IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL APPEAL NO. 74 OF 2010
(From the judgment and order dated 11.05.2009 passed by the High Court Division in Civil Revision No.57 of 2003)

Shahin Mia : ..... Appellant

=VERSUS=

Parul Begum and others : ..... Respondents

For the appellant	**:Mr. N.K. Saha, Senior Advocate, instructed by Mrs. Mahmuda Begum, Advocate-on-Record**
For the Respondent Nos.1-4 and 7	**:Mr. Mazibar Rahman, Advocate-on-Record**
For the respondent Nos.5-6 and 8-23	**:Not represented**
Date of hearing	**:17-05-2022, 31-05-2022, 27-07-2022 and 03-08-2022**
Judgment on	**:The 7th August, 2022**

J U D G M E N T

MD. NURUZZAMAN, J:

This Civil Appeal, by leave, has arisen out of the judgment and order dated 11.05.2009 passed by the High Court Division in Civil

Revision No.57 of 2003 making the Rule absolute and thereby set aside the judgment and decree dated 23.07.2002 passed by the learned Additional District Judge, 1st Court, Brahmanbaria in Title Appeal No.74 of 1999 dismissing the appeal and thereby affirming the judgment and decree dated 19.04.1999 passed by the learned Senior Assistant Judge, Kasba, Brahmanbaria in Title Suit No.18 of 1997 dismissing the suit.

The respondent Nos.1-8 as plaintiffs instituted Title Suit No.18 of 1997 in the Court of Senior Assistant Judge, Kasba, Brahmanbaria, impleading the appellant as defendants and respondent Nos.9-22 as others defendant and respondent No.23 as proforma defendant, praying for declaration of title to

the suit land and for recovery of khas possession therein.

Facts leading, to filing of this civil appeal, in short, are that, the suit plot No.638 and 639 along with on non suited plot No.643 measuring 39 decimals of land originally belonged to Samina Bibi which was finally published in her name in Cadastral Survey (in short, C.S.) Khatian and that the said Samena Bibi died leaving behind her only daughter Amena Khatun and thereafter Amena Khatun died leaving behind her daughter Malekernesa alias Maleka. While Maleka was owning and possessing the said plots, she transferred the entire land of plot no.643 by executing and registering deed of sale no.3219 dated 26.04.62 and 07 decimals of land from the suit plots by

executing and registering another deed of sale bearing no.4967 dated 6.12.1972 to the plaintiff no.4 Abdul Sobhan alias Sobhan Miah. After purchase he mutated his name and got Jama Separated in Separation Case No.224/83-84 by creating a separate Khatian No.982 and took a loan from the Janata Bank, Brahmanbaria Branch by mortgaging the said 07 decimals of land. Thereafter, Maleka Begum died leaving behind one son Abdul Hossain, father of plaintiff No. 5, who died leaving behind plaintiff nos.3-5 as his sons and daughter and thus the plaintiff nos.1-4 became the owners of 27 decimals of land in the suit plot by way of purchase and by inheritance. That in State Acquisition (in short, S.A.) operation, the suit property along with the property of plot no.643 has been

wrongly recorded in the name of one Aderjaman and other, predecessors of the defendants in khatian no.117. The plaintiff learnt about the wrong record in the S.A. Khatian on the basis of so-called partition suit no.172 of 1929. The defendant No.5 with help of other defendants forcibly entered into the plot no.638 on 30.09.96 and constructed two Dochala tin shade and 3 Chouchala tin shade house defying the objection raised by plaintiff no.3.

The defendant No.3 contested the suit by filing a written statement contending, inter alia, that the suit is barred by limitation and that the suit plot nos.638 and 639 along with non-suited plot no.643 measuring an area of 39 decimals of land belonged to Samina Bibi and

her name was rightly recorded in C.S. Khatian. Samina Bibi subsequently defaulted to pay rents and the Talukder was going to file a suit for realization of rent then Samina Bibi executed Istafanama deed dated 06.06.1920 and surrendered the property in favour of the landlord who settled the property to Munshi Mia, son of Nawaj Ali on 10.09.1921 and thus Munshi Mia became the sole owner of the land of the said 3 plots and has been possessing of the said land and prayed for dismissal of the suit.

On conclusion of the trial, the Trial Court, considering the evidences and documents on record, dismissed the suit by the judgment and decree dated 19.04.1999.

Feeling aggrieved, by the judgment and decree of the Trial Court, the plaintiffs as appellants preferred Title Appeal No.74 of 1999 before the learned District Judge, Brahmanbaria. On transfer, the said appeal was heard by the learned Additional District Judge, Court No.1, Brahmanbaria who by the judgment and decree dated 23-07-2002 disallowed the appeal and thereby affirmed the judgment and decree of the trial Court and decreed the suit.

