

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 5579 OF 2001

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Md. Zarzis

--- Defendant-Petitioner.

-Versus-

Moulana Md. Idris alias Md. Idris Ali {died
leaving behind his legal heirs: 1(a)-1(f)} and
subsequently O.P No. 1(e). Most. Zakera
Khatun died leaving behind her legal heirs:
1(e)(i)- 1(e)(vi).

--- Plaintiff- Opposite Parties.

Mrs. Fara Mahmuda, Advocate

--- For the Defendant-Petitioner.

Mr. Golam Rabbani, Advocate

--- For the Plaintiff- Opposite Parties.

**Heard on: 07.06.2023, 20.08.2023,
29.08.2023, 30.10.2023, 31.10.2023 and
09.11.2023.**

Judgment on: 22.11.2023.

At the instance of the present defendant-appellant-
petitioner, Md. Zarzis, this Rule was issued upon a revisional
application filed under section 115(1) of the Code of Civil
Procedure calling upon the opposite party to show cause as to
why the judgment and decree dated 30.09.2001 passed by the

learned Subordinate Judge, Court No. 2, Nilphamari in the Other Appeal No. 34 of 2001 should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present opposite party, Moulana Md. Idris alias Md. Idris Ali (now deceased and his legal heirs have been substituted) as the plaintiff filed the Other Class Suit No. 70 of 1997 in the court of the learned Senior Assistant Judge, Saiadpur, Nilphamari praying for a decree of permanent injunction restraining the defendant from entering into the disputed land described in the schedule “Ka” of the plaint and also for khas possession after being dispossessed from the said land measuring 0.01 acre of land described as schedule “Kha” of the plaint after removing the structure of dwelling house (ঘর) of the defendant. The further claim of the plaintiff is that he has made Darul Ulum Madrasha upon the land measuring 4.12 acres of land gifted by Riaz Uddin who was the Mutwalli thereof. It is further claimed that the said Riaz Uddin filed earlier Other Class Suit No. 11 of 1953 in the court of the then learned Subordinate Judge, Rangpur which was decreed and an appeal being No. 64 of 1964 was dismissed on contest and thereafter 2nd Appeal No. 75 of 1967 was also dismissed. During pendency of this suit an application for

amendment of the plaint was filed after being dispossessed from $21\frac{1}{2}$ decimals of land mentioned as the schedule "Kha" of the plaint in violation of the order of injunction/*status quo*.

The petitioner as the defendant contested the suit by filing a written statement contending, *inter alia*, that the plaintiff dispossessed the defendant No. 1 who was recorded C. S. Plot No. 410 and Khatian No. 439 and Bibhuti Bhushan Bondopadhyaya had been the Superior Landlord thereof under whom the tenants Syed Md. Zakaria, Syed Md. Saleh and Syed Md. Idris Ali who were possessing the land as subjects and R. S. Record of Right was in their names. The total land measuring $21\frac{1}{2} + 1 = 22\frac{1}{2}$ decimals was recorded in the name of the defendant on 21.06.1990 and the defendant is in possession by constructing dwelling house thereof. It is further contended that there was no Wokf property in the said land. The suit property was never possessed by the said Md. Riaz Uddin. The plaint was amended on 05.06.2000, as such, an additional written statement was filed.

After receiving the above case, the learned Senior Assistant Judge, Saiadpur, Nilphamari heard the parties and

considering the evidence adduced and produced by the parties dismissed the suit by the judgment and decree dated 16.04.2001. Being aggrieved the present plaintiff-opposite party, Moulana Md. Idris alias Md. Idris Ali preferred the Other Class Appeal No. 34 of 2001 in the court of the learned District Judge, Nilphamari which was heard by the then learned Subordinate Judge, Court No. 2, Nilpahmari who after hearing the parties and considering the evidence allowed the appeal on 30.09.2001 by reversing the judgment of the learned trial court.

Being aggrieved this revisional application has been filed by the defendant-petitioner under section 115(1) of the Code of Civil Procedure challenging the legality of the impugned judgment passed by the learned lower appellate court and this Rule was issued thereupon.

Mrs. Fara Mahmuda, the learned Advocate appearing on behalf of the defendant-appellant-petitioner submits that the Superior Landlord Bibhuti Bhushan Bondopadhya settled the suit land in favour of 3 sons of Riaz Uddin who transferred the suit land to the said plaintiff Madrasha and he was the Motwalli of the said Madrasha property which was a Wakf property, as such, his son Moulana Md. Idris alias Md. Idris Ali filed the present

suit for a permanent injunction and a recovery of khas possession but the learned trial court dismissed the suit without properly appreciation of the evidence produced by the plaintiff, as such, committed an error of law. However, lower appellate court allowed the appeal and decreed the suit on contest after properly examining the documents passed the impugned judgment and decree by committing an error of law, as such, this Rule should be made absolute.

The learned Advocate further submits that having regard to the facts that the defendant is a co-sharer in possession in respect of specific portion of the properties and there having been no document to show that the properties have ever been included in any Waqf the learned appellate court erred in law by reversing the judgment of the trial court resulting in miscarriage of justice, therefore, the Rule should be made absolute.

The present Rule has been opposed by the present opposite parties who are substituted.

Mr. Golam Rabbani, the learned Advocate, appearing for the present opposite parties submits that the plaintiff-opposite party, Moulana Md. Idris alias Md. Idris Ali as a plaintiff filed the suit on behalf of the said Madrasha which was a Wakf

property but the learned trial court misread the evidence produced by the parties and came to a wrongful conclusion by dismissing the suit. However, the learned appellate court below came to a lawful conclusion to decree by reversing the judgment of the learned trial court on the basis of the possession in favour of the Madrasha but the present petitioner obtained the present Rule by misleading the court which is liable to be discharged.

The learned Advocate further submits that the present petitioner Md. Zarzis as a son of one of the 3 brothers, namely, Moulana Zakaria filed the present revisional application whereas his father transferred the property as -বনামদার in the said Madrasha who was in possession of the suit land by dispossessing the present petitioner which was enlisted as a Waqf property, as such, the present petitioner failed to substantiate his claim, as such, the learned appellate court below committed no error of law and the Rule is, therefore, should be discharged.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with the annexures therein,

in particular, the impugned judgment and decree passed by the learned appellate court below and also perusing the important documents adduced and produced by the respective parties by way of depositions as PWs and DWs in the learned courts below which have been included in the lower courts records, it appears to me that the Superior Landlord settled the land to 3 brothers, namely, Syed Md. Zakaria, Syed Md. Saleh and Syed Moulana Idris alias Md. Idris Ali who are the sons of Riaz Uddin who transferred the suit land in favour of the plaintiff-opposite party being the said Madrasha. The said Moulana Md. Idris Ali filed the present suit claiming the entitlement of the property as described in the schedule of the plaint. On the other hand, the present plaintiff-opposite party claimed that the said Riaz Uddin was the -বনামদার, thus, he could transfer the land in favour of the said Madrasha and handed over possession upon the suit land measuring $22\frac{1}{2}$ decimals. The present opposite party was a C. S. recorded owner who is the son of Riaz Uddin but the present defendant-petitioner, namely, Md. Zarzis prayed for seeking a permanent injunction on the basis of the transfer deed by executing in the year 1926 in favour of the said Madrasha.

In view of the above factual and legal aspects, this court has to take a decision as to whether the plaintiff could prove its own case by providing sufficient evidence.

I have carefully examined the judgment and decree passed by the learned Senior Assistant Judge, Saiadpur, Nilphamari who dismissed the suit filed by the plaintiff for a permanent injunction upon the suit land measuring $22\frac{1}{2}$ decimals of land and the original plaint was amended when there was a change by dispossession of the plaintiff, as such, the decree was sought by the plaintiff for a permanent injunction upon the said suit land. The settled principle is that for filing a suit praying for a permanent injunction of the possession is an important matter to be decided by the court. The evidence produced by the plaintiff and also amended the plaint the plaintiff could not prove as to the possession upon the suit land and also the dispossession of 1 decimal of land during the pendency of the present suit. The learned trial court in this regard came to a wrongful conclusion that the plaintiff was in possession of the suit land. The learned trial court dismissed the suit by misreading the evidence as to the possession and decided that in a suit for a permanent injunction, the plaintiff must prove the *prima facie* title and absolute

possession. The plaintiff failed to prove an absolute possession, therefore, prayed for the recovery of khas possession by amending the plaint and the plaintiff failed to pay an appropriate court fee for recovery of khas possession from which he was in possession, as such, the learned trial court dismissed the suit. However, the learned appellate court below came to a lawful conclusion to reverse the judgment of the learned trial court by decreeing the suit in favour of the present plaintiff-opposite party.

I have carefully examined the judgment passed by the learned courts below and I found that the learned Senior Assistant Judge, Saiadpur, Nilphamari misread the evidence adduced and produced by the parties and came to a wrongful conclusion by dismissing the suit filed by the plaintiff (Madrasha). The learned trial court came to a conclusion and dismissed the suit on the basis of the following findings which reads as follows:

...“বাদী পক্ষ মামলা চলাকালীন ২১½ শতক সম্পত্তি হইতে বেদখল হওয়ার কথা বলিয়া-ছেন। ০৬.০৬.২০০০ ইং তারিখ হই-ত ১৫ দি-নর ম-ধ্য বিবাদী ঘর-বাড়ী, টিউবও-য়ল ও পায়খানা যেখা-ন স্থাপন করিয়াছেন। কিন্তু উক্ত ০৬.০৬.২০০০ ইং তারিখের কোন সময় বাদী-

বিবাদী কর্তৃক ২১^১/_২ শতক হই-ত বেদখল হইয়া-ছেন তাহার নির্দিষ্ট সময় উল্লেখ করেন নাই। উপরোক্ত পর্যালোচনার আলোকে বাদীপক্ষ মামলা চলাকালীন দি-নর বা রা-তর কোন সম-য় ০৬.০৬.২০০০ ইং বিবাদী কর্তৃক ২১^১/_২ শতক হই-ত বেদখল হইয়া-ছেন তাহা সুস্পষ্ট ও সুনির্দিষ্টতা-ব উ-ল্লেখ না করায়, সম্পূর্ণ ২২^১/_২ শতকের জন্য বাদীপক্ষ খাস দখলের ডিক্রীর প্রার্থনা না করায় এবং সম্পূর্ণ ২২^১/_২ শতকের জন্য বাদীপক্ষ খাস দখলের ডিক্রীর প্রার্থনা না করায় এবং সম্পূর্ণ ২২^১/_২ শতকের উপর এড-ভ-লারাম কোর্ট ফি বাদীপক্ষ প্রদান না করায় এবং আর্জি সং-শাধনীর দরখা-স্ত খাস দখ-লর ডিক্রীর প্রার্থনা না করায় বাদীপক্ষ প্রার্থীত মতে খাস দখলের ডিক্রী পাইতে পা-রন না।”...

However, the learned appellate court below came to a lawful conclusion to reverse the judgment of the learned trial court on the basis of the following findings which reads as follows:

...“So, it is easy to say that pltf side was in the possession in the suit land just before their dispossession from the ‘Kha’ scheduled land. The Id. Trial court has enquired in the PWs whether the pltf has any possession now or not. But such idea is not correct as the plaint shows that pltf side has been finally dispossessed from the remaining $21\frac{1}{2}$ decimals of the ‘Kha’ schedule during the pendency of the original suit. However, it is found from the depositions that pltf side has been disposed by the

defd from the suit land in the two phares from one decimal before the filing of the suit and from $21\frac{1}{2}$ decimals during the pendency of the suit.”...

In view of the above conflicting decisions in a suit for permanent injunction absolute possession must be provided but the plaintiff could not prove his possession absolutely, therefore, committed an error of law by rejecting the application by the learned trial court. However, the learned appellate court below came to a lawful conclusion as to the possession by *setting aside* and thereby reversing the judgment of the learned trial court which was filed for a permanent injunction, therefore, I am not inclined to interfere upon the impugned judgment and decree passed by the learned appellate court below.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

The impugned judgment and decree dated 30.09.2001 passed by the then learned Subordinate Judge, Court No. 2, Nilphamari in the Other Class Appeal No. 34 of 2001 allowing the appeal and thereby reversing the judgment and decree of the learned trial court dated 16.04.2001 in the Other Class suit No. 70 of 1997 is hereby upheld.

The interim order passed by this court at the time of issuance of this Rule staying the operation of the impugned judgment and decree dated 30.09.2001 passed by the then learned Subordinate Judge, Court No. 2, Nilphamari in the Title Appeal No. 34 of 2001 is hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower courts records along with a copy of this judgment and order to the learned courts below immediately.