2 SCOB [2015] HCD 47

HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Civil Revision No. 1622 of 2010.

Sultan Ahmed and another.
…. Defendant-Respondent-Petitioners.
-Vs-
Johur Ahmed and others
…. Plaintiff-Appellant-Opposite Parties.

Mr. H.S. Deb Brahman with
Mr. Anwar Hossain Reza and
Ms. Fowjia Akhter, Advocates
---- For the petitioners.
Mr. Swapan Kumar Datta, Advocate
…. For the opposite parties.

Heard On:22.09.13, 24.09.13, 01.10.13, 07.10.13, 08.10.13, 03.11.13 & 17.11.13,
And
Judgment On : 20.11.2013.

Code of Civil Procedure, 1908
Section 9:
The general remedy of the suit under section 9 of the Code of Civil Procedure will be impliedly barred where a right is created by a special law and special forum is provided in it.
...(Para 20)

JUDGMENT

Soumendra Sarker, J:

1. The Rule issued calling upon the opposite party Nos. 1-2 to show cause as to why the impugned judgment and decree dated 27.01.2010 and 03.02.2010 respectively passed by the learned Joint District Judge, 1st Court, and Artharin Adalat, Bhola, in Civil Appeal No. 17 of 2008 allowing the appeal reversing the judgment and decree dated 31.03.2008 and 03.04.2008 respectively passed by the learned Senior Assistant Judge, Charfashion, Bhola in Civil Suit No. 68 of 2004 dismissing the suit should not be set aside and/or pass such other order or further order or orders as to this Court may seem fit and proper.

2. The facts leading to the issuance of the Rule in a nutshell can be stated thus, the opposite party nos. 1 and 2 being plaintiff instituted the original Other Class Suit No. 68 of 2004 in the Court of learned Assistant Judge, Charfashion, Bhola for a declaration of permanent injunction and declaration contending *inter alia*, that the plaintiffs obtained the suit land by Settlement Case No. 806F/99-2000 followed by kabuliyat from the Government. Therefore, the plaintiffs erected house in plot NO. 3567 under khatian no. 587 and the remaining plot being no. $\frac{3690}{1}$ and $\frac{3690}{2}$ are cultivable land. The defendant no.1 took settlement of .40 acres of land in plot no. 3567 in Miscellaneous Case No. 42F/2000-2001 and the defendant no.2 took settlement of .20 acres of land in plot no. 3690 and .50 acres of land in plot no. 3567 in all .70 acres from the government collusively. The further case of the plaintiff is such that the defendants threatened the plaintiffs in the month of ***Chaitra*** 1490 B.S. at which the plaintiffs instituted the original suit. Subsequently the plaintiffs by filing an amendment petitioner challenging the settlement of the defendants and declaration of title with a further declaration that the order described in schedule "Kha" in respect of the land described in schedule "Ka" of the plaint is fraudulent, illegal and ineffective.

3. The contrary case of the defendants in short is thus that the properties measuring an area 1.50 acres of land is under khatian no. 318 and it is earlier plots were $\frac{1751}{13}$, $\frac{1361}{1}$ and $\frac{1775}{3}$. The defendant no.1 for getting the land settlement from the government prayed for settlement and in settlement case

No. 562A/69-70 he obtained settlement followed by a registered kabuliyat. The settlement khatian No. 18 was opened in favour of the defendant no.1 and possession was handed over. Subsequently the settlement holder defendant no.1 constructed his residence therein. The defendant no.2 in another settlement case no. 1366F/77-78 took settlement from settlement khatian no. 1296 for 1.50 acres of land under plot no. $\frac{496}{1}$ and $\frac{558}{1}$. A separate khatian was opened in his name and possession was handed over. The further case of the defendant is such that .40 acres of land of plot no. $\frac{1775}{3}$ under khatian no. 318 corresponds to Diara plot no. $\frac{1661}{1}$ and $\frac{1451}{13}$ measuring 1.10 acres of land under khatian no. 3567 and .40 acres of land of plot no. $\frac{558}{1}$ under khatian no. 1296 corresponds to Diara plot no. 5567 measuring an area .50 acres and .20 acres of land in plot no. 3690 comprising an area of .30 acres of land. The defendant no.1 after settlement filed a Miscellaneous Case No. 43F/2000-2001 before Assistant Commissioner (Land), Charfashion, Bhola opened khatian no. 581 in the name of the defendant no.1 which was approved by Deputy Commissioner, Bhola and the defendant no.2 after his settlement filed a file Miscellaneous Case No.30F/99-2000 before the same authority and the Assistant Commissioner (Land), Charfashion, Bhola opened khatian no. 584 in the name of defendant no.2 which was also approved by the Deputy Commissioner, Bhola. The plaintiff to the suit after granting a collusive khatian no. 587 in Dokar settlement case no. 806F/99-2000 tried to grave the property but in fact the settlement of the plaintiffs not at all affected by genuine transaction or delivery of possession. Knowing about the false settlement case the defendant applied to the Deputy Commissioner, Bhola for cancellation of the settlement of plaintiff no.1 on 12.02.2004 and thereafter after due enquiry and process of law the settlement of the plaintiffs were cancelled. The plaintiffs having no manner of right, title interest and possession in the suit land filed the suit on false allegation.

4. During trial original suit the learned Senior Assistant Judge, Charfashion, Bhola after taking evidence dismissed the suit on contest on 31.03.2008. Being aggrieved the plaintiffs preferred an appeal being Civil Appeal No.17 of 2008 in the Court of learned District Judge, Bhola which was heard and disposed of by the learned Joint District Judge, Court No.1 and Artharin Adalat, Bhola and the learned lower Appellate Court allowed the appeal reversing the judgment and dismissal decree the suit by the impugned judgment and decree dated 27.01.2010.

5. Being aggrieved by and dissatisfied with the impugned judgment and decree the defendant-respondent-petitioners has preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the Rule with an interim order of stay.

6. During hearing of this application Mr. H.S. Deb Brahman, the learned Advocate appeared on behalf of the petitioners while Mr. Swapan Kumar Dutta appeared on behalf of the opposite-parties.

7. The learned Advocate appearing on behalf of the petitioners submits that the learned lower appellate court during passing the impugned judgment and decree committed gross illegality and irregularity resulting in an error in the decision occasioning failure of justice. The learned Advocate further submits that the learned appellate court below without considering the settlement cases marked exhibit-“Gha” (O) and “Cha” (Q) and evidence of P.W.1 the plaintiffs in holding that the plaintiff-opposite parties obtained settlement for the suit land earlier to the defendant, committed error of law and misconstrued the facts of the case. The defendant-petitioners obtained settlement of the suit land in the year 1969-70 and in the year 1977-78 vide exhibit-“Ga” and “Chha” (R) while the plaintiff-opposite parties got settlement in the year 1999-2000 vide Annexure-“Ja”. Therefore, obviously after the settlement of the defendants the plaintiffs obtained the settlement which is no doubt Dokar settlement in favour of the plaintiffs. But the learned appellate court below erroneously held hat the plaintiffs to the case obtained settlement prior to the defendant which is apparently an error of law resulting in an error in the decision. The learned Advocate also submits that the plaintiffs-opposite

parties in settlement case no. 806F/99-2000 obtained settlement as alleged which was fraudulent, collusive and not acted upon. The findings of the trial court not at all rebutted or reverse by the appellate court below after assessment of the evidence and appreciation of law. Without discussing the evidence on record properly in its true perspective and without reversing the observation and findings of the trial court especially on the point of possession the learned appellate court below committed gross illegality which is violative to the provisions laid down in Order XLI rule 31 of the Code of Civil Procedure. The impugned judgment and decree is not a proper judgment of reversal in as much as without discussing the evidence on record and reversing the findings of the trial court the learned Joint District Judge, Bhola decided the merit of the case arbitrarily and thereby in decreeing the suit there has been miscarriage of justice. The learned Advocate lastly submits that the decision of the trial court on possession over the suit land is based on the deposition of the witnesses adduced from the cites of the respective parties which is not at all considered by the trial lower appellate court and there is total non-consideration of material facts resulting in an error in the decision occasioning failure of justice. There is no rent receipt from the side of the plaintiffs from 2000-2004 which has cast a serious doubt in believing the plaintiffs case, especially on their alleged possession after their alleged settlement. In this context; it is clear findings of the trial Court that the plaintiffs have totally failed to prove their prima-facie title and possession to the suit land and this decision was passed on preponderance of evidence and scanning of the deposition given by both the parties. The said observation and decision of the learned Assistant Judge, Charfashion, Bhola is not rebutted referring evidence of the parties which has resulted in an error in the decision. In view of the facts and circumstances of the case the learned Appellate Court below is misconceived in holding that the burden of proof in proving the respective case of the plaintiffs is shifted to the shoulder of the defendants. The original suit as it was found is not maintainable and there is a specific remedy lies upon the respective parties in the Bangladesh Bhumy Babosthapona Manual, 1990 (বাংলাদেশ ভূমি hÉhØq¡fe¡ jÉ¡eu¡m, 1990). Under Section 67 of the said manual reads as follows:

"৬৭। বন্দোবস্ত বাতিল- জেলা কালেক্টর স্বীয় উদ্যোগে বা কোন সুস্পষ্ট অভিযোগের ভিত্তিতে কবুলিয়তের শর্ত ভংগজনিত কারণে লিখিত কারণ দর্শাইয়া যে কোন বন্দোবস্ত বাতিল করিতে পারিবেন কালেক্টরের এইরুপ বন্দোবস্তি বাতিল আদেশের বিরুদ্ধে কমিশনারের নিকট আপীল দায়ের করা যাইবে এবং তাহার সিদ্ধান্ত চুড়ান্ত বলিয়া গণ্য হইবে।"

8. Apparently the matter in dispute lies on settlement which is guided by the special provisions laid down in the State Acquisition and Tenancy Act, 1950. Under section 76 of the State Acquisition and Tenancy Act, 1950 "No Civil Court shall entertain any application or suit concerning any matter relating to the settlement and 76(2) of the aforesaid Act is a barring Clause upon the Civil Court to entertain such dispute. In this regard the learned Advocate Mr. H.S. Deb Brahman has referred several decisions of our Apex Court including the BAR Act. In the instant case without existing the provisions which are expressly provided in the relevant law the plaintiffs to the suit instituted the original suit which is apparently barred by law.

9. As against the aforesaid submission advanced from the side of the learned counsel for the petitioners the learned Advocate appearing on behalf of the opposite parties opposing the Rule submits that the learned appellate court below committed no illegality or irregularity in deciding the merit of the appeal in favour of the defendant-appellant and during disposal of the appeal the learned lower appellate court after considering all the evidence adduced from the sides of the respective parties and on proper sift of evidence in appreciation of law decided the merit of the appeal and reversed the judgment and dismissal decree passed by the trial court. The learned Advocate further submits that the settlement of the defendants as it appears from the face of the papers suffers from non service of notice as *malafide* act of the concern officials and based on fraudulent activities and the learned appellate court below during disposal of the appeal rightly held that the defendants settlement is liable to be decreed illegal and in absence of tangible evidence from the side of the defendants it cannot be held that they acquired any right, title, interest and possession over the suit land. The learned Advocate further submits that the case *nathi* which was called for by the defendants during trial of the original suit go to show that their exhibit-Kha does not tally with the report of the concern '***kanongo'*** dated 04.01.2004 for which the settlement of the plaintiffs were cancelled. Under section

67 of the Bangladesh Bhumy Babosthapona Manual, 1990 (বাংলাcn i¢j h£hØq¡fe¡ j£¡eu£¡m, 1990) the reason for which a settlement can be cancelled is totally absent in the instant case but the authority concern illegally being guided by undue influence cancelled the settlement of the plaintiffs which is a *malafide* act of the government official and for that for the reason stated above the plaintiffs instituted the original suit for getting proper relief from the court of law. The learned Advocate Mr. Swapan Kumar Dutta also submits that there is nothing in the concerned ***nathi*** of settlement that the present plaintiffs were ever notified before cancellation of their settlement which was mandatory before drawing any such inference that the settlement is illegal or Dokar as alleged. The learned Advocate for the opposite parties referred from the judgment of the appellate court below read as follows :

"এই মামলার গুরুত্বপূর্ণ একটি বিষয় হলো এই যে, মামলার বাদীদের অনুকূলে স্বীকৃত মতেই সরকার নালিশী সম্পত্তি বাবদ বন্দোবস্ত দিয়েছে। তাই এই বন্দোবস্ত বাতিল করতে হলে নালিশী সম্পত্তি বাবদ ১নং ¢hh¡দী পূর্বেই বন্দোবস্ত পেয়েছিল তা প্রমান করার দায়িত্ব ১নং বিবাদীর উপরেই বর্তায়, বাদীর উপর নয়। ১নং বিবাদী কোন নিরপেক্ষ সাক্ষ্যের মাধ্যমে এই বিষয়টি প্রমান করতে পারে নাই। বাদী তার সাক্ষ্যে এবং জেরায় ৩৫৬৭ দাগের সম্পত্তি $\frac{1775}{3}$ দাগের নয় বলে দাবী করে আসছে। সাবেক $\frac{1775}{3}$ দাগের সম্পত্তি বাদীপক্ষের বন্দোবস্ত প্রাপ্ত ৩৫৬৭ দাগের সম্পত্তি তা প্রমান করার মত কোন সাক্ষ্য প্রমান উপস্থাপিত না হওয়ায় কোনভাবেই একথা বিশ্বাস করা যায় না যে, বাদীপক্ষের বন্দোবস্ত প্রাপ্ত সম্পত্তি বিবাদী পক্ষ আগেই বন্দোবস্ত পেয়েছিল। অন্যদিকে বিজ্ঞ বিচারিক আদালতের বিচা l L A¢a¢l š²®Sm¡ f£ej¡pL (l¡Sü) LaL 3567 ew দাগের সম্পত্তি বাবদ বন্দোবস্ত বাতিলের বিষয়টি এই সম্পত্তি বাবদ বিবাদীপক্ষের অনুকূলে প্রদত্ত বরাদ্দের আদেশের সত্যায়িত কপি দেখে বিশ্বাস করেছেন এবং ৩৫৬৭ নং দাগের সম্পত্তি $\frac{1775}{3}$ নং দাগের সম্পত্তি হিসাবে পূর্বে বন্দোবস্ত দেয়ার কারণে সরকার বিবাদীদের অনুকূলে প্রদত্ত বন্দোবস্ত বাতিল করার অধিকার সংরক্ষন করেন বলে মন্তব্য করেছেন। নথিতে এ ধরনের বরাদ্দ বাতিল আদেশের কোন প্রমান পাওয়া যায় না। এ রকম কোন বরাদ্দ বাতিল করার পূর্বে বরাদ্দ প্রাপ্ত ব্যক্তিদের নোটিশ প্রদানের মাধ্যমে তাদের বক্তব্য শোনা বা ®n¡e¡l ®Qøা করার আইনগত বাধ্যবাধকতা বিদ্যমান । আইনগত এই দায়িত্ব সরকার পালন করেছে তাও বিবাদীপক্ষ কোন গ্রহণযোগ্য সাক্ষ্যের মাধ্যমে প্রমান করতে পারে নাই। "

10. The learned Advocate after citing several decisions of this court and our Apex Court submits that under section 9 of the Civil Procedure Court a Civil Court is quite competent to entertain the original suit and the learned appellate court below after thorough discussions over the evidence on record passed the impugned judgment and decree which deserve no interference of this court in absence of misreading or non-reading of evidence and non-consideration of material facts resulting in an error occasioning failure of justice.

11. Heard the learned Advocates of both sides, perused the case record, exhibited documents, deposition of the witnesses and all other connected papers.

12. It appears from the case record that the pertinent question of the instant case is as to whether the settlement which was granted in favour of the defendants was genuine or affected after due process of law and as to whether the authority concern i.e. the collector cancelled the settlement of the plaintiffs legally. From the argument advanced it is also a matter of adjudication that the civil court was empowered to entertain the suit especially when the matter relates to settlement which is guided by the special law.

13. On perusal of the case record it transpires that during pendency of the original suit the plaintiffs filed an application for declaration of title and also for a declaration that the order of cancellation of his settlement dated 24.06.2004 by the Assistant Commissioner (Land), Charfashion, Bhola is illegal, fraudulent and not acted upon. The said amendment petition was filed under the purview of Order VI rule 17 of the Code of Civil Procedure. During trial of the original suit four witnesses were adduced from the side of the plaintiffs and three witnesses were examined from the sides of the defendants. The learned Assistant Judge, Charfashion, Bhola during disposal of the original suit after framing six different issues decided that the plaintiffs to the suit after adducing credible, tangible evidence failed to discharge their onus in proving their prima-facie title and

possession in the disputed property and also failed to establish that the settlement in favour of the defendants was false and not acted upon. The learned appellate court below in his findings observed that the plaintiffs' title to the suit land has been denied by the defendants by virtue of their settlement and the evidence which was laid from the side of the defendants does not prove their *bonafide* and disprove the respective plea of the plaintiffs to the suit land. It was further observed by the lower appellate court the land in dispute is not identical with the settlement papers and the defendants since not filed any plot index or any Commission was held by a survey knowing Advocate Commissioner the land relates to the paper of settlements suffers from vagueness.

14. In this regard it was argued from the side of the learned counsel for the petitioners that it was an incumbent duty as well as onus upon the plaintiffs to investigate the land or specify the land in the schedule and for the removal of alleged vagueness or unspecification it is the plaintiff who is required to hold Commission to establish their case and the plaintiffs to the suit because of their institution of the original suit must have to prove their case beyond all reasonable doubt and it is the established principle of civil law that the plaintiffs must prove their case and they cannot banked upon weakness of their adversary.

15. Having going through the connected papers on record including the evidence adduced from the sides of the respective parties it appears that exhibit-Kha is the Diara khatian which is not challenged by the plaintiffs but the lower appellate court passed his findings which is unwarranted in law as well as facts of the case. Furthermore, the finding of the learned Joint District Judge is not consistent with the papers on record that there is no existent of plot no. $\frac{1755}{3}$ in settlement khatian no. 318. Furthermore, the plot no. $\frac{1755}{3}$ or $\frac{1775}{3}$ which are Diara plots has gone into khatian no. 3567 (Diara) is not based on any documentary evidence. As a whole the observation and findings of the appellate court as to the identity of the suit land as described itself contradictory and not consistent or identical with the relevant documents. The decision as it appears from the impugned judgment and decree that the order of cancellation of settlement does not lie in the concern ***nathi*** is not correct and it can be treated as non-consideration of material documents. Beside this the oral evidence of the plaintiffs' witnesses which is not at all discussed by the lower appellate court has make the judgment and decree not in accordance with law. Under Order XLI rule 31 of the Code of Civil Procedure the learned appellate court below ought to discuss the evidence on record and evaluate the same in its true perspective before arriving at a decision over the material in issue but in the instant case as I have gone through the learned Joint District Judge, Bhola not at all consulted the relevant evidence and deposition of the witnesses which is violative of the provisions as cited above. The findings of the trial court in view of the rent receipts and settlement papers in consultation with the evidence not at all rebutted by the lower appellate court and in this context it can be easily held that the impugned judgment and decree cannot be treated as a proper judgment of reversal in the eye of law.

16. It is evident from exhibit-"Cha" series i.e. the rent receipts from the side of the defendants that the settlement which were granted in favour of the defendant nos. 1 and 2 pursuant to kabuliyat, exhibits Ga and "Chha" were affected and by acceptance of rent the government accepted the settlement holders as tenant. Vis-à-vis; it is from the face of the documents that the plaintiffs after filing the suit in the year 2004 procured two rent receipts vide exhibit nos. 1 and 1(ka). The positive findings of the trial court on the defendant-petitoners settlement wich were prior to the plaintiffs and pursuant to that their possession over the disputed property after payment of rent were thoroughly considered and it is a clear findings of the trial court that the defendants by virtue of their settlements do possess the suit property while the plaintiffs has failed to discharge their onus in proving their respective case. Particularly, their settlements and possession over the disputed property rebutting the said objection findings and decisions of the trial court the lower appellate court in a very evasive manner decided the merit of the appeal which is unwarranted in law.

17. Apart from this; on careful scrutiny over the connected papers on record on point of maintainability of the suit it is apparent from the face of the paper that the settlement upon which the

respective cases of the parties banks is guided on Special Law. Section 76 of the State Acquisition and Tenancy Act, 1950 shall have to be followed in the instant case and 76(1) of the Act runs as follows:

"76. (1) Except as otherwise expressly provided in this Act, any land which vests in the Government under any of the provisions of this Act shall be absolutely at the disposal of the Government; and the Government shall be competent to make settlement of such land in accordance with such rules as it may make in this behalf or to use or otherwise deal with such land in such manner as it thinks fit:

Provided that no land shall be settled with a person unless he is a person to whom transfer of land can be made under section 90:

Provided further that in making settlement of any cultivable land preference shall be given to an applicant for settlement who cultivates land by himself or by the members of his family and holds a quantity of cultivable land which, added to the quantity of cultivable land, if any, held by the other members of his family, is less than three acres."

18. Section 76(2) contemplates no Civil Court shall entertain any application or suit concerning any matter relating to the settlement, by any officer of the Government of any land under sub-section (1).

