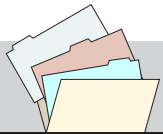


Star LAW report



Adverse possession can be enforced against a person who does not prove a better title

High Court Division
(Civil Revisional Jurisdiction)
Civil Revision No. 813 of 1999
Janab Ali Mondal and others
V
Md. Anowar Hossain and others
Before Mr. Justice Mirza Hussain Haider

Background

Mirza Hussain Haider, J: The defendant-petitioners obtained this Rule to show cause as to why the impugned judgment and decree dated 11.2.1999, passed by the learned Additional District Judge, Jhenidah, in Title Appeal No. 78 of 1996 reversing those dated 23.4.1996 passed by the learned Subordinate Judge (now Joint District Judge), Jhenidah, in Title Suit No. 58 of 1986 should not be set aside and/or pass such other of further order or orders as may be deemed fit and proper.

The case of the defendant-petitioners in short, is that on 29.12.1980 the opposite party instituted Title Suit for declaration of his title in the Court of Subordinate Judge, Jessore. Against the heirs of Godai Molla and the suit was transferred to the Court of Subordinate Judge Jhenidah on 16.3.1986 and renumbered as Title Suit No. 58 of 1986. The plaintiff alleged that the suit property along with other properties originally belonged to one Kunjo Bihari Ghose under the Superior landlord Raja Bhushan Dev Roy Bahadur. Kunjo Bihari Ghose while possessing the suit land died leaving behind his only son Rashik Lal Ghose who inherited the same and subsequently settled 7.08 acre of land, orally, with the plaintiff on 10th Ashar, 1350 BS and since then the plaintiff has been possessing the same peacefully.

The present petitioner appeared and contested the suit by denying all material allegations of the plaintiff contending inter alia that admittedly the suit land originally belonged to Kunja Bihari Ghose under Raja Promotha Bhushan Deb Roy Bahadur. But the said defendant claims that Kunja Bihari, while possessing the suit property settled the same in favour of Godai Molla by oral settlement. Subsequently Kunja Bihari surrendered his interest in favour of the superior Land Lord and since continued to pay rent in the Sheresta. The defendant petitioner claims that one Rajab Ali and some others instituted Title Suit No. 150 of 1953 in the 2nd Court of Munsif, Jhenidah against Godai Mollah and obtained a collusive sole decree which was challenged by Godai Mola in Title Suit No. 78 of 1955 of the same Court wherein the said sole decree was set aside against which Rajab Ali and others unsuccessfully moved up to the High Court of East Pakistan. The contention of the contesting defendant is that during the Rent Role Verification the suit property was correctly recorded in the name of Godai Mollah who subsequently transferred the entire property to Babar Ali, Khelafof, Aitor and Khotejan. Some of these transferees in their turn transferred some of their shares to some other persons.

Deliberation

Upon hearing the parties and perusing the evidences on record the trial court was pleased to dismiss the suit by its judgment and decree. Against the aforesaid judgment and decree, the plaintiff preferred Title Appeal No. 78 of 1996 in the Court of District Judge, Jhenidah. But the defendants did not challenge the finding of the trial court as regards disbelieving Godai Molla's title in the suit land by "Bondabasta" as well as the title of the defendants on the basis of the said unfounded "Bondabasta". Also the finding of the plaintiffs part possession by preferring neither any appeal nor the defendants filed any cross objection in the appeal filed by the plaintiff. However, the aforesaid appeal of the plaintiff appellant was ultimately heard by the learned additional district Judge who allowed the same on contest and reversed the findings and decision of the trial court and thereby decreed the suit.

Mr. Harendra Nath Nondy, the learned advocate appearing for the petitioners, submits that the suit is barred by limitation. Secondly, he submits that PW's admission that other than 3 Katas of his paternal property. He did not purchase or acquire any property, which supports the suggestion of the defendants that the plaintiff has no right, title and interest in the suit land and hence he did not record his name. Thirdly, he submits that recording of Godai's name being existing for long 30 years, and supported by the *dakhilas*, the presumption should have been that the defendants have title and possession in the suit land. According to him the rent receipts filed by the defendants are corollary evidences of title and possession and thus the rent receipts of the defendants following the title of Godai Molla being not considered by the courts below the findings and decision arrived at the are erroneous and as such liable to be set aside. According to him the finding of the court of appeal below being based on inadequate evidence the same has resulted error in the decision occasioning failure of justice. Mr. Nondy submits that Rashik Lal Ghose S/O Kunja Behari Ghose, was produced as P.W., who admitted that his father Kunja Bihari Ghose surrendered possession of the suit land to the superior Land Lord. Lastly he submits that the learned Judge failed to consider that without asking for consequential relief simple declaration of this nature is not maintainable.

