

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Muhammad Abdul Hafiz

CIVIL REVISION NO. 4208 OF 2010

Md. Abdur Rouf and others
Plaintiffs-Appellants-Petitioners

versus

Md. Munsur Hossain Gazi and others
Contesting-Defendants-Respondents-Opposite
Parties

Md. Abul Hossain Gazi and others
Non Contesting-Defendants-Respondents-
Opposite Parties

Mr. Mohammad Abdur Rashid, Advocate
for the Plaintiffs-Appellants-Petitioners

Mr. Md. Ashad Ullah, Advocate
for the Defendants-Respondents-Opposite Party
Nos. 1-17

Judgment on: 31.8.2023

This Rule was issued calling upon the opposite party Nos. 1-17 to show cause as to why the impugned Judgment and Decree dated 27.7.2010 passed by the learned Additional District Judge, 2nd Court, Satkhira in Title Appeal No. 105 of 2005 dismissing the appeal and allowing the cross objection and thereby affirming the Judgment and Decree dated 30.6.2005 passed by the learned Senior Assistant Judge, Debhata (in charge), Satkhira in Title Suit No. 64 of 1995 dismissing the suit should not be set aside and/or

such other or further order or orders passed as to this Court may seem fit and proper.

The petitioners as plaintiffs instituted the instant suit being Title Suit No. 64 of 1995 in the Court of the learned Assistant Judge, Debhata, Satkhira for setting aside the ex-parte decree passed in Title Suit No. 92 of 1976 on the allegation inter alia, that Gangadhar and Chandi Charan had title and possession in 1.10 acres of land under C.S. Khatian No. 267 in equal portion. Mohananda Gosh and Anukul Chandra Gosh had title and possession in 2.17 acres of land in equal portion under C.S. Khatian No. 320. Mathura Boidyanath had title and possession under C.S. Khatian No. 71 and Mathura Boidya and Rameshwar Boidya had title and possession over 54 decimal and 4.12 acres of land in equal portion under C.S. Khatian Nos. 372 and 318 and S.A. Khatian Nos. 456, 553, 118, 601 and 530 were prepared respectively following the above C.S. Khatians. Gangadhar Gosh transferred his share to Mathura Nath Boidya and Chandi Charan transferred his portion to Phulmoti who transferred her share to Mathura Nath Boidya. Anukul Chandra being died in unmarried status Mahananda Gosh who transferred his share to Mathura Nath Boidya and thus Mathura Nath Boidya became the owner and possessor of 6.16 acres of land from C.S. Khatian Nos. 267, 320, 71, 372 and 318. Mathura Nath Boidya died leaving behind 5 sons namely Tarapada, Gourhori Nitaipada, Supada and Horipada Gosh.

Haripada Gosh died in unmarried status and above 4 (four) brothers were the successors of the land of Mathura Nath Boidya. Rameshwar Boidya died leaving behind 2 (two) sons namely Madar Boidya and Sudhir Boidya. The predecessors of plaintiff petitioners and opposite parties were Tamir Gazi, Nomir Gazi and Nayamat Gazi who were full brothers and they came from west Bengal of India in 1950. Nomir Gazi and Neyamat Gazi started to live in this country since 1950 and Tamir Gazi not having been able to sell his land at times he lived in the house of Nomir Gazi and Neyamat Gazi and during his living he agreed to purchase the land to Tarapada Boidya and Nitai Boidya and Tamir Gazi took Nomir Gazi to India and he gave money to Nomir Gazi in good faith and 3.70 acres including 2.70 acres were purchased from Nitai in the name of the plaintiff. The defendant Nos. 30 and 31 on 08.07.1950 by registered deed No. 4099 and Nomir Gazi and Neyamat Gazi being greedy purchased 3.70 acres of land on 08.07.1950 vide registered deed No. 4101 in their names with the money of Tamir Gazi. Tamir Gazi after selling his land of India started living permanently in this country since 1952 and took over possession of the land described in Deed Nos. 4099 and 4101 and he knows that both deeds stand in his name and the said deeds were in the custody of Nomir Gazi at the time of preparation of S.A. Khatian; both the deeds were handed over to him and called

for an explanation from Nomir Gazi for purchasing the land of Deed No.4101 and he expressed that due to the mistake of scribe the said deed was registered in their names and promised to him that he will get the names of the plaintiffs and his sons names to be prepared in the S.A. record of rights but subsequently it was detected that S.A. Khatian No. 118 was prepared in the name of Nomir Gazi and others in respect of the land described in C.S. Khatian No. 71 and hence the suit.