Feeling aggrieved, by the judgment and decree dated 23.07.2002 passed by the learned Additional District Judge, 1st Court, Brahmanbaria, the plaintiffs as petitioners

preferred Civil Revision No.57 of 2003 before the High Court Division and obtained the Rule.

In due course, a Single Bench of the High Court Division upon hearing the parties made the Rule absolute by the impugned judgment and order dated 11.05.2009 and thereby set aside the judgment and decree of the Courts below.

The defendant as petitioner herein feeling aggrieved by the impugned judgment and order dated 11.05.2009 of the High Court Division preferred Civil Petition for Leave to Appeal No.1431 of 2009 before this Division and obtained leave, which, gave rise to the instant appeal.

Md. N.K. Saha, the learned Senior Counsel

appearing on behalf of the appellant submits that the High Court Division committed an error of law in disturbing the findings of facts arrived at by both the Courts below and on misreading of the evidence on record committed an error of law in holding that the plaintiffs did not mention the date of cause of action and the date of dispossession and also gave perverse finding upon non-consideration of the findings of facts recorded by the lower Appellate Court. He next submits that the High Court Division made the Rule absolute in finding that both the Courts below specially the Appellate Court being the last Court of facts misread the evidence on record that the plaintiff did not mentioned the date of cause of action and the date of dispossession and

also gave perverse finding in failing to consider that neither the Trail Court not the lower Appellate Court found that the plaintiffs have not mentioned the date of cause of action and date of dispossession, rather, both the Courts below found that the plaintiffs failed to prove the date of cause of action and date of dispossession, as such, the observation made by the High Court Division is perverse which is liable to be set aside. He finally submits that the Trial Court found that the plaintiff did not adduce any direct witness to prove alleged dispossession and the Appellate Court affirmed those findings but the High Court Division neither reversed those finding arrive at on consideration of material evidence on record nor gave any independent finding regarding to

the plaintiffs' title, date of knowledge about S.A. Plot No.117, proof of alleged dispossession, limitation and, as such, the impugned judgment and order of the High Court Division is liable to be set aside. Hence, the instant appeal may kindly be allowed.

Mr. Md. Mazibar Rahman, the learned Advocate-on-Record appeared in the appeal by filing caveat. He supports the impugned judgment and order of the High Court Division.

We have heard Mr. N.K. Saha, the learned Senior Counsel for the appellant. Perused the impugned judgment and order of the High Court Division and other connected materials on record.

Leave was granted to examine the following reasons of the appellants,

" The High Court Division committed an error of law in disturbing the findings of facts arrived at by both the Courts below and on misreading of the evidence on record committed an error of law in holding that the plaintiffs did not mention the date of cause of action and the date of dispossession and also gave perverse finding upon non-consideration of the findings of facts recorded by the lower appellate Court. …. Therefore, learned judge of the High Court Division committed an error of law in holding that the suit is not barred by limitation and also in finding that the plaintiffs did adduce direct

evidence to prove alleged dispossession."

We will weigh up the materials on record as to whether judgment and order of the High Court Division is justified or erred which calls for interference by this Division.

It is the long standing settled cardinal principle of appreciation of evidence that finding of facts, whether concurrent or not, arrived at by the trial and lower appellate court is immune from interference in revision, except in certain well-defined circumstances such as non-consideration and misreading of material evidence affecting the merit of the case, or misconception, misapplication or misapprehension of law.

In these points this Division decided in the case of Md. Habibur Rahman Bhuiyan and Others Vs. Mosammat Galman Begum and Others reported in 2013 33 BLD (AD)93 as follows:

> **"When a finding of fact is based on consideration of the materials on record, those findings are immune from interference by the revisional Court except there is non-consideration or misreading of the material evidence on record. The High Court Division has no jurisdiction to sit on appeal over a finding of fact. It is concerned with the question as to whether the appellate court in giving a particular finding has committed any error of law resulting in an error in the decision**

occasioning failure of justice or such finding is found to have resulted from glaring misconception of law or there is misreading or non-consideration of material evidence in arriving at such finding …… This Division would also interfere with the judgment of the High Court Division or the Tribunal where a finding is reached without taking into consideration vital evidence or where the conclusions arrived at without consideration of the materials evidence or the finding which is inconsistent with the evidence on record. Apart from the above if this Division finds a substantial and grave injustice or if

there exists special and exceptional circumstances it can exercise extra ordinary jurisdiction for doing 'complete justice' in any matter pending before it. This does not mean that in every petition or appeal this Division will exercise extraordinary jurisdiction and reassess the evidence on record as may be done in an appeal under clause (2) of Article 103."