On the other hand, Mr. Nurul Amin appearing with Mrs. Sakila Rowshan, learned Advocates for the plaintiff submit that this revisional application filed by the added defendants is not maintainable. Because Ainuddin the defendant who has been shown as petitioner neither contested the suit by filing any written statement nor preferred or contested the appeal. But he deposed as D.W. wherein

he neither claimed his on title and possession in the suit land nor he proved the title and possession of any other defendant and having no interest in the suit land cannot have any grievance against the judgment and decree. And cannot be a petitioner in this revisional application and the other defendants having adopted defendant's case did not take sufficient steps to prove them as such this application is not maintainable. Moreover, without filing any appeal or cross objection against the findings of the trial court with the title of Godai Molla and exclusive possession of the defendants they are not in any way aggrieved and they have no *locus standi* to file the revisional application. Mr. Amin then submits that the petitioner now cannot argue that rent receipts are corollary evidences of title and possession before this court. As because Godai's title as well as the defendants' title having not been proved before the court below by producing any convincing and cogent evidence, which they could also do in the appeal and the defendants having not preferred any appeal challenging those findings. Thus they cannot now argue contrary to the concurrent findings of fact.

He also submits that the courts below rightly did not take the same into consideration as neither the plaintiff nor his predecessors were parties in the said decree rather the same was passed against a 3rd party who is not a party in the present suit. On the point of limitation Mr Amin submits that the suit is not barred by limitation. He submits that the plaintiff is not bound to institute a suit for declaration that the entry in the record of rights is wrong rather he can wait and sue when his right is invaded. About the next contention of Mr Nondy that a finding of fact when not based on evidence or based on merely inadequate evidence or inconsistent with the evidence with the evidence on record the High Court can interfere when misreading of evidence is apparent. Mr Amin submits that the said principle also does not help Mr Nondy, in any manner, because relying upon the evidences available on record the courts below came to a definite finding that the defendants failed to prove their title or exclusive possession in the suit property.

Mr Amin next submits the CS *Khatian* bears the name of Kunja Behari Ghose as a *Rayoti* tenant which cannot be surrendered simply by oral pronouncement without compliance of the provisions of sections 85, 86 and 87 of the Bengal Tenancy Act. Thus the statement of Rashik Lal as to surrendering the tenancy by his predecessor to the superior Landlord cannot be construed as complete evidence and as such the petitioner cannot take any advantage of the said statement. Mr Amin submits that the court below very carefully considered all the evidences on record specially the rent receipts and came to proper finding that the defendants failed to prove their title no matter Godai Molla's name was in the record for a certain period but without filing any rent receipt or any other document his title is not proved. Lastly, Mr Amin submits that for argument sake if it found that the plaintiffs title through his predecessors settlement in 1350 BS is not valid, which is not at all admitted rather found to be proved as valid by the last court. In fact the plaintiff has a good and valid title by way of adverse possession and the plaintiff had been enjoying the same and also transferred some portion of it to different persons and now he is possessing the rest of it along with 3 *Khatas* of his paternal property. According to him the judgment of the court of appeal below having been based on proper consideration and appreciation of all the material evidences available on record and upon proper scrutinizing the same, is a correct judgment and as such there is nothing to interfere with the same.

On hearing the learned Advocates for both the parties at length and on record it appears that the defendants did not file any appeal or cross objection challenging the findings of the trial court as regards disbelieving the title of Godai Molla in the suit land. As such the said finding being not reversed by any competent court the same remains as a final finding of fact thus the defendants cannot claim their own title and possession under the revisional jurisdiction, contrary to what has been found by the courts below. In several decisions it is clearly said that only the error of law can not be a ground for interference under section 115(1) of the Code. But it is also the duty of the petitioner to prove that such error has caused error in the decision occasioning failure of justice. Under such circumstances Mr Nondy the frankly admits that it is difficult to attract section 115 of the Code of Civil Procedure to set aside the impugned judgment on the ground that the error, if any found, has occasioned failure of justice to his clients. So in the present Rule only point remains to see whether the court below has committed any error in holding that the plaintiff has been able to prove his case by sufficient evidence, not beyond that. It appears that the plaintiff produced five witnesses and some documentary evidences to prove his case and relying upon all the evidences on record and considering the same the courts below disbelieved the title of Godai Molla as the defendants failed to produce or prove the alleged "Bondabasta Nama". And also failed to prove the date of settlement by Kunja Behari in favour of Godai Molla or any other date of settlement subsequent thereto by the superior Landlord as alleged. Documents they have produced in this respect show that some rents were paid by one Ainuddin a non contesting defendant having no interest in the suit land. As such there is no evidence on record from which the courts below could arrive at a decision that Godai Mollah had a valid title and after his death his heirs inherited the same and transferred it to the defendants. It appears that after Kunja Behari Ghose his son and successor Rashik Lal became the owner of the suit land and continued to possess the same and settled the same to the plaintiff. On receiving rents by Rashik Lal having been produced before the Court and clearly show that there is no discrepancy in this respect that the suit land has been transferred to the plaintiff. It can be said that when no less than the settler himself the son of the admitted recorded tenant Kunja Behari, appears and admits the rent receipts than the primary of the same is already made. And the burden of proving contrary or otherwise of those receipts thereafter is thus shifted to the persons who challenges the same. In the present case the onus of



proving transfers from the admitted tenant Kunja Behari Ghose through his son to the plaintiff and to prove the same. He proved the rent receipts in support of his contention. The signatures in those receipts *dakhilas* having been proved by Rashik Lal himself, those are rightly taken into consideration by the court of appeal below which decree the suit. Thus it appears that the plaintiff proved the transfer in his favour by sufficient evidence. It appears that admittedly the defendants before the court to prove Godai's title by way of settlement have produced nothing. To prove payment of rent from Godai time till filing of the suit in 1980 to prove that Godai Molla or any of the subsequent transferees paid rents in support of their title or possession in the suit land. Thus such rent receipts is subsequent to the institution of the suit cannot be considered as corollary evidence to the defendants. Thus in the absence of any such evidence on record the courts below rightly found that Godai and or the defendants claim through him do not have any title in the suit land.

Whatever might be the statement of PW unless the provisions of sections 85, 86 and 87 of the BT Act are complied with the surrender cannot be proved under the law. The defendants having not taken any step to prove such surrender or abandonment of the Tenancy by adducing any evidence the allegation of surrendering and or the statement made by Rashik Lal, will not ipso facto prove the defence case. However it appears that PW has proved plaintiffs possession in the suit land for last 45/46 years. However, when Rashik Lal categorically deposed that he has transferred the suit land to the and the plaintiff's possession being proved by other witnesses there remains no doubt in to hold that the plaintiff has been able to prove his title and possession. On the other hand the evidence led by the defendants, in no way, proves the title of the defendants having clearly proved the title and possession of the plaintiff. The court of appeal below rightly passed the impugned judgment and as such no error has been committed in passing the same occasioning failure of justice.

Mr. Nondy could not point out any misreading of evidence in the judgment of the lower appellate court. It is true that the plaintiff is to prove his title in all the cases. But it is now settled that the plaintiff is not always required to prove his title to the hilt rather if he is able to prove his title better than that of his adversary it is enough. Moreover, adverse possession in law is subsisting right of a party, which the law protects and which can be enforced against a person who does not prove a better title. Thus it appears that the plaintiff, in this case have been able to prove better title against the defendants and having possessing the suit land since 1350 B.S. he is as such, entitled to a decree.

Judgement

Having consonance with the decisions referred herein above I am of the view that the learned court of appeal below rightly allowed the appeal and decreed the suits upon setting aside the judgment and decree of the trial court on discussing and considering all the materials on record and as such in doing so the learned judge did not commit any error of law resulting in an error in the decision occasioning failure of justice.