The opposite parties as defendant Nos. 1-3, 11, 12, 16 and 18 contested the suit denying material allegations of the plaint contending inter alia, that Tamir Gazi, Nomir Gazi and Neyamat Gazi who are full brothers came to live in this country and looked for land for purchase the same. Tara Pada Boidya transferred 3.70 acres including the land of disputed Khatian to Nomir Gazi and Neyamat Gazi who were predecessors of the defendants opposite parties, on 08.07.1950 vide registered deed No. 4101 on the self same date Gourhori transferred his 3.70 acres of land to Nomir Gazi and Neyamat Gazi vide deed No. 4100. Madar Boidya, Sudhir Boidya , Nitai Boidya and Supada Boidya transferred their land to Taleb Gazi, Giad Gazi and Tomijuddin and others. Nomir Gazi during the period of holding title and possession of disputed 2.70 acres of land and 2 deeds not being in custody S.A. Khatian was prepared in the name of the title-less person who threatened to

transfer his land to others and in consequence of which the disputed suits were instituted and the addresses of the defendants in that suits were right and summons were served upon them and the defendant No. 4 of the said suit i.e. the defendant No. 32 of the instant suit appeared in earlier suit but did not contest and the decree was passed duly and Nomir Gazi did not forget the signature of defendant No. 4 in earlier suit and on the basis of the decree the defendants against their names mutated in the record of rights and they have been possessing the said land by cultivating fish in the pond and planting trees and erecting houses thereon and hence the suit is liable to be dismissed.

The Senior Assistant Judge, Debhata (in charge), Satkhira dismissed the aforesaid suit by his judgment and decree dated 30.6.2005. Against the aforesaid judgment and decree the plaintiffs as appellants preferred Appeal before the learned District Judge, Satkhira being Title Appeal No. 105 of 2005 and thereafter which was transferred to the learned Additional District Judge, 2nd Court, Satkhira who dismissed the Appeal and allowed the cross objection by his Judgment and Decree dated 27.7.2010 and thereby affirmed the Judgment and Decree dated 30.6.2005 in Title Suit No. 64 of 1995 passed by the learned Senior Assistant Judge, Debhata (in charge), Satkhira and hence the plaintiffs as petitioners

moved this application under Section 115(1) of the Code of Civil Procedure before this Court and obtained this Rule.

Mr. Mohammad Abdur Rashid, learned Advocate for the plaintiffs-appellants-petitioners submits that the defendant No. 1 Nomir Gazi i.e. the father of the opposite party No. 1 purchased 10 Anna share from Dag No. 1473 under C.S. and S.A. Khatian Nos. 218 & 530 respectively which is included in registered deed No. 4101 dated 08.7.1950 from the plaintiffs-petitioners and their brothers by virtue of a deed dated 08.5.1965 which proves that the plaintiffs-petitioners had title and possession over the disputed land and to that effect the Trial Court has given finding but the Additional District Judge, 2nd Court, Satkhira without reversing his finding of the Trial Court mechanically held that the defendants opposite parties have been able to prove their title and possession of disputed land and thereby committed an error of law resulting in an error in the decision occasioning failure of justice. He further submits that the Trial Court held that fraud has been practiced in respect of service of summons in respect of Title Suit No. 92 of 1976 and the decree thereof has been obtained fraudulently but the Appellate Court below subjectively held that D.W.2 Bidhan Chandra Sarker has proved the service of summons without discussing the evidence and without reversing the finding of the Trial Court. He lastly submits that the Courts below committed an

error of law resulting in an error in the decision occasioning failure of justice without considering that when an ex-parte decree is challenged on the ground of being obtained by fraud and the same elements of fraud are found on record of the Court is not to sustain such fraudulent decree even if set-aside the said ex-parte decree is barred by limitation. In support of his submissions he has referred to the case of Mohammad Ali Vs Burma Eastern reported in 38 DLR(AD)41, National Bank Vs M.R. Trading Company reported in 72 DLR (AD) 57.

