

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

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

CIVIL APPEAL NO.185 OF 2008.

(From the judgment and order dated 26.07.2006 passed by the High Court Division in First Appeal No.377 of 1998).

Md. Abdus Daiyan Khan @ Babul. : ...Appellant.

-Versus-

Md. Abdur Rouf Bhuiyan being dead his : ...Respondents.
hears: 1(a) Musammat Umma Habiba Begum
and others.

For the Appellant. : Mr. Nurul Amin, Senior Advocate
instructed by Mr. Syed Mahbubar
Rahman, Advocate-on-Record.

For the Respondents. : Mr. Sk. Reajul Hoque, Advocate
instructed by Ms. Madhumalati
Chowdhury Barua, Advocate-on-Record.

Date of Hearing. : The 21st June, 2022, 3rd, 10th, 17th
and 23rd August, 2022.

Date of Judgment. : The 30th August, 2022.

J U D G M E N T

Borhanuddin,J: This civil appeal arose out of the judgment and order dated 26.07.2006 passed by the High Court Division in First Appeal No.377 of 1998 dismissing the appeal and thereby affirm the judgment and decree dated 15.09.1998 passed by the learned Subordinate Judge, 2nd Court, Narayangonj, in Title Suit No.111 of 1996 decreeing the suit on contest.

Facts leading to disposal of the appeal are that the respondents herein as plaintiffs instituted the Title Suit in the 2nd Court of Subordinate Judge, Narayangonj, impleading the present appellant as defendant for declaration of title and recovery of khas possession contending, inter alia, that the suit property originally belonged to Rahman Baksa Kha, Jaha Baksa Kha, Ali Baksa Kha and Wahid Baksa Kha; Subsequently, the suit property was owned by Abdul Jabbar Kha son of Jaha Baksa Kha; Said Abdul Jabbar Kha died leaving widow Serajun Akhter, two daughters namely Anwara Akhter and Mahmuda Akhter who inherited the suit property and were in possession; S.A. Khatian No.15 was prepared in their name; The suit plot numbering 147 was in exclusive possession of Abdul Jabbar Kha by family settlement; Said Serajun Akhter, Anwara Akhter and Mahmuda Akhter transferred the suit land to the predecessor of the plaintiffs' Abdus Samad Bhuiyan on 05.01.1963; During possession of the suit land Abdus Samad Bhuiyan mutated his name and paid rents; R.S. Khatian No.19 was correctly prepared in his name; Abdus Samad Bhuiyan died leaving 3(three) sons, the plaintiffs

and one daughter namely Nurjahan Begum; Said Nurjahan Begum transferred her share infavour of her brothers i.e. plaintiffs; Plaintiffs' father constructed 3(three) tin shed huts, one kitchen, one stable in the suit land and dug a tank on the southern side of the suit land; During the war of liberation, Pak Army burnt down the tin shed huts; Plaintiffs' father constructed another hut in the suit land and was residing there; He was also used to possess the land by caretaker; Subsequently, he died; After the expiry of plaintiffs' mother one Afroza Begum @ Afsu became the caretaker of the suit hut and property; On 14.12.1993, the defendant first caught fish from the tank situated in the suit land for which the plaintiffs filed GD entry in the local police station on 20.12.1993; The defendant broke down one of the tin shed on 31.12.1993 and by the end of March, 1995 broke down the other tin shed and thereby dispossessed the plaintiffs from the suit land; As the plaintiffs were residing at Dhaka they informed the incident to the local Chairman as well as the local elites but they failed to resolve the matter; Hence, the plaintiffs were constrained to file

the suit; Defendant has no right, title and interest in the suit land; Mutation in the name of the defendant regarding 17 decimals of land is not binding upon the plaintiffs.

Defendant contested the suit by filing a written statement denying the material allegations made in the plaint and stating, inter alia, that the suit land alongwith other lands originally belonged to Kifat Kha who died leaving 5(five) sons namely Abdur Rahman Kha, Jaha Baksa Kha, Ali Baksa Kha, Wahid Baksa Kha and Labo Baksa Kha; Said Labo Kha died leaving only son Chand Kha; C.S. Khatian regarding suit land recorded in the name of Abdur Rahman Kha, Jaha Baksa Kha, Ali Baksa Kha, Wahid Kha and Chand Kha in equal share; As per family arrangement, suit land measuring 23 decimals of land in plot no.147 was possessed by Jaha Baksa Kha exclusively which has been noted in the C.S. Khatian; Jaha Baksa Kha died leaving 5(five) sons namely Jabbar Kha, Zahat Kha, Din Mohammad Kha, Nur Mohammad Kha and Ali Newaz Kha who inherited and possessed the land in equal share; Jabbar Kha died leaving wife Serajun Akhter and two daughters

