4 SCOB [2015] HCD 127

High Court Division
(Civil Revisional Jurisdiction)

Civil Revision No. 5441 of 2000

Syed Aynul Akhter being dead his heirs
.....Petitioners
Vs.
Sanjit Kumar Bhowmik and others
…..Opposite Parties

Mr. Muhammad Nazrul Islam with
Mr. Md. Abdul Baten, Advocates.
….For the Petitioners
Mr. Netai Roy Chowdhury with
Mr. Bivash Chandra Biswas, Advocates
…..For the Opposite Parties

Heard on: 15.01.2014, 19.01,2014, 26.01.2014, 09,02.2014, 10.02.2014 and Judgment on : 13.02.2014.

Present :
Mr. Justice Nozrul Islam Chowdhury
And
Justice Kashefa Hussain

Evidence Act, 1872
Section 91 and 92:
We are surprised that the Courts below did not take these rent receipts into any consideration at all and which are relevant documentary evidences. Instead, as is obvious from their findings, the Courts below have erroneously and unlawfully relied upon oral evidences bypassing the documentary evidences and which they are barred from doing under the law. Section 91 and 92 of the Evidence Act expressly bar the reliance upon oral evidences where documentary evidences are there on record.
...(Para 22)

Code of Civil Procedure, 1908
Order XIV Rule 1:
It is a settled principle of law and as per Order XIV Rule 1 of the Code of Civil Procedure that an issue which was not taken up earlier in the Courts below, cannot be taken up at a later stage before the superior Courts. ...(Para 35)

Judgment

Kashefa Hussain, J :

1. This Rule was issued calling upon the opposite-party Nos.1-4 to show cause as to why the judgment and decree dated 24.10.2000 passed in Title Appeal No.38 of 1998 by the Learned Sub-ordinate Judge, 2nd Court, Magura affirming those dated 22.03.1998 in Title Suit No. 120 of 1983 passed by the Senior Assistant Judge, Sadar, should not be set aside.

2. The facts relevant for the disposal of the Rule in short are that ;

One Rajendra Nath Dhar as plaintiff filed Title Suit No. 120 of 1983 seeking a decree for declaration that the registered Deed No. 5029 dated 05.06.1969 is a mortgage deed and not a sale deed inrespect of the properties, namely plot no. 612 comprising an area of .33 decimals and plot no. 1045 comprising an area of .31 decimals being a total area of .64

decimals of land and the consideration of the deed amounted to a sum of total Tk. 2000/-. That the plot no. 1045 was an agricultural land and plot no. 612 was low land, but the plaintiff used half portion of plot No. 612 for residential purposes by filling earth and the rest was used to rear fish.

3. The defendant in the Suit in defence raised the grounds in contrary, that the defendant's two storied building comprising of an area of .82 decimals was purchased in the year 1968 for a consideration of Tk. 8600/- and where he has been living with his family since his purchase in 1968. The defendant in his defence also states that the ground floor was occupied by the original plaintiff late Rajendra Nath Dhar since before purchase of the plaintiff and even after his purchase of the residential house from the plaintiff, the defendant allowed the original plaintiff to continue to live in the ground floor of the house, but that after some time it became inconvenient for them to live in the same building with a tenant from a different community , and, therefore, the defendant-petitioner requested the plaintiff opposite parties to live in the adjacent plot no. 612, half portion of which he had developed by filling earth by creating a ditch. He also stated in his defence that he had even given some used (*cÿ¨vZb*) C.I. Sheets to the plaintiff to construct temporary huts in the raised portion of Plot no. 612 and allowed him to stay there till he could find out an alternative accommodation.

4. That the Assistant Judge who tried the Suit on the first occasion after consideration of evidence and other relevant documents came to the finding that the deed was not a mortgage deed but a sale deed, and, therefore, dismissed the Suit vide Judgment and Decree dated 27.02.1988. Thereafter, being aggrieved by the said Judgment and decree the plaintiff opposite parties filed Title Appeal No. 57 of 1988 and the Appellate Court vide judgment and order dated 27.04.1991 allowed the Appeal and remanded the suit for a fresh Trial.