Mr. Md. Ashad Ullah, learned Advocate for the defendants-respondents-opposite party Nos. 1-17, submits that Golam Rabbani Gazi son of Tamiz Uddin Gazi and মোকাবেলা বিবাদী নং 32 of the Title Suit No. 99 of 1991 is the full brother of plaintiff of the said suit Abbas Ali Gazi. Firstly, Golam Rabbani Gazi appeared in Title Suit No. 92 of 1976 as defendant No. 4 of the said suit by filing Vokatnama as admitted by plaintiff Abbas Ai Gazi at paragraph No. 5(ঙ) of his plaint, which is the whole truth. He further submits that the plaintiff-petitioner's predecessor late Abbas Ali Gazi (son of Tamiz Uddin Gazi) filed Title Suit No. 99 of 1991 on 24.08.1991 in the Court of Assistant Judge, Kaligonj and on transfer the said suit re-numbered as Title Suit No. 64 of 1995 and prayed for declaration of the said ex-parte decree dated 23.12.1980 passed in Title Suit No. 92 of 1976 of the Court of 2nd Munsif,

Satkhira as তৎক্ষণিকী ও ভয়েড সাব্যস্তে রদ ও রহিত। He next submits that in paragraph No. 5(গ) of the plaint of Title Suit No. 64 of 1995, the plaintiff stated that on 05.08.1991 for the first time he knew about the ex-parte judgment and decree passed on 23.12.1980 in Title Suit No. 92 of 1976. He further submits that the plaint of Title Suit No. 64 of 1995, the plaintiff clearly stated that the plaintiff and the proforma defendant Nos. 30-34 are the sons and daughters of late Tamijuddin Gazi and Tamijuddin Gazi paid money to purchase the land in question but Nomir Gazi purchased said land in his name. From the cause title of the plaint, it is evident that the plaintiff and the proforma defendants Nos. 30-34 are the full brothers of the plaintiff and sons of late Tamijuddin Gazi residing the same house and address. The plaintiff and the proforma defendant being the heirs of late Tamij Uddin Gazi, is the equal claimant of the alleged land by way of inheritance. 4(four) sons of Tamiz Uddin Gazi and his daughters were the claimant of the suit land but only Abbas Ali Gazi filed the present suit and that other sons impleaded as proforma defendant in the suit since they had/have participated in legal process relating the judgment and the decree passed in the said Title Suit No. 92 of 1976. He then submits that Abu Bakar Gazi, son of late Tamiz Uddin Gazi, proforma defendant No. 34 who is also full brother of the plaintiff Abbas Ali Gazi and alleged co-owner of the suit property, filed an

application under Order 9 rule 13 read with section 151 of the Code, 1908 on 04.02.1988 to set aside ex-parte judgment and decree dated 23.12.1980 passed in Title Suit No. 92 of 1976 of the Court of Second Munsif, Kaligong and the said application as Miscellaneous Case No. 02 of 1988. In the said application the applicant impleaded plaintiff Abbas Ali Gazi and his other brothers as opposite party Nos. 5 and 6. The certified copy of the application Miscellaneous Case No. 02 of 1988 marked as Exhibit “ঙ” without any objection. The opposite party appeared in the said miscellaneous case. The applicant Md. Abu Bakar Gazi filed an application to withdraw the suit with permission to re-file on the day of pre-emptory hearing, that is on 17.01.1990, but the learned Munsif rejected said prayer by order dated 17.01.1990. The opposite party at the time of hearing clearly submitted that “পক্ষান্তরে তরফছানী পক্ষে বক্তব্য, ছাওল মিথ্যা উক্তি অহেতুক হয়রানীমূলক মোকদ্দমা আনায়ন করেছে। এবং সমনজারীর প্রকৃত সাক্ষীকে ভারত থেকে আনায় নিশ্চিত পরাজয় জেনে পুনঃ চূঃ শুনানীর দিনে ছাওল মোকদ্দমা প্রত্যাহার করিতে চান।” That the Order dated 11.01.1990 marked as Exhibit as “ঙ/১” without objection. Thereafter Md. Bakar Gazi filed an application on 11.01.1990 to withdraw the Miscellaneous Case with permission to re-file and his prayer was allowed but Abu Bakar Gazi did not file any application as per his prayer, consequently, the plaintiffs had full knowledge about the judgment and decree passed in Title Suit

No. 92 of 1976 on and from 08.02.1988, in this count the suit filed beyond 3 (three) years as required under Article 91 of the First Schedule of the Limitation Act, 1908. He then submits that the plaintiffs-petitioners, in the third round, filed the present suit on 24.08.1991 and in view of the facts stated above, it is clear that the suit is barred by Article 91 of the First Schedule of the Limitation Act, 1908. He then submits that the plaintiffs failed to prove their plaint case, is the finding of both the Courts below and that the suit is barred by law. He further submits that the summons of the suit duly served upon the defendants of the suit. The plaintiff as P.W.1 in his examination-in-chief clearly deposed as under:

