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

First Appeal No. 263 of 1972

In the matter of:

Province of East Pakistan.

… Appellant

-Versus-

Arshed Ali Molla and others.

…Respondents.

Mr. Arobindo Kumer Roy, DAG with
Mr. Mohammad Abbas Uddin, AAG

…For the appellant

None represented

…For the respondents

Heard on 08.02.2024 and 15.02.2024.
Judgment on 15.02.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J.

At the instance of the sole defendant the then Province of East Pakistan (hereinafter referred to as "the Government"), this appeal is directed against the judgment and decree dated 14.12.1966 passed in Title Suit No. 58 of 1964 by the then learned Subordinate Judge, 1st Court, Barisal decreeing the suit filed for declaration of title in the suit properties

measuring an area of 6.80 acres of land described in schedule ‘Kha’ to the said plaint.

The case of the plaintiffs herein respondent nos. 1-11 in short are:

An area of 6.80 acres of land which has been described in schedule ‘Kha’ originally belonged to one, Jamini Kanta Banerjee Choudhury and others which is the part and parcel of ‘ka’ schedule of land. While those Benerjee Babus’ had been in possession of the land (described in ‘ka’ schedule to the plaint) one, Ramizuddin took settlement of $1\frac{1}{2}$ *kanis* of land by registered *kabuliyat* dated 19th *Bhadra*, 1323 B.S. fixing an annual rent of Rs. 12.00. On the same date, Khabiruddin who was the full-brother of Ramijuddin also took settlement for an area of 3 *kanis* of land out of ‘ka’ schedule of land from those Banerjee Babus’ through registered *kabuliyat* at an annual rent of Rs. 24.00. Those two *kabuliyats* were duly acted upon by the landlords and Ramijuddin and Khabiruddin started possessing the land under those two *kabuliyats*. After the demise of Khabiruddin his interest was then devolved upon his brother, Ramijuddin and on his demise, the plaintiffs became the heirs and successors-in-interest of Ramijuddin who kept on enjoying possession of the lands described in those two *kabuliyats*. While the plaintiffs had been in possession in the suit lands which has been described in ‘Kha’ schedule of land to the plaint, it washed away by the river and that very diluvition took place one or two years before the commencement of the revisional settlement operation in the locality (R.S. record). The plaintiffs however did not obtain any reduction of rent of the diluviated land from their landlords. The said diluviated land remained submerged for 6-7 years. When it re-appeared and reformed in

situ, the plaintiffs got into possession of the suit land as well. During the settlement operation the portion of land which had not been washed away by the river was duly recorded in the name of the plaintiffs but the diluviated portion of land was wrongly recorded in the name of the Government though no vested right was accrued to the Government nor it has possessed the said land. There has been no basis, the suit land to be recorded in the name of the Government in the settlement khatian and hence, the instant suit.

On the contrary, the present appellant as defendant contest the suit by filing written statement denying all the material averments so made in the plaint contending *inter alia* that, the suit itself is not maintainable in the present form and the plaint is not sufficiently stumped which is also barred by provision of section 42 of the Specific Relief Act as well as the provision of sections 86 and 87 of the East Bengal State Acquisition and Tenancy Act, 1950. It has further been stated that, the suit land has not been attracted by the alleged *kabuliyats*. The disputed land was diluviated in the year 1328 B.S. and after its reappearance it vested upon the Government under the provisions of sections 86 and 87 of the East Bengal State Acquisition and Tenancy Act. It has also been stated that, the right, title and interest of the plaintiff has been extinguished by operation of law and the suit is liable to be dismissed.

In order to dispose of the suit, the learned Judge of the trial court framed as many as 7(seven) different issues and to prove the case, the plaintiffs examined 4(four) witnesses and also produced several documents which were marked as exhibit nos. ‘1-6’. On the other hand, the sole

defendant-appellant did neither adduce any witness nor produce any document in support of the defence case. The learned Judge of the trial court after considering the materials and evidence on record vide impugned judgment and decree decreed the suit holding that, the plaintiffs have been able to prove their case and they have been in possession of the suit properties.

It is at that stage, the sole defendant as appellant preferred this appeal.

Mr. Arobinda Kumar Roy, the learned Deputy Attorney-General appearing for the appellant upon taking us to the impugned judgment and decree at the very outset submits that, the suit itself is not maintainable under the provision of sections 86 and 87 of the East Bengal State Acquisition and Tenancy Act and that of P.O. Nos. 135 and 137 of 1972 where it put a clear bar to entertain such kinds of suits moment those two presidential orders came into effect.