Anwara Akhter and Mahmuda Akhter; Mahmuda Akhter inherited 02 decimals of land in the suit plot and transferred the same to the defendant on 08.09.1993 through a registered deed of sale; Zahat Kha who possessed $04\frac{3}{4}$ decimals of land died leaving 3(three) sons Nurul Islam, Serajul Islam and Waliullah; By amicable settlement Nurul Islam possessed $01\frac{1}{2}$, Serajul Islam and Waliullah jointly possessed $03\frac{1}{10}$ decimals of land; Nurul Islam transferred $01\frac{1}{2}$ decimals of land to the defendant on 08.04.1996; Serajul Islam and Waliullah transferred $03\frac{1}{10}$ decimals of land to the defendant; Din Mohammand, another son of Jaha Baksa, died leaving 4(four) sons namely Shamsul Zoha, Shamsul Huq, Shamsul Alam and Shamsur Rahman; Said Shamsul Zoha and Shamsur Rahman sold their share to the defendant on 18.09.1993; Nur Mohammad Kha transferred his entire share to the defendant on 28.08.1994; Ali Newaz Kha died leaving 3(three) sons namely Hannan Kha, Awal Kha and Momen Kha; After family settlement, Hanana Kha and Awal Kha possessed $02\frac{3}{5}$ and

Momen Kha 02 decimals of land; On 01.01.1994 Momen Kha sold his share to the defendant; Hannan Kha and Awal Kha made an agreement to sell $02\frac{3}{5}$ decimals of land to the defendant; By this way the defendant purchased $14\frac{1}{10}$ decimals of land and got $05\frac{7}{10}$ decimals of land through verbal agreement; Accordingly, the defendant claimed $19\frac{4}{5}$ decimals in the suit land and mutated his name for $14\frac{1}{4}$ decimals of land and also constructed 40x20 and 50x13 tin sheds in the suit land; The defendant filed Mutation Case No.53 of 1994 for modification of the Mutation Case No.183/64-65 before the Assistant Commissioner (Land) Rupgonj, Narayangonj, who by his order dated 20.09.1994 modified the same by mutating $14\frac{1}{2}$ decimals of land and proposed separate jama in the land; The defendant denied the fact of dispossession and prayed for dismissal of the suit.

Upon hearing the parties and assessing the evidence on record, learned Subordinate Judge decreed the suit on

contest directing the defendant to hand over possession of the suit land infavour of the plaintiffs within 40(forty) days from the date of decree, in default, to deliver possession infavour of the plaintiffs by dispossessing the defendant through Court.

Being aggrieved, the defendant as appellant filed First Appeal No.377 of 1998 before the High Court Division.

After hearing the parties and re-assessing the materials on record, a Division Bench of the High Court Division dismissed the appeal vide judgment and order dated 26.07.2006.

Having aggrieved, the defendant-appellant filed Civil Petition for Leave to Appeal No.796 of 2007 before this Division under Article 103 of the Constitution and obtained leave granting order dated 25.05.2008 on the following submissions made by the learned Advocate for the petitioner:

"Mr. Mahmudul Islam, learned Counsel, appearing for the petitioner submitted that the court below has committed an error of

law in declaring that the entire suit property was lawfully owned, possessed and transferred by the widow and a daughter of Abdul Jabbar Kha to the plaintiffs and as such the impugned judgment and decree passed by the Court below is not sustainable in law; That the Court wrongly admitted the sale deed executed by the widow and a daughter of Abdul Jabbar Kha infavour of the plaintiffs because Abdul Jabbar Kha was the only owner of $\frac{1}{5}$ the suit land and the aforesaid deed is collusive, defective and made with a bad motive and as such, the impugned judgment and decree passed by the Court below is not sustainable in law; That the High Court Division as also the Trial Court failed to notice that the kabala obtained by the predecessor of the plaintiffs was void as against the share of the minor daughter of Abdul Jabbar Kha and ineffective as against the brothers of Abdul Jabbar Kha.

In view of the above, the submissions of the learned counsel for the petitioner merit consideration.

Accordingly, the leave is granted.

Mr. Nurul Amin, learned Advocate appearing for the appellant made his submissions in light of the leave granting order.

On the other hand Mr. Sk. Reajul Hoque, learned Advocate appearing for the respondents supports the impugned judgment and order passed by the High Court Division.

Upon going through the papers/documents contained in the paper book it appears that the Trial Court as well as the High Court Division thoroughly and meticulously perused the evidence on record in light of the relevant law and decisions of the Apex Court.

It appears that the plaintiffs filed the suit for declaration of title and recovery of khas possession. Admitted case of the parties are that the suit land originally belonged to Kifat Khan who died leaving 5(five) sons Abdur Rahman Kha, Jaha Baksa Kha, Ali Baksa, Wahid Baksa and Labo Baksa Kha and accordingly C.S. Khatian prepared in their names. Both the parties also admitted that by family arrangement Jaha Baksa Kha inherited the suit property. Plaintiffs' case is that after the expiry of Jaha Baksa Kha his son Jabbar Kha got the suit property by family settlement. Said Jabbar Kha died leaving one wife namely Serajun Akhter and two daughters Anwara Akhter and Mahmuda Akhter and S.A.

Khatian prepared in their names, they sold the land to the plaintiffs' predecessor Abdus Samad Bhuiyan by sale deed dated 05.01.1963. On the other hand, defendant's case is that though Jaha baksa Kha got the entire 23 decimals of land in suit plot no.147 through family settlement but after his expiry his 5(five) sons inherited the property in equal share. From Exhibit-1 i.e. C.S. Khatian No.11 it appears that Jaha Baksa Kha exclusively possessed the suit land. PW-1 deposed that S.A. Khatian No.15 has been prepared in the name of the heirs of Jabbar Kha who got the suit land by amicable settlement. He also deposed that his father purchased the suit land on 05.01.1963 by registered sale deed no.109 and mutated his name on payment of rents to the Government exchequer. He produced the R.S. Khatian No.19 which was prepared in the name of his father. PW-2 and 3 corroborate the contention of the PW-1. Exhibit-1(b) i.e. R.S. Khatian No.19 prepared in the name of plaintiffs' father Abdus Samad Bhuiyan. Exhibit-4 is the mutation Khatian filed by the plaintiffs. Plaintiffs also filed 1 DCR and 6 Dakhilas which were marked as Exhibit-2, 2(a)-

2(f). Exhibit-6 shows that Nurjahan Begum sold her share infavour of her brothers, the plaintiffs. Exhibit-8-8(c) are the tax receipts of Union Parishad which proves the huts constructed by the plaintiffs. The trial Court after considering the exhibits filed by the plaintiffs and defendant arrived at a definite finding that there was an amicable partition between the co-sharers and the predecessor-in-interest and father of the plaintiffs and thereafter plaintiffs were in exclusive possession of the suit land for more than 30(thirty) years till their dispossession. It transpires that Mahmuda Akhter sold her share infavour of the plaintiffs' father on 05.01.1963 and no objection came regarding the sale within 30(thirty) years, even the defendant did not raise any objection before 1993. The Trial Court after perusing the evidence on record arrived at a finding that:

"উপরক্ত বিবাদীপক্ষের প্রদর্শনী-ডি(২) অর্থাৎ কবালা ৬৬৪২, তাং-১৮/০৯/১৯৯৩ ইং দৃষ্টে প্রতিপন্ন হয় যে, উহার দাতাগণের পিতা দ্বীন মোহম্মদ এবং উক্ত দ্বীন মোহাম্মদ বাদীপক্ষের দলিলের একজন সাক্ষী। ফলে বাদীপক্ষের কথিত ঘরোয়া আপোষ বন্টন তথা খরিদেদের কাহিনী সন্তোষজনকভাবে প্রমাণিত হয়"

The High Court Division after scanning the evidence on record found that:

"We do not find any evidence of title and possession of appellant vendors. On the other hand plaintiffs have filed series of Dakhilas together with the mutation Khatian and their original deed where their vendor clearly stated that by amicable partition she was in possession and for necessity of money and to pursue of the education of her minor children she was in need of money and accordingly she sold the suit land in 1963 to the father of the plaintiff. The document is more than 30(thirty) years old and its recital has got much evidentiary value. None of the co-sharers challenged the deed and her exclusive possession and that of her vendee within those 30(thirty) years."(sic.)

Both the courts below arrived at a definite finding on the basis of the materials on record that the predecessor-in-interest and the father of the plaintiffs and thereafter plaintiffs were in exclusive possession of the suit land for more than 30(thirty) years till their dispossession and the plaintiffs have able to prove their case of possession and dispossession.

It is also noticeable that the vendor Mahmuda after attaining her majority did not challenge the 30(thirty) years old registered sale deed executed by her mother on behalf of her to meet the minor's necessary requirements,

Mahmuda even did not take any step to recover the possession within the statutory period of 12(twelve) years and by the same it can be considered as ratification of the deed in respect of the minor's portion. On perusal of the record it is apparent that the defendant-appellant to prove his case deposed himself as DW-1 and produced the deed writer as DW-2 but failed to produce any other witness to prove his possession nor able to give any documentary evidence in support of his possession of the suit land before dispossession of the plaintiffs. The High Court Division correctly arrived at a finding that:

"The case of the appellant is barred by the provision of section 55 of the Transfer of Property Act, 1882."

The trial Court after thorough discussions of the material evidence on record arrived at a conclusive finding:

"ইতিপূর্বেই বিস্তারিত আলোচনা করিয়া সিদ্ধান্ত গৃহীত হইয়াছে যে, বাদীপক্ষ নালিশা সম্পত্তিতে স্বত্ববান নিরঙ্কুশভাবে দখলকার ছিলেন। বাদীপক্ষের ১নং সাক্ষী তাহার জবানবন্দীতে বলিয়াছেন যে, বিগত ১৪/১২/৯৩ইং তারিখে বিবাদী নালিশা সম্পত্তিতে অবস্থিত বাদীপক্ষের পুকুর হইতে মাছ ধৃত করিয়া এবং বিগত ৩১/১২/৯৩ইং তারিখ বাদীপক্ষের নিযুক্ত কেয়ারটেকারকে উচ্ছেদ করিয়া নালিশা সম্পত্তি হইতে বাদীপক্ষকে বেদখল করিয়াছেন। এই প্রসঙ্গে বাদীপক্ষের দাখিলী রূপগঞ্জ থানার সাধারণ ডায়েরী এর

অনুলিপি (প্রদর্শনী-৫) সন্তোষজনকভাবে বাদীপক্ষের বক্তব্যকে প্রমাণ করে। ফলে বিবাদীপক্ষের বিজ্ঞ আইনজীবী যদিও দাবী করিয়াছেন যে, বাদীপক্ষের কোন নালিশের কারণ নাই, তাহা যুক্তিসঙ্গত নহে তথা গ্রহণযোগ্য নহে।”

Similarly, upon re-assessing the evidence on record the High Court Division disallowed the appeal filed by the defendant-appellant and concurred the findings of the trial Court that the plaintiffs were in possession of the suit land since purchase of the same by their father in the year 1963 and they were dispossessed from the suit land by the defendant on 31.12.1993 and the defendant dismantled the huts of the plaintiffs in the suit land on the last week of March, 1995.

It is apparent that the trial Court as well as the High Court Division arrived at a concurrent finding of facts regarding title and possession as well as dispossession.

By now it is settled that 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 materials evidence on record. It has now been

conclusively settled that the third court cannot entertain an appeal upon question as to the soundness of findings of fact by the second court. If there is evidence to be considered, the decision of the second court, however unsatisfactory it might be if examined, must stand final.

In the case of *Ram Gopal vs. Shakshaton*, reported in 1 LR (1893) Calcutta 93 (P.C.) the court emphasized that a court of second appeal is not competent to entertain questions as to the soundness of a finding of facts by the courts below.

In the case of *Md. Habibur Rahman Bhuiyan and others vs. Mosammat Galman Begum and others*, reported in 33 BLD (AD), 93 this Division held that:

"Article 103 does not give a right to a party to appeal to this Division except in cases provided in clause (2) to Article 103. Normally this Division grants leave against a judgment, decree or sentence of the High Court Division or from the judgment of the Administrative Appellate Tribunal if a substantial question of law of general or public importance arises which may not only determine the dispute between the parties but will be precedent for guidance for

determination of similar disputes in other cases. The mere fact that some question of law arises from the judgments of the High Court Division or the Tribunal will not enable a party to claim as of right to appeal to the Division. 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."

Since the learned subordinate Judge came to finding of facts regarding title of the suit land and possession of the parties as well as dispossession based on assessment of evidence on record and the High Court Division upheld the finding upon re-assessing the

evidence on record, the matter does not call for any interference.

The appeal is dismissed. There will, however, no order as to costs.

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