

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION
 (Civil)

Present:

Muhammad Imman Ali, J Abu Bakar Siddiquee, J Date of hearing and judgement: The 25 th day of August, 2019 Result: Dismissed.	Most Aysha Siddika and others <div style="text-align: right;">... Petitioners</div> <div style="text-align: center; margin: 10px 0;">=VS=</div> Nizam Uddin Sikder and others <div style="text-align: right;">... Respondents</div>
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CIVIL PETITION FOR LEAVE TO APPEAL NO.3661 OF 2017

(From the judgement and order dated 13.03.2017 passed by the High Court Division in Civil Revision No.1051 of 2010).

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioners: Mr. Sharifuddin Chakladar, Advocate, instructed by Mrs. Nahid Sultana, Advocate-on-Record

For the Respondents: Mr. Khadimul Islam Chowdhury with Mr. Taufiq Anwar Chowdhury, Advocates, instructed by Mr. Zainul Abedin, Advocate-on-Record.

Declaration of title– Appellate Court being the last court of fact–

The appellate Court, being the last court of fact, reversed the finding of the trial Court that Mofezuddin died after Dholu Sikder upon proper appreciation of the evidence and materials on record. The appellate Court allowed the cross objection filed by defendant Nos.1-3. The High Court Division upon considering the judgement and decree of the appellate Court upheld the same. We find that the impugned judgement and order does not suffer from any illegality or infirmity and does not call for any interference by this Division. The civil petition for leave to appeal is dismissed without, however, any order as to costs. ... (Paras-12 and 13)

JUDGMENT**MUHAMMAD IMMAN ALI, J:-**

01. This civil petition for leave to appeal is directed against the judgement and order dated 13.03.2017 passed by a Single Bench of the High Court Division in Civil Revision No.1051 of 2010 discharging the Rule.

02. The facts, relevant for disposal of the instant civil petition for leave to appeal, are that late Aftab Hossain, the husband of petitioner No.1 and the other petitioners herein along with others as plaintiffs filed Title Suit No.35

of 1990 in the Court of Subordinate Judge, Jhalakathi, for declaration of title in respect of ‘Kha’ schedule land and also for partition in respect of ‘Ka’ schedule land impleading respondent Nos.1 to 30 as defendants. They stated, *inter alia*, that the land measuring an area of 1.90 acres appertaining to C.S. khatian No.72, Mouza-Goalkati, District-Jhalakati belonged to Mofezuddin Sikder and Ayen Ali Sikder in equal shares. Ayen Ali Sikder died leaving behind his wife Azimunnessa and brother Mofezuddin. Azimunnessa settled 0.24

acre of land by giving pattan in favour of Dholu Sikder, son of Mofezuddin in Kolkarsha right. Dholu Sikder died leaving behind his father and 2 sons namely, Sobhan and Abdul Aziz and 2 daughters namely, Sufia and Jamila Khatun. In the above way Mofezuddin obtained 14 anas 6 gonda 2 kara 2 kranti share in C.S. Khatian No. 72. Mofezuddin while owner in possession died leaving behind 3 sons namely, Khadem Hossain, Kobbat Ali and Rustom Ali and a daughter Rupban Bibi. The land measuring 1.36 acres appertaining to C.S. Khatian No.72 of the said Mouza belonged to Foyzuddin and Hasanuddin in equal shares but for the default in payment of khajna, the original landlord (Zamindar) filed the Rent Suit No.118 of 1915 against the said defaulters and obtained a decree pursuant to the Rent Execution Case No.639 of 1918. The land was sold in auction on 22.11.1918 and the said auction sale was confirmed on 05.01.1919 through the Court. The said auction purchaser settled the suit land in favour of Khadem Hossain, Kobbat Ali and Rustom Ali. A kabuliyot was executed on 25.04.1928 and the possession was delivered to them. The present plaintiff-petitioners as successors have been paying rent to the Zamindar and, thereafter, to the Government. After their death the legal heirs have been enjoying the suit land. The records of rights in S.A. and R.S. khatians had not been recorded correctly in the name of the plaintiffs during the last settlement operation but the said record has not been acted upon. On the basis of the wrong record the defendants are taking advantage by claiming title upon the suit land.