5. Upon remand, the Court of the Assistant Judge decreed the Suit hearing the parties and adducing evidence, recording further evidence decreed the Suit vide his Judgment and Decree dated 22.03.1998. Thereafter, being aggrieved by the Judgment and Decree dated 22.03.1998 passed by the Senior Assistant Judge, Sadar the defendant-petitioner preferred an Appeal before the District Judge, Magura and which upon transfer to the Court of Sub-Ordinate judge, 2nd Court, Magura, the Sub-ordinate Judge, 2nd Court Magura after hearing both sides by his Judgment and Decree dated 24.10.2000 dismissed the Title Appeal No. 38 of 1998 affirming the Judgment and Decree dated 22.03.1998 passed earlier by the Senior Assistant Judge, Sadar, Magura, the defendant as petitioner obtained the present Rule in this Revisional Application.

6. Mr. Md. Nazrul Islam, the learned Advocate appearing on behalf of the petitioner made his submission, while learned Advocate Mr. Nitai Roy Chowdhury with Mr. Bivash Chandra Biswas appeared on behalf of the opposite parties.

7. The learned Advocate appearing for the petitioner submits that the alleged Deed No. 5029 dated 05.06.1969 is not a deed of mortgage, rather it is an out and out Sale Deed. In support of his submission he claims that the word "‡Lvk Kevjv" "khosh kabala" Is written on the face of the said Deed and the word "wewµq" has been used in the body of the said deed and the use of these terms only comes to aid to clarify the fact that the document is a Sale-Deed and not a mortgage deed. The Learned Advocate argues that if it was a mortgage deed there would have been a specific date mentioned for repayment of the mortgage loan and he also asserts that in the recital of the sale deed it is stated that the property transferred was heritable, transferable and that no body from the side of the plaintiff would ever raise any

objection claiming any interest in the property at any time in the future and the deed also contained a condition that if any such claim is raised from the side of the plaintiffs it would not be tenable in any Court of law. The learned Advocate stresses on the point that the nature of the deed is to be determined from an examination of the language of the document itself and that in the instant case the language of the document itself is clear enough proof that it is a sale deed and not a mortgage deed. He also submits that the Courts below upon an erroneous finding came drew the conclusion that the document is a mortgage deed and not a sale deed and the Learned Advocate asserts that it is a principle of law that the intention of the parties in a document or any other legal instrument has to be deduced from that instrument or document and the facts that gave rise to it. Relying upon such principle, the Learned Advocate in support of his case cited the case of Somedulla being dead his heirs Saika Bibi and others -Vs- Mahmud Ali being dead his heirs Monsur Ali and others and which is reported in 44 DLR (AD) page-83.

8. Upon making an effort to stress upon his assertion that the said deed is actually a "sale deed" and not a ''mortgage deed'', the Learned Advocate drew the Court's attention upon the essential ingredients of a mortgage deed. He submits that in order to constitute a mortgage, there are certain ingredients of which the recital of the mortgage-deed has to be comprised of and the learned Advocate for the petitioner persuades that in the event of those ingredients being absent in the recital, a deed cannot be considered by a mortgage-deed in the eye of law. In this context, the Learned Advocate for the petitioner referred to a decision of our Apex Court in the case of Ganu Mia –Vs- Abdul Jabbar and others reported in 10 DLR 1958 page-636 in which the Court below had relied upon in arriving at its decision. The Learned Advocate submits that the Courts below while relying upon that Case erred in that it failed to appreciate the legal principle set out in the test applied in that case as the criteria to determine and comprehend a mortgage by conditional sale and submits that in the said decision reported in 10 DLR the learned judges set out six conditions as determining factors to construe that a document is a mortgage by conditional sale. The Learned Advocate on behalf of the petitioner further submits that the Appellate Court below failed to apply their judicious mind in that they failed to interpret the judgment in its true perspective. While stressing on this point, the Learned Advocate asserted that all the six determinants as has been decided in that case are intrinsic to fulfill the conditions necessary to constitute a mortgage by conditional sale. He argues that from a perusal and interpretation of the 10 DLR Case, it leaves no doubt that the Court in that case intended that in order to constitute a mortgage all these conditions have to be fulfilled and embodied in the document itself, and none of those conditions may be omitted and that the parties to the deed have not been accorded any option to choose one from the other. He moreover points out the fact that the alleged registered deed dated 05.06.1969 only fulfills two of the conditions and those two are the conditions No. 3 and 5 set out in the criteria in the 10 DLR Case and forms part of the recital of the deed, but the rest four determining factors or conditions precedent are totally absent from the recital and do not constitute any part of the deed.

