

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 4712 OF 1998

IN THE MATTER OF:

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

(Against Decree)

-And-

IN THE MATTER OF:

Petitioner No. 1. Md. Abu Bakkar Fakir died
leaving behind his legal heirs: 1(a)-1(m),
Petitioner No. 2. Md. Yeakub Ali Mondal
died leaving behind his legal heirs: 2(a)-2(n)
and others

--- Plaintiff-Petitioners.

-Versus-

Md. Mahbubur Rahman and others {O. P. No.
8. Mosammat Rokeya Bewa died leaving
behind her only legal heir: 8(a), O. P. No. 18.
Mosammat Hashna Bewa died leaving behind
her legal heirs: 18(a)-18(i)}.

---Opposite Parties.

Mr. Md. Shahadat Tanveer Amin, Advocate

---For the Plaintiff-Petitioners.

Mr. Md. Zahedul Bari, Advocate

---For the Opposite Party Nos. 1-19.

Mr. Abu Yahia Dulal, DAG with

Mr. Md. Humayun Kabir, AAG

--- For the Opposite Party No. 20.

Heard on: 10.08.2023, 21.08.2023,
15.01.2024 and 17.01.2024.
Judgment on: 23.01.2024.

At the instance of the present plaintiff-petitioners, Md. Abu Bakkar Fakir (Petitioner No. 1 & 2 now deceased and substituted) and others, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1-4, 6 and 12 at the risk of the petitioners to show cause as to why the judgment dated 15.06.1996 passed by the learned District Judge, Joypurhat in the Other Class Appeal No. 11 of 1997 reversing the judgment dated 29.01.1997 passed by the then learned Subordinate Judge (the learned Joint District Judge), Court No. 2, Joypurhat in the Other Class Suit No. 77 of 1994 dismissing the suit should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present petitioners as the plaintiffs filed the Other Class Suit No. 77 of 1994 in the court of the then learned Subordinate Judge, Court No. 2, Joypurhat praying for a declaration to the effect that they have the right of irrigation, grazing, bathing, fishing, burying on the suit land described in the schedule of the plaint. The plaint contains that the suit land was originally owned by Kalikesh Chandra Chattapadhyia and others as Maliki (মালিকী) rights under Bharat Samrat. The plaint also contains that the

plaintiffs have been in possession upon the suit land for more than 80 years for using the pond, for catching fish, by burying dead bodies without any objection from any parties including the defendant- opposite parties and the suit was filed by the petitioners as the plaintiffs upon the threat of dispossession by the defendant-opposite parties. This case is filed by the plaintiffs for a respective local persons under the provisions of Order-1, Rule-8 of the Code of Civil Procedure.

The present defendant- opposite parties, Md. Mahbubur Rahman and others contested the suit by contending that their predecessor obtained a settlement/ pattan (পত্তন) of the suit land from the previous Zaminder (জমিদার) in the year of 1339 BS and on the basis of the said settlement/ pattan (পত্তন) the defendants got the record of right on MRR by paying “Najor Salami” (নজর সালামী) in the name of the predecessors Abdul Mazid Fakir and Marfat Zaman Fakir and the present defendant- opposite parties inherited the land in their names after death of the original Patta (পাট্টা) holders. It also contended that the defendants were in possession of the suit land under the Superior Landlord earlier of the Government, thereafter, the present plaintiff-petitioners have no possession of the suit land or have no easement right.

Upon receipt of the said suit the then learned Subordinate Judge, Court No. 2, Joypurhat heard the parties and also obtained oral evidence by way of depositions and thereafter the learned trial court came to a conclusion to dismiss the suit. Being aggrieved the present plaintiff-petitioners preferred the Other Class Appeal No. 11 of 1997 in the court of the learned District Judge, Joypurhat who after hearing the parties allowed the appeal in part in favour of the present plaintiff-petitioners by his judgment and decree dated 15.06.1998. Being aggrieved the present plaintiff-petitioners filed this revisional application under the provision of section 115(1) of the Code of Civil Procedure and this Rule was issued thereupon.

Mr. Md. Shahadat Tanveer Amin, the learned Advocate, appearing for plaintiff-respondent-petitioners, submits that the suit was filed by them claiming the right of easement for using water of the pond for irrigation, catching fish and bathing their cattles and also for grazing for cattle in the suit land as well as for burying the dead body on the suit land and also for prayinhg Eid prayer on the Eidgah since 70-80 years earlier without any interruption or objection from any persons including the defendant-opposite parties by the local people but the learned

trial court failed to consider the right of the local people, therefore, came to a conclusion to dismiss the suit, however, the learned lower appellate court decreed suit in part allowing the appeal of the land of local people for using the suit land as a Eidgah upon the plot No. 510 and also only burying the dead body upon the plot No. 433 as a graveyard ignoring the easement right upon other parts of the suit land, as such, both the courts below committed an error of law by denying the long standing easement rights, therefore, the Rule should be made absolute.

