

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashefa Hussain

Civil Revision No. 3583 of 2017

Babul Howlader

.....petitioner

-Versus-

Mokbul Hossain and another

----- Opposite parties.

Mr. M.F Ahmed, Advocate with

Mr. Gopal Chandra, Advocate with

Mr. Mohammad Iqbal Hossain, Advocate

----- For the petitioner

Mr. Ehsanul Hoque, Advocate

----- For the Opposite Parties.

Heard on: 15.04.2019 and Judgment on
29.04.2019.

Rule was issued in the instant Civil Revisional application calling upon the opposite party Nos. 1-2 to show cause as to why the judgment and decree dated 18.09.2017 (decree signed on 24.09.2017) passed in Title Appeal No. 123 of 2014 by the learned Joint District Judge, Additional Court, Barisal dismissing the appeal by affirming the judgment and decree dated 17.07.2014 (decree signed on 24.07.2014) passed in Title Suit No. 27 of 2010 by the learned Assistant Judge, Banaripara (In Charge), Barisal decreeing the suit should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

The instant opposite parties as plaintiffs instituted Title Suit No. 27 of 2010 in the court of learned Assistant Judge, Banaripara (In charge), Barisal impleading the instant petitioner as defendant. The trial court after framing issues, adducing evidences taking deposition upon trial allowed the suit by its judgment and decree dated 17.07.2014. Being dissatisfied by the judgment and decree dated 17.07.2014 passed by the trial court the defendant in the suit as appellant (petitioner here) filed Title Appeal No. 123 of 2014 before the court of learned District Judge, Barisal which upon transfer was heard by the learned Joint District Judge, Additional Court, Barisal. After hearing both sides the appellate court dismissed the appeal by its judgment and decree dated 18.09.2017 and thereby affirmed the judgment and decree passed by the trial court.

Being aggrieved and dissatisfied by the judgment and decree of the courts below the defendant appellant as petitioner filed a civil revisional application which is instantly before this court for disposal.

The plaintiff's case inter alia is that the suit land originally belonged to Momin Uddin, Araj Uddin, Joynal, Abdul Malek, Abdul Goni, Abdul Hossain, Kulsum Khatun, Salaha Bibi, Azim Uddin, Shafij Uddin and S.A Khatian No. 143 was correctly prepared in their names. The suit plot No. i.e. S.A. plot No. 23 and quantum of land is 24 decimals out of which only 2 decimals

of land is the disputed land in the instant suit. Abdul Gani and others were the possessors of the suit land and their possession were correctly noted in S.A khatian No. 143. The plaintiffs are the sons of S.A recorded owner Abul Hossain Bapari and as such the plaintiff acquired title by inheritance. On 24.09.2009 the defendant forcibly entered into the suit land and erected tin shed house in the suit land. The plaintiff requested the defendant to vacate the suit land lastly on 17.03.2010 but the defendant refused to vacate the suit land. The plaintiff finding no other alternative filed that the suit and prayed that the suit should be decreed.

The defendant filed a written statement and contested the suit denying the material allegations in the plaint inter alia that the case is not maintainable, barred by limitation, bad for defect of parties and also barred by section 42 of the Specific Relief Act. His further case was that Abdul Malak Bapari was one of the co-sharer of S.A khatian No. 143 and after his death his legal heirs sold the suit land by a registered deed No. 96 dated 19.01.2003 in favour of the contesting defendant and delivered possession to him. Then the defendant developed the suit land by filling soil and Tk. 84,000/- was invested for that purpose and he also erected a tin shed house and has been living and possessing the suit land since. His further case is that the suit land is a joint property between the parties and the defendant is a co-sharer in

the suit land and the suit for recovery of khas possession against the co-sharer is not maintainable and suit for recovery of khas possession, against the co-sharer does not lie. The defendant prayed that the suit should be dismissed.

The plaintiff examined 3 P.Ws and defendant examined only 1 D.Ws and both the parties exhibited some documents

Learned Advocate Mr. M.F Ahmed along with Mr. Gopal Chandra, Advocate along with Mr. Mohammad Iqbal Hossain, Advocate appeared for the petitioner while learned Advocate Mr. Ehsanul Hoque represented the opposite parties.

Learned Advocate for the petitioner submits that the courts below upon nonconsideration of the evidences and misinterpretation of facts upon error of law came upon their concurrent findings causing serious injustice to the interest of the petitioner and therefore both the judgments of the courts below are not sustainable, calls for interference and ought to be set aside. He submits that the courts made a serious error of law which error caused serious injustice to the defendant petitioner. He submits that the trial court without properly completing the deposition of the witnesses particularly the defendant's witnesses whimsically closed the deposition of the D.W-1 which it cannot do as per law. In this context he takes me to the record of this case whereby he points out that the deposition of the D.W-1 was closed on the ground that the concerned advocate of the plaintiff