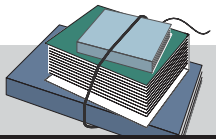
I do not find any merit in the Rule. Accordingly, the Rule is discharged without any order as to cost.

The judgment and decree passed by the learned Additional District Judge, 2nd Court Jhenidah in Title Appeal No. 78 of 1996 is affirmed.

Mr. Harendra Nath Nondy, Advocate, for the defendant-petitioners.
Mr. Nurul Amin, with Mrs. Sakila Rowshan, Advocates, for the opposite party.

Please note that the judgement of the above case was published incorrectly in the last issue (8 August) due to an unexpected mixing of two partial judgements arisen from the computer error. We now reprint the above case with the correct version of the judgement.

LAW lexicon



Slavery

When a person (called "master") has absolute power over another (called "slave") including life and liberty. The slave has no freedom of action except within limits set by the master. The slave is considered to be the property of the master and can be sold, given away or killed. All the fruits of the slave's labor belongs to the master (see, for example, the extract from The 1740 South Carolina Slave Code in the History of the Law). Slavery was once very prevalent in the world but is now illegal in most countries.

Small claims

A regular court but which has simplified rules of procedure and process to deal with claims of a lesser value. Many jurisdictions have established small claims courts which, because of their structures and reliance on deformedalized proceedings, allow for expedited hearings and where representation by lawyer is not required or encouraged. Some typical distinctive characteristics of small claims courts include the ability to serve by regular mail and to seize both a court and an adversary at far less cost than in ordinary courts.

LAWSCAPE



Q: What's the difference between a lawyer and a boxing referee?
A: A boxing referee doesn't get paid more for a longer fight.

Q: What's the difference between a lawyer and a civilian getting run over?
A: At least civilian will have skid marks!

Q: What do a good lawyer and a good mechanic have in common?
A: They don't exist!

The Junior Partner

A junior partner in a firm was sent to a far-away state to represent a long-term client accused of robbery. After days of trial, the case was won, the client acquitted and released. Excited about his success, the attorney telegraphed the firm: "Justice prevailed."

The senior partner replied in haste: "Appeal immediately."

LAW week



Foreign prisoners suffer for lack of legal aid

Most of the foreign prisoners in Bangladesh and its neighbouring countries languish in jail due to lack of access to legal aid. In most cases, the foreign citizens imprisoned belong to lower income group and lack financial ability and moral support to seek legal aid. Moreover, it becomes hard for them to seek legal support in a foreign land even if they can afford it. "There are a number of cases where a person remained imprisoned even 10 years after serving their prison term," said Fazlul Huq, executive director of Bangladesh Legal Aid and Services Trust (BLAST) on a roundtable on "Foreign Prisoners and Access to Justice" in the capital. "At least 64 Bangladesh fishermen are languishing in a jail of West Bengal," said Justice DK Basu, chairman, Legal Aid Services-West Bengal (Lasweb). He added 37 of the Bangladesh nationals are languishing in Midnapore jail of West Bengal. Sixty-two Indians are detained in Rajshahi and 46 in Jessore jails. Dr Kamal Hossain, chairperson, BLAST, said no human being is beyond the purview of human rights. All international conventions and the constitution itself guarantee human rights not only to the citizens but to any person of any country, as well. He said even an hour of illegal detention denies a person human rights. - *Daily Star*, 9 August.

Draft of consumer rights law okayed

The government yesterday approved in principle the draft law with proposals titled 'Protection of Consumers' Rights' to protect consumers' rights that proposes up to ten years in prison for selling adulterated and inferior quality products. A special tribunal to try the accused responsible for selling and producing fake commodities injurious to public health. The cabinet meeting with Prime Minister sent the draft to the law ministry for further scrutiny. According to the draft law, a national consumer council will be set up to formulate policies to protect consumers' rights. A consumer bureau will investigate allegations by consumers and if it finds any proof, the matter will be sent to tribunal. - *Daily Star*, 10 August.

