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. 376 OF 2016

(From the judgment and order dated 24th day of January, 2010 passed by the High Court Division in Civil Revision No. 2624 of 2005).

Md. Abdul Hamid being dead his heirs: Md.Arju Hossain and others .....Appellants.

=Versus=

Mst. Sara Khatun and others .....Respondents.

For the Appellants	:	Mr. Md. Hamidur Rahman, Advocate, instructed by Mr. Md. Nurul Islam Chowdhury Advocate-on-Record
For Respondent No. 1	:	Mr. Shahanara Begum, Advocate-on-Record
Respondent Nos. 2-36	:	Not represented
Date of hearing and judgment	**:**	**The 30th day of August, 2023**

JUDGMENT

M. Enayetur Rahim, J: This civil appeal, by leave, is directed against the judgment and order dated 24.01.2010 passed by a Single Bench of the High Court Division in Civil Revision No.2624 of 2005 making the Rule absolute.

The facts, relevant for disposal of the appeal, are that the predecessor of the present appellants as plaintiff filed Title Suit No.81 of 1996 in the Court of Senior Assistant Judge, Sadar, Meherpur for declaration that the preliminary decree dated 30.10.1989 and the final decree dated 05.11.1989 passed by the learned Senior Assistant Judge, Meherpur is collusive and not binding upon the plaintiff and for cancellation the same and also for declaration of title and confirmation of possession in the 'Ka' schedule land to the plaint measuring an area of 66 decimals appertaining to

S.A. Khatian Mo. 331, C.S Plot No. 50 and 51, 41 decimals of land out of R.S. Plot No. 703 and 25 decimals of land out of 52 decimals land of Plot No. 702 contending *inter alia* that the land of S.A. Khatian No. 331 Mouza Bowmanpara, measuring an area of 11.03 acres land belonged to Ratimon Nessa who died leaving behind 5 sons namely-Saifuddin, Nasaruddin, Kasaruddin, Didar Uddin and Khabir Uddin and one daughter Shaharan Nessa; by amicable partition the 'Ka' schedule land was allotted to the saham of Saifuddin who had been possessing the same and died leaving behind one son Zillur Rahman alias Abdur Rahman and one daughter Shakaran Khatun.

An amicable partition took place between Zillur Rahman and Shaharan Nessa. Zillur Rahman got 2.06 acres of land in his saham and, thereafter, sold the same by kabala deed dated 19.01.1974 in favour of the plaintiff's wife Arjia Khatun and Khalesan Nessa. Said deed was not executed and registered but a Bainanama was executed on 19.01.1974 and, thereafter, Zillur Rahman @ Abdur Rahman refused to execute and register a kabala deed in December, 1974.

Abdur Rahman demanded more money but that was refused by Khalesan Nessa and the plaintiff's wife demanded back the kabala money, and that was refunded and, thereafter, Abdur Rahman wanted to sale out the suit land and a fresh bainanama was executed on 04.02.1981 for transferring the Suit land in favour of the plaintiff and his wife. Thereafter, Abdur Rahman without executing and registering a kabala had transferred the said land in favour of Sara Khatun. Having come to know the said fact

plaintiff's wife instituted Title Suit No. 206 of 1991 but mistakenly the plaintiff was not made a party in the said Suit. Thereafter, Abdur Rahman executed and registered a kabala deed on 19.12.1991 and, thereafter, Arjia Khatun withdrew the Title Suit No. 206 of 1991.

Further case of the plaintiff is that defendant No. 1 with a view to deprive the plaintiff from the suit property made collusion with her brother Abdur Rahman and instituted a suit for partition being No. 04 of 1982. Thereafter, without serving notices upon the defendant managed to get a preliminary decree on 25.10.1989 and got a final decree on 10.10.1990. The plaintiff came to know about the said decree on 10.3.1995 and, thereafter, got the certified copy on 27.4.1995 and instituted the suit.

The Suit was contested by the present respondent No.1. In the written statement it is contended *inter alia* that the Suit was not maintainable and was barred by limitation as well as defect of parties. It was the case of the defendant that Ratiman Nessa being a co-sharer of the suit holding died leaving behind one son named Didar Uddin and a daughter, Shaharan and predeceased 4 sons and 2 daughters. One of the predeceased sons Nasar Uddin died leaving behind one son and 5 daughters and Khabir Uddin died leaving one widow, 3 daughters and Saifuddin died leaving behind 1 son Abdur Rahim and a daughter Sara Khatun. In this way the defendant became a co-sharer to the case holding and instituted partition Suit No. 04 of 1982. That Suit was contested by Didar Uddin, son of late Nasar Uddin and the suit was decreed on contest by the judgment and decree dated 31.10.1989.

