhaka against the plaintiff for declaration that the lease deed dated 09.05.1960 was obtained by practicing fraud. But the

suit was dismissed on contest by judgment and decree dated 30.03.1985 (Exhibit-10). Thus, relying on Exhibits-8(a) and 10 the plaintiff claims that the predecessor of the defendants Abul Kasem was lessee under the plaintiff. It is palpable from Exhibit-10 that Title Suit No.7 of 1985 was instituted challenging the legality of lease deed dated 09.05.1960 and the said suit was dismissed on 30.03.1986. But before dismissal of the said suit the lease period for eight years expired automatically due to which the lease deed dated 09.05.1960 lost its validity much before the institution of the Title Suit No.7 of 1985. In the aforesaid backdrop, the plaintiff's claim to the effect that the predecessor of the defendant Abul Kasem was a lessee under the plaintiff cannot stand at all.

Regarding the filing of written statement by the predecessor of defendants Abul Kasem and Mohiuddin Ahmed admitting themselves as lessees under the plaintiff in Title Suit No.79 of 1964 the defendants contend that taking the advantage of illiteracy of their predecessor Abul Kasem the plaintiff Babru Mia managed to insert a sentence in the written statement filed by Mohiuddin Ahmed and Abul Kasem admitting the plaintiff as lessor. But unless the claim of the plaintiff as to the giving lease of the suit land to the defendants is proved with other reliable evidence the aforesaid plea in the written statement cannot give the plaintiff a benefit of dispensing with the proof of his title and possession in the suit land.

It divulges from the record that although the trial Court did not find title of the plaintiff in the suit land it made a self-contradictory observation to the effect that the plaintiff acquired title by adverse possession in the way that the plaintiff taking over possession of the suit land by lease deed from Hazi Md. Arif and he did not challenge the peaceful possession of the plaintiff. In fact, it is the moot point on which the total case hinges on. At this point, let us expatiate our discussions on the said point.

Admittedly, the plaintiff has neither pleaded acquiring title by adverse possession nor instituted the suit praying for declaration of title by adverse possession and accordingly no issue was framed regarding acquiring title by the plaintiff by way of adverse possession. As regards the framing of issue Order XIV Rule 1 of the Code of Civil Procedure lays down the following:

> "**1.** (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
>
> (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
>
> (3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
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> (underlines supplied by us)

In view of the above provisions of law, it is transparent that where a party claims title by adverse possession in the pleadings and the other party denies it the Court frames an issue regarding the adverse possession. But in the case in hand since the plaintiff did not assert the claim of adverse possession the defendants were not needed to deny the claim of adverse possession in the written statement. Therefore, there was no occasion to frame an issue as regards adverse possession.

It is worthwhile to know what the plaintiff is required to prove in a case of adverse possession. By referring the case of Ejaz Ali Qidwai Vs. Special Manager, Court of Wards, Balirampur Estate AIR 1935 PC 53, it has been enunciated in the case of *Abdul Kader and Others vs. A.K. Noor Mohammad and others* reported in *36 DLR(AD) (1984) 261* as follows:

> "21. In Ejaz Ali Qidwai V. Special Manager, Court of Wards, Balirampur Estate, AIR 1935 PC 53, the Judicial Committee of the Privy Council, while referring to the principle of law regarding adverse possession observed that:
>
> > a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. This onus the appellants have failed to discharge."
>
> (underlines supplied by us)

It has been further observed in the case of *Salma Khatun and others vs. Zilla Parishad, Chittagong* reported in *51 DLR(AD) 257* that-

> "4.....When they are in possession claiming raiyati settlement they cannot set up adverse possession either....."
>
> (underlines supplied by us)

It is transparent from the above that where the plaintiff claims acquiring of title by adverse possession he must show by clear and unequivocal evidence that his possession was hostile to the original owner. But in the case in hand the plaintiff never ever claimed his possession repugnant to his vendor Hazi Md. Arif rather he asserts his title and possession by oral lease from Hazi Md. Arif.

In the given facts and circumstances, the trial Court was not required to frame an issue on adverse possession. Accordingly, the plaintiff is not entitled to set up a case of adverse possession in the suit land. Having considered the averments and prayers made in the plaint of the case *vis-à-vis* the issues framed during trial as well as the evidences led by the plaintiff, the finding of trial Court on plaintiff's title by adverse possession is *ex facie* gratuitous relief.

It has been held by this Division in the case of *Mahaprabhu Ram vs. Gopal Ram Ram and others* reported in *10 BLD (AD) 94* that-

> "16. The appellant prayed for partition never on the basis that he or his predecessor acquired title to the suit property by adverse possession. Title by adverse possession has to be specifically pleaded and proved. The

appellant's case was one of acquisition of title by settlement. The trial Court found that the case of settlement has not been proved, but it conferred title on the appellant on a gratuitous finding of adverse possession in his favour, unwarranted by pleadings. This gratuitous conferment of title was uncalled for in a suit for partition where the plaintiffs claim of title is to be looked into incidentally. If the precise title to which he lays his claim is not supported by the evidence on record, the Court cannot find out another source of title for the plaintiff by way of gratuitous relief. Hence on all counts we find that the impugned judgment does not merit any interference."

(underlines supplied by us)

In the case of *Bangladesh Parjatan Corporation and others vs. Mofizur Rahman and others* reported in *46 DLR(AD) 4*6 it is held that-

"19. This principle of estoppel is stated in another form when it is said that party litigant cannot be permitted to assume inconsistent positions in court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponent. In the case of Ambu Nair Vs. Kelu Nair, AIR 1933 P.C. Page 167, the principle was quoted from Smith Vs. Baker, 8 C.P. 350 as follows:

> A person cannot "at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another say it is void for the purpose of securing some further advantage."

