

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.2682 OF 2004

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Abdus Sattar Mia

.... Petitioner

-Versus-

Zaher Ali Khan and others

.... Opposite parties

Mr. Zahangir Hossain with

Ms. Mowlee Morshed Mou, Advocates

.... For the petitioner.

Mr. Uzzal Paul with

Ms. Afroza Akter, Advocates

.... For the opposite party No.1.

Heard on 25.02.2025 and 26.02.2025.

Judgment on 27.02.2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and decree dated 17.04.2004 passed by the learned Additional District Judge, 5th Court, Dhaka in Title Appeal No.110 of 2003 reversing the judgment and decree dated 25.01.2003 passed by the learned Senior Assistant Judge, 6th Court, Dhaka in Title Suit No.355 of 2001 to grant permanent injunction in favour of the plaintiff 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 parties as plaintiffs instituted above suit for permanent injunction for $73\frac{3}{4}$ decimal land alleging that above property belonged to Rahim Kha who died leaving three sons Gafur Khan, Mohammad Ali Khan, Ahmad Ali Khan and one daughter Jobeda Khatun and relevant B.S. khatian was accordingly prepared. Above Mohammad Ali Khan died leaving one son Jaher Ali two daughters Firoza Begum and Masuda Begum and one wife Obayda Khatun and the plaintiff who is the son of Mohammad Ali Khan has partitioned above suit by a registered deed of bantonnama with his mother and two sisters and is in exclusive possession in above land. Defendants threatened the plaintiff on 15.11.2001 with forceful dispossession from above property.

Above suit was contested by defendant Nos.16 and 20 by filling two separate written statements. Defendant Nos.16 did not dispute the title and possession of the plaintiff in the disputed property. But defendant No.20 alleged that the plaintiff does not have any right, title, interest and possession in above land and by amicable partition above property was possessed by Gafur Khan. Defendants are successive heirs of Abdur Gafur Khan and they are in peaceful possession in above land and above property was not partitioned by meets and bounds and the

plaintiff cannot get a decree for perpetual injunction in respect of ejmali property against co-shares.

At trial plaintiffs and defendants examined 3 witnesses each and documents of the plaintiffs were marked Exhibit Nos.1-5 series and those of the defendants were marked as Exhibit Nos "Ka" - "cha".

On consideration of facts and circumstances of the case and evidence on record the learned Senior Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree of the trial court above plaintiffs as appellants preferred Title Appeal No.110 of 2003 to the District Judge, Dhaka which was heard by the learned Additional District Judge, 5th Court who allowed above appeal, set aside the judgment and decree of the trial Court and decreed the suit.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of Appeal below above respondent (defendant No.20) as petitioner moved to this Court with this revisional application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

Mr. Zahangir Hossain, learned Advocate for the petitioner submits that in the plaint it has stated that the heirs of Rahim Kha namely Mohammad Ali, Ahmad Ali, Gafur Kha abd Jobeda khatun used to possess above property by amicable partition. It is admitted that above property has not been partitioned by meets and bounds

either amicably by a registered instrument or by filling a suit for partition in a Court of law. As such the plaintiff cannot get a decree for permanent injunction against other co-sharers for any part of above joint property. The learned Advocate lastly submits that defendant No.20 has acquired title and possession in the disputed land by virtue of purchase by registered kobala deed from Jobeda Khatun and as plaintiff he has instituted Title Suit No.208 of 2011 for partition of above property and plaintiff opposite party is defendant No.1 in above suit and defendant No.1 is contesting above partition suit by filling a written statements. In support of above submissions the learned Advocate has produced a copy of the plaint of Title Suit No.208 of 2011 and written statement submitted by Jaher Ali khan who is defendant No.1 of above suit. The learned Advocate for the petitioner lastly submits that in his cross examination PW1 has admitted that defendant No.20 has erected a boundary wall surrounding the disputed land which shows that the plaintiff is not in exclusive possession of above land and relevant R. S. Khatian and B. S. khatian of above land has been prepared in the name of defendant No.20.

On the other hand Mr. Uzzal Paul, learned Advocate for the opposite party No.1 submits that admittedly plaintiff is successive heir of Rahim Kha and relevant S. A. Khatian was rightly prepared in the name of the father of the plaintiff and he is in exclusive possession in disputed land on the basis of amicable partition with his sisters and

mother by a registered deed of partition and in the plaint the plaintiff has provided specification of above land by boundaries. On an independent assessment of the evidence on record the learned judge of the Court of Appeal below rightly held that the plaintiff has succeeded to prove his prima facie title and exclusive possession in the disputed land and accordingly allowed the appeal, set aside the flawed judgment and decree of the trial Court and decreed the suit which calls for no interference.

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

Admittedly disputed property belonged to Rahim Kha who died leaving three sons Abdul Gafur, Mohammad Ali and Ahmed Ali and daughter Jobeda Khatun as his heirs and relevant C. S. and S. A. khatians were rightly recorded in their names. It is also admitted that plaintiff is a successive heir of Mohammad Ali and defendant No.20 claims title and possession in above land on the basis of successive purchase from Jobeda Khatun.

A co-sharer is entitled to get a decree for permanent injunction against another co-sharer for unpartitioned joint property if he can prove by legal evidence that he is in exclusive possession in above land on the basis of amicable partition with all other co-sharers.

It turns out from the plaint that the plaintiff has described the disputed property by mentioning C. S. Khatian and S. A. Khatian. It is

not disputed that R. S. khatian and City Survey khatian of above property were prepared and finally published in the Government gazette before filing of this suit on 26.11.2001 but the plaintiff did not mention above khatians. A record of right is a document as to the possession of the property and a land cannot be legally identified unless the latest records of rights are mentioned with reference to the relevant khatian number and plot number. Since the plaintiff did not mention the latest record of rights prepared for the disputed land and the defendant claims that relevant RS and City Survey khatian were prepared in the name of the defendant.

The plaintiff has failed to prove exclusive possession in the disputed land due to non production of the latest record of rights and show that those were prepared in his name. Secondly for proper identification of the disputed land producing above latest khatians were necessary. A Court of law cannot pass a decree for any immovable property which has not been identified in the plaint with the latest record of rights.

Moreover, while giving evidence as PW1 plaintiff himself has admitted in cross examination that Wahedul Islam has erected brick wall surrounding the disputed land and Lutfor hRahman and Abul Kalam is owning 10 decimal land.

On consideration of above materials on record I hold that the learned Additional District Judge committed serious illegality in

holding that the plaintiff succeeded to prove his exclusive possession in the disputed land which is not tenable in law.

As mentioned above the learned Advocate for the petitioner has produced copy of the plaint of Title Suit No.208 of 2011 and written statement filed in above suit by defendant No.1 Jaher Ali Khan who is the plaintiff of this suit. Above documents show that above suit has been instituted for partition for the disputed property and the plaintiff of this suit is contesting above suit as defendant No.1. As such the plaintiff be at liberty to file a petition for injunction in above suit for partition if he feels that his peaceful and exclusive possession in any land of above ejmali property is under threat of dispossession by any co-sharer.

In above view of the facts and circumstances of the case and evidence on record I find that the impugned judgment and decree of the court of appeal is vitiated by serious illegality and I find substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserved to be absolute.

In the result, the Rule is hereby made absolute. The impugned judgment and decree dated 17.04.2004 passed by the learned Additional District Judge, 5th Court, Dhaka in Title Appeal No.110 of 2003 is set aside and the judgment and decree dated 25.01.2003 passed by the

learned Senior Assistant Judge, 6th Court, Dhaka in Title Suit No.355 of 2001 is restored.

However, there will be no order as to costs.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER