

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 619 of 2016

Abdul Aziz Khan

.....Petitioner.

-Versus-

Md. Faijul Sharif and others

.....Opposite parties.

Mr. Md. Matiur Rahman Howlader, Adv.

.....For the petitioner.

Mr. Syed Altaf Hossain, Advocate

..... For the opposite parties.

Heard and judgment on 27th February, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 26.11.2015 passed by the Additional District Judge, Madaripur in Title Appeal No. 79 of 2013 reversing those dated 15.04.2013 passed by the Joint District Judge, 2nd Court, Madaripur in Title

Suit (Civil Suit) No. 137 of 2010 decreeing the suit should not be set aside.

Petitioner as plaintiff filed Title Suit No. 137 of 2010 before the Court of Joint District Judge, 2nd Court, Madaripur against the defendants opposite party for partition of the 'Ka' schedule land and for pre-emption of 'Kha' schedule land.

Plaint case in short, inter alia, is that Aftar Uddin was the owner of 5 anna 6 gonda 2 kranti share of 2.24 acre land of R.S. khatian No. 693 of Mouja Ishibpur of Rajoir Police Station under Madaripur District. Of which 1.61 acre land of suit dags No. 398,399,402,403 are fellow, pond and pond-side land and Aftar Uddin owned 0.5366 acre in his share. Aftar Uddin died leaving behind two sons Makbul Khan and plaintiff, 5 daughters Fuljan, Shefali, Hapee, Renu Julekha, 5 sisters namely Fuljan and other verbally gifted their shares equally to both the brothers and as such the plaintiff and his brother got 0.2683 acre land each. Plaintiff and his brother, by kabala No.6092 dated 14.11.1974, Mortgaged 0.13 acre land with Chand Kha on Vensal Condition of reconveyancing. Plaintiff has his dwelling house on the mortgaged land having the rest of the land under his possession. The

plaintiff's predecessor having died before S.A. operation, could not get S.A. record in his name. Chand Kha deceptively got the same recorded in his name but the said record created no hurdle of plaintiff's possession and title. Chand Kha secretly made sale deeds No. 3409 dated 22.10.2008 and No.442 dated 11.02.2009 concerning 0.26 acre of land and mortgaged 0.13 acre in favour of defendants No. 1/2. Such deeds were beyond the back of the plaintiff. No notice was served upon the co-sharers. Defendants 1/2, on 16.02.2006, made public the matter of the said deed and refused partition of the ejmali property. Plaintiff told the defendants No. 1/2 to return the land and on refusal declared to pre-emptee in presence of local elderlies. Plaintiff is the co-share while defendants 1 /2 are strangers, who did neither make any development nor filled up earth. He filed this suit for partition of 'ka' schedule land and pre-emption of 'Kha' schedule land.

Opposite party Nos. 1 and 2 as defendant Nos. 1 and 2 contested the suit by filing written statement denying the plaint case alleging, inter alia, that Chand Bibi was the owner in possession of 2 anna 13 gonda 1 kara 1 kranti share of land appertaining to R.S. Khatian No. 693 corresponding to S.A.

khatian No. 515.516 and 517 of Mouja Ishibpur, Thana Rajoir under Madaripur District. Chand Bibi died leaving behind one son Hakim Sheikh and 4 daughters Kaituri Begum, Rajia alias Kalabibi, Bilasi Bibi and Lal Banu, who got decree of their land in Civil Suit No.21 of 1991 since their names were not recorded during S.A. operation. Lal Banu died leaving 3 sons and 2 daughters. Heirs of Chand Bibi wanted to sell their land and approached the plaintiff and other co-shares but in vain and the formers requested defendants No. 1 /2 since relatives to purchase the land, Hakim Sheikh and other by registered kabala dated 22.10.2008 transferred 0.26 acre land and delivered possession on the following day in presence of the plaintiff and other co-shares. Defendant No. 1/2 filled earth at a cost of Taka 2 Lac, erected 'Dochala' tinshed, a cock shed a cowshed, a pacca bathroom installed tube-well and started living. Chand Kha wanted to sell 0.13 acre land and when the plaintiff and other co-shares refused to purchase, defendants No. 1/2 purchased the same by registered kabala dated 11.02.2009. Thereafter defendants No. 1/2 planted 400 different trees at a cost of Tk. 12000/- the present value of the land is increased manifold times and the plaintiff having neither

title nor possession, filed the suit on false averments which is liable to be dismissed.

Subsequently although the defendant No.3 and the other defendants filed written statement separately but did not contest the suit.

During trial the Joint District Judge framed the following issues.

- i) Whether the suit is maintainable to its present form?
- ii) Whether the suit is bad for defect of parties?
- iii) Whether the suit is bad for hotchpotch?
- iv) Whether the plaintiff has got title and possession in the suit land?
- v) Whether the plaintiff is entitled to get an order of pre-emption under section 4 of the Land Partition Law?
- vi) What else relief or relieves, the plaintiff is entitled to get?

By the judgment and decree dated 15.04.2013, the Trial court decreed the suit in part.

Challenging the said judgment and decree defendants opposite parties preferred Title Appeal No. 79 of 2013 before the Court of District Judge, Madaripur, which was heard on transfer by the Additional District Judge, Madaripur, who by the impugned judgment and decree allowed the appeal and after setting aside the judgment of the trial court dismissed the suit.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant Rule.