The learned Advocate also submits that the present defendant-opposite parties could not produce any documents as to the settlement/ patta (পাট্টা) from the Superior Landlord and opposite parties did not possess the suit land but their names were recorded in the MRR Record of right in the names of their predecessors by practicing fraud which should be declared illegal, as such, the record of right requires to be corrected.

The Rule has been opposed by the present defendant-opposite parties by filing a written statement contending, *inter alia*, that the suit land measuring a total 12.65 acres through a settlement/ patta (পাট্টা) in their favour in the year of 1339 B.S. by the Superior Landlord in the names of the predecessors of the

present defendant-opposite parties and C. S. Record was prepared in the name of the Zaminder (জমিদার).

Mr. Md. Zahidul Bari, the learned Advocate, appearing along with the learned Advocates, Mr. Emdadul Huq and Ms. Nazmun Nahar, for the defendant-opposite parties, submits that the learned trial court dismissed the suit filed by the present plaintiff-petitioners on the ground that the present plaintiff-petitioners never possessed the suit land and any easement right established in their favour upon the suit land, as such, there was no record of right in their favour. During the pendency of the suit in the learned trial court, there was a local investigation and the investigation report was filed by an Advocate Commissioner as to the possession of the suit land, as such, the learned trial court lawfully dismissed the suit, however, the learned appellate court below decreed the suit in part by misreading and non-considering the evidence adduced and produced by the parties but the present plaintiff-petitioners obtained the present Rule by misleading the court, as such, the Rule is liable to be discharged.

The learned Advocate further submits that the learned trial court dismissed the suit on the ground of filing the suit beyond the limitation period and also for the principle of estoppels

against the present plaintiff-petitioners but the learned appellate court below committed an error of law by decreeing the suit in part upon the said representative suit filed in favour of the local people, as such, the Rule is liable to be discharged.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed by the plaintiff-petitioners 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 as well as perusing the relevant documents available in the lower courts record, it appears to this court that the present plaintiff-petitioners filed an other class suit claiming rights upon the suit land described in the schedule of the plaint situated at Mouza- Purba Kristapur, J. L. No. 80, MRR Khatian No. 42, Police Station- Kalai, District- Joypurhat for total land measuring 12.65 acres claiming easement rights and claiming possession upon the suit land by the local inhabitants for using water in the suit land, irrigation, for catching fish from the pond and also bathing their cattle in the pond. The plaintiffs also claimed that the local people used to catch fish from the pond and to graze for cattle on

the suit land and also used the suit land to bury the dead bodies of the local people in the suit land for more than 70/80 years as the Eidgah for praying Namaj of Eid day using the suit land without any interruption for a long period of time. The plaintiffs filed the suit as to the suit land on behalf of the local people and inhabitants under Order-1 Rule-8 of the Code of Civil Procedure to represent the local inhabitants. It further appears that the above Other Class Suit was filed within the limitation period from the date of knowledge as to the publication in MRR Record of Right published in the names of the present defendant-opposite parties without any basis. It also appears that the present defendant-opposite parties claimed the right upon the suit land on the basis of a settlement/ patta (পাট্টা) in favour of the present defendant-opposite parties by the original Landlord, namely, Kalikesh Chottopaddya and the defendant-opposite parties disclosed about the MRR Record of right on 11.10.1992 and their possession upon the suit land.

I have carefully examined the documents in the lower courts records particularly the judgment and decree passed by the learned trial court as well as the learned appellate court below and I found that there are some admitted positions between the

parties as to the original Landlord Kalikesh Chattopaddya. There is also an admitted position that the suit land has been used by the local inhabitants for the above purposes for a long period of time and the C. S. Record was published in the name of the original Landlord. Another admitted position between the parties is that there was a local investigation by an Advocate Commissioner which was accepted by the trial court by order dated 16.11.1994. The further admitted position is that there are some ponds for watering, irrigation, fishing and bathing their cattle in the ponds and grazing their cattle on the suit land and also for a graveyard for burying the dead bodies without any objection. There is also an admitted position between the parties that there is an Eidgah for praying namaj in the Eidgah by the local people. However, there are some disputes between the parties as to the possession of the suit land. The plaintiff-petitioners claimed that the local public used the suit land for a long period of time without any interruption and no objection by the defendant-opposite parties. There are also disputes as to the MRR Record of Rights published in the names of the defendant-opposite parties. The above disputes have been examined by the learned courts below. The learned trial court the then

Subordinate Judge (now Joint District Judge), Court No. 2, Joypurhat dismissed the suit on the basis of the following findings:

...“It may be mentioned here that the defendants did not file any paper relating to their story of pattan but they have given an explanation saying that the papers relating to pattan were filed in the office of R.D.C. Bogra but subsequently, those papers were not taken back by Abdul Majid and Marfat Zaman Fakir.