03. Defendant Nos.1 and 3 contested the suit by filing written statements denying the material assertions made in the plaint. They contended, *inter alia*, that the plaintiffs have no right, title and possession in the suit land. The

land measuring 1.00 acre in C.S. Khatian No.72 belonged to one Ayen Ali Sikder and Mofezuddin Sikder. Ayen died leaving behind his wife Azimunnessa and brother Mofezuddin. Azimunnessa gave pattan for land measuring .24 acre in favour of Dholu Sikder, son of Mofezuddin. Mofezuddin died leaving behind 4 sons Dholu, Khadem, Kobbat, Rustom and a daughter Rupjan Bibi. It is also contended that the land in C.S. Khatian No.73 originally belonged to Foyzuddin and Hossain Uddin in equal shares. Hossain Uddin died leaving behind a son Menaj Uddin who also died leaving one daughter Zahura Bibi who also died leaving behind the present defendant-opposite-party Nos.1-5 as her legal heirs. Defendant No.1 purchased 11 decimals of land from defendant No.5 on 14.11.1988. This property of Khatian No.73 was never sold in auction. The said auction sale is fraudulent, collusive and the said auction has never been acted upon in the field.

04. After hearing the parties and considering the evidence and materials on record the learned Subordinate Judge, dismissed the suit by his judgement and decree dated 11.09.1993. Being aggrieved the present petitioners as the appellants preferred Title Appeal No.132 of 1993 in the Court of the District Judge, Jhalakathi, which was heard by the learned Additional District Judge, Jhalakathi who allowed the appeal on 24.05.1999 and thereby set aside the judgement and decree passed by the trial Court. Against the said judgement the Civil Revision No.3732 of 1999 was filed before the High Court Division. After hearing the parties the Rule was made absolute setting aside the judgement of the appellate Court below and the suit was sent on remand to the trial Court for rehearing. On the basis of the above judgement passed by the High Court Division the Suit No.35 of 1999

was restored and thereafter, it was renumbered as the Title Suit No.11 of 2003.

05. In addition to the earlier documents and depositions P.W.1 Md. Shahalam was recalled and re-examined regarding the S.A. khatian No.305. Nizamuddin who deposed as D.W.1 was also recalled and re-examined. After hearing, the learned Joint District Judge, Second Court, Jhalakathi, by his judgement and decree dated 25.01.2004 decreed the suit in part. Then the plaintiffs preferred Title Appeal No.22 of 2004 before the District Judge, Jhalakathi. On transfer, the said appeal was heard by the Additional District Judge, Jhalakathi, who by his judgement and decree dated 11.10.2009 dismissed the appeal with modification affirming the judgement and decree passed by the trial Court. Being aggrieved, the plaintiffs filed Civil Revision No.1051 of 2010 before the High Court Division and obtained Rule, which upon hearing the parties, was discharged. Hence, the plaintiffs are now before us having filed the instant civil petition for leave to appeal.

06. Mr. Sharifuddin Chakladar, learned Advocate appearing on behalf of the petitioners submitted that the judgement and order passed by the High Court Division is not based on the evidence on record. He submitted that the learned Assistant Judge after proper appreciation of the evidence of P.W.1 and P.W.4 and also relying upon Exhibit Nos.2 and 7 found that Mofezuddin died leaving behind 3 (three) sons and further found that the defendants could not prove that their father Dholu Sikder did not die during the life time of his father Mofezuddin. The learned Judge of the appellate Court without reversing those findings allowed the cross objection of the defendants-respondents but the High Court Division erroneously held that the plaintiffs did

