

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.1558 of 2016

In the matter of:

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

And

Yunus Ali and others

... Petitioners

-Versus-

Abul Hossain and others

... Opposite parties

Mr. Monzoorul Karim Kazal, Advocate

... For the petitioner.

Ms. Sarker Tahmeena Begum Sandha, Advocate

... For the opposite party Nos.1-4, 6
and 8-12.

Heard and Judgment on 08.12.2024

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party Nos.1-12 to show cause as to why the impugned judgment and decree dated 29.05.2014 passed by the learned Additional District Judge, Kurigram in Other Appeal No.02 of 2010 reversing the judgment and decree dated 30.11.2009 passed by the learned Joint District Judge, 2nd Court (Acting), Kurigram in Other Class Suit No.23 of 1999 should not be set aside and/or pass such other or further order or as to this Court may seem fit and proper.

Facts in short are that the petitioners as plaintiffs instituted Other Class Suit No.23 of 1999 for partition seeking a separate sahum for 2.68 acre land.

Above suit was contest by defendant Nos.12-22 and 39 and defendant Nos.23-26 by filling two separate sets of written statements. Defendant Nos.1-7 and 27-34 executed a solenama with the plaintiffs.

At trial plaintiff examined 1 witness but his cross examination could not be concluded. On the basis of above evidence the learned Joint District Judge, 2nd Court, Kurigram decreed above suit on contest against above defendants and allowed the plaintiffs a separate sahum for 9.22 acres.

Being aggrieved by above judgment and decree of the trial Court defendant Nos.12-22 and 39 preferred Other Appeal No.2 of 2010 and defendant Nos.23-26 preferred Other Appeal No.6 of 2010 to the District Judge, Kurigram which were heard by the learned Additional District Judge who by a single judgment allowed above two appeals, set aside the judgment of the trial Court and remanded the suit for retrial.

Being aggrieved by above judgment and decree of the Court of appeal below above respondents as petitioners moved to this Court with an application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

Mr. Monzoor ul Karim Kazal, learned Advocate for the petitioners submits that the original suit was filed in 1999 and after taking adjournments for a long time the defendants submitted a written statement in 2001 and after the examination of PW1 the defendants did not close his cross examination nor they adduced any evidence. On consideration of above materials on record the learned Joint District Judge rightly decreed the suit on contest. But the learned Judge of the Court of Appeal below failed to appreciate above materials on record rightly and most illegally allowed the appeal set aside the judgment and decree of the trial Court and remanded the suit for retrial which is not tenable in law.

On the other hand Ms. Sarker Tahmeena Begum, learned Advocate for the opposite party Nos. 1-4, 6 and 8-12 submits that the learned Joint District Judge disposed of the suit on contest but the defendants could not conclude the cross examination of PW1 and adduce evidence in support of the respective cases. On consideration

of above materials on record the learned Judge of the Court of Appeal below has rightly allowed the appeal and set aside the flawed judgment of the trial Court and remanded the suit for retrial 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.

As mentioned above this was a suit for partition which was contested by two sets of defendants by filing separate written statements. Plaintiff No.16 gave evidence as PW1 but his cross examination could not be concluded by defendant Nos.12-22 and 39. Defendant Nos.23-26 could not cross examine above witness at all. Since PW1 did not withstand the cross examination of the contesting defendants above evidence of PW1 cannot be accepted as legal evidence. As such the learned Joint District Judge committed serious illegality in disposing of above suit as contested one on the basis of above incomplete evidence of PW1.

The learned Judge could if he was convinced that the defendants are not inclined to get the cross examination of PW1 concluded or adduce the evidence fix a date for ex-parte hearing of the suit and then proceed with the hearing in accordance with law.

In a suit for partition the status of the plaintiff and defendant is equal and since two sets of defendants submitted separate written statements they deserved to adduce evidence in support of their respective claims.

On consideration of above materials on record the learned Judge of the Court of Appeal below has rightly allowed the appeal, set aside the flawed judgment and decree of the trial Court and remanded the suit for retrial.

I am unable to find any infirmity or illegality in the impugned judgment and decree passed by the learned Additional District Judge calling for interference by this Court nor I find any substance in the Civil Revision under section 115(1) of the Code of Civil Procedure and the Rule issued in this regard is liable to be discharged.

In the result, the Rule is hereby discharged. The order of status-quo granted at the time of issuance of the Rule is vacated.

However, there is no order as to costs.

Send down the lower Courts record immediately.