

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No.1576 of 2004

A. Aziz Hawlader and another.

.....*Petitioners.*

-Versus-

Shahid Mia.

.....*Opposite party.*

Mr.Md. Shariful Islam, Advocate.

.....*For the petitioners.*

None appears.

.....*For the Opposite party.*

Heard and judgment on 07.05.2024.

A.K.M.Asaduzzaman,J.

This Rule was issued calling upon the opposite party to show cause as to why the judgment and decree dated 18.02.2004 passed by the Joint District Judge, 2nd Court, Gopalganj in Title Appeal No. 48 of 2003 affirming those dated 04.08.2003 passed by the Assistant Judge, Kotalipara, Gopalganj in Title Suit No. 92 of 2002 dismissing the suit should not be set aside.

Petitioner as plaintiff filed Title Suit No. 92 of 2002 before the Court of Assistant Judge, Kotalipara, Gopalganj against the

opposite party for declaration of title and recovery of khas possession.

Plaint case in short inter alia, is that before R.S. survey, the suit land belonged to Bonomali Bhaterjee. During R.S. operation, it was recorded in the name of the said Bonomali Bhaterjee correctly in R.S. khatian No. 318 corresponding to plot No. 253. She sold the same to Ganesh Biswas alias Madhu, son of Debicharan Biswas alias Modhu by a kabala deed bearing No. 1056 and handed over possession to him. During S.A. operation, Ganesh Chandra died leaving his 03 sons namely Naresh, Paresh and Shuresh as heirs and having their title and possession. Naresh Chandra sold 2/3 share including other land to Nikhil Chandra Modhu, son of Dasharath Modhu and to Usharani, wife of Anil Chandra Madhu by way of a Kabala deed bearing No. 2652 dated 25.06.77 and handed over possession. Usharani and Nikhil Chandra Modhu sold the suit land to plaintiff No. 1-2 by two kabala deed bearing nos. 2028 and 2029 respectively on the same day i.e. on 24.03.78 and accordingly the plaintiff-petitioner acquired title and possession over 1/3 of the suit land by purchase and thereafter Naresh and Shuresh, two sons of Ganesh Chandra sold their share to the wife of Asen Sikder namely Choto Bibi by

way of a kabala deed bearing no. 2966 dated 25.05.79 and Choto Bibi while owning and possessing the suit land, sold the same to the plaintiff by way of a registered deed being no. 3616 dated 04.07.79. On the basis of those deeds, plaintiff have been possessing 23 decimals of land having their title. But the defendant opposite party no. 1 herein being a powerful man having long standing enmity with the plaintiff tried to cause harm to the plaintiff and on 31.12.2001, he along with his followers built plinth there, on filling earth and on the next day, the plaintiff found that they had been erecting houses in their part and instantly the plaintiff opposed to erect the same before Moslem Sikder, Syed Ali Howlader and many others and told them to give up possession but they refused. Defendant No. 1 is a trespasser in the suit land in question. He had no title in the suit land and erected homestead forcibly and hence the suit.

Opposite party as defendant contested the suit by filing written statement, denying the plaint case, alleging, inter alia, that plaintiff nos. 1-2 proposed to sell the suit land i.e. 23 decimals from plot no. 253 and to sell .07 decimals of land from other plot nos. 161/165 for sending Manik Gazi, son-in-law of the plaintiff no. 2 abroad and accordingly Sonavan Bibi for his son and

daughter agreed to purchase the same to erect dwelling house there. On 02.02.90 the value of the land had been settled in between of them at Tk. 15,000/-. At that time Majed Gazi, Nizam Mia, Paresh Madhu, Barek Gazi, Anil Modhu were present there. Sonavan paid to Lal Mia at Tk. 15,000/- on behalf of her son and daughter and Lal Mia accepted that consideration of money for his necessity and Lal Mia and his brother A. Aziz gave him possession of 12 katha from the western side of the suit land in question. Defendant No. 1 told the plaintiff to register sell deed but they were causing delay saying that some part of the suit land had been listed in the vested property list and after releasing the same, they would register the sale deed in the name of the defendants. Mazid Gazi was acquainted with the defendant and he was the mediator of this sell and the defendant did not disbelieve him and accordingly none of them disbelieved Lal Mia. Accordingly, defendants erected dwelling housed to the western side of the suit plot no. 253 comprising area of 30 decimals of the land earlier in the year of 1396 B.s. and their mother has been living together. On the eve of the month of Baishakh in 1397 B.S defendants told the plaintiff to register the deed of transfer but they consumed time making different pleas and subsequently the

plaintiffs refused to register kabala deed in respect of the suit land, rather threatened the defendants to evict from the suit land in question within seven days. But the defendant no. 1 did not give up the possession till today from the suit land and he has been possessing the same with adverse possession through his mother and sister and they have been residing there above 12 years. Plaintiff tried to dispossess them many time but the villagers opposed them, they could not evict the defendants. Plaintiffs case is false, fabricated and should be dismissed.

By the judgment and decree dated 04.08.2003 Assistant Judge, Kotalipara, Gopalganj dismissed the suit on contest.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 48 of 2003 before the Court of District Judge, Gopalganj, which was heard on transfer by the Court of Joint District Judge, 2nd Court, Gopalganj, who by the impugned judgment and decree dated 18.02.2004 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree plaintiff-petitioners obtained the instant rule.

Mr. Md. Shariful Islam, the learned advocate appearing for the petitioners drawing my attention to the judgment of the court below submits that when both the courts below concurrently found that plaintiff is the owner of the suit land and defendant by way of oral testimonies admits that they had erected the houses on the land, which was admittedly owned by plaintiff but only upon wrong presumption held that suit is barred by limitation and dismissed the suit illegally. The impugned judgment of the court below is thus not sustainable in law, which is liable to be set aside.

Although the matter is posted in the list for several days and on 04.03.2024 a vokatnama was filed by the learned advocate Rexona on behalf of the opposite party and the same was kept with the record and finally posted today for delivering judgment but no one appears to oppose the rule.

Heard the learned Advocate and perused the impugned judgment and the L.C. Records.

This is a suit for simple declaration of title and recovery of khas possession. Admittedly suit land was belonged to the plaintiffs. Plaintiff filed the suit claiming that defendant is a trespasser and dispossessed the plaintiff from the suit land by

erecting 02(two) huts on 31.12.2001 and as such he filed this suit for declaration of title and recovery of khas possession.

On the other hand defendant claimed that plaintiff intend to sell the suit property fixing a consideration money of Tk. 15,000/- and thereafter handed over the possession to him on the basis of an oral agreement long before the institution of this suit in the month of Falugun 1396 B.S. and he is not a trespasser rather he is a valid purchaser and is also in possession in the suit property. Both the courts below although found on evidence on record that plaintiff is the owner of the suit property and defendant is found to be in possession thereon but dismissed the suit on holding that plaintiff could not succeed to prove the date of dispossession i.e. a cause of action of institution of this suit.

Now let us see how far this finding is justifiable, since it has been questioned in this rule that it was held arbitrarily.

In order to prove the respective cases both the party adduced 04 witnesses. In order to substantiate, the plaintiff contention that he was dispossessed by the trespasser defendant illegally on 31.12.2001, plaintiff Ajij Howlader deposed in court

as P.W.1 and asserted the same. In support of his contention P.W.2 Siddiquir Rahman corroborate the same and said that

‘৩১/১২/২০০১ তারিখে নালিশী জমিতে ১নং বিবাদী মাটি কাটে। পরদিন সেখানে ঘর তোলে।’

P.W.3 Abul Hossain Mia stated in his deposition that

‘মামলার জমিতে ১৪০৮ সালের পৌষ মাসে ৩১.১২.২০০১ তারিখে শহিদ মাটি কাটে। তার আগে বিবাদীরা ভোগ দখল করত না।’

P.W.4 Shamsher Ali stated in his deposition that

‘বিবাদী সকলে জোর করে মাটি কাটে। আর একটি ঘর দিয়ে গরু রাখে।’

This way plaintiff tried to prove that he was dispossessed on 31.12.2001 and thereafter he instituted this suit on 10.07.2002, which is well within time under Article 120 of the Limitation Act.

