7 SCOB [2016] AD 32

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A.H.M.Shamsuddin Chowdhury

CIVIL APPEAL NO.201 OF 2005
(From the judgment and order dated the 1st day of December, 2002 passed by the High Court Division in Civil Revision No.4859 of 1997)

Karim Khan and others	:	. . . Appellants
=Versus=		
Kala Chand @ Chand Miah and others	:	. . . Respondents
For the Appellants	:	Mr. Bivash Chandra Biswas, Advocate-on-Record
For Respondent Nos.1-4	:	Mr. M. A. Quayum, Senior Advocate instructed by Mr. Nurul Islam Chowdhury, Advocate-on-Record
For Respondent Nos.5-7	:	None represented
Date of Hearing	:	06.05.2015
Date of Judgment	:	The 12th day of May, 2015

Code of Civil Procedure, 1908
Section 115
And
Permanent Injunction:
It is a well settled legal proposition that the Appellate Court is the last Court of fact and if the Appellate Court comes to a finding of fact on consideration of the evidence on record that cannot be disturbed or reversed by the High Court Division in exercising jurisdiction under section 115(1) of the Code of Civil Procedure, unless it can be shown that the finding of the Appellate Court is perverse or contrary to the evidence on record or based on misreading of the evidence on record or on misconception of law. It is also a settled legal principle that in a suit for permanent injunction title can be looked into incidentally and the prime consideration is whether the plaintiff has got exclusive possession in the suit land. ... (Para 8)

Code of Civil Procedure, 1908
Order VII, Rule 3:
The plaintiff mentioned the number of the C.S. and the S.A. Khatians and also the plot numbers of the lands in the suit and thus there was full compliance with the previsions

of Order VII, rule 3 of the Code. And since no fraction or portion of the lands of the two plots was claimed, there was no necessity of giving any chauhaddi or boundary of the suit plots. ... (Para 10)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the judgment and order dated the 1st day of December, 2002 passed by a Single Bench of the High Court Division in Civil Revision No.4859 of 1997 making the Rule absolute.

2. Facts necessary for disposal of this appeal are that the appellants as the plaintiffs filed Title Suit No.16 of 1993 in the Court of Senior Assistant Judge, Rupganj, Narayangonj against the defendant-respondents for permanent injunction on the averments, *inter alia*, that Akbar Ali Bhuiyan was the owner of the land of C.S. Khatian No.15 and some other lands and that Jonab Ali and others were the owners of the land of C.S.Khatian No.243 and some other lands including the suit land. Prior to the C.S. operation, the land of C.S. plots of C.S. Khatian No.15 was owned and possessed by Maizuddin and that at one time, he handed over possession of the land of the said khatian to Akbar Ali Bhuiyan. The lands of Khatian Nos.15 and 243 were sold in auction and the landlord purchased the auction sold land of the said khatians. After the auction purchase, the auction purchased land including the suit land came in the hand of one Mohabbat Khan before 1940. Said Mohabbat Khan owned and possessed the suit land along with other lands on payment of rent to the Zamindar. Mohabbat Khan died leaving behind sons: Ayer Khan, Taiub Khan and Ala Box and the S.A. and the R.S. records were prepared in their names. Ayer Khan died leaving behind the plaintiffs as his heirs and they have been possessing the suit land by growing crops therein to the knowledge of all including the defendants. The defendants who have no right, title and interest as well as possession in the suit land tried to dispossess the plaintiffs on 19.03.1993, but due to the intervention of the people of the locality, they were not successful and in that background, the plaintiffs were constrained to file the suit for the relief aforementioned.

3. The suit was contested by defendant Nos.1-4 by filing a written statement denying the material statements made in the plaint and contending, *inter alia*, that Akbar Ali Bhuiyan was the owner and possessor of the land of C.S. Khatian No.15 and Jonab Ali and others were the owners and possessors of the land of C.S. Khatian No.243. The lands of the said khatians were sold in auction and Suja Khan, father of Mohabbat Khan and Immat Khan purchased the auction sold land from the Zaminder. Suja Khan died leaving behind sons: Mohabbat Khan and Immat Khan and the suit land fell in the saham of Immat Khan on amicable partition and as he was owning and possessing the same, R.S. record was prepared in his name and in the name of Mohabbat Khan. Immat Khan sold 45 decimals land out of 50 decimals land to defendant No.1(Kala Chand) from Plot No.360 on 05.12.1977 and handed over possession thereof to him. Later one Immat Khan also sold 30 decimals land out of 36 decimals land from Plot No.361 on 12.03.1979 to defendant No.1 and handed over possession thereof to him. On 12.03.1979, Immat Khan gifted $4\frac{1}{2}$ decimals land from Plot No.360 to his two grand children: Serajul Islam Khan and Md. Dulal Khan and handed over possession of the said land to them. On 12.03.1979, Immat Khan gifted $4\frac{1}{2}$ decimals land to his son, Md. Rup Khan and handed over possession of the transferred land to him. The son, the grand children and

the mother of the grand children of Immat Khan sold 1 decimal land from Plot No.360 and 6 decimals land from Plot No.361 and some other lands to defendant No.1 and handed over possession thereof to him. Defendant No.1 acquired 54 decimals land from Plot No.360 and 36 decimals land from Plot No.361 and he got his name mutated on 03.03.1986 and has been paying rents to the Government and he has been possessing the lands for more than 13 years planting fruit trees. The plaintiffs have no right, title, interest and possession in the suit land, but they filed the suit making false statements and as such, the suit was liable to be dismissed.

4. The trial Court dismissed the suit by the judgment and decree dated 29.11.1994. Against the judgment and decree of the trial Court, the plaintiffs filed Title Appeal No.148 of 1994 before the District Judge, Narayangonj. The learned Subordinate Judge, 1st Court, Narayangonj on hearing the appeal by the judgment and decree dated 28.08.1997 allowed the appeal and decreed the suit. Having felt aggrieved by and dissatisfied with the judgment and decree of the Appellate Court, the defendants preferred Civil Revision No.4859 of 1997 before the High Court Division and a learned Judge of the Single Bench by the impugned judgment and order made the Rule absolute and dismissed the suit.

5. Against the judgment and decree of the Appellate Court, the plaintiffs preferred Civil Petition for Leave to Appeal No.1221 of 2003 before this Court and leave was granted to consider the submissions of the learned Advocate for the plaintiff-appellants as under:

> "The learned Counsel for the petitioners submits that the High Court Division has erred in law in making the Rule absolute on holding that "a suit for permanent injunction where the plaintiff did not mention the boundary of the specific plot and there is no specific demarcation, in that view of the matter granting injunction in favour of the plaintiff can not be sustained." whereas, it was and/or is not the case of either of the parties, inasmuch as the appellate Court has clearly found as fact and observed that "মামলার আরজি, বিবাদীদের জবাব, স্বাক্ষীদের জবানবন্দী ও জেরা পর্যালোচনা e¡¢mn£ i¢j vague h¡ unspecified HC I¦f ®L¡e ¢haL ®cM¡ k¡u e¡z k¢cJ ¢h ' ¢ejÀBc¡ma Eš² বিষয়ে কোন ইস্যু (বিচার্য বিষয়) ধার্য্য করেন নাই, তথাপিও এই পোষকে নালিশী (ভুমি) vague, unspecified নহে মর্মে সিদ্ধান্ত হইল" and as such, the impugned judgment and order is liable to be set aside. The learned Counsel further submits that inspite of claiming injunction for the entire land of the two suit plots, the High Court Division has committed an error of law in deciding the revision case without considering the provisions of Order 7, Rule 3 of the Code of Civil Procedure and has thereby arrived at a wrong decision occasioning failure of justice; that the impugned judgment of the High Court Division seriously suffer from non-application of judicial mind to the facts of the case as well as the principles and guidelines laid down by the Appellate Division in several cases with regard to matters of reversing an appellate Court's judgment in exercising jurisdiction under Section 115 of the Code of Civil Procedure that in any view of the matter the impugned judgment is not a proper and legal judgment in the eye of law."

6. Mr. Bivash Chandra Biswas, learned Advocate-on-Record, for the appellants has made his submissions in the light of leave granting order. He has further submitted that the

Appellate Court being the last Court of fact on consideration the evidence on record, both oral and documentary, gave clear finding that the plaintiffs are in possession of the suit land, but the High Court Division did not at all reverse the said finding of the Appellate Court with reference to the evidence on record and thus erred in law interfering with the judgment an decree of the Appellate Court restoring those of the trial Court and as such, the impugned judgment and order is liable to be set aside and the appeal be allowed.

7. Mr. M. A. Quayum, learned Counsel, for the defendant-respondents on the other hand, has supported the impugned judgment and order.

8. It is a well settled legal proposition that the Appellate Court is the last Court of fact and if the Appellate Court comes to a finding of fact on consideration of the evidence on record that cannot be disturbed or reversed by the High Court Division in exercising jurisdiction under section 115(1) of the Code of Civil Procedure, unless it can be shown that the finding of the Appellate Court is perverse or contrary to the evidence on record or based on misreading of the evidence on record or on misconception of law. It is also a settled legal principle that in a suit for permanent injunction title can be looked into incidentally and the prime consideration is whether the plaintiff has got exclusive possession in the suit land. Keeping in view the above settled legal propositions, let us see whether the High Court Division rightly interfered with the judgment and decree of the Appellate Court.

9. So far as the trial Court is concerned, it appears that it did not consider the oral evidence on record in its entirety as to the possession of the suit land by the parties; it considered the evidence of the PWs and some of the DWS in a piece-meal manner and also failed to consider the presumption of the S.A. khatian and the rent receipts which were exhibited as exhibits-'4', '5' series and '6' series. The Appellate Court, the last court of fact, considered the evidence of both the PWs and the DWs and also the documentary evidence, namely: exhibits-'4, 5 series and 6 series' and came to the positive finding to the effect:

> "উপরোক্ত সাক্ষীদের জবান বন্দী ও জেরা পর্যালোচনা ও বিশ্লেষনে বাদী আপীল কারী পক্ষ নালিশী ভূমিতে দখল bাকার বিষয়েটি প্রতিষ্ঠিত হয়। পূর্বেই সিদ্ধান্তিত হইয়াছে যে, যেহেতু বিবাদীদের পূর্ববর্তী সুজা খা জমিদারদের নিকট হইতে পত্তন গ্রহনের পোষকতায় বিবাদী রেসপনডেন্ট পক্ষ কোন রুপ কাগজাদি দাখিল করেন নাই। এমন কি সুজা খার ২ পুত্র মহব্বত খাঁ ইম্মত খার মধ্যে পরিবারিক আপোষ ইম্মত খা নালিশী ভূমি ভোগ দখল করিতে এমন কোন প্রমান আদালত উপস্থাপন করা হয় নাই ফলে বিবাদীদের ভায়া ইম্মত খার নামে আর, এp, BV Be¡ Awn qJu¡a ¢ea¡¿C ভিত্তি হীন। যেহেতু বিবাদীপক্ষ স্বত্বইহীন লোকের নিকট হইতে নালিশী ভূমি ফরিদের (sic) L¢afu c¢mm fËç হইয়াছেন এবং যেহেতু উক্ত দলিলের, ফলে কোন দখল লাভ করেন নাই সেহেতু বিবাদীদের দলিলpjq L¡k£L¡l£a¡ প্রশ্নে রহিয়াছে এবং যেহেতু বাদী পক্ষ তাহাদের দাবীর সমর্থনে মহাব্বত খার নামীয় পত্তন গ্রহনের পোষকতায় জমিদার বরাবরে খাজনার দাখিলা fËne£ 6, ¢p¢lS Hhw jqîa খার ওয়ারিশদের নামে পরবর্তীতে এস, H, Sl£f qJu¡ fËne£ 4 Hবং পরবর্তীতে মহব্বত খার ওয়ারিশগন নালিশী ভূমির সরকার বরাবরে খাজনা প্রদান প্রদর্শনী ৫ সিরিজ এবং একইভাবে নালিশী ভূমির অদ্যাবধি দখলে থাকার বিষয়েটি প্রতিষ্ঠিত হওয়ায় নালিশী ভূমিতে বাদী আপীলকারী পক্ষের আপাতঃ স্বত্ব ও দখল বিদ্যমান থাকায় বিবাদী পক্ষ কর্তৃক law full croo (sic) h£a£a বেদখলের কোন অবকাশ না থাকায় বাদী আপীলকারী পক্ষ স্হায়ী নিষেধাজ্ঞার ডিক্রী পাইতে পারে।"

10. As noted in the leave granting order, in fact, the High Court Division interfered with the judgment and decree of the Appellate Court on the view that *"the plaintiffs did not mention the boundary of the specific plot and there is no specific demarcation, in that view of the matter granting injunction in favour of the plaintiff cannot be sustained."* The High Court Division was totally wrong in taking the said view inasmuch as from the schedule to the plaint, it is *prima facie* clear that the plaintiff filed the suit for permanent injunction in respect of two plots being Plot Nos.361 and 360, the total area of the land involved in the said two plots are 39+54 decimals respectively and the plaintiffs claimed the entire area of the said two plots. Therefore, it was not at all necessary for the plaintiff to give the boundary of the said two plots. In this regard, the learned Judge of the Single Bench totally misconceived the provisions of Order VII, rule 3 of the Code of Civil Procedure (the Code) inasmuch as the said provisions of the Code has clearly spelt out that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. In the instant case, from the schedule to the plaint, it is clear that the plaintiff mentioned the number of the C.S. and the S.A. Khatians and also the plot numbers of the lands in the suit and thus there was full compliance with the previsions of Order VII, rule 3 of the Code. And since no fraction or portion of the lands of the two plots was claimed, there was no necessity of giving any chauhaddi or boundary of the suit plots. Therefore, we find substance in the first submission as noted in the leave granting order.

11. From the judgment of the Appellate Court, it appears that it discussed the case of the respective party, considered the oral as well as the documentary evidence and adverted the findings of the trial Court as regards the *prima facie* title of the plaintiffs and also their exclusive possession in the suit land and then reversed the decision of the trial Court in decreeing the suit. Mr. Quayum could not show with reference to the evidence on record that the finding of *prima facie* title in favour of the plaintiffs in the suit land and their possession therein by the Appellate were contrary to any evidence or misreading of any evidence. The High Court Division in its judgment did not also point out what evidence the Appellate Court failed to consider or the Appellate Court misread in arriving at the finding of the *prima facie* title and exclusive possession in the suit land in favour of the plaintiff. Therefore, we find merit in the 2nd and the 3rd submissions on which leave was granted.

12. For the discussion made hereinbefore, we find substance in the appeal and accordingly, the same is allowed without any order as to cost. The impugned judgment and order of the High Court Division is set aside and that of the Appellate Court is restored.