It is the further case of the defendant that the plaintiff Abdul Hamid was made defendant No.3 in the said suit and his wife Arjia Khatun was made defendant No. 18. The final decree obtained in the said Suit was executed by filing Execution Case No. 01 of 1991 and the decree holder got delivery of possession in the decreed land on 05.05.1991. After the delivery of possession was made in the said Suit the plaintiff's wife Arjia Khatun instituted Title Suit No. 206 of 1991 on 17.08.1991 and the plaintiff Abdul Hamid was a *Tadbirkar* who sworn affidavit and submitted an application under order 39 rule of the Code of Civil Procedure. The application was contested by the present defendant by filing a written objection. In the said written objection the fact of Title Suit No. 04 of 1982 and its decree was disclosed and the prayer for injunction was rejected by order dated 15.10.1991. Then Arjia Khatun preferred Title Appeal No. 60 of 1991 against the rejection order of the injunction application and that appeal was also dismissed by judgment and order dated 17.05.1994. Thereafter Arjia Khatun withdrew the suit on 12.08.1995 and after withdrawal of the said, a criminal case was filed. The plaintiff does not have any title and possession in the suit land.

At the trial, respective parties adduced both oral and documentary evidence in support of their respective cases. After hearing, the trial Court by its judgment and order dated 29.02.2004 decreed the suit.

Against the judgment and decree passed by the trial Court, the defendant preferred Title Appeal No.24 of 2004

before the learned District Judge, Meherpur. On transfer, the appeal was heard and disposed of by the learned Joint District Judge, First Court, Meherpur, who by his judgment and order dated 09.05.2005 dismissed the appeal.

Being aggrieved by and dissatisfied with the judgment and decree of the appellate Court, the defendant moved before the High Court Division by filing a revisional application and obtained Rule in Civil Revision No.2624 of 2005. A Single Bench of the High Court Division upon hearing said civil revision by the impugned judgment and order dated 24.01.2010 made the Rule absolute by setting aside the judgments and decrees passed by the Courts bellow.

Feeling aggrieved by the judgment and order passed by High Court Division, the successors of the plaintiff filed civil petition for leave to appeal No. 1212 of 2010 before this Division and leave was granted on 22.05.2016. Hence, the present appeal.

Mr. Md. Hamidur Rahman, learned Advocate, appearing on behalf of the appellants submits that when the plaintiff prayed for confirmation of possession as consequential relief by paying *advolarame* court fees, the findings of the High Court Division that the defendant obtained possession through process of the court, the instant suit is not maintainable, is not legal.

The learned Advocate further submits that the learned Judge of the Appellate Court categorically held that the summons upon the defendant No. 03 (present appellant) in title suit No. 04 of 1982 was not served, therefore the High Court Division in absence of any

misreading or misappreciation of evidence by the Court's below set aside the decree and hence committed error of law. The learned Advocate finally submits that when the suit itself for declaration of title and setting aside the decree, Article 120 of the Limitation Act governed for filing of such a suit within 6 years, therefore, the High Court Division Committed illegality in holding that the suit is barred by limitation.

Per contra Mrs. Shahanara Begum, learned Advocate-on-Record appearing for the respondent No.1 having supported the impugned judgment and order passed by the High Court Division submits that the plaintiff was defendant No.3 in that title suit No 81 of 1996 and the plaintiff's wife Arjia Khatun was defendant No.18 and present defendant Sara Khatun got preliminary decree on 31.10.1989 against one Didar and the decree was made final on 10.10.1990. That final decree was put into execution in Case No.01 of 1991 and the defendant Sara Khatun got delivery of possession in the suit land through Court on 05.05.1991. So, this suit is not maintainable without seeking prayer for recovery of khas possession. The learned Advocate further submits that the judgment and decree passed in Partition Suit No.4 of 1982 bears that the defendant was admitted a co-sharer to C.S. khatian and she being a co-sharer instituted partition suit where plaintiff and his wife Arjia Khatun were made defendant No.3 and 18 respectively. From the report of Process Server (Exhibit-'Tha' and 'Da') it proves that summons were duly served upon those defendants. She further submits that the fact of filing of Partition Suit No.4 of 1982 was well acquainted with the plaintiff, who came to

know about the said decree in 1991 from the written statement filed in Title Suit No.206 of 1991 through his wife so the present suit was filed long after 5 years which was hopelessly barred by limitation, but the Courts bellow failed to appreciate the same and the High Court Division arrived at a correct decision.

The learned Advocate finally submits that the trial Court as well as the Appellate Court failed to consider that defendant No.l has been possessing the suit land for long time and, the plaintiff appellant fraudulently filed the suit which was not maintainable.

In the instant case, the plaintiff filed the suit for declaration of title, conformation of possession and that the primary and final decree dated 30.10.1989 and 05.11.1989 passed in Title Suit No.04 of 1982 respectively were obtained by fraud.

The trial Court decreed the suit, which was affirmed by the Court of appeal below. However, in revision the High Court Division set aside the judgment and decree of the Courts bellow holding that the suit was not maintainable in its present form and it was barred by limitation.

The trial Court and the appellate Court although found possession of the plaintiff relying on the evidence of P.W.2 but it appears that the High Court Division on proper consideration of the evidence and record came to definite finding that the defendant entered into the possession of the suit land pursuant to the decree passed in Title Suit No.04 of 1982 and Title Execution Case No. 422 of 1999. The High Court Division also held that since defendant being the

co-sharer in the suit property the suit in not maintainable in its present form without any prayer of consequential relief of khas possession. Further, the High Court Division held that the suit was not filed within a period of 3 (three) years from date of judgment and decree passed in Title Suit No.04 of 1982.

Upon perusal and consideration of the above findings of the High Court Division, it appears that those findings are based on proper appreciation of the evidence and materials on records and as well as law. The High Court Division in deciding the issue of limitation has observed:

> "It further appears that the fact of filing of Partition Suit No. 04 of 1982 was well acquainted with the plaintiff opposite party who came to know about the said decree in 1991 from the written objection filed in Title Suit No. 206 of 1991 through his wife. The present suit was filed long after 5 years of institution of that Title Suit No. 206 of 1991. The law of limitation provides 3 years limitation for filing a suit for setting aside a decree passed in a suit. In the instant case the Suit was filed after 5 years. So, the Suit was barred by limitation. Both the Courts below measurably failed to decide the question of limitation."

The High Court Division further observed that the defendant got delivery of the possession through Court on 05.05.1991 in the suit land but the plaintiff managed to get the suit land transferred by a kabala dated 19.12.1991. Learned Advocate for the appellants has tried to convince us that the High Court Division has committed serious error in interfering with the concurrent findings of fact of the Court's below.

It is now well settled that the High Court Division in revisional jurisdiction has got the jurisdiction to interfere with the findings of fact of the courts below, if it finds error apparent on the face of record.

In the case of **Golam Sarwar (Md) and others Vs. Md. Liakat Ali and others,** reported in **50 DLR (AD) 67**, this Division has held that:

> "Ordinarily, the High Court Division in the exercise of its revisional authority should not embark upon the function of the lower appellate court to reassess the evidence on record in reversing a finding of fact. If however, the High Court Division is satisfied that the lower appellate Court has failed to consider any material evidence in reversing a finding of fact arrived at by the trial Court upon assigning proper reason therefore, the proper course is to send back the case on remand to the appellate Court for rehearing the appeal upon proper assessment of the evidence on record. But there may be cases where, in the interest of justice, the High Court Division may also consider the evidence which were not considered by the lower appellate Court, in upholding the finding of the lower appellate Court to maintain the appellate decree."

In the case of **Chand Biswas and others Vs. Abdul Khaleque Sheikh and others,** reported in **51 DLR (AD) 55,** this Division has also held that:

> "True, the High Court division has interfered with the findings of fact by the last Court of fact but the interference being based on detecting error apparent on the face of the record need not be disturbed."

In the case of **Hussain Ahmed Chowdhury alias Ahmed Hossain Chowdhury and others Vs. Md. Nurul Amin and others,** reported in **47 DLR (AD) 162** this Division has observed that:

> "It is to be stated here that if there is misreading of evidence and non-consideration of some material evidence then it was incumbent on the

revisional court to consider the same and to arrive at a proper finding on the material evidence on record and to finally dispose of the case."

Thus, we are of the view that the judgment passed by the High Court Division based on sound principle of law and facts and there is no scope to interfere with the same.

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

C. J.

J.

J.

B.S./B.R./*Words-2565*