9. The learned Advocate on behalf of the petitioner also attracts our attention to Section 58C of the Transfer of Property Act, 1882 . He submits that from a scrutiny and interpretation of Section 58C of the Transfer of Property Act, 1882, it is clear that the Deed in question is a deed of sale and not a deed of mortgage. In support of his contention he relied upon a decision of this Court in the case of Serajul Huq and others -Vs- Ahmed Hossain and others reported in 1984 BLD page 194, wherein the principle setout is that a transaction of sale cannot be treated as a mortgage, even if the sale was made with a condition of resale, unless the condition is embodied in the document which effects or purports to effect the sale. The

Learned Advocate also submits that the opposite parties in support of their contention that the said deed is a mortgage deed failed to produce any documentary evidence, rather in support of their contention they only adduced oral evidences. In this context the Learned Advocate for the Petitioner refers to Section 91 and 92 of Evidence Act,1872 and stresses on the point that according to the provision of Section 91 and 92 of the Evidence Act, 1872 when documentary evidences are in existence, those documentary evidence in these cases are primary evidence and that cannot be changed or altered by secondary evidence, and, therefore, oral evidence with documentary evidence in existence are not acceptable in the eye of law. He further asserts that the Courts below made a serious error in law upon basing their finding on the oral evidences adduced by the opposite parties while ignoring the documentary evidences before it. In this context he also takes us to the decision in the case of Feroja Majid and another -Vs- Jiban Bima Corporation reported in 39 DLR (AD) page-78, wherein the underlying principle set out in Section 91 & 92 of the Evidence Act, 1872 has been enunciated and corroborated.

10. He also submits that the learned Courts below in passing the impugned Judgment and Decree committed an error in law by not taking into any consideration the evidences produced by the defendant-petitioner as exhibits B-B7 and rent receipt C-C1 (dhakhila). He contends that the Courts below failed to appreciate the legal significance of these rent receipts in the present case and also failed to appreciate that those two rent receipts evidence the fact that the Suit house was rented out and was also rented to the plaintiff and by not taking those into consideration the Courts below committed a serious error of law which thereby led to an erroneous decision and thereupon occasioned failure of justice. In support of his submissions he placed his reliance in the case of Syed Abdul Huq and another –VS- Surendra Nath Majumder and others reported in 59 DLR (AD) page-111 , in which case the Learned Advocate submits that our Apex Court settled the principle that ;

> *"when the finding of fact arrived at in the result of misreading and non-consideration of the evidence or misconstruction of the document, the High Court Division is quite competent to set aside the finding of fact so arrived at by the last Court of fact"*.

11. Referring to this principle, the Learned Advocate persuades that since, in this case also there has been a non-consideration of material evidence, those are the rent receipts which were exhibited as Exhibit B-B7 and Exhibit C & C1 by the Courts of fact, hence the Judgment and Decree given by the Court below cannot be sustained in law, and ,therefore, ought to be set-aside for the sake of Justice.

12. The Learned Advocate for the petitioner further contends that the vendor of the Deed i.e. the plaintiff put his signature in the deed in sound mind, knowing and understanding the contents thereof fully and therefore, there is now no scope for him to contend otherwise and he is actually barred by law to claim that it is a "mortgage deed" and not a Sale deed. He submits that the Courts below arrived at a wrong finding upon misconstruction of the documents and misinterpretation and non-consideration of evidences and thus gave an erroneous decision ultimately resulting in failure of justice and hence the Rule issued in the instant application ought to be made Absolute.

13. The Learned Advocate for the opposite parties Mr. Nitai Roy Chowdhury opened his averments by submitting that the Kabala deed dated 05.06.1969 is a mortgage-deed and not a sale deed and in support he basically echoed his reliance on the same decision as was relied upon by the Court below, that is the decision cited from 10 DLR 1958, Page-636 in the case

of Ganu Mia –Vs-Abdul Jabbar in which case certain criteria were set out as conditions determinant of a mortgage-deed. Out of the six conditions set out as test applicable for the purpose of determining a mortgage-deed, the Learned Advocate for the Opposite parties argues that two of the conditions that is condition number 3 (three) and 5(five) are fulfilled and forms part of the recital of the deed and therefore argues that the said deed is indeed a mortgage-deed and not a sale-deed.

14. The learned Advocate for the opposite parties while making his arguments primarily relied upon the oral evidences that were deposed by the witnesses in the Trial Court. The Learned Advocate for the opposite parties argues that the defendant No. 1 in the Original Suit in his written statement did not state anywhere that the plaintiff was a "tenant" under the defendant upon the Suit land and he also submits that rent receipts marked as exhibits "C" series could not lawfully be considered as a piece of evidence as per the provision of Order 6 Rule 7 of the Code of Civil Procedure.

15. The Learned Advocate for the opposite parties also raised an issue of "adverse possession" before this Court upon Title and Ownership. In course of his argument claiming Title by way of adverse possession, he submits that the impugned deed was executed and registered on 5.6.1969 and the Title Suit No. 120 of 1983 was filed on 27.02.1983 and as such a period of 12 (twelve) years had elapsed from the date of the Kabala till filing of the Suit, while the plaintiff-opposite-parties have been in possession of the suit property prior to the kabala and therefore the right to claim title by way of adverse possession has accrued upon them.

16. The Learned Advocate also refutes the defendant-petitioner's claim that the plaintiffs are in possession only as "permissive" possessors and also submits that the said property was never transferred in the name of the defendant nor did the defendant mutate his name, and, therefore, the defendant failed to prove his possession on the basis of the deed dated 05.06.1969. He further submits that the lower Courts below arrived at their findings based on evidences adduced by parties and deposition of witnesses from both sides available on record and that there was no misconstruction or non consideration of any of the evidences on record and there has been no miscarriage of justice and the said concurrent findings and facts cannot be set-aside under Section 115 of the Code of Civil Procedure and that therefore the Rule issued in the instant Revisional Application ought to be discharged.

17. We have heard the learned Advocates from both sides, perused the application, documents and judgment of the Courts below and other materials on record placed before us for our scrutiny. Upon such perusal and scrutiny we have found that the impugned deed dated 05.06.1969 is the main bone of contention and issue in question wherefrom the cause of action in the original suit had ensued, ultimately leading to the instant Civil Revisional Application , therefore, let us first focus our attention towards the document itself.

18. From our perusal and examination and from what transpires from the record, we find that it is an admitted fact by both parties that a deed was signed by the parties having full knowledge of the contents thereof and we also find that both the original plaintiff being the present opposite parties in no way denied the contents in the recital of the said documents and have at no stage denied its validity. While scrutinising the registered document, the decision reported in 10 DLR 1958 in the case of Ganu Mia –Vs- Abdul Jabbar and others was cited by the Learned Advocates for the parties and placed before us for our appreciation thereof. We have read the case and we have also perused the impugned registered deed. While so doing,

we have compared the recital contained in the registered deed with the conditions laid down in the said case, reported in 10 DLR as the test applicable for the purpose of determining a mortgage by conditional sale. Upon comparison, it is our considered opinion that the Courts below in relying upon that case upon a misconceived notion misinterpreted the intention of the court in laying down the conditions set out for the test applicable for the purpose of determining the documents to be a mortgage by conditional sale. The conditions set out in the said decision in 10 DLR (1958) page-636 in the case of Ganu Mia-Vs- Abdul Jabbar has been reproduced as under ;

> ***"Mortgage by conditional sale-Test applicable for the purpose of determining it.***
> *In order to determine that the document is a mortgage by conditional sale, the following tests, though not exhaustive, should be applied:-*
> *(1) the existence of a debt;*
> *(2) the period of repayment, a short period being indicative of sale and a long period of a mortgage;*
> *(3) the continuance of the grantor in possession Indicates a mortgage;*
> *(4) a stipulation for interest on repayment indicates a mortgage;*
> *(5) a price below the true value indicates a mortgage;*
> *(6) a contemporaneous deed stipulated for reconvenes indicates a mortgage, but one executed after a lapse of time points to a sale.*

19. Now six conditions as we have seen, been laid out as conditions determinant for the purpose of determining a mortgage deed by conditional sale. After perusal of the registered deed No. 5029 dated 05.06.1969, we find that out of the six conditions set out as the criteria to determine a mortgage by conditional sale, in the present case, only two of the conditions have been fulfilled in the impugned registered deed dated 05.06.1969. As to the remaining four conditions, those are totally absent from the recital of the impugned registered deed. Pursuant to our perusal and scrutiny, we find that the Court in the 10 DLR case while laying out the six conditions had intended that to form a valid a mortgage deed, all six conditions have to be mandatorily fulfilled and it would not suffice even if one of those conditions are left out from the recital. There is no indication anywhere in the said 10 DLR Judgment that these conditions are optional, and furthermore no choice have been given out of the six conditions. Consequently there is no room for any presumption that all the six conditions are not necessary to fulfill the criteria for a mortgage deed. But the Learned Courts below upon a fallacy and misinterpretation of the afore mentioned 10 DLR Judgment committed a serious error in law and to their own satisfaction decided that since two of the conditions are featuring in the recital of the instant registered deed, it is adequate enough to constitute a valid mortgage deed by conditional sale and wrongly presumed that the said deed is in conformity with the decision in 10 DLR (1958) Page-636. Here the Courts below have gone wrong. We are also of the view that to constitute a valid mortgage deed all six conditions have to be mandatorily fulfilled and even one condition cannot be left out from the recital of the deed and in the event of it being left out, it shall not constitute a valid mortgage deed by conditional sale. Therefore, the Learned Courts below misinterpreted and upon misconceived reliance on the said 10 DLR case and upon fallacy of law misconstrued the intention of the court in the said case and consequently in the instant case misconstrued the impugned registered deed as a mortgage deed where under the law it is actually a "sale-deed".