Police to probe all Rab custodial deaths

The police will investigate deaths in the custody of Rapid Action Battalion (Rab) and the guilty will be punished, Rab chief Anwarul Iqbal said 8 August '04. "If autopsy or forensic reports show the people were killed in custody, unnatural death cases will be turned into murder cases," director general of Rab, told reporters in the Rab headquarters in Uttara. But in the recent time an increasing number of deaths in the custody of Rapid Action Battalion (Rab), raids on the houses of people including retired army and police officials and alleged misbehaviour with their family members have prompted sharp reaction among members of the public. In all cases of custodial deaths, the victims' family members alleged the Rab tortured them to death, an allegation Rab officials and the home ministry denied

routinely. According to press reports and human rights and legal aid organisations, nine people have died so far in Rab custody or after arrest. The home ministry recently empowered the Rab to take any criminal on remand. The step followed reported police refusal to allow Rab personnel to take to their office and quiz any person on police remand. The crime-combat force formed through a March 1 government order launched formal operations on June 21. Rab collects information and evidence before launching a drive against criminals. The force is staffed with 4,325 members of the 5,521 posts and 3,183 of them have trained in anti-crime combat, with the members drawn from six forces -- army, air force, navy, police, paramilitary forces (BDR) and ansar. Coastguard will also be included in Rab. Rab now run checks at three international airports to control trafficking in women and children and detect fake passports and visa. - *Law Desk*.

Militant hunt planned for blanket security

The law enforcement agencies are likely to launch a massive hunt for militants and criminals ahead of the 13th Saarc (South Asian Association for Regional Cooperation) Summit in Dhaka to ensure foolproof security during the meet scheduled for January 9-11 next. Sources at the second inter-ministerial meeting on security of the Saarc summit held yesterday said the militant hunt would be launched to allay possible concern of foreign delegates to the summit over the security situation in the country. - *Daily Star*, 12 August.

Manik murder

The Khulna Chief Metropolitan Magistrate's Court on 12 August ordered a gazette notification of the charge-sheeted people to confiscate their property in the case of a bomb attack that killed journalist Manik Chandra Saha. Sources said the CMM court also ordered sending the case to the district judge court for the trial without fixing any date in this regard. The judge's court might send the case to the speedy tribunal court, the sources added. The CMM court, however, did not take any decision regarding the Manik murder case on Thursday as it re-fixed the date to review all the papers of the case on August 24. - *New Age*, 13 August.

Corresponding with the Law Desk

Please send your mails, queries, and opinions to: **Law Desk**, The Daily Star, 19 Karwan Bazar, Dhaka-1215; telephone 8124944, 8124955, 8124966; fax 8125155, 8126154; email <dslawdesk@yahoo.co.uk

READER'S queries



Your Advocate

Q: I am a junior lawyer just striving to build up a career at the Bar and at the same time make a living for my family. Recently I appeared in a Special Tribunal case on behalf of its two accused who were previously known to me. I cross examined the prosecution witnesses and finally argued the case before Special Tribunal, 2nd my district. The accused were ultimately convicted and sentenced to suffer life imprisonment. The *tadbirkars* of the case got seriously dissatisfied with me and wanted the money back on the ground that I gave them assurance for acquittal but failed. The accused is in jail now. I told them that the judgement is wrong and the higher court in appeal would acquit him. Accordingly my clerk applied for certified copy of the judgement and after collecting the same I myself went to a lawyer of High Court in Dhaka. The learned senior lawyer rebuked me in front of my clients saying that I had come to him beyond time fixed for appeal and the right to appeal is lost for ever. He said he might try a writ but there is no certainty of relief because it is discretionary. He also demanded much higher fees for writ. Later I came to know that the senior lawyer told the client that I had finished the case as I could not take cross-examinations on right points and also failed to show right decisions of the higher court. The Clients are now so angry with me that they wanted not only the money back but also to file a complaint in the Bar Council against me. Sir, a) I am a lawyer and have the right to represent the clients in court. Can the client demand the money back? b) Should the senior lawyer tell the client that I have finished the case? Is it my fault if the accused are convicted? c) can a case not be out of time? d) can a junior lawyer not make mistakes? e) what Bar Council has to do if a complaint is lodged against me? I am desperately in need of your answer.