Mr. Md. Matiur Rahman Howlader, the learned advocate appearing for the petitioner drawing my attention to the judgment of the courts below submits that although this is a suit for partition as well as for pre-emption and the trial court upon holding that a partition suit between the parties on the same suit land is pending and accordingly he did not interfere the matter of partition but he allowed the pre-emption case of the petitioner and decreed the suit in part holding that plaintiffs petitioner being a co-sharer in the suit jote and contesting defendant are the stranger purchaser in the suit property and thus rightly allowed the pre-emption in favour of the pre-emptor. But the appellate court without at all reversing the said findings of the trial court most arbitrarily held that since the

partition suit between the parties is disposed of earlier, the instant suit is barred by resjudicata and accordingly dismissed the suit illegally. He finally prays that the impugned judgment is not sustainable in law, it is liable to be set aside.

Mr. Syed Altaf Hossain, the learned advocate appearing for the opposite party drawing my attention to the judgment of the Trial court submits that trial court without framing any issues on limitation most illegally allowed the pre-emption case. The learned advocate further submits that when the plaintiffs contention of acquiring the property by way of oral gift from the sisters not been proved by adducing evidence and accordingly all other contention on title are also not been proved. Even then trial court decreed the suit most illegally in favour of the plaintiff. He lastly submits that when no issue was framed on limitation, the suit may be sent back on remand to the trial court for proper adjudication after framing the proper issues in the suit for pre-emption.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for partition together with a prayer for pre-emption as per section 4 of the Partition Act. According to the plaintiff, suit property was belonged to Aftar Uddin, who died leaving behind two sons, plaintiff and his brother Mokbul Khan together with their 3 sisters. Said 3 sisters subsequently gifted their share in favour of their two brothers and accordingly plaintiff and his brother Mokbul Khan acquired entire suit property. When the defendant No.1 and 2 disclosed that they purchased the suit property from Mokbul Khan through 2 registered sale deed, plaintiff instituted the suit. On the other hand defendant claimed that plaintiffs were asked to purchase the suit property by Mokbul Khan, when he was in need of money and intends to sale the property. But when the plaintiff declined to purchase the same, the pre-emptee defendants No.1 and 2 purchased the same from Mokbul Khan and thereafter they improved the land by spending huge amount of money as well as constructing their dwelling house thereon. Defendant's further case is that plaintiff earlier instituted suit for partition wherein this defendants were made party as a purchaser and the said suit is still pending.

Trial court upon discussing the evidences on record found that although the contention of the plaintiffs to the effect that property of 3 sisters are obtained by the plaintiff and his brother Mokbul Khan by way of oral gift not been proved by adducing any evidence and a suit for partition is also pending amongst the parties but since that cannot be a bar to institute a suit as well as prayed for preemption in a separate suit for pre-emption and as such he allowed the plaintiffs claim to preempt the land, which was admittedly purchased by the defendant No.1 and 2, who are the stranger of the suit property, beyond the knowledge of the petitioner plaintiff. Trial court upon discussing the evidence on record found that defendants contention that plaintiffs were very much aware of the sale and initially declined to purchase the suit property not been proved by adducing evidence and as such pre-emption was allowed by the trial court. But in appeal there against the appellate court did not discuss the evidences on record as well as without at all reversing the said findings of the trial court allowed the appeal and dismissed the suit. The Appellate court only consider that there is an earlier decree in a suit for partition and declaration and accordingly the instant suit is barred by

resjudicata. Although no issues has been framed accordingly as well as no discussion is there in the four corner of the suit on this point. If any decree in passed earlier in the suit for declaration of title as well as partition that cannot be a bar to a suit subsequently instituted for pre-emption. The two suits are quite different in nature from each other and prayer of both the suit are also very different in nature and accordingly it cannot be said a bar as resjudicata. Appellate court totally failed to consider this aspect of this case and erred in law in allowing the appeal.

I have gone through the memo of appeal together with written statement filed by the defendant Nos.1 and 2. Nowhere in the pleadings, it has been urged ever before by the defendant that the suit was at all been barred by limitation. In the plaint of the suit it can be noticed that cause of action of this suit was shown as that on 16.02.2010, when the defendant disclosed that they got the suit property by way of two registered sale deed and after getting the certified copy of the said sale, plaintiff became confirmed and then instituted the suit within a month on 04.03.2010.

I have noticed above that the point raised by the defendant that plaintiffs declined to purchase the suit property from the

Mokbul Khan consequently the defendant Nos. 1 and 2, thereafter purchased the same was not been proved by any evidence as been found by the trial court. Moreover when the contention of the plaintiff to the effect that they got to know about the impugned sale deed on 16.02.2010 and thereafter instituted the suit on 14.02.2010 well within time, there is no latches to institute the suit and the point raised on limitation contents no legs to stands.

Having regards to the above law, fact and circumstances of this case, I find that the judgment passed by the appellate court is not sustainable in law and accordingly it is set aside and the judgment passed by the trial court is hereby revived.

I thus find merit in this rule.

In the result, the rule is made absolute and the impugned judgment and decree passed by the appellate court is hereby set aside and the judgment passed by the trial court is hereby restored and the suit is decreed.

The order of stay granted earlier is hereby recalled and vacated.

Send down the L.C.R along with the judgment at once.