

8 SCOB [2016] HCD 29**HIGH COURT DIVISION
(Civil Revisional Jurisdiction)**

Civil Revision No. 1269 of 2014

Mr. Kadom Ali Mollick, Advocate

...for the petitioners

Md. Rofiqul Islam and others

Mr. Kamruzzaman Bhuiyan with

...Petitioner

Mrs. Nusrat Yesmin, Advocate

Versus

...for the opposite-
parties**Md. Khalilur Rahman and others**

...Opposite-Parties

Heard on: 18.08.2015

Judgment on: 20.08.2015

Present:**Mr. Justice Md. Rais Uddin****Record of rights****And****Section 90 of the Evidence Act, 1872:**

Record of right is evidence of present possession and registered kabala is an evidence of title. The registered document will prevail over the records of rights and would remain in enforce until and unless, such kabala is cancelled by an appropriate civil court. The registered deed dated 13.05.1965 is an old document more than 30 years produced from proper custody presumed under Section 90 of the Evidence Act that it was duly executed and genuine documents. ... (Para 14)

Judgment**Md. Rais Uddin, 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 11.03.2014 passed by the learned Joint District Judge, 2nd Court, Chuadanga in Title Appeal No. 36 of 2013 disallowing the appeal and thereby affirming the judgment and decree dated 30.05.2013 passed by the learned Assistant Judge, Damurhuda in Title Suit No. 152 of 2000 decreeing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the opposite party Nos. 1-4 as plaintiffs instituted a suit for declaration that R.S. record was wrong and partition claiming $8\frac{1}{4}$ decimals of land out of 82 decimals of land contending, inter-alia, that the suit lands measuring .42 acres appertaining to plot No. 25 of S.A. Khatian No. 110 of Babhadanga Mouza originally belonged to Joti Mandal who sold $16\frac{1}{2}$ acres land of the suit plot by means of a registered deed being No. 5334 dated 13.05.1965 in favour of Hossen Ali, Bokter Mandal and delivered possession thereof. Hossain Ali become the owner of $8\frac{1}{4}$ acres land died leaving two sons namely Khalilur, Foroj Ali and two daughters namely, Bulbuli Khatun, Sonahar Khatun and wife Sonaton Bibi as his heirs. Foroj Ali, Bulbuli Khatun, Sonahar

Khatun and Sonatan Bibi sold $.6\frac{3}{4}$ acres land including $.5\frac{1}{2}$ acres land of suit plot by virtue of a registered deed being No. 6559 dated 27.11.2000 in favour of plaintiff No. 2 Julfiker and handed over possession thereof. As such the plaintiffs are in possession and enjoyment of $.8\frac{1}{4}$ acres land. The plaintiffs after obtaining certified copy of R.S. record came to know R.S. record was prepared in the name of Montaj Ali also who is the predecessor of defendant Nos. 1-3 about some land of the land in question and refused to make partition on 01.05.2000. Hence, the instant suit.

3. The defendant contested the suit by filing written statements denying the material allegations made in the plaint contending, inter-alia, that the suit lands measuring .42 acres appertaining to plot No. 25 of S.A. Khatian No. 110 of Babhadanga Mouza originally belonged to Joti Mandal. Joti Mandal sold $16\frac{1}{2}$ acres land of the suit plot by means of a registered deed being No. 5334 dated 13.05.1965 in favour of Hossen Ali, Bakter Mandal. Hossen Ali and Montaj Ali are the full brother and they lived in the same house in ejmali and the suit land was purchased in the names of both Hossen Ali, Montaj Ali and therefore Montaj Mandal, Hossen Ali got in equal shares of land by the alleged deed. As such the heirs of Montaj Ali owners of $.4\frac{1}{8}$ acres land since the suit land was purchased with the money of their ejmali property and R.S. record is correctly prepared in the names of aforesaid Montaj Ali and his successors and defendants are in possession for about 30 years in suit land. Therefore, the suit is liable to be dismissed.

4. At the trial, the plaintiffs examined 3(three) witnesses and the defendants examined 3(three) witnesses in support of their respective cases.

5. The learned Judge of the trial court on conclusion of trial after hearing the parties, considering the evidence and materials on record decreed the suit by his judgment and decree dated 30.05.2013. Against the said judgment and decree the defendants preferred appeal before the learned District Judge, Chuadanga. On transfer it was heard and disposed of by the learned Joint District Judge, Chuadanga who after hearing the parties, considering the evidence and materials on record dismissed the appeal and affirmed the judgment and decree of the trial court by his judgment and decree dated 11.03.2014.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree the defendants as petitioners moved this court and obtained the instant Rule.

7. Mr. Kadom Ali Mollick, the learned advocate appearing for the petitioners has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the suit is not maintainable without consequential relief and suit is barred by limitation. He submits that during pendency of the suit without permission of the court cannot transfer the suit land and is barred by principle of lis pendens. He submits that the defendants successfully proved their title and possession and their homestead in the suit land by rent receipts and R.S. record. He further submits that the courts below on misreading and non-consideration of evidence both oral and documentary passed the judgment and decree and thereby committed error of law resulting in an error occasioning failure of justice. He lastly submits that without prayer for declaration of title and recovery of khas possession the suit is not maintainable and prayed for to make the rule absolute. In support of his

contention he has referred the decisions reported in: (1) 35 DLR224, (2) 17 BLD 68, (3) 13 BLD 621, (4) AIR 1946 Bombay 207, and (5) AIR 1946 Patna 306.