20. It also appears from the materials on record and other documents placed before us that the Courts below arrived at the conclusion that the impugned deed is a mortgage deed relying mainly on the ground that the consideration money paid by the defendant-petitioner is

inadequate and disproportionate in comparison to the valuation of neighboring lands of similar nature, lands and class as prevailing in contemporaneous times. The Courts below arrived at such conclusion placing their reliance upon certain contemporaneous documents pertaining to the deed as it prevailed at the time when the impugned deed was executed and certain documents were produced before the Court by the plaintiff-opposite parties featuring as exhibit 1 and 1 (Kha). But, our opinion is, under the principles of law we cannot rely on such contemporaneous documents only, when the impugned deed itself and other relevant factors speak differently and indicate otherwise. We could have relied on such contemporaneous documents indicating a higher value of the suit land existing at that time than the value that was paid by the defendant-opposite parties as consideration money and we could have accepted those as relevant pieces of evidence, if other relevant documents and factors placed in the instant case did not appear so clearly and distinctly before us. But in the instant case, these other documents, for example the impugned deed itself and the rent receipts were produced before the Courts below, but the courts relied only on the "lesser" amount paid for the suit land as consideration which conclusion the Courts arrived upon comparison of the value paid as consideration of sum of some neighboring lands during contemporaneous times. Such a finding is contrary to the principle laid down in the decision in the case of Somedulla -VS- Mahmud Ali reported in 44 DLR (AD) page-83 where our Apex Court has set out the principle that reads as under;

"Mere inadequacy of consideration is no ground to treat a document to be a mortgage".

21. What the Court meant by this is that a lesser payment of consideration money alone and only by itself does not indicate the existence of a ''mortgage deed'' in place of a ''sale deed'' and that the intention of the parties have to be gathered from the document itself in addition to surrounding circumstances. In our case in hand, the impugned registered deed dated 05.06.1969, the rent receipts and Dakhilas marked as Exhibits B-B(7) and C-C(1) however, tell a different story, different from the claims and assertions of the plaintiff-opposite parties and which we have discussed above and which under the principles of law are more relevant for us to decide upon the contention raised in the instant case, and therefore these other evidences we are in no position to ignore. Moreover, as regarding the principle in adducing evidence relating to the valuation of land we have drawn support from the established principle set out by our Apex Court in the aforementioned Case of Somedullah-Vs-Mahmud Ali reported in 44 DLR (AD) Page-83

22. While scanning through the records of the case and the judgment we find that the courts below had basically relied upon oral evidences and have ignored and thereupon not taken into consideration documentary evidences produced by the defendant available on record. In this context, we mean the rent receipts produced before the court by the defendant, and those receipts were marked as Exhibit "B" series and Exhibit 'C' series. We have found from the records that the defendant No. 1 (DW.1) in his deposition also mentioned the existence of the rent receipts. These rent receipts are substantive evidences in that Exhibit 'B' is the ground rent receipts paid to the Government by the defendant while Exhibit 'C' series are the monthly rent receipts for living in the ground floor of the building. We are surprised that the Courts below did not take these rent receipts into any consideration at all and which are relevant documentary evidences. Instead, as is obvious from their findings, the Courts below have erroneously and unlawfully relied upon oral evidences bypassing the documentary evidences and which they are barred from doing under the law. Section 91 and 92 of the Evidence Act expressly bar the reliance upon oral evidences where documentary evidences are there on record.