On the other hand D.W. 1 Md. Shahid Mia while deposing in court said that

‘মজিদ গাজীর আশ্রয়ে আমরা থাকি। ২৫৩ দাগে বাড়ী করে ২টি ঘর তুলি। ১৭ বন্দের একটি একটি টিনের একটি খড়ের ঘর

তুলি ১৩/১৪ বছর আগে ফাল্গুন মাসে ঘর তুলি। ঘর তুলে সেখানে
বসবাস করছি।’

This statement was made on 11.06.2003, which means they took possession over the suit land in the year 1988 or 1989 but in the written statement defendant stated that when plaintiff no. 2 Lal Miah wanted to sell the property consideration money was fixed at Tk. 15,000/- on 02.02.1990 and on paying the said consideration money, defendant took possession on 12 kathas land. Thus the statement of defendant as D.W.1 is not in conformity with the statement made by him in the written statement as well as is also a vague.

D.W.2 A. Mazid Gazi regarding the possession has said that

‘বাংলা ১৩৯৬ সনের ২০ শে মাঘ তাদের ১২ কাঠা জমি নিয়ে
বেচাকেনার কথাবার্তা হয়। ১৫,০০০/- টাকা দাম স্থির হয়। তাদের
বাড়ীতে ঘরের বারান্দায় বসে কথাবার্তা হয়। টাকাপয়সা ঐ সময়
লেনদেন হয়। জায়গার দখল বুঝ করে দেয়।’

He further stated that

‘বিবাদী দখল পাওয়ার পর বাড়ী করে ঘর তুলে ঐ সালের
ফাল্গুন মাসের ১ম দিক দিয়ে দুবার ঘর তুলে বসবাস করছে।’

D.W.3 Anil Madhu a day labourer, who claimed to be worked on the construction of the tin shed house on the suit land stated that

‘শহিদ মিয়ান সাথে আজিজ হাওলাদের বেচা কেনার কথাবার্তা হয় তা জানি। মাঘ মাসের ২০ তারিখে ১৩/১৪ বছর আগে আমি সেখানে উপস্থিত ছিলাম।’

D.W.4 Nikhil Madhu also another day labourer, who has stated a similar version as D.W.3 and said that

‘নালিশী দাগে আমি পুকুর কাটি। আমি মাটি কাটার কাজ করি। ১৩/১৪ বছর আগে মাঘ মাসের শেষ দিক দিয়ে নালিশী দাগে একটি পুকুর কাটি। বিবাদী শহিদ মিয়া পুকুর কাটায়। দাগের মাঝে শহিদ মিয়ান ঘর আছে। তাহা ১৩/১৪ বছর আগে থেকে। শহিদ মিয়া ১৩/১৪ বছর হয় নালিশী দাগে বসবাস করছে।’

Upon perusal of the deposition of the D.W it appears that all the defendant’s witnesses although made a vague assertion on taking possession over the suit land by the defendant as well as not in conformity with the statement made in the written statement but taking into consideration of this statement of the D.W.s, Court below most arbitrarily held that cause of action of the suit was not been proved. When defendant could not show any scarp of paper

that he has got any title over the suit land and holding the possession thereon on the basis of any legal valid document rather he is found to be an illegal possessor as well as trespasser there on the suit property and that admittedly plaintiff is the owner of the suit property and being in possession in the suit property since before the date of dispossession and the defendant's story of getting the suit property by way of an oral agreement of sell not been proved. Court below ought to have decreed the suit in favour of the plaintiff, failing which both the courts below concurrently committed error of law in dismissing the suit resulting error in the decision occasioning failure of justice and accordingly the judgment is not sustainable in law, which is liable to be set aside.

In that view of the matter, I find merits in this rule. Accordingly the Rule is made absolute without any order as to costs. The judgment and decree passed by the court below are hereby set aside and suit is decreed in favour of the plaintiff and defendant is hereby directed to vacate the suit premises forthfully failing which plaintiff may entitle to get possession into the suit property in due course of law.

Let the order of status-quo granted earlier by this court is hereby recalled and vacated.

Send down the L.C.Records and communicate the judgment to the court below at once.