

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No.1066 of 2023

Mamtaz Begom and otherspetitioners

-Versus-

Sanoara Begum and others

.....opposite parties

Mr. Ruhul Amin, Advocate

..... for the petitioners

Mr. Md. Mubarak Hossain, Advocate

..... for opposite parties 1-5, 7 and 14

Judgment on 30.07.2024

The leave was granted and Rule was issued calling upon opposite parties 1-14 to show cause as to why the judgment and order of the Additional District Judge, Court No.2, Cumilla passed on 31.10.2022 in Civil Revision No.10 of 2021 allowing the revision thereby reversing the order of the Assistant Judge, Debidwar, Cumilla passed on 27.01.2021 in Miscellaneous Case No.04 of 2017 rejecting the application under section 151 of the Code of Civil Procedure (the Code) shall not be set aside and/or such other or further order or orders passed to this Court seem fit and proper.

The material facts for disposal of the Rule, in brief, are that the opposite parties herein as plaintiffs instituted Title Suit No.27 of 1987 against the present petitioners and others praying for partition of the suit land as detailed in the schedule to the plaint. The suit was decreed in preliminary form on 11.11.1999. The

contesting defendants then preferred appeal before the District Judge, Cumilla being Title Appeal No.31 of 2000. The transferee Court heard the said appeal and dismissed it on 11.08.2010. The contesting the defendants then moved in this Court in Civil Revision No.4405 of 2010. The Rule issued in the aforesaid revision was discharged on 15.04.2014 and the judgment and decreed passed by the trial Court was upheld. Then on the prayer of the plaintiffs and defendants 1-10 and 25 who got *saham* an Advocate Commissioner was appointed to allocate *saham* to the plaintiffs and the above defendants. The Commissioner submitted his report on 20.01.2016. The trial Court accepted the report and final decree was drawn up on 10.10.2016. The plaintiffs then filed execution Case No.03 of 2016 for getting possession. At that moment it came up to the knowledge of the petitioners that an *ex parte* decree was passed against their predecessor late Amir Hossain Sarker. Then they filed Miscellaneous Case No.04 of 2017 under Order 9 Rule 13 of the Code for setting aside the *ex parte* decree passed against their predecessor. In the miscellaneous case they stated that their predecessor Amir Hossain was the owner of plot 817 who owned and possessed the same constructing a house over it surrounded by a boundary wall. During his possession and enjoyment over the land he died on 09.01.2010 leaving behind the petitioners as heirs and they are

living therein. In the miscellaneous case they further stated that no summons was served upon their predecessor. They came to learn from one of the defendants on 25.05.2017 that the plaintiff got an *ex parte* decree against their predecessor. When the plaintiff and others went to take possession of the land through Court then they filed the miscellaneous case for setting aside the *ex parte* decree passed against them.

Opposite parties herein appeared in the case and filed written objection denying the facts stated in the miscellaneous case. They contended that the petitioners had full knowledge about the suit and the judgment and decree passed against them. The judgment of the suit was passed on 11.11.1999 and the Advocate Commissioner submitted report in the year 2016. The petitioners have filed the miscellaneous case only to frustrate the Execution Case 03 of 2016 and as such the miscellaneous case would be rejected.

At the fag end of disposal of the miscellaneous case, the opposite parties to the case filed an application under section 151 of the Code prying for dismissal of the miscellaneous case on the ground that the judgment and decree of the suit has been merged with the judgment passed in Civil Revision No.4405 of 2010 and since there is no existence of the judgment of the trial Court, the miscellaneous case would be rejected being not maintainable.

Learned Assistant Judge rejected the application on the findings that this is a miscellaneous case under Order 9 Rule 13 of the Code and allegation of the petitioners is that no notice of the suit was served upon their predecessor and *ex parte* decree was passed behind their back which is to be decided in the case. The learned Judge then fixed the next date to 08.02.2021 for hearing of arguments of the case. The opposite parties to the miscellaneous case then file a revision under section 115(2) of the Code before the District Judge, Cumilla challenging the aforesaid order. The Additional District Judge, Court No.2, Cumilla heard the said revision on transfer and by the judgment and order under challenge in this revision allowed it and set aside the judgment and order passed by the Assistant Judge. The revisional Court further directed the Assistant Judge to dispose of the application filed under section 151 of the Code as per the observation and direction given in the body of the judgment. Being aggrieved by the petitioners of the miscellaneous case approached this Court and leave was granted and Rule was issued with an *interim* order.

Mr. Ruhul Amin, learned Advocate for the petitioners takes me through the judgment and orders passed by the Courts below and other materials on record and submits that the petitioners filed the miscellaneous case under Order 9 Rule 13 of the Code alleging that the summons of the original suit was not served upon their

predecessor and the decree was passed *ex parte* against him. The subject matter of the miscellaneous case is that whether the summons was served or not upon their predecessor. The judgment and *ex parte* decree passed against their predecessor has been affirmed up to the High Court Division in revision and there is nothing in this case about merger of the trial Courts judgment with the appellate or revisional judgment. The revisional Court below misdirected and misconstrued in the approach of the matter and allowed the revision directing the Assistant Judge to dispose of the application filed under section 151 of the Code as per the guideline and direction because the Assistant Judge disposed of the application on merit. The revisional Court cannot send the matter again to the same Court for disposal. Moreover, the revisional Court made no specific observation in the impugned judgment which is to be complied with by the Assistant Judge. In passing the impugned judgment and order the revisional Court below committed error on an important question of law which has resulted in an error in such decision occasioning failure of justice. The Rule, therefore, would be made absolute.