23. **Section 91 of the Evidence Act, 1872 reads as under:**

> 91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

24. **Section 92 of the Evidence Act, 1872 reads as under:**

> 92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying adding to, or subtracting from, its terms;

25. The principle underlying the provisions of the statute as in section 91 and section 92 Evidence Act, 1872 has been echoed in the decision in the Case of Feroja Majid and another –Vs-Jiban Bima Corporation reported in 39 DLR (AD) (1987) Page:78 where our Apex Court has unequivocally decided that:

> "Oral or extraneous evidence to contradict the terms of the contents of a document is inadmissible under section 92 of the Evidence Act"
>
> "What sections 91 and 92 provide- It is an established rule of evidence that oral evidence is inadmissible for the purpose either of construing terms of a document or of ascertaining the intention of the parties thereto"

26. Therefore, upon an interpretation of Section 91 and Section 92 of Evidence Act, 1872 read with the aforementioned decision cited from 39 DLR (AD) (1987) Page-78 in the Case of Feroza Majid and another –Vs-Jiban Bima Corporation, we being bound by the statute as provided for in Section 91 and 92 of the Evidence Act,1872 and which received its interpretation in the said decision given by our Apex Court, we cannot make a departure from such principle, while deciding the case in hand. Therefore, our finding is that the Courts below while bypassing the documentary evidence and accepting the oral evidences instead thereby committed a serious error of law thus arriving at an erroneous decision resulted in failure of Justice.

27. The Courts below had also in their findings stated that the defendant no. 1 had claimed that the plaintiffs were earlier residing in the suit land upon ''permission'' of the defendant and that the defendant could not at any point prove their own possession in the suit land. The learned Advocate for the opposite parties in course of his submissions had raised the point that the defendant had stated in his written statement that the plaintiff was living in the suit land with the ''permission'' of the defendant, but the defendant No.1 did not state anywhere in his written statement that the plaintiff was a ''fvowUqvÖ, that is a tenant under the defendant on the suit land and persuaded that, therefore the rent receipts could not be considered as a valid piece of evidence, since as per the provisions of Order 6 Rule 7 of the

Code of Civil Procedure those evidences are precluded from being considered as lawful piece of evidence. Now let us examine Order 6 Rule 7 of CPC which reads thus;

> *"No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the parties pleading the same."*

28. In attracting Order VI Rule 7 of the Code of Civil Procedure the Learned Advocate for the Opposite Parties contention is that since the defendant had earlier stated that the plaintiffs were living in the suit land with the defendant's permission, therefore, they the defendant as per the provisions of Order VI Rule 7 cannot now claim that they are their tenants and were residing in that capacity.

29. Now on this point also we cannot agree with the opposite parties. In our opinion, the defendant-petitioner have not deviated from the scheme of Order 6 Rule VII of CPC, given that he has not made any substantive departure from his claims. The opposite parties according to the petitioner were earlier residing in that house upon permission of the defendant-petitioners i.e. as licensees and eventually they became their tenants by paying rents and started residing upon the suit land in the capacity of tenant. We do not find anything unreasonable or inconsistent in this statement of the petitioner. Such an arrangement is quite reasonable under the circumstances and the conversion of a person who had originally started living upon a property as a licensee and eventually converted into a tenant by paying rent is very much possible and probable under the circumstances and may not call for further enquiry.

30. The Appellate Court in its Judgment has made an observation in the terms of *"bwjkx 612 `vMi Rwg‡Z gÿ ev`x I Zvi Iqwik cÖvPwi emZ evox wn‡m‡e fvM `Lj K‡i Avm‡Q| Av‡`Š H Rwgi `Lj n¯vši K‡ib bvB| †ebwjkx 1045 `vMi Rwg I Zviv n¯vši K‡ib K‡ib bvB"* This observation of the Appellate Court is based upon a misconceived notion. The Courts below tried to justify its finding upon the rationale that the defendant was not in possession of the suit property and that it has all through been in the possession of the plaintiff opposite parties. But, we feel that the question of possession by the petitioner is not very relevant here in that after purchasing the property from the plaintiff-opposite parties, the defendant-petitioner had continued to let them reside in the property first as licensees and subsequently in the capacity of tenants by payment of rent and as we have already opined it is reasonable and very much possible under the particular circumstances of this case. Further our view is that, nobody is denying the fact that the opposite-parties were in possession even after execution of the impugned registered deed No. 5029 dated 05.06.1969, but the Courts below failed to comprehend the fact that they, the plaintiffs after the execution of the registered deed dated 05.06.1969 were allowed to reside therein initially as licensees with permission to live there and then subsequently in the capacity of tenants subject to payment of rent. Therefore our finding is that though the literal physical possession is still under the plaintiffs, but the ownership had passed to the defendant-petitioner after the execution of the deed. We must not confuse possession with ownership or title to property. Ownership and title to property can only be determined by the construction of the deed or document itself and not by any extraneous considerations.

31. As is apparent from the Judgment of the District Judge, The Courts below had also arrived upon the erroneous finding that the defendant had no Title to the suit property relying upon the ground that the suit property comprising of Dag No. 1045 was subsequently acquired by the Government under the Act and against that acquisition nobody had ever come to claim or receive any compensation money from the government and that the defendant No. 1 neither tried to receive the compensation money nor did they file any suit against them.

Placing their reliance upon this ground, the court below committing a fallacy in law decided that the defendant's Title to the suit land could not be proved. We do not agree with this reasoning of the Courts below given that as it transpires upon perusal of the judgment itself, the land was acquired by the Government between the years 1984-1985. As is also evident from the records, the original Suit was filed in 1983, that is prior to the acquisition of the land by the government. Therefore, since the land was acquired between 1984-1985, that is after the Original Suit being Title Suit No. 120 of 1983 was filed in the year 1983, it was already a pending litigation for declaration of ownership and Title to the property, and therefore, Title to the property being a Sub-judice matter, it can only be reasonably concluded that the question of receiving the compensation money by either parties cannot arise under the laws.

32. Upon scrutinizing the Judgment and the depositions made by the witnesses, we find that the Courts below while relying upon oral evidences also referred to a verbal contract "‡gŠwLK Pvi" regarding the return of the so called mortgage loan. Therefore, the Courts below have again erroneously relied upon the assertion of the Plaintiffs and the deposition of the prosecution witnesses alluding to a "‡gŠwLK Pvi" between the parties to the effect that the "mortgage" shall be redeemed upon repayment of the so called "loan" that was as claimed by the plaintiff-opposite parties was taken by them from the defendant-petitioner. The Court below states that although there was no "ikrarnama'' there was a "‡gŠwLK Pvi" verbal agreement between the parties and in its Judgment the Court below casually refers to the so-called "‡gŠwLK Pvi" or "verbal agreement" being a local custom or convention. In this point, we would like to remind everyone once again that under Section 91 & 92 of the Evidence Act, 1872, oral evidences cannot prevail over documentary evidence and documentary evidence is primary evidence which cannot be changed or altered by any secondary evidence and also no custom or convention can prevail over any law that is in existence. Therefore, our view is that in the present case no oral evidence in the form of "‡gŠwLK Pvi" or ''Verbal Agreement'' whatsoever, can be relied upon, when a legal document, in the present case, the impugned deed dated 05.06.1969 itself is in existence and speaks differently and the Courts below on relying upon the oral evidence referring to a so-called "‡gŠwLK Pvi" committed a serious error in law and ultimately occasioned a failure of Justice. Therefore, these findings of the Courts below being devoid of any legal basis cannot be sustained.

33. The Learned Courts below have also relied on the plaintiff opposite parties's assertion that the plaintiff-opposite parties repaid the so called ''mortgage'' loan which the original plaintiff had received from the petitioner. We find that here the lower Courts below while relying upon such claim had relied only upon the oral evidences as has been given as deposition of the witnesses and not on any proper legal documents. Here we can only repeat that repayment of loan cannot be sustained in law in the absence of any document to prove such claim and when there is another legal document in existence, in this case the impugned registered deed itself, that indicates otherwise.

34. The opposite parties, while making their submissions before us, had also in the course of their arguments before us made a plea of adverse possession. The contention of the Learned Advocate for the opposite parties is that they are entitled to claim acquisition of Title to the property through adverse possession. The Learned Advocate for the opposite parties argued that the impugned registered deed was executed and registered on 05.06.1969 and the instant suit was filed on 27.02.1983 and twelve (12) years had elapsed from the date of the Kabala till filing of Title Suit No. 120 of 1983 and the Plaintiffs having been in possession of the Suit land even long before that and the defendant-opposite parties having full knowledge of the plaintiff's possession never opposed to such possession and had not mutated the

defendant's name on the basis of the alleged Kabala. and that hence the Plaintiff-Opposite parties have acquired Title through adverse possession and that the Courts below lawfully decreed the suit in favour of the Plaintiffs.

