IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,C.J.

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.35 OF 2008
(Arising out of C.P.No.1438 of 2006)

(From the judgment and order dated the 21st August, 2005 passed by a Division Bench of the High Court Division in Civil Revision No.6575 of 2002)

Kabir Ahmed being dead his heirs 1(a) Mahmuda Khatun being dead her heirs: Noor Mohammad and others	:	. . . Appellants

-Versus-

Mahohar Ali and others	:	. . . Respondents
For the Appellants	:	Mr. Khair Ezaz Maswood, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record
For the Respondents	:	Mr. Abdul Wadud Bhuiya, Senior Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on-Record
Date of Judgment	**:**	**The 18th day of January, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 21.08.2005 passed by the High Court Division in Civil Revision No.6575 of 2002 making the Rule absolute and thereby setting aside the judgment and decree dated 18.11.2002 passed by the learned District Judge Cox's Bazar in other Class Appeal No.17 of 2000 allowing the appeal and reversing the judgment and decree dated 04.01.2000 passed by the learned Senior Assistant Judge, Sadar, Cox's Bazar in Other Class Suit No.211 of 1998 dismissing he suit.

The relevant facts for disposal of the present appeal, in brief, are that:

The predecessor of the present appellants as plaintiffs instituted other class suit No.211 of 1993 on 10.08.1998 before the court of the learned Assistant Judge, Sadar, Cox's Bazar against the respondents and proforma respondent Nos.8 and 9 herein impleading them as defendants for declaration that the plaintiffs have right and title in the suit land by purchase and the M.R.R. Khatian No.471 and B.S. Khatian No.362 in respect of the suit land have been prepared wrongly and collusively and the plaintiffs are not bound by the same.

The case of the plaintiffs, in brief, is that the land of suit schedules 1 and 2 originally belonged to Abdul Hakim and Imam Uddin. The suit schedule 1 land was auction purchased by the Government in certificate case No.662 of 1936-37 for arrear of rent. Abdul Hakim and Imam Uddin surrendered the suit schedule 2 land in favour of Government due to their inability to pay rent of the same. Thereafter, the Government settled the suit schedule 1 and 2 land in favour of one Bazlul Karim in settlement case No.$\frac{57\ of\ 1937-38}{88\ of\ 1937-38}$ and the settled land was included in the family jote No.3. The homestead of said Bazlul Karim was situated at a distance of 30 miles from the suit land. The defendant No.1 on bringing money from Bazlul Karim paid rent to the government. Bazlul Karim sold the suit land to the plaintiffs by a kabala dated 22.01.1980 and made over possession thereof to them. On 20.03.1995 the defendant Nos.2-7 claimed title of the suit land by way of purchase

disclosing that the M.R.R. and B.S. record of rights in respect of the suit land have been prepared in the name of their vendor Gura Miah the defendant No.1. The M.R.R and B.S. record of rights in respect of the suit land have been wrongly prepared in the name of the defendants, alleged vendor. The defendants did not acquire right and title by virtue of aforesaid wrong M.R.R. and B.S. Khatian. The plaintiffs asked the defendants to execute deed of relinquishment in respect of the suit land in their favour for several occasions but the defendants did not pay heed to the same and as such the plaintiffs were compelled to file the suit praying for reliefs stated above.

The defendant Nos.2-7 contested the suit denying material allegations made in the plaint contending, inter alia, that the suit is not maintainable in its present form; the suit is hopelessly barred by limitation. The suit is also barred under section 42 of the specific Relief Act. The suit land is in possession of the defendants and as such without prayer for consequential relief paying advalorem court fees, the suit as framed is not maintainable in law. The settlement of the suit land as stated by the plaintiffs was taken by Bazlul Karim with joint family fund and for the interest of the joint family Bazlul Karim settled the suit land with the defendant No.1 in 1952 by a dakhila and accordingly M.R.R. and B.S. record of rights were correctly prepared and finally published in the name of Gura Miah, defendant No.1. Gura Miah sold .40 acres of land from the land of suit schedule

2 in favour of the defendant Nos.2-7 and Abdur Sukkur by a kabala dated 08.02.1974 and accordingly made over possession thereof to them. Gura Miah sold the remaining .39 acres of land to Nazir Ahmed and Khatija by registered kabala dated 18.01.1974 who died leaving behind Manoara and others who sold the aforesaid .39 acres of land to the defendant Nos.5,7 and one Dilwara Begum by a kabala dated 09.11.1995. The plaintiffs did not implead Abdul Sukkur and Dilwara Begum as parties in the suit and as such the suit is bad for defect of parties. The plaintiffs had/have no right, interest and possession in the suit land and on the other hand the defendants have been in continuous, uninterrupted and peaceful possession of the suit land i.e. .79 acres of land on payment of rent since their purchase. The plaintiffs are not entitled to the relief as prayed for in the suit.

At the trial both parties adduced both oral and documentary evidence.

The trial court dismissed the suit and on appeal the appellate court set aside the judgment of the trial court and allowed the appeal and decreed the suit. Thereafter, the present respondents filed civil Revision No.6575 of 2002 before the High Court Division and by the impugned judgment and order the High Court Division made the Rule absolute and set aside the judgment of the appellate court.

Being aggrieved by and dissatisfied with the said judgment the plaintiff’s preferred civil petition for

leave to appeal No.1438 of 2006 before this Division and leave was granted.

Hence, the present appeal.

Mr. Khair Ezaz Maswood, learned Senior Advocate, appearing for the plaintiffs-appellants submits that in spite of finding that no dakhila in support of defendants-respondents claim of settlement in favour of Gura Miah could be proved, the High Court Division was wrong in finding the title of Gura Miah on the basis of MRR khatian under the State Acquisition and Tenancy Act and as such the impugned judgment requires interference by this Division.

The learned Advocate further submits that R.S. khatians (exhibits-2 and 4) show that Bazlul Karim was sole riyat in place of Abdul Hakim and Imam Uddin by way of Certificate Case No.662 of 1936-37 and re-settlement case No.88 of 1937-38 (exhibit-5) and thus he had acquired title under State Acquisition and Tenancy Act. Therefore, the High Court Division was wrong in holding that rent receiving interest was of Bazlul Karim’s family and Gura Miah was their tenant. Neither the appellate court nor the trial court found the suit land as property of joint family and the khatians show Bazlul Karim himself was sole riyat yet the High Court Division on misconception of law and facts treated the suit land as property of Bazlul Karim’s family only with rent receiving interest.

The learned Advocate lastly submits that the appellate court being final court of facts found possession of the plaintiffs appellants. The High Court

Division without adverting the same with reference to evidence, made lump observation that findings of appellate court on possession is based on misreading of evidence and thus committed illegality in passing the impugned judgment which is liable to be set aside.

Per contra, Mr. Abdul Wadud Bhuiya, learned Senior Advocate, appearing for contesting defendants-respondents submits that the trial court in consideration of the evidence of PWs and DWs and of the fact of non-payment of rent by the plaintiffs or their predecessor, recording of MRR Khatian and BS Khatian in the name of the defendant's vendor Gura Miah had arrived at the conclusion that the plaintiffs have no possession in the suit land and the appellate court not having reversed this finding with reference to the evidence considered by the trial court, the suit for simple declaration without prayer for recovery of khas possession is barred by section 42 of the Specific Relief Act and therefore, the judgment of the High Court Division is sustainable in law.

Mr. Bhuiya further submits that Gura Miah claimed to have taken settlement of the suit land from Bazlul Karim and the suit land having been recorded in the MRR Khatian and B.S. Khatian in the name of Gura Miah who was in possession of the suit land and the suit land having been transferred by Gura Miah by registered deed dated 05.02.1974 and 18.01.1974 to the defendants the registered documents are not void but valid and are to be avoided by filing suit against the registered documents for declaration that the documents are invalid and not binding

on the plaintiffs before claiming title in the land transferred by those documents and the same not having been done the suit is barred by law as found by the trial court and the same has not been rightly reversed by the appellate court and the High Court Division affirmed this finding of the trial court and therefore, the judgment of the High Court Division is sustainable in law.

He also submits that the appellate court did not consider that P.W-2 being the brother of plaintiff No.2 and P.W-3 being the son-in-law of the plaintiff No.2 are not at all credible witnesses and the plaintiffs could not adduce any independent witness to support their claim of possession. The High Court Division on proper consideration of the materials on record came to a correct decision that plaintiffs are not entitled to get a decree as prayed for and that the defendants-respondents proved their title by exhibiting their relevant papers and documents.

We have considered the rival submissions of the learned Advocates for the respective parties, perused the impugned judgment as well as the judgments of the courts below and the evidence on record.

The plaintiff's instituted the suit making the following prayers:

> "(ক) নালিশী জমি-ত বাদীগ-নর খরিদা স্বত্ব অটুট আ-ছ ম-র্ম উচ্চার-নর ডিগ্রী দেওয়ার,
>
> (খ) নালিশী জমি সম্পর্কিত এম, আর, আর ৪৭১ নং খতিয়ান ও বি, এস ৩৬২ নং খতিয়ান ভুল কেরবী, ভিত্তিহীন, যোগ সাজসে অনধিকার ভাবের হয়। তৎদ্বারা বাদীগন ও নালিশী জমি বাধ্য ন-হ,

(গ) মোবদ্দমার তাবৎ ব্যয় বিবাদীগনের বিরুদ্ধে ডিগ্রী দেওয়ার,

(ঘ) মোকদ্দমার অবস্থামতে বাদীগন আর যে যে প্রতিকার পাই-ত পা-র তাহা ও ডিগ্রী দেওয়ার প-ক্ষ হুজু-রর বিহিত মর্জি হয়। ”

However, it appears from the record that eventually the plaintiffs filed an application under order 6 rule 17 of the Code of Civil Procedure for amendment of the plaint with a prayer to correct the prayer to the effect;

“বাদীগ-নর আরজির প্রার্থনায় কলা-ম নি-ম্ন বর্নিত প্রার্থনা লিপি হই-ব।

গ) ১নং বিবাদী গুরা মিয়া কর্তৃ নজিন আহমদ গং বরাবরে চকরিয়া সাব-রেজিষ্ট্রি অফি-স বিগত ১৮/১/৭৪ ইং তারি-খর ৮৩ নং কবলা, ২/৩/৪/৭ নং বিবাদী মনহর আলী গং এর বরাব-র ও বিগত ৫/২/৭৪ ইং তারি-খর ২৫০ নং কবলা, এবং ম-নায়ারা বেগম গং কর্তৃক ৫/৭/১ নং বিবাদীর বরাব-র বিগত ৯/১১/৯৫ ইং তারি-খর ৪৭৪২ নং কবলা, ২২/৯/৭৯ ইং তারি-খর কবলা ফেরবী, যোগসাজসী, প্রপনশুন্য, অর্কমন্য, বেআইনী, ভ-য়ড, এ্যা-তৎদ্বারা বাদীগন ও নালিশী জমি বাধ্য নহে মর্মে উচ্চারনের বিক্রিদেওয়ার।”

On our query to the learned Advocate for the plaintiffs-appellants whether the said amendment was allowed or not, the learned Advocate has conceded that no such order was passed by the trial to the above effect.

In the instant case the plaintiffs have sought declaration of title over the suit property and that the M.R.R. and B.S. record in respect of the suit property is wrong.

The trial Court as well as the High Court Division on scrutiny of the evidence on record held that the plaintiffs have failed to prove their possession in the suit land and hence suit is hit by proviso to section 42 of the Specific Relief Act.

Having examined the evidence, both oral and documentary adduced by the respective parties, we are of

the same view that the plaintiffs have failed to prove their possession in the suit land and admittedly M.R.R and B.S. khatian have been prepared in the name of the predecessor of the defendants, Gura Miah.

The trial court on proper consideration of the evidence on record held that the plaintiffs could not file a single dakhila to prove their possession over suit land; though, the plaintiffs claimed title on the strength of the deed dated 21.01.1980 exhibit-9, but no rent receipt was produced. The trial court also disbelieved the evidence of P.Ws-2 and 3 in regard to the evidence of possession as P.W-2 is the full brother and P.W-3 is the son-in-law (জামাই) of plaintiff No.2. The trial Court also held that Gura Miah was the possessor of the said suit land at the time of B.S. khatian, so B.S. khatian rightly record in the name of Gura Miah from where other defendants purchased the suit land vide various deeds, exhibit-kha, kha-1 and Ga and those deeds were not challenged by the plaintiffs and as such the plaintiffs are not entitled to get any relief under section 42 of the Specific Relief Act. The court of appeal below without adverting to the above findings of the trial Court with reference to the evidence on record allowed the appeal and dismissed the suit.

Having considered the evidence on record, we have no hesitation to agree with the findings of the trial court as well as the High Court Division that since the plaintiffs have failed to prove their possession in the suit land, the present suit for declaration simpliciter

without a prayer for consequential relief is hit by proviso to section 42 of the Specific Relief Act and as such the present suit is not maintainable.

In this connection we may rely on the cases of **Enjaheruddin Mia Vs. Mohammad Hossain and others reported in 18 BLD(AD)page-176 and Pear Ali (Md)@ Pear Ali Bepari and others vs. Md. Abdul Hai and others, reported in 24 BLC (AD), page-32.**

This Division in the case of **Delipjan being dead her heirs Fazlul Haque and others Vs. Shahed Badsha and others, reported in 66 DLR(AD), page-176** has been held to the effect:

> "Where the plaintiffs are out of possession, the "further relief" would be recovery of possession and the suit for declaration of title without prayer for recovery of possession is hit by the proviso to section 42 of the Specific Relief Act."

It is true that the defendants failed to produce the 'Dhakhila' by which Gura Miah got settlement of the suit land from Bazlul Karim and Fazlur Karim. But it is a cardinal principle of law that plaintiff has to prove his own case and he cannot be entitled to get a decree on the weakness of the defendant(s), if any. The burden lies on the plaintiff to prove his case and he must succeed on his own strength only and not at the weakness of the adversary.

In the case of **Golzar Ali Pramanik Vs. Saburjan Bewa being dead her heirs Md. Yakub Ali Khan and others,**

reported in 6 BLC(AD) page-41 this Division has held to the effect:

> "There may be thousands of detects in the documents of the defence as well as their case but that does not entitle, the plaintiff to get a decree. The plaintiff is to prove his case irrespective of the defence version of the case."

In the case of **Moksed Ali Mondol Vs. Abdus Samad Mondal, reported in 9 BLC(AD), page-220** this division also held:

> "It is cardinal principle of law that the plaintiff is to prove his case and he must not rely on the weakness or defects of defendant's case. As the plaintiff has not been able to prove his case we need not discuss the case of the defendant."

Having considered and discussed as above, we are of the opinion that the High Court Division did not commit any error of law in making the Rule absolute setting aside the judgment and decree of the court of appeal below.

Accordingly, the appeal is dismissed without any order as to costs.

C.J.

J.

J.

B/O. Imam Sarwar/
Total Wards 2748