not take sufficient steps with regard to the death of Dholu prior to his father Mofezuddin, which has been a vital matter to substantiate the claim and as such the judgment of the High Court Division is liable to be set aside. The learned Advocate submitted that neither the judgement debtors Foyzuddin and Hossain Uddin nor their successors in interest challenged the proceedings of the rent suit, rent execution case and the sale thereunder, and the sale certificate and writ of delivery of possession were admitted into evidence in presence of the defendants without any objection and the High Court Division in its findings in respect of the documents of Rent Suit No.118 of 2015, Rent Execution Case No. 629 of 1918 and the validity of Bainama, Kabuliyat dated 25.04.1928 (Exhibit-3) and Dokholnama deed, held that those documents of auction Bainama, Kabuliyat as well as the rent case are documents of nearly 100 years old and in spite of that the High Court Division upheld the judgement of the appellate Court hence the same is liable to be set aside. He submitted that a portion of land of C.S Khatian No.72 has been recorded in S.A. Khatian No.307 Exhibit Ka-(3) on the basis of auction purchase in the name of the predecessors of the plaintiffs and D.W.1 admitted in cross examination that the name of the original owners namely Foyzuddin and Hasan Uddin were not recorded in S.A Khatina Exhibit Ka-(3) and the said facts clearly prove that the aforesaid auction purchase has been acted upon, but the appellate Court and the High Court Division without any findings and without reversing the trial Court judgement reduced the saham of the plaintiffs. He lastly submitted that earlier in Civil Revision No.3732 of 1999 the High Court Division found that the genealogy of both the parties was not resolved by either of the courts below

and as regards the documents of auction sale, the findings was also not satisfactory, hence the High Court Division sent the case to the trial Court for fresh trial and, accordingly, the trial Court after re-examining the plaintiffs and considering the documents and the evidence particularly Exhibit(3) as well as other oral and documentary evidence decreed the suit for 1.14 acres of land allocating saham of the plaintiffs, but the appellate Court without reversing the said findings reduced the saham of the plaintiffs to 84 decimals land and the said findings were also upheld by the High Court Division without proper assessment and hence the judgement of the High Court Division is liable to be set aside.

07. Mr. Bivash Chandra Biswas, learned Advocate-on-Record appearing for respondent Nos.2-3 made submissions in support of the impugned judgement and order of the High Court Division.

08. We have considered the submissions of the learned Advocates for the parties concerned, perused the impugned judgement and order of the High Court Division and other connected papers on record.

09. The claim of the plaintiffs hinges on the assertion that Dholu Sikder died before his father Mofezuddin Sikder and, therefore, the heirs of Dholu Sikder did not inherit his property. On the other hand the claim of defendant Nos.1 to 3 is that their predecessor Dholu Sikder died after Mofezuddin Sikder and, therefore, they inherited property from Mofezuddin Sikder through their predecessor Dholu Sikder.

10. As stated above, the trial Court decreed the suit in part finding that Dholu Sikder did during the lifetime of his father Mofezuddin.

The appellate Court after assessing the evidence and materials on record observed that there was no documentary evidence as to whether Dholu Sikder or Mofezuddin Sikder died first. Thereafter, upon discussing the evidence of the witnesses come to a finding that the witnesses of the defendants proved that Mofezuddin died before Dholu Sikder and as a result Dholu Sikder inherited property from Mofezuddin. The appeal was allowed with modification in the light of the above finding.

11. The learned Advocate for the petitioner submitted before us that since the R.S. and S.A. records do not show the name of Dholu, he must have died before Mofezuddin. In this regard the appellate Court observed that both Dholu and Mofezuddin died before the R.S. and S.A. record as a result of which Dholu's name did not appear in the R.S. and S.A. record, rather the record was in the name of their sons.

12. The appellate Court, being the last court of fact, reversed the finding of the trial Court that Mofezuddin died after Dholu Sikder upon proper appreciation of the evidence and materials on record. The appellate Court allowed the cross objection filed by defendant Nos.1-3. The High Court Division upon considering the judgement and decree of the appellate Court upheld the same.

13. In view of the above discussion, we find that the impugned judgement and order does not suffer from any illegality or infirmity and does not call for any interference by this Division.

Accordingly, the civil petition for leave to appeal is dismissed without, however, any order as to costs.

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