The learned Deputy Attorney-General by referring to the written statement in particular, paragraph nos. 4 and 7 thereof and those of the grounds couched in the memorandum of appeal in particular, ground nos. 2 and 6 also contends that, in spite of taking specific grounds, the learned Judge of the trial court though framed issue no. 4 to the effect that whether the suit is barred under the provision of sections 86 and 87 of the East Bengal State Acquisition and Tenancy Act yet the learned Judge of the trial court did not bother to discuss on that legal point and therefore, the impugned judgment is devoid of any legal basis.

The learned Deputy Attorney-General by referring to Annexure in particular, Annexure-‘2’ and ‘2A’ which are the *kabuliyats* produced at the instance of the plaintiffs further contends that, since the *kabuliyat* is an unilateral document so until and unless, any document in support of alleged lease is produced such unilateral document cannot be taken into evidence to prove the title of the plaintiff but the learned Judge without taking into account of that legal compulsion has illegally put his all reliance on those two documents and found that, the plaintiffs have been able to prove their title.

The learned Deputy Attorney-General by referring to other documents which have been exhibits ‘1’ and ‘1A’, the *dakhilas* also contends that, though it has been asserted by the defendant in its written statement that, those *dakhilas* do not correspond the suit properties but the learned Judge of the trial court did not bother to examine those *dakhilas* and erroneously decreed the suit.

The learned Deputy Attorney-General further contends that, though there has been no stipulation within the four corners of the plaint when the suit land was washed away and diluviated and when it was reformed in *situ* still the learned Judge came to observation that, since the suit properties remained under water, for only 6-7 years so there has been no reason not to prepare the SA record in the name of the plaintiffs which is totally beyond the pleadings and therefore, the said observation is purely contrary to the pleading resulting in the findings of the trial court cannot sustain in law.

The learned Deputy Attorney-General by referring sections 2 and 5 as well as sections 2 and 3 of P.O. Nos. 135 of 1972 and 137 of 1972

respectively also contends that, those very two provisions clearly debar any court of law to entertain any application, suits or appeal or any proceedings (which was promulgated in respect of sections 86 and 47 of the State Acquisition and Tenancy Act, 1950) claiming title in diluviated land and since after the promulgation of those two orders, the court has got no authority even to entertain any appeal so on that very statutory settled point, the suit itself was not maintainable from its inception and the learned Judge of the trial court going beyond that legal provisions has rather discussed the evidences of the parties on factual aspect and wrongly came to a finding that the plaintiffs are entitled to have decree.

The learned Deputy Attorney-General lastly contends that, since S.A record has rightly been prepared in the name of the Government in khas khatian as of diluviated land following the operation of two presidential orders so the learned Judge of the trial court ought to have found that the suit itself was not maintainable and therefore, the impugned judgment and decree cannot sustain in law and the appeal is liable to be allowed on setting aside the impugned judgment and decree.

Record shows that, notices have duly been served upon the respondents yet none represented them.

We have considered the submission so advanced by the learned Deputy Attorney-General for the appellant and perused the impugned judgment and decree including the documents so appeared in the paper book. We have also very meticulously gone through the provisions so have been provided in sections 86 and 87 of the East Bengal State Acquisition and Tenancy Act and those of two presidential orders being nos. 135 and

137 of 1972. Those very two statutes clearly debar the court from entertaining any legal proceedings either in the form of suit or in the form of appeal moment those statutes came into being.

However, on going through the plaint as we have stated hereinabove that, there has been no clear assertion therein when the suit land was diluviated and when it was aluviated or reformed in *situ*. In any view of the matter, since those two occasions has no manner of application to give effect of the presidential order nos. 135 and 137 of 1972 whenever the suit land went under water and reappeared or reformed in *situ* but since the appeal was pending after those statutes came into operation so as per article (3) of P.O No. 137 of 1972 and article (5) of P.O No. 135 of 1972 appeal became abated. In the above panorama, there is no earthly reason to go for further discussion and observation to dispose of the appeal on merit.

In this regard, we can profitably to rely on the decisions reported in 1989 BLD (AD) 116 and 1 BLC (AD) 26.

Regard being had to the above facts and circumstances and that of statutory provision of law, the appeal is liable to be allowed on the heels of the claim of the respondent no. 1 got abated.

Accordingly, the appeal is allowed in view of the provision of article (3) of P.O No. 137 of 1972 and article (5) of P.O No. 135 of 1972 however without any order as to cost.

The impugned judgment and decree dated 14.12.1966 passed by the then learned Subordinate Judge, 1st Court, Barisal in Title Suit No. 58 of 1964 is thus set aside.

Let a copy of this judgment along with the lower court records be sent to the learned Joint District Judge, 1st Court, Barisal forthwith.

Mohi Uddin Shamim, J.

I agree.

Abdul Kuddus/**B.O**.