The plaintiffs claim that Zaminder had no authority to settle the suit lands with the predecessor of the defendants and thus MRR Khatian was prepared without any basis.

In the course of the argument hearing Ld. Adv. for the plaintiffs submits that as the suit lands recorded in C. S. Khatian with a note in the remark column, ‘সাধারণ ব্যবহার্য’ the Ex-Landlords had no authority to settle the lands. In support of his contention, he refers a rulings reported in 1983 BLD 32:”...

However, the learned appellate court below decreed the suit in part on the basis of the following findings:

...“But the existence of a graveyard in the suit plot Nos. 433 and 510 also Eidgah in suit No. 510 has not been denied by both parties. The local investigation report has also corroborated in this

respect. It appears from the local investigation report that .16 acres of land out of .58 acres of land of suit plot No. 433 and .160 acres of land out of 2.68 acres of land of plot No. 510 are graveyard and there is also Eidgah in suit plot No. 510 appertaining to area $.10\frac{1}{2}$ acres of land. The area and nature of the graveyard itself prove that it is not a family graveyard, but it is the graveyard for the local inhabitants.

Considering the above facts and circumstances, I am inclined to say that although the other easement of the Plffs in the suit land have ceased to exist by the passes of time, yet the customary easement in the suit plot No. 433 and 510 for burying the dead body of the local inhabitants and for offering the Eid prayer is in existence without any interruption by anybody.”...

In view of the above conflicting decisions by the learned courts below, I consider that the present plaintiff-petitioners could prove possession upon the suit land but the present defendant-opposite parties could not file any documents or evidence or manner to prove their possession and failed to prove any documents or evidence as to the manner of their possession, however, MRR Khatian was prepared without any basis. The learned trial court came to a conclusion to dismiss the suit on the basis of the possession and wrongfully interpreted the Advocate

Commissioner's report as to the suit land on the basis of the limitation period, therefore, came to a wrongful decision to dismiss the suit. The learned appellate court below lawfully came to a conclusion as to the possession of the suit land on the Plot No. 433 as the graveyard for burring the local people and also Eidgah on the Plot No. 510 on the basis of the local investigation report mentioning 16 decimals of land out of 58 decimals of land in the Plot No. 433 and 16 decimals of land out of 2.68 acres of land in the Plot No. 510. The said local investigation report also contains a description of the Eidgah in the suit Plot No. 510 on the land measuring $10\frac{1}{2}$ decimals which is not a family graveyard rather than it is a graveyard of the local inhabitants. Accordingly, the learned appellate court below passed the impugned judgment and decree in part those can be considered as an easement right as per section 4 read with section 18 of the Easement Act, 1882 as amended in the year 1985. Section 4 of the Easement Act, 1882 as amended in the year of 1985. Section 4 of the Easement Act is quoted below:

...“4. “EASEMENT” DEFINED- **An easement is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment**

of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

DOMINANT AND SERVIENT HERITAGES AND OWNERS- The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servant heritage, and the owner or occupier thereof the servant owner.

Explanation.- In the first and second clauses of this section, the expression “land” includes also things permanently attached to the earth: the expression “beneficial enjoyment” includes also possible convenience, remote advantage and even a mere amenity; and the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.”...

The above provisions of law define the right of easement for the beneficial enjoyment of the land which is not owned by the users. In the instant case, the suit was filed by the local

people through the plaintiffs as the representative of the local people. The easement right can only be created rights upon any land which is permanently attached to the earth. Accordingly, an easement right has been created for the benefit of the local people as the graveyard, Eidgah, pond as well as the feed for grazing cattle. The learned appellate court below decreed the suit in part as to the right of easement upon the graveyard and Eidgah by describing the rights as the customary easement as per section 18 of the Easement Act. As such, the learned appellate court decreed the suit in part on the basis of the customary easement created by using for a long period of time by the local people. As such, the learned appellate court did not commit any error of law by finding the suit land for the use of the local people on the Plot No. 433 and Plot No. 510 situated at Mouza- Purba Kristapur, J. L. No. 80, M. R. R. Khatian No. 42, Police Station- Kalai, District- Joypurhat which is based upon the report submitted by the Advocate Commissioner in the learned trial court out of total land measuring 12.65 acres claiming easement right which is based upon the report submitted by the Advocate Commissioner in the trial court.

In view of the above, I consider that the learned trial court misread the evidence adduced and produced by the parties and concluded the suit wrongfully, whereas, the learned appellate court below found 2 dags in the scheduled land for use as the easement in favour of the present plaintiff-petitioners.

I am, therefore, 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 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.