In the Supreme Court of Bangladesh
High Court Division
(Civil Revision Jurisdiction)

Present:
Mr. Justice Jahangir Hossain

Civil Revision No. 2255 of 2017

In the matter of :
An application under section 115(4) of the Code of Civil Procedure

And

In the matter of :
Md. Habibur Rahman Liton
.....petitioner
-Versus-
Md. Anisur Rahman Badal
.....Opposite Party
Mr. Mahmud Hasan, Advocate
.....for the petitioner
Mr. Shuvra Dev Ratul, Advocate
.....for the opposite party

Judgment on 22.11.2020

By order dated 09.07.2017 this Court issued a Rule calling upon the opposite party to show cause as to why the impugned judgment and order dated 02.02.2017 passed by the learned Additional District Judge, 1st Court, Narayangonj in Civil Revision No. 06 of 2015 disallowing the revision and thereby affirming the order dated 14.01.2015 passed by the learned Senior Assistant Judge, Rupgonj Court, Narayangonj in Title Suit No. 145 of 2010 allowing the application for amendment, should not be set aside.

The relevant facts for disposal of the Rule, in a nutshell, are that the suit property along with other properties originally belonged to Dagu Sheikh who died

leaving behind his two sons namely Sekandar and Enayetullah and said Sekandar got his saham measuring an area of 71 decimals of land by an amicable partition and enjoying the same with peaceful possession. Thereafter, this Sekandar died leaving behind only son-Mominuddin, who also died leaving his wife and three sons namely Mannan, Hannan and Fazlul Haque and two daughters namely Khursheda and Mortoza Begum. Said Khursheda died leaving behind only son- Humayan Kabir and two daughters namely Hosneara and Khaleda. Fazlul Haque transferred 04 decimals of the land out of 10 decimals in favour of the plaintiff, his father, uncle and full brothers by a registered deed dated 02.03.1999. The father of the plaintiff died leaving behind the aforementioned four sons and two daughters. The remaining 06 decimals of land was transferred by the son of Khursheda Begum named Humayun Kabir by a registered deed dated 22.09.1999 in favour of the plaintiff and others.

It is further stated that the said deed has been rectified by another deed of rectification dated 04.11.2009. In this way the plaintiff along with his brother and uncle acquired the ownership of (04+06)=10 decimals of land and during their enjoyment they have made an amicable partition amongst them and subsequently the suit land was developed and was duly recorded in R.S record in the name of the plaintiff. The plaintiff was peacefully enjoying and possessing the suit land with the knowledge of the defendants by erecting dwelling huts along with shops and planting various seasonal trees on the suit land. Although the defendant had/have no right, title, interest and possession over the suit land but he was trying to dispossess the plaintiff at the influence of the influential person.

Hence, the plaintiff filed Title Suit No. 145 of 2010 before the Senior Assistant Judge, Rupgonj Court, Narayangonj praying for permanent injunction over the suit property fully described in the schedule of the plaint. The defendant entered appearance in the suit and contested the same by filing written statement denying materials facts as alleged in the plaint.

During pendency of the suit the plaintiff filed an application under order VI Rule 17 of the Code of Civil Procedure for amendment of the plaint on 07.10.2012 and the said application was rejected vide order No. 22 of the trial court. Against which the plaintiff preferred Civil Revision No. 56 of 2012 before the learned District Judge and on transfer the learned Additional District Judge, 1st Court, Narayangonj heard and pleased to send back the case to the trial court by allowing the said Revision with some observations. Thereafter, the plaintiff filed two applications on 04.03.2013 and 06.11.2014 respectively for amendment of the plaint. Both the applications were heard analogously and allowed by the trial court by its order dated 14.01.2015. The defendant being aggrieved with the said order preferred Civil Revision No. 06 of 2015 before the learned District Judge, and subsequently the learned Additional District Judge, 1st Court, Narayangonj heard the said revision and was pleased to disallow the same by impugned judgment and order dated 02.02.2017.

Being aggrieved by and dissatisfied with the said order of the learned Additional District Judge, the petitioner filed an application before this Court under section 115(4) of the Code of Civil Procedure and obtained the instant Rule with an order of stay for a period of 01[one] year. The interim order of stay was further extended from time to time.

Mr. Mahmud Hasan, learned Advocate appearing for the petitioner submits that admittedly the plaintiff-opposite party was dispossessed from the suit property and now he is not entitled to get any relief by way of amendment of the plaint as allowed by both the courts below. In support of this contention he has referred to the decisions held in the case of Rajdhani Unnayun Kortripokka-Vs- Mir Nowsher Ali, reported in 46 DLR, 134 and also 11 MLR (AD)1. It is further submitted that the said suit was filed for permanent injunction by the plaintiff-opposite party. If he was dispossessed from the suit land during the pendency of the suit, he could not seek any relief by way of amendment in the plaint. It is an admitted fact that the plaintiff-opposite party was dispossessed from a portion of the suit property during pendency of the suit. Therefore, the suit for permanent injunction becomes frustrated without seeking any relief for declaration and recovery of khash possession as laid down in section 9 of the Specific Relief Act, 1877. There is no scope to get any relief at this stage incorporating new facts for mandatory injunction by way of amendment and as such both the courts below committed error of law resulting in an error in the decision occasioning failure of justice. Learned Advocate lastly submits that if the plaintiff is not in possession of the suit land how the court will restrain the defendant from the suit land by way of injunction.