who was cross examining the defendant No. 1 could not be found. He takes me to the last deposition of the D.W-1 which was on 27.03.2014 and draws this court's attention to the bottom of the deposition where it is noted below as "চলবে". He submits that "চলবে" implies that the deposition in cross examination whatsoever of the D.W-1 shall continue further. He next points out the court's note dated 24.02.2014 and 04.05.2014. He particularly draws the court's attention to the court's note dated 04.05.2014 where the court noted down that "এড. হাজিরাও দেয়নি বা খুজে পাওয়া যায়নি জেরা হতে বারিত করে যুক্তিতর্কে।" He argues that this shows that the conduct of the trial court is most inconsistent in as much as that no court can act according to its own whim but must follow the due procedures in the proceedings. He next submits that the appellate court unfairly rejected his prayer for additional evidences by the defendant appellant at the appellatge stage. In support of his submission he cites two decisions of our Apex court one in the case of Sunil Krishna Vs. Kailash Chandra reported in 36 DLR(AD)(1984)220 and another in the case of Bangladesh Vs. Dhaka Lodge Welfare Society reported in 1988 BLD (AD) 99. He concludes his submission upon assertion that the trial court most unfairly allowed the suit without even completing the deposition of the D.W-1 and the appellate court most unfairly rejected the prayer of the defendant for producing evidences by way of deposition and also exhibits and therefore

the judgment of the courts below ought to be set aside and the Rule be made absolute for ends of justice.

On the other hand learned Advocate for the opposite parties submits that the courts below upon correct appraisal of the evidences and upon following the due procedures of law allowed the suit of the plaintiff and dismissed the appeal of the defendant appellant respectively and those need not interfered with in revision. Controverting the argument of the petitioner he submits that the trial court did not commit any error of law in closing the deposition of the D.W-1 in as much as that the closing of the deposition of D.W-1 would not adversely affect the defendants' interest as such. He submits that the appellate court correctly rejected the prayer of the defendant appellant in as much as that the defendant appellant should have produced the additional evidences by way of deposition and additional witnesses at the trial court but which he did not do deliberately. He next submits that this case was filed by the plaintiff under Section 9 of the Specific Relief Act and continues that the filing of the appeal by the defendant was not maintainable and he further submits that under Section 9 of the Specific Relief Act if the plaintiff files the suit within 6 months of the dispossession there is no provision of appeal by the defendant. He concludes his submission upon assertion that under the circumstances both the courts arrived at correct findings and the appellate court

correctly rejected the prayer for additional evidences by way of deposition whatsoever by the defendant and therefore the Rule does not bear any merit and ought to be discharged for ends of justice.

Heard the learned Advocate for both sides, perused the application, materials on record including the judgments of the courts below. I have perused the lower courts records. From the records it appears that the last deposition of the D.W-1 by way of cross examination was held on 27.03.2014 and I have also noticed that below the deposition the word “চলবে” is written. On the bottom of the page there are 2 notes one dated 24.02.2014 and the other note dated 04.05.2014. The note dated 24.02.2014 states “এড. খোজে পাওয়া যায় নি।” meaning the concerned Advocate who is to cross examine the D.W-1 could not be found. The note dated 04.05.2014 reads as “এড. হাজিরাও দেয়নি বা খুজে পাওয়া যায়নি জেরা হতে বারিত করে যুক্তিতর্কে।” implying that the concerned Advocate did not appear nor could he be found and therefore the deposition was closed and the court ordered that the proceeding should proceed towards the argument stage. I am in agreement with the learned Advocate for the petitioner in as much as that this conduct of the trial court is whimsical and inconsistent in itself. No court can relying upon its whims reverse its own earlier order that the deposition shall continue upon cross examination.

Moreover it cannot reverse an earlier order on the ground that the Advocate for the plaintiff could not be found.

The learned Advocate for the opposite parties argued that stalling the deposition and proceeding to the argument did not in any way jeopardize or otherwise adversely affect the interest of the defendant. In my considered view there is no scope for presumption and speculation here whether the defendants' interests are jeopardized or not. The trial court for proper dispensation of justice ought to have completed the proceeding which it began. It ought not to have closed the deposition suddenly and gone over to the argument.

I have also perused the judgment of the appellate court whereby it transpires that the petitioner prayed for recall of the witnesses of P.W-1, 2 and 3 and also prayed for deposition of more witnesses by the defendant. My considered opinion is that there is no scope for the petitioner to recall the P.W-1, 2, 3 anymore which it could have done at the stage of trial but however the defendants did not do so. The defendants at the appellate stage gave the excuse that they had inadvertently not prayed for recall of the P.Ws. In my considered opinion this is not a satisfactory ground for recalling the P.Ws. And the appellate court's finding to that effect is correct so far as it did not allow the recalling of the witness of the P.Ws.

I am also of the considered opinion that for ends of justice the appellate court ought to have admitted additional evidences by way of exhibits that the defendant appellant wanted to produce by way of exhibits but only those which are mentioned in the written statement.

The learned Advocate for the opposite parties contends that the suit being a case under the section 9 of the Specific Relief Act and the suit being filed the suit within 6 months there is no scope for appeal as such. I have gone through the appellate court's judgment. It appears that the plaintiff respondent opposite parties did not raise this issue at the time of appeal nor is there anything specific from the record which may indicate that this was a case under section 9 of the Specific Relief Act. Therefore I am not inclined to discuss this matter at this stage.

Under the facts and circumstances I am inclined to this matter send back on remand to the trial court with some directions. The trial court is hereby directed to proceed with the trial from the stage of cross examination of the D.W-1 dated 08.04.2014 onwards and the trial court is also directed to allow the defendant to bring more witnesses if they are so advised. The trial court is also directed to consider any exhibits by way of documentary evidences produced by the defendant but only those which have been specifically mentioned in the written statement. The trial Court is further directed to dispose of the matter as

expeditiously as possible preferably within 6 (six) months of receiving the copy of this judgment.

In the result, the Rule