8. Mr. Kamruzzaman Bhuiyan, the learned advocate appearing for the opposite-parties opposed the rule and submits that the suit is not barred by principle of lis pendens because the subsequent transfer brought to the notice of the court. He submits that the plaintiffs added party as plaintiffs by amendment of plaint against which the defendants did not take any step before higher forum and as such they are not entitled to raise the question at this stage. He submits that the possession of the plaintiffs is admitted by D.W.1 and as such the partition suit is maintainable. He further submits that in a suit for partition the status of the plaintiffs and the defendants are same and the defendants failed to prove their title in the suit land and as such both the courts below rightly decreed the suit. He also submits that R.S. Khatian is not document of the title and the defendants failed to produce any deed in support of their claim and as such both the courts below rightly decreed the suit in favour of the plaintiffs. He lastly submits that in a partition suit all kind of incidental relief can be decided however complicated. In support of his contention he has referred the decisions reported in: (1) 13 DLR(SC)191, (2) 4BLT(AD) 224, (3) 55 DLR(AD) 115, (4) 42 DLR (AD) 53, and (5) 49 DLR(AD) 68.

9. In order to appreciate the submissions made by the learned advocates for the parties, I have gone through the revisional application, pleadings, evidence, exhibits and the judgment and decree of the courts below very carefully.

10. Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

11. On perusal of the record it appears that the plaintiffs brought a suit for declaration that R.S. record was wrong and for partition claiming $8\frac{1}{4}$ decimals of land out of 82 decimals of land. The predecessors of the plaintiff namely, Hossen Ali purchased the suit land by a deed dated 13.05.1965 along with one Bokter Ali measuring $16\frac{1}{2}$ decimals of land and predecessors of the plaintiffs namely, Hossen Ali are entitled $8\frac{1}{4}$ decimals of land (exhibit-3). The defendant Nos. 1-3 also claimed the suit land as inheritance and claimed that Hossen Ali predecessor of the plaintiffs and Montaj Ali predecessors of the defendants were full brothers and as such defendants have been possessing the suit land. The defendants claimed the suit land on the basis of purchase by Hossen Ali since Hossen Ali and Montaj Ali were full brothers. On perusal of the exhibits-3 deed of 1965 dated 13.05.1965, it appears that the name of Hossen Ali and Bokter Ali in the deed. The defendants in support of the claim submitted D.C.R. and mutation Porcha.

12. The plaintiffs and the defendants claimed the suit land by purchase by their predecessors namely, Hossen Ali, predecessor of the plaintiffs and Montaj Ali predecessors of the defendants. The defendants claimed that suit land was purchased in the name of Hossen Ali from the income of joint family since Montaj Ali predecessors of the plaintiffs was brother of Hossen Ali. In this context D.W.2 a vital witness who is sister of Hossen Ali and Montaj Ali may be referred who in examination-in-chief stated that- “*ev`x weev`xi ucZvi v Avgvi fiB| bwi j wk Rwg Avgvi gv Avgvi eo fiB tni tmb Avj x wk t b t`q| `B fiB t qi tQ t j i v t m L v t b eim K t i*”

D.W.2 Amena Khatun in cross-examination stated that—“*তনিতম্ব এও অম্ব তগ্‌স্‌ গেস্‌ গব্‌জিব্‌র তবিউ/ তনিতম্ব ই গব্‌জিব্‌র গি ৫ এওি এঁএব্‌ত্ব্‌ মেত্‌গ্‌ ন্য/ এস্‌জ্‌ত্‌ কঁ বঁব্‌ন ই ল্‌গ্‌বি ৪ এওি অ্‌ত্‌ম্‌ জ্‌ত্‌ ই মেত্‌গ্‌ ন্য/ মেত্‌গ্‌ি সি জ্‌বিব্‌ অ্‌জ্‌ব্‌ব্‌ ন্য/ ংজ্‌জ্‌ ম্‌ম্‌উব্‌ ত্‌বি ম্‌গ্‌গ্‌ অ্‌ম্ব্‌গ্‌* হলাম না। নালিশি জমি ক্রয়ের টাকা মা দিয়েছিল।”

13. Upon reading of the exhibit-3 and evidence of D.W.2 it appears that suit land was purchased in the name of Hossen Ali. Therefore, it appears to me that the learned Judge of the trial court considering the evidence and materials on record rightly decreed the suit. The learned Judge of the appellate court considering the evidence and materials on record both, oral and documentary affirmed the judgment and decree of the trial court.