“দেং ৯২/৭৬ নং মামলার ৪ নং বিবাদী গোলাম রব্বানী ওকালতনামা দিয়ে হাজির হয়েছিল কিনা খবর রাখি নাই। অত্র মোকদ্দমা করিবার পূর্বে আমি মোকদ্দমা করেছিলাম কালিগঞ্জ কোর্টে সত্য নয়। আবু বকর আমার ভাই। তিনি মামলা করেছিল কিনা খবর রাখি নাই।”

From the above deposition, it is evident that the plaintiff-petitioner willfully withheld from producing his co-owner of the suit land, full brothers and residing in the same house, namely, Golam Rabbani Gazi and Abu Bakar Gazi to adduce their evidence in favour of the plaintiff inasmuch as in their presence Khogen infavoured the plaintiff about the ex-parte judgment and decree, gives a presumption against non-service of the summons upon the petitioners and the whole truth relating to service of summons

upon the plaintiffs-petitioners and that the P.W.1 did not deny the whole truth as stated above in this affidavit. He next submits that the description of the schedule of the suit land being vague and unspecified portion of the bigger plots inasmuch as without any boundary, consequently, the suit is not maintainable in view of Order 7 rule 3 of the Code of Civil Procedure, 1908 and the Courts below rightly dismissed the suit as the Courts below in passing judgments considered the whole plaint. He next submits that the alleged plaint of Title Suit No. 64 of 1995 is not a plaint in the eye of law as mandated under Order 6 rule 15(2) of the Code of Civil Procedure, 1908 and as such not maintainable Courts below in dismissing the suit considered the entire plaint and the point of law relating to the plaint. He lastly submits that Md. Golam Rabbani Gazi, full brother of the plaintiff of the suit was not cited as witness to admit the plaint case of non-service of the summons of the Title Suit No. 92 of 1976 and Golam Rabbani Gazi did not file Vokatnama in Title Suit No. 92 of 1976 although he was present in the Court Room as evident from the evidence of P.W.1 Abbas Ali Gazi. That it is stated that Md. Golam Rabbani Gazi by filing Vokatnama appeared in the Title Suit No. 92 of 1976, consequently, full knowledge of the plaintiff Abbas Ali Gazi about the institution of the Title Suit No. 92 of 1976 and the ex-parte judgment and decree dated 23.12.1980 and that summons of the

said duly served upon him as it is clear from record. The ex-parte judgment and decree passed in Title Suit No. 92 of 1976 on 23.12.1980 and the present suit filed on 24.08.1991. In his examination-in-chief, the plaintiff stated that he heard about the ex-parte decree on 05.08.1991 from Khogen and at that time amongst others Golam Rabbani Gazi and Abu Bakar Gazi were present but they were not cited as witness. Golam Rabbani Gazi appeared in Title Suit No. 92 of 1976 by filing Vokatnama and the knowledge of the plaintiff of the ex-parte decree at least on and from 23.12.1980. Consequently, Title Suit No. 99 of 1991 re-numbered as Title Suit No. 64 of 1995 is barred under Article 95 of the First Schedule of the Limitation Act, 1908 since the plaintiff filed suit beyond within 3(three) years of the judgment and decree dated 23.12.1980.

Heard the learned Advocates for the parties and perused the record.

The petitioners as plaintiffs instituted the instant suit being Title Suit No. 64 of 1995 for setting-aside the ex-parte decree passed in Title Suit No. 92 of 1976 but it is well settled principle that after passing a decree, it can only be challenged under Section 44 of the Evidence Act to show that it was obtained either by fraud or collusion and or no other ground. It appears that the plaintiffs-petitioners failed to produce or adduce any oral and documentary

evidences before the Courts below to substantiate their own case, even if their so called ownership along with the possession could not be proved any way. Both the Court below find that the plaintiffs-petitioners failed to prove their case. There is no misreading or non-consideration of evidence by both the Courts below. The plaintiffs-petitioners could not point out any misreading and non consideration of evidence on record. This Court cannot interfere with the concurrent findings of facts.

Considering the facts and circumstances of the Case, I find no substance in this Rule, rather I find substance in the submissions of the learned Advocate for the defendants-opposite parties.

In the result, the Rule is discharged without any order as to costs.

The impugned Judgment and Decree dated 27.7.2010 passed by the learned Additional District Judge, 2nd Court, Satkhira in Title Class Appeal No. 105 of 2005 dismissing the appeal and thereby affirming the Judgment and Decree dated 30.6.2005 passed by the learned Senior Assistant Judge, Debhata (in charge), Satkhira in Title Suit No. 64 of 1995 dismissing the suit is hereby up-held.

Send down the lower Court's record with a copy of the Judgment to the Courts below at once.