35. We would now like to address this claim of adverse possession made by the opposite parties at this juncture of the case. Interestingly, we discover from the records that the plaintiff-opposite parties did not take up this issue in the Trial court and as is evident from the records, no issue of adverse possession was framed in the Trial Court during the course of the proceedings. Now, it is a settled principle of law and as per Order XIV Rule 1 of the Code of Civil Procedure that an issue which was not taken up earlier in the Courts below, cannot be taken up at a later stage before the superior Courts. The Learned Advocate for the plaintiff-opposite parties argued otherwise and while trying to contradict this legal point, the Learned Advocate for the plaintiff-opposite parties cited a decision by our Apex Court in the case of Mohammmad Abdul Jalil Miah –Vs- Nirupama Ritchil and others reported in 17 BLD (AD) 1997, Page-63 wherein our Apex Court had given its finding as follows ;

> *"Order XIV Rule 1 of the Code casts a definite responsibility upon the trial Court to frame issues upon the material assertions by one parties and denied by the other and this can be done at any stage of the suit if found necessary. But it is necessary that the contending parties are afforded adequate opportunity to contest the issue."*

36. Now after perusal of this Judgment, we find that this particular finding of our Apex Court is not relevant for our present case, since in the present case the issue of adverse possession was never taken up by the Trial Court at all ever at any stage of the proceedings. So we do not need to discuss this decision any further and in the instant case the plaintiff-opposite parties cannot claim any adverse possession relying upon this finding of the Apex Court.

37. Regarding the claim of the opposite parties of acquisition of Title by adverse possession, we find it very much pertinent and necessary to point out the fact that in the present case it is obvious from the materials on record, other documents and the submissions made on behalf of the opposite parties, that the plaintiff-opposite parties at the very outset, in limine, brought the suit relying upon the claim that they are the original owners of the Property and that the Title to the property was never transferred and that the registered deed No. 5029 dated 05.06.1969 that was executed by them in favour of the defendant was only a "mortgage-deed", and, therefore, legal ownership and Title to the Suit land had always remained with them. But after making such a claim all through, suddenly at this stage, before us, they take up the plea of acquisition of Title through Adverse possession. Now there are various incidents attached to a claim that may determine a title through adverse possession. Adverse possession is inter alia a way of gaining or acquiring legal title to property by the hostile, exclusive continuous possession of the property within the knowledge of the true owner for a certain period as prescribed under the law and if the real owner fails to bring a suit within the statutory period, title shall be acquired by the person in adverse possession. Adverse possession therefore as was also observed by our Apex Court in the above mentioned decision in Mohammad Abdul Jalil Miah –Vs-Nirupamer Ritchil reported in 17 BLD (AD) (1997)

"Implies that it commenced in wrong and is maintained against right"

38. In the present case, the Plaintiffs-Opposite parties did not at any stage of the Suit rely upon the claim that they were living in that property in hostile possession as to the title or

ownership of the true owner. They never said anywhere that they were not the original owners but had acquired Title by adverse possession of more than twelve years that is the statutory period of limitation. Their prayer for declaration of Title has been based on their claim that they had been the lawful owners of the property all through. Therefore, their claim at this stage that they have acquired Title through Adverse Possession is an absurdity and cannot be sustained under the law. On the one hand, the opposite Parities claim that they are the Original lawful owners holding Title and on the other hand they claim that they have acquired Title through Adverse possession. We regret to say that such claims run counter to each other and the plaintiff-opposite parties are not themselves certain about their legal standing as to the suit property and is thus making inconsistent and contradictory statements to that effect and according to their own convenience and such arguments and claims cannot be sustained in law and is hence not acceptable to us.

39. Upon perusal of the judgment of the Courts below and other documents and materials on record it transpires that the Lower Courts below in arriving at their findings had relied primarily upon the oral evidences and deposition made by the prosecution witnesses as against the documentary evidences relied upon by the defendant-petitioner.

40. Therefore, under the aforesaid facts and circumstances stated above and upon perusal of documents and other materials on record and the Judgments of the Courts below, we find substance in the Rule and in the submissions made by the Learned Advocate for the petitioner, and, therefore, the Rule is made Absolute without any order as to costs and the Judgment and Decree dated 24.10.2000 passed by the learned Sub-ordinate Judge, 2nd Court , Magura in Title Appeal No. 38 of 1998 affirming those dated 22.03.1998 passed by Senior Assistant Judge, Sadar, Magura decreeing the Suit in Title Suit No. 120 of 1983 are hereby set-aside and the said suit stands dismissed.

41. In view of what has been stated above, this Rule is made absolute without any order as to costs.

42. Send the Lower Court s record along with the copy of this judgment to the Courts below at once for compliance.