19. In this connection I may not be out of place to advert that our Appellate Division in a case law reported in 11 BLD(AD)294 in the case of *Chand Miah and others –vs.- Abdur Razzaque Mahmud Chowdhury and others*, held,

"It is settled law that the jurisdiction of the Civil Court may be expressly barred or it may be barred by necessary implication. Such implied ouster takes place when a Special Statute provides for a special forum for redress of the grievances, if any, and when the decision of that forum is declared to be final, vide, Secretary of State Vs. Mask & Co. 44 CWN 709. The Judicial Committee in that case referred to the dicta of Willes J., in Wolverhampton New Water Works Co. V. Hawkesford, (6 C.B (N.S) 336 at p. 356(1859), which was approved of in the House of Lords in Neville V. London Express Newspaper Limited (L.R. (1919)AC 368) viz. "where the statute creates a liability not existing at common law and gives also a particular remedy for enforcing it with respect to that class, it has always been held that the party must adopt the form of remedy given by the statue."

In the recent case of Md. RAfiqul Alam Vs. Mustafa Kamal 42 DLR(AD) 137=(1990)10 BLD(AD)151, we have held following the aforesaid dicta and the decision of the Privy Council that the jurisdiction of the Civil Court is impliedly barred in respect of any election dispute because a separate forum has been created under the special law i.e. the Local Government (Union Parisahad) Oridnance, 1983 for the resolution of such dispute."

20. The general remedy of the suit under section 9 of the Code of Civil Procedure will be impliedly barred where a right is created by a special law and special forum is provided in it as the instant case be. Special law overrides the general jurisdiction conferred on civil courts to entertain suits of civil nature-Where a right is created by a special law and a method of enforcing the right is pointed out by the law creating such right, the general remedy of suit under the Code will be impliedly barred. In such a case the method provided by the special law must be followed.

21. The jurisdiction of Civil Court in the instant case has been expressly barred under section 76 of the State Acquisition and Tenancy Act, 1950 and a bear reading of the section itself shows that the jurisdiction of Civil Court has been curtail from entertaining any suit or application against any order passed or any action taken under this law. Apparently in the instant case without exhausting the specified forum as provided the plaintiffs instituted the original suit and I have already ..there earlier that the Civil Court was not empowered to entertain the original suit and the matter in controversy which is apparently such a dispute which arise out from a settlement granted by the government and it subsequent cancellation of earlier settlements granted in favour of the plaintiff-opposite-parties. The facts remains that the allegation on fraud, *malafide* practice and non service of notice can be agitated in appropriate forum and in this regard the arguments advanced from the side of the learned counsel for the petitioners that the plaintiffs to the suit not at all raised such plea in their pleading is consistent with the plaint itself. Under Order VI rule 2 of the Code of Civil Procedure,

"Every pleading shall contain and contain only, a settlement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures."

22. Consulting the decision referred from the side of the learned counsel for the opposite parties of this court reported in 24 BLD 395 and 45 DLR, 727, 23 DLR 205, I have reason to inclined such a view that the decisions as cited therein are not identical with the present case. Due to different facts and circumstance of the case those are not applicable in our instant case.

23. On careful scrutiny over the connected papers including the impugned judgment and decree it is noticed that the defendants' settlement deeds which prior to the plaintiffs has been marked as exhibit-"Ga" and "Chha" respectively. Exhibit-"Kha" is the settlement khatian of the defendant no.1 followed by his settlement dated 29.01.1987 and exhibit-"Kha" is the Diara khatian of the defendant no.1. In respect of the remaining defendant-petitioner no.2 his settlement dated 09.09.1978 is followed by exhibit-Uma, this settlement khatian and exhibit- "Kha" and its corroborating Diara khatian exhibit-"Gha". This documentary evidence all these documentary evidence were overlooked by the learned appellate court below and there has been non-consideration of material evidence resulting in an error in the decision occasioning failure of justice.

24. Having regard to the facts, circumstances and discussions referred to above I am constrained to hold such a view that the impugned judgment and decree suffers from material illegality and non-consideration of material facts including misreading and non-reading of evidence resulting in an error in the decision which have been founded on misconception and misinterpretation of material document including relevant laws and as a result the judgment and decree is perverse which is contrary to law, evidence and material on record.

25. In the result, the Rule having much substance is made absolute without any order as to costs. The impugned judgment and decree dated 27.01.2010 and 03.02.2010 respectively passed by the learned Joint District Judge, 1st Court, and Artharin Adalat, Bhola, in Civil Appeal No. 17 of 2008 allowing the appeal reversing the judgment and decree dated 31.03.2008 and 03.04.2008 respectively passed by the learned Senior Assistant Judge, Charfashion, Bhola in Civil Suit No. 68 of 2004 is hereby set aside.

26. The order of stay granted by this Court at the time of issuance of the Rule stands vacated.

27. Send back the lower Court's record at once.