Mr. Md. Mubarak Hossain, learned Advocate for opposite parties 1-5, 7 and 14 on the other hand opposes the Rule. He submits that in the miscellaneous case the petitioners did not state the quantum of land their predecessor used to possess and they

possess. Even they did not tell how their predecessor Amir Hossain got a part of the suit property. Since the execution case is pending for execution of the judgment and decree passed in the suit, the petitioners ought to have challenged the execution case in this miscellaneous case. He further submits that it is evident in the Commissioner's report that there is residuary *saham* measuring an area of .1777 acres and the present petitioners can get their *saham* by submitting their claim in the execution case. The revisional Court below on correct interpretation of law and fact found that the judgment and decree passed by the Assistant Judge has been merged with the judgment of appeal and revision, and as such the miscellaneous case is not maintainable. In the premises above, the Rule, having no merit would be discharged.

I have considered the submissions of the learned Advocates of both the sides, gone through the revisional application, grounds taken therein, particularly the impugned revisional judgment and order passed by the Additional District Judge, Court No.2, Cumilla. It is admitted fact that opposite parties 1-14 as plaintiffs instituted Title Suit No.27 of 1987 against the predecessor of the petitioners and others praying for partition in the suit land as described in the schedule to the plaint. It is also admitted that the predecessor of these petitioners was defendant 27 in the suit. On holding trial the trial Court decreed the suit on contest against

defendants 1-15, 18-19, 21-24 and 25 and *ex parte* against the others. The trial Court allocated *saham* to the plaintiffs and defendants 1-10 and 25. The suit was decreed against the predecessor of these petitioners *ex parte*. The judgment and decree passed by the trial Court was upheld by the appellate Court and affirmed by this Division in a civil revision. Thereafter, the plaintiffs and defendants 1-10 and 25 filed an application to the trial Court for preparation of final decree. The Court appointed an Advocate Commissioner who submitted a report. In three consecutive dates after filing the report no one raised any objection against it. The trial Court then accepted the report and accordingly final decree was prepared. The petitioners alleged that at that time they came to learn about the judgment and *ex parte* decree passed against their predecessor and then filed the miscellaneous case under Order 9 Rule 13 of the Code for setting aside the *ex parte* decree. The miscellaneous case was filed in the year 2017 and the plaintiffs, *i.e.*, opposite parties herein filed written objection on 22.04.2018. The witnesses of the parties have been examined and the case is fixed for hearing of argument. At this stage, the plaintiffs filed the application under section 151 of the Code for dismissal of the suit being not maintainable. In the application it has been alleged that the judgment and decree passed by the trial Court has been merged with the judgments of

the Court of appeal and revision and as such the original decree does not exist and that the miscellaneous case is not maintainable. However, the Assistant Judge rejected the said application stating reason that the cases as referred to by the learned Advocate for the applicants do not match the case in hand considering the facts upon which the *ratio* of those cases has been laid. The lower revisional Court discussed the *ratio* laid in the cases as referred to by the learned Advocate for the opposite parties to the miscellaneous case and allowed the revision.

I have gone through the cases as referred to by the parties and relied on by the Additional District Judge. In the instant case, the judgment and decree passed by the Assistant Judge in the original suit has been affirmed up to this Court. Therefore, the point raised by the opposite parties to the miscellaneous case that the judgment passed by the Assistant Judge has been merged in the judgment of appeal and revision does not arise at all. The judgment and decree passed by the trial Court remained as it is without any modification. The plaintiffs and the defendants who got *saham* in the suit land have filed the execution case for executing the decree passed by the Assistant Judge as it is. Therefore, the fact of merger as claimed by the opposite parties to the miscellaneous case appears to me meaningless and against their own execution case. The *ratio* laid in the cases as relied on

by the Additional District Judge is found not applicable in this case. It is only to be decided in the miscellaneous case whether the summons was served upon the predecessor of the petitioners because the judgment was passed against him *ex parte*. It is further found that in the meantime the parties examined witnesses in the miscellaneous case and the next date of it has been fixed for hearing of argument.

Considering the statements made in the miscellaneous case, I find that it is required to be disposed of on merit. Although the application filed under section 151 of the Code was rejected by the Assistant Judge on merit but the Additional District Judge by the impugned judgment again directed the Assistant Judge to dispose of the application on merit as per the direction given in the body of the judgment. On going through the judgment passed by the Additional District Judge, I do not find that any specific observation was given to the Assistant Judge in disposing the application. The judgment passed by the revisional Court below is found perverse and non application of the mind on the judgments referred to by him and *ratio* laid in those cases. Mr. Mobarak Hossain, learned Advocate for the opposite parties argued that in the miscellaneous case the petitioners did not state the quantum of land their predecessor used to possess and how he got a part of the suit property. The above point of law can raised in the argument of

miscellaneous case. His submission as to non mentioning of the quantum of land which Mr. Amir Hossain alleged to have possessed and that there is residuary *saham* of .1777 acres as per the report of the Commissioner and final decree is found to be correct but this Court has nothing to do with those because it is not the subject matter of this revision. He can raise those points as and when necessary, if so advised.

I view of the discussion made hereinabove, I find merit in this Rule. Accordingly, the Rule is made absolute. However, no order as to costs. The judgment and order passed by the Additional District Judge in Civil Revision No.10 of 2021 is hereby set aside and that of the Assistant Judge is restored.

However, the Assistant Judge is directed to dispose of the miscellaneous case within a short span of time, preferably within 3(three) months from the date of receipt of this judgment and order. In dealing with the miscellaneous case, the Assistant Judge shall not allow either party any adjournment without dire necessity.

Communicate this judgment to the concerned Courts.