(underlines supplied by us)

That apart since the plaintiff claims his title from his vendor Hazi Md. Arif the plaintiff ought to implead his vendor in the present suit in case of getting decree on the basis of adverse possession. Although Hazi Md. Arif was a necessary party in the suit he was not impleaded as party and it is settled law that a decree on adverse possession cannot be passed in absence of a necessary party to the suit. But the trial Court most illegally established the title of the plaintiff by way of adverse possession.

It is undeniable that the High Court Division being the appellate Court had power to grant relief to the plaintiff regarding the adverse possession in the suit land under Order XL Rule 33 of the Code of Civil Procedure, where the plaintiff made out a case to grant such relief, but failed to pray for such relief in categorical terms. But in the case in hand, the plaintiff utterly failed to make out a case for adverse possession either in the pleadings or in the whole evidences on record. In *Hefzur Rahman (Md) vs. Shamsun Nahar Begum and another* reported in *51 DLR(AD) 172* it has been observed by this Division in the following:

> "60. The law requires that the relief must be specifically claimed either simply or in the alternative. It is true that general or other relief which the Court may think just may be granted although not specifically asked for. But the essential conditions are that, the averments in the plaint must justify such relief and the defendant must get an opportunity to contest such relief. In the name of

granting general or other relief the Court cannot and would not mount any surprise on the defendant and make him liable for something which does not arise out of the plaint and, as such, he had no occasion to answer the same. This is merely an extension of the principle of natural justice."

(underlines supplied by us)

In view of the above proposition of law, the High Court Division rightly rejected the decree of adverse possession in favour of the plaintiff-appellant since the plaintiff could not make out a case of adverse possession within the four corners of plaint.

From the certified copy of the judgment of Civil Petition for Leave to Appeal No.585 of 1995 (Exhibit-13(a)) it is evident that the plaintiff-appellant filed SCC Suit No.02 of 1974 which was renumbered as SCC. Suit No.1 of 1982 against the predecessor of the defendant Abul Kasem claiming him a tenant under him by way of lease deed dated 09.05.1960 (Exhibit-4(a)). Although the SCC Suit was decreed the High Court Division set aside the judgment and decree of the trial Court in Civil Revision No.424 of 1991. Against which the appellant filed Civil Petition for Leave to Appeal No.585 of 1995 which was dismissed by this Division on 16.05.1996. This Division found in the said judgment that the lease deed dated 09.05.1960 was not acted upon inasmuch as admittedly there was no payment of rent in terms of the said lease deed. The aforesaid findings of this Division is binding upon all Courts including the trial Court as well as trial

Court according to the provisions of Article 111 of the Constitution. But the trial Court committed error of law and facts in relying on the lease deed dated 09.05.1960 (Exhibit-4(a)) which is violative of Article 111 of the Constitution.

On the other hand, the defendants claim that their predecessor Abul Kashem was inducted into the possession of the suit land through Manu Mia in the year 1952. D.Ws.1-4 categorically stated in their testimony that Abul Kashem came into the possession of the suit land since the year 1952.

The plaintiff by adducing the order sheet of L.A. Case No.25 of 1959-60 (Exhibit-7) claims that by order dated 23.08.1960 the authority held that the compensation for acquisition cannot be given without adjudication of right, title and interest of the respective parties in the competent Court. The defendants refuted the said argument by referring the order dated 05.12.1959 (Exhibit-C) passed in L.A. Case No.25/59-60 from which it appears that the authority directed the defendant No.1 Nurjahan Begum on 05.12.1959 to hand over possession of the suit land to it by 15.12.1959. Thus, it is evident that the predecessor of the defendants Abul Kashem and his wife Nurjahan Begum were in possession of the suit land before 1960. From the memos dated 27.04.1960 (Exhibits-C(1) and C(2) it is seen that the acquiring authority asked the defendant Abul Kashem and his wife Nurjahan Begum to provide the name of the co-sharers, if

any in the suit property. Memo dated 22.11.1960 (Exhibit-F(1)) issued by the Dhaka WASA to Md. Abul Kashem shows that as per his application dated 09.01.1960 the authority allowed him to take water connection in his structure in the name and style Matin Restaurant, Bijoynagar situated in C.S. Plot No.129. All the aforesaid documentary evidences clearly show that the defendants' predecessor had been in possession of the suit land long before execution of so-called lease deed by the plaintiff on 09.05.1960.

The plaintiff except himself as P.W.1 could not examine any neutral witness to corroborate his claim to the effect that the defendant's predecessor Abul Kashem was inducted into possession of the suit land on the basis of the lease deed dated 09.05.1960. The plaintiff also could not prove that he is in possession of the suit land taking oral settlement from Hazi Md. Arif in the year 1953.

In the light of the foregoing discussions, we find that the plaintiff did not acquire title and possession in the suit land and the defendants were never lessee under the plaintiff but the trial Court without proper appraisal of the oral as well as documentary evidence available on the record decreed the suit and while the High Court Division lawfully set aside the judgment and decree of the trial Court. We do not find any deviation in the impugned judgment and decree of the High Court Division. In view of the reasons stated above and in the light of the above discussions, it does not warrant

interference with the impugned judgment and decree dated 22.02.2011 passed by the High Court Division in First Appeal No.92 of 2009. Therefore, we do not find any merit in the submissions of the learned counsel for the appellants and as such the instant Civil Appeal is liable to be dismissed.

Consequently, the instant Civil Appeal is **dismissed** without any order as to costs.

C.J.

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The 20th day of November, 2023
RRO; Total words- 6,581