The same was reiterated in the case of Shamser Ali (Md) and others vs. Mosammat Kafizan Bibi, reported in 44 DLR(AD)231-

"The learned Single Judge of the High Court Division in Revision set aside the above findings of the lower

appellate Court on re-assessment of the oral and documentary evidences on record which he was not permitted under section 115 of the Code of Civil Procedure."

In the instant case, on a diligent delving into the judgments of the Trial Court and lower Appellate Court it become obvious to us that the Trial Court reached into the decision as to that the pivotal assertion of the plaintiffs concerning the ancestral ownership of them over the suit land was disproved on the basis of proper appreciation of the evidences on record. Thereafter, lower Appellate Court affirmed the same findings on apposite evaluation of the materials on record.

To prove the case, plaintiffs' side examined 4 (four) P.Ws. P.W.1, Tahera Begum, P.W.2, Abu Zandal, P.W.3, Safor Ali and P.W.4, Abdul Aziz.

P.W.1, Tahera Begum, in her testimony, stated that on 30.09.1996, the defendants illegally upon trespassing the suit land, erected 5 (five) tinshed houses on the Plot No.638. She has further testified that her sister, the defendant No.3 resisted them and tried to stop the erecting of the houses. She did not know the names of the labours, her sister, the defendant No.3 resides in the suit Plot. As such, she is fully acquainted with the facts of dispossession. She admitted that she and her husband, the defendant No.4 resides in Brahmanbaira.

It appears from the decree of the suit that the defendant No.3 is Mrs. Rahima Khatun, wife of late Dhon Miah. On carefully scrutiny it appears that this defendant No.3, Mrs. Rahima Khatun was not examined on the side of the plaintiffs, rather, others P.Ws. i.e. P.W.2, Abu Zandal, P.W.3, Safor Ali and P.W.4, Abdul Aziz. So, it is abundantly apparent on the face of the record that the defendant No.3 was not adduced as P.W. to prove the dispossession and erecting the houses on the suit property.

It is long line of catena that in a suit for recovery of khas possession, the plaintiffs must prove at first their possession with specific date with supporting evidences. In that case, he can later claim that they were

dispossessed on specific date and time from the suit property. But on the four corners of the evidences, adduced by the plaintiffs, we do not find any such facts possession or depositions in the present case.

From these facts, it is crystal clear that the plaintiffs' side was not able to prove the possession followed by dispossession of the plaintiffs by the defendants from the suit properties.

It is curtail principle of law that only in revisional jurisdiction, the High Court Division can interfere, if it is found that the Court of appeal below committed any error of law or procedural mistake and such errors have affected the merit of the case. The plaintiffs must prove his plaint case to succeed in the

suit. The weakness of the defence's case cannot be the ground to succeed or to prove the plaint case.

To support the our above mentioned views, we can rely upon the case of Md. Naimuddin Sarder @ Naimuddin Sarder Vs. Md. Abdul Kalam Biswas @ Md. Abul Kalam Basiruddin @ Abul Kalam Azad and another reported in 39 DLR (AD)237 whereupon this Division was held that-

> **"It is now well-established that the High Court Division can only invoke its jurisdiction under the said section if there is any error of law or procedure committed by the first appellate Court and such error has affected the merit of the decision, otherwise a finding of**

fact, however wrong it might appear, cannot be interfered with in second appeal."

"Plaintiff in order to succeed must establish his own case to obtain a decree and weakness of defendant's case is no ground for passing a decree in favour of the plaintiff."

As such, this Division finds no non-consideration or misreading of the material evidence on record or an error in the decision occasioning failure of justice or such finding is found to have resulted from glaring misconception of law or misconception, misapplication or misapprehension of law in the judgments and decisions of the Courts below.

Rather, we find with sheer surprise that the High Court Division committed error of law in disturbing the concurrent findings of facts arrived at by both the Courts below and on misreading of the evidence on record committed an error of fact in holding that the Courts below reached in a finding that the plaintiffs did not mention the date of cause of action and the date of dispossession. The real scenario is in fact the contrary. We find that the Courts below did never mention that the plaintiffs did not describe the date of cause of action and the date of dispossession. Rather, the Courts below on proper appreciation of the materials on record rightly decided that the plaintiffs failed to prove the cause of action and the date of dispossession. Hence, we compelled to

approve the submission of the learned Senior Counsel that the High Court Division gave appalling discovery upon non-consideration of the findings of facts recorded by the Courts below.

Accordingly, we find merit in submissions of the learned Senior Counsel for the appellants. Accordingly, the appeal is allowed. No order as to cost. The impugned judgment and order of the High Court Division is set aside and that of the Trial Court and lower Appellate Court are hereby restored.

J.

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The 7th August, 2022
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