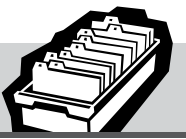
Sk.Abedur Rahman, Advocate
from E-mail

Your Advocate: I have gone through your query word for word. The first reaction that I had is- this is the reason for which Bangladesh Bar Council introduced Clinical Legal Education Programme roughly 10 years back which now has developed into Bar Vocational Course (BVC). Now I feel the anxiety of our senior lawyers who amid much of adversities conceived and strove for an institutional training for the junior lawyers in these days of huge influx in the Bar population. Your questions have also served to send a message to the leaders of the Bar that they should be much more cautious about the input of the training course and try to do everything possible for making it more and more effective in giving a lawyer of tomorrow proper orientation, that is, how to 'think like a lawyer'. I don't know in what batch you have taken the training in the Bar Council. If you have taken the training you are supposed to learn what should be the professional approach particularly of a junior lawyer. I am sorry to say that you are seriously lacking in professionalism and has failed to take right approach to a case and to the court and the clients. In my detection you have committed several wrongs. Firstly, you cannot receive a brief from your clients with a promise or undertaking to bring them a relief. That offends against your professional ethics. And your mistaken approach has now given your clients handle to get their money back. This is unbecoming of a lawyer. Secondly, you did take a wrong and inexcusable approach in not advising your clients to engage a senior lawyer in a case involving complicated questions of law, facts and higher punishment. Thirdly, you seemed to be oblivious of the Limitation Act which plays crucial role in pursuing the case in the higher forums. The common knowledge of law that is- for filing an appeal there is a limitation of time didn't bother you or touch your professional sense in any way. A lawyer practising at the Bar must not do any act, which would not have been done by a man of ordinary prudence. This is a kind of soldiering for the rights of the litigants. Professional common sense must be developed. The senior lawyer was perfectly right in saying that you had finished the case. This is a case of special limitation prescribed by a special statute. Court does not have power to condone the delay. So the right to appeal and all the privileges which might be available to the convicts in an appeal are lost for good. The remedy that the convicts are now left with is very limited and discretionary and the lawyer will have to do much of extra toil to find a footing in the narrow corridor of law. So, you can understand the damage you have done not only to the client but also to yourself as a professional lawyer. Fourthly, the Bar council has much to do about it. If a complaint is lodged it can proceed against you for professional misconduct and award punishment if the allegations are found proved.

I hope you will find answers to all your questions in my comments that I have already made. Accused may be convicted, lawyers may commit mistakes, cases may run out of time but certainly not in the way things have taken place in your case. Senior lawyer's comment in presence of the client is not expected but if any senior flares up in the circumstance he is not to blame because much heavier damage is done by you than the one done by his comments. This is much more a case of reflections than of excuses.

Your advocate M. Moazzam Husain is a lawyer of the Supreme Court of Bangladesh. His professional interests include civil law, criminal law and constitutional law.

FACT file



Sudan: Government arrests people for 'talking to foreigners'

Amnesty International has called on the Sudanese government to release immediately and unconditionally scores of people who have recently been arrested in Darfur for reportedly talking to journalists and members of foreign government delegations about the human rights crisis in Darfur. Many are believed to be held incommunicado and are at risk of torture.

15 men were reportedly arrested following the visit of US Secretary of State Colin Powell to Abu Shawq camp near al-Fasher on 30 June, and five men were arrested at the same camp after a visit by a delegation from the French Foreign Minister Michel Barnier on 27 July. UK Foreign minister Jack Straw is to visit Darfur on 23 August.

Other displaced people have been arrested after talking to members of the African Union Cease-fire Commission which was sent to Darfur in June to monitor April's fragile cease-fire. The Cease-fire Commission has apparently tried to visit those arrested but has not been allowed to see them.



Amnesty International UK Director Kate Allen said "The Sudanese government should give assurances that none of those arrested will be tortured or ill-treated while in detention and that Sudanese people can speak freely about Darfur without fear of reprisals." In North Darfur At least 47 people reportedly arrested between 26 June and 3 August by the security services or the Sudanese army mostly after speaking to members of foreign delegations. The need for human rights access, monitoring and reporting remains ever more crucial in Darfur. Amnesty International calls for an immediate and unimpeded access to all areas and people of Darfur, including detention centres, for lawyers, cease-fire observers, human rights monitors, humanitarian workers and journalists.

Source: Amnesty International UK