14. Record of right is evidence of present possession and registered kabala is an evidence of title. The registered document will prevail over the records of rights and would remain in enforce until and unless, such kabala is cancelled by an appropriate civil court. The registered deed dated 13.05.1965 is an old document more than 30 years produced from proper custody presumed under Section 90 of the Evidence Act that it was duly executed and genuine documents. This view find supports in the case of:

(1) A.D.C.(revenue) Vs. Md. Reaz Uddin Pramanik and others, reported in 5 BLC (AD)76, wherein their lordships held:

“Once a document more than 30 years old is produced from proper custody under section 90 of the Evidence Act entitles the court to presume that it is a genuine document.”

(1) Abdul Mannan Bhuyan and others Vs. Md. Nasir Hossain and others, reported in 18 BLC (AD) 44, wherein their lordships held:

“S.A. and R.S. records were not an evidence of title and that a registered document would prevail upon the records of rights and that the registered document would remain in enforce unless the same was cancelled by an appropriate civil Court.”

15. Now, let us see the legal position of the case in the light of decisions cited by the learned advocate for the petitioners and the opposite parties.

1) Manager Personal Division Vs. Md. Sazahan Miah and others, reported in 35 DLR 224, wherein his lordship held:

“A suit for declaration that plaintiff’s dismissal was illegal and not binding without asking for consequential relief for enforcing the declaratory decree. Omission to pray for consequential relief for enforcing declaratory decree renders it unenforceable in law.”

2) Basharatullah Vs. Md. Managing Committee for New Academy and another, reported in 17 BLD 68, wherein his lordship held:

“A simple prayer for declaration that the impugned order of dismissal from service is illegal, void and not binding upon the plaintiff without a further prayer for consequential relief in the form of back salary and for mandatory injunction to reinstate him in his former post is hit by the proviso of section 42 of the Specific Relief Act and such a suit is not maintainable in law.”

3) Md. Usman Mia and others Vs. Sunu Mia and others, reported in 13 BLD 621, wherein his lordship held:

“Plaintiffs cannot get partition simplicitor. They must have to pray for declaration of title before succeeding in getting partition. On the very averment of the plaint, the plaintiff should pay requisite court fees.”

4) Ajiruddin Mondal and another Vs. Rahman Fakir and others, reported in 13 DLR(SC) 191, wherein their lordships held:

“There is, strictly speaking, no right at all in a defendant to have his share partitioned. Any person who wants some relief from a court has to file a suit and to pay court fee on it. The defendant may be out of possession and he cannot have his share separated and possession granted to him just because he happens to be a defendant in the suit. Even if he be in possession, he wants to get relief for which he would otherwise have to pay court fee under Article 17(v-a), Schedule II. If a defendant wants to have his share partitioned the ordinary rule should be that he files a suit for it.”

5) Syed Ahmed and others Vs. Azamullah being dead his heirs: Raja Miah and others, reported in 4 BLT(AD) 224, wherein their lordships held:

“That may be so, but in a suit for declaration of title the plaintiffs cannot succeed merely on an entry of their names in the R.S. khatian, because R.S. khatian is not document of title.”

6) Cinmoy Chowdhury and another Vs. Mridul Chowdhury and others, reported in 55 DLR(AD) 115, wherein their lordships held:

“In a suit for partition all the incidental question of title, however complicated it may be, can be decided and finally disposed of.”

7) Rezaul Karim and others Vs. Shamsuzzoha and others, reported in 49 DLR(AD) 68, wherein their lordships held:

“In a suit for partition the court will no doubt consider the title of the plaintiffs to the suit land in some details more than in a suit for permanent injunction, but it cannot in either case convert itself into a court for determination of the respective titles of the parties if a serious dispute emerges from the pleadings as to the title of the plaintiffs to the partible property and if it is not possible to effect partition without formally determining the plaintiffs’ title to the property claimed in the partition suit.”

16. On consideration of records it appears to me that findings arrived at by the court of appeal below having been rested upon considerations and discussions of the evidence and the materials on record and also on a correct and proper analysis of the legal aspect involved in the case. Moreover, impugned judgment and decree of the appellate court below in its entirety are well founded in the facts and circumstances of the case and law. Therefore, grounds urged and contentions advanced by the learned advocate for the petitioners are not correct exposition of law. However, I have gone through the decisions reported in (1) 35 DLR224, (2) 17 BLD 68, (3) 13 BLD 621, (4) AIR 1946 Bombay 207, and (5) AIR 1946 Patna 306 are quite distinguishable to that of the instant case and therefore, to that

effect I am also unable to accept his submissions. On the contrary the legal pleas taken by the learned advocate for opposite parties prevail and appear to have a good deal of force.

17. In view of the discussions, decisions and reasons stated above, I am of the view that impugned judgment and decree of the court of appeal below suffers from no legal infirmity which calls for no interference by this court in revision. Thus, I find no merit in the Rule.

18. In the result, the Rule is discharged. However, there will be no order as to costs. The judgment and decree passed by the learned Joint District Judge, 2nd Court, Chuadanga in Title Appeal No. 36 of 2013 dismissing the appeal and affirming the judgment and decree of the trial court are hereby affirmed.

19. The order of stay and status-quo granted earlier by this Court stands vacated.

20. Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.