On the other hand, Mr. Shuvra Dev Ratul, learned Advocate appearing for the opposite party submits that the amendment is always necessary to determine the real question of controversy between the parties otherwise there is likelihood of cropping-up of multifarious litigations. In order to determine the real question of controversy between the parties, the incorporation of new fact is very much

necessary. In the present case amendment will not change the nature and character of the suit.

It is further submitted that the proposed amendment will settle the question whether during pendency of the suit the plaintiff was dispossessed by the defendant from the suit land or not, it will end all pending controversies between the parties and it will not amount to a change in the nature and character of the suit.

By citing 34 BLD (HCD) 295 learned Advocate finally submits that the defendant by way of dispossessing the plaintiff has disobeyed and disregarded the Rule of law and judicial system of the country and as such the Rule, issued by this Court, should be discharged for the ends of justice.

Heard the submissions of learned Advocates of both sides, perused the judgment and order of both the courts below and the connected documents on record wherefrom it transpires that the plaintiff opposite party filed the aforementioned suit for declaration of permanent injunction as the defendant was trying to dispossess the plaintiff from the suit land.

During pendency of the suit the defendant dispossessed the plaintiff from a portion of the suit land measuring 5.25 decimal out of 6 decimals. Therefore, the plaintiff filed an application before the trial court under order VI Rule 17 of the Code of Civil Procedure as it became necessary for amendment of the plaint. The trial court rejected the same. Against which the plaintiff preferred Civil Revision before the learned District Judge under section 115(2) of the Code of Civil Procedure. Subsequently the said Civil Revision was allowed by the learned Additional District Judge, 1st Court with some observations. Thereafter, the

plaintiff filed another application for amendment of the plaint before the trial court. Both the applications dated 04.03.2013 and 06.11.2014 were heard together. The trial court by its order dated 14.01.2015 allowed the applications for amendment of the plaint. Against the said order the defendant preferred civil revision before the learned District Judge. On transfer the said revision was heard by the learned Additional District Judge, 1st Court who rejected the same stating that the order passed by the trial court does not suffer from any illegality.

Being aggrieved by and dissatisfied with the impugned judgment and order of the learned Additional District Judge, the defendant as petitioner filed an application before this Court under section 115(4) of the Code of Civil Procedure and obtained the present Rule with an order of stay. It appears from record that in the amendment application the plaintiff has sought to include R.S Plot number and there is no shop situated in the suit land in place of shop and also made prayer for mandatory injunction as dispossessed from some portion of the land during the pendency of the suit.

Now the question arises whether the nature and character of the suit at all will change by way of this amendment. Admittedly the plaintiff was dispossessed from some portion of the suit land during its pendency. In the original plaint it has been stated that there is shop in the suit land. Now it would be only land. These three issues namely R.S Plot number, no shop over the suit land and dispossession of some portion of the suit land during its pendency, are being incorporated in the amendment petition. This amendment does not ensure finality rather the plaintiff has to prove it by way of evidence. The onus of proof lies upon the plaintiff to establish these three issues at the trial court. In the case of

Shahajadpur Central Co-operative Bank Ltd –Vs- Md. Majibur Rahman and others, reported in 18 BLD(AD) 81 wherein it was held that the proposed amendment would settle the question whether during the pendency of the suit the plaintiff was dispossessed or not by the defendant from the suit land. This will end all pending controversies between the parties and will not amount to a change in the nature and character of the suit.

The contention of learned Advocate for the plaintiff-opposite party is that the plaintiff has still some portion of the suit land in his possession. So there is no scope to file another suit for declaration of title and recovery of khash possession if such application for amendment is not allowed in the present suit. If the amendment of three issues is allowed, the defendant-petitioner will not be prejudiced in any way because the amendment is necessary to determine the real question of controversy between the parties. If such view is discharged in any way, then it will bring multiple litigations. It may rely upon the decision, held in the case of Md. Akram Ali Pk. and others-Vs-Md. Yasin Ali and others, reported in 21 BLT(AD)175 where it was opined that,

> *"Having considered the application for amendment, it appears that the plaintiffs incorporated new facts by the amendment but incorporation of new fact cannot in any way change the nature and character of the suit. The suit still be named as a suit for declaration of plaintiffs' easement right. The finding of the High Court Division that the nature and character of the suit would be changed by the amendment without elaboration of its finding cannot sustain in law. Amendment is always necessary to determine the*

real question of controversy between the parties otherwise there is likelihood of cropping-up of multifarious litigations."

Nevertheless, in a revisional jurisdiction, there is very limited scope to interfere with the concurrent findings of fact of the trial court as well as court of appeal, unless there is gross misreading and non-consideration of the material evidence on record or mis-construction of any instrument or the findings are divergent and contrary to the related law or evidence resulting in an error in the decision occasioning failure of justice. In the present case in hand, both the courts below upon considering the facts and circumstances concurrently came into decision that the amendment is very much necessary to determine the real question of controversy between the parties.

Therefore, this court finds no illegality in the impugned judgment and order to interfere.

Accordingly, the Rule is discharged without any order as to costs. The order of stay granted earlier by this Court stands vacated.

Office is directed to send down the LCR along with a copy of this judgment and order at once.

[Jahangir Hossain,J]

Liton/B.O