

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.1008 OF 2013

In the matter of:

An application under Section 115(4) of the Code of Civil Procedure.

And

Abdul Rashid (Nasu)

... Petitioner

-Versus-

Md. Moslem Miah and others

... Opposite parties

Mr. Md. Habibur Rahman with

Ms. Shahida Arobi, Advocates

.... For the petitioner.

Mr. Md. Ferdous Rahman, Advocate

.... For the opposite parties.

Heard and Judgment on 22.10.2024.

This Rule was issued calling upon the opposite party Nos.1-8 to show cause as to why the impugned order dated 13.11.2012 passed by the learned Additional District Judge, Bhola in Civil Revision No.13 of 2009 allowing the revision and setting aside the order dated 07.04.2009 passed by the learned Assistant Judge, Borhanuddin, Bhola in Title Suit No.87 of 2004 rejecting the application for rejection of plaint should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the opposite party as plaintiff instituted above suit for declaration of title and partition seeking a separate saham for $4.34\frac{1}{2}$ acres out of 8.08 acres of R.S. Khatian No.43.

In above suit defendant entered appearance and submitted a petition under Order 7 Rule 11 of the Code of Civil Procedure alleging that claiming title in above land the plaintiff previously filed Title Suit No.170 of 1984 which was dismissed for default on 19.08.1990. After about 14 years of dismissal of above suit the plaintiff has filed this suit for the selfsame cause which is barred by Order 9 Rule 8 of the Code of Civil Procedure. It was further stated that the plaintiff did not pay sufficient Court fees in above suit and the same was barred by limitation as well.

On consideration of submissions of learned Advocate for the respective parties and materials on record the learned Assistant rejected above petition.

Being aggrieved by above judgment and order of the trial Court defendants preferred Civil Revision No.13 of 2009 to the District Judge, Bhola which was heard by the learned Additional District Judge who allowed the revision set aside the judgment and order of the trial Court and rejected above plaint under Order 7 Rule 11 of the Code of Civil Procedure.

Being aggrieved by above judgment and order of the learned Additional District Judge plaintiffs respondents as petitioners moved to this Court and obtained this Rule.

Mr. Md. Habibur Rahman, learned Advocate for the petitioner submits that petitioner as plaintiff instituted Title Suit No.170 of 1984

for 8.08 acres land and the cause of action of above suit arose in the 1st Agrahaon 1389 and that was suit for declaration of title. But the instant suit is for partition and the plaintiffs have claim a separate saham for 4 acres land out of 8.08 acres land. The cause of action of above two suits are different. Since both the parties of this suit are co-sharers in respect of the disputed joma and this is a suit for partition the learned Assistant Judge rightly rejected the petition of the opposite party under Order 7 Rule 11 of the Code of Civil Procedure. But the learned Additional District Judge misconceived the true meaning of Order 7 Rule 11 of the Code of Civil Procedure and most illegally allowed the revision and rejected the plaint which is not tenable in law.

On the other hand Mr. Md. Ferdous Rahman, learned Advocate for the opposite party Nos.1-8 submits that Title Suit No.170 of 1984 was filed by the petitioner for the selfsame property and against this opposite parties which was dismissed for default in presence of the defendant and concealing above material facts the petitioner has filed the present suit after about 14 years. As such the instant suit is barred by limitation as well as by Section 11 of the Code of Civil Procedure. The learned Additional District Judge on correct appreciation of laws and facts of this case rightly allowed the revision and set aside the judgment and decree of the trial Court and rejected the plaint which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is well settled that the limitation and resjudicata both involve mixed questions of laws and facts and above questions cannot be determined in a civil suit without consideration of evidence to be adduced by the parties on above issues. As such the submissions of the learned Advocate for the opposite party that the plaint was liable to be rejected for being barred by limitation or being hit by Section 11 of the Code of Civil Procedure appears to be without any legal substance.

It is not disputed that the petitioner as plaintiff instituted Title Suit No.170 of 1984 for declaration of title for 8.08 acres land of R.S. Khatian No.43 alleging that the cause of action of above suit arose in the 1st Augrahaon 1389 B.S. due to denial of plaintiff's title by the defendants. But the present suit is for partition and the plaintiff has claimed a separate saham for $4.34\frac{1}{2}$ acres land out of above 8.08 acres. It is an admitted fact that the plaintiff and the defendants are co-sharers for the disputed joma.

In view of above materials on record I hold that the learned Assistant Judge on correct appreciation of materials on record rightly rejected the petition filed by the defendant under Order 7 Rule 11 of the Code of Civil Procedure. But the learned Additional District Judge failed to appreciate the facts and circumstances of the case and materials on record properly and most illegally set aside the lawful

judgment and decree of the trial Court and rejected the plaint which is not tenable in law.

In above view of the materials on record I find substance in this petition under Section 115(4) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned order dated 13.11.2012 passed by the learned Additional District Judge, Bhola in Civil Revision No.13 of 2009 is set aside and those of the learned Assistant Judge is restored.

However, there is no order as to costs.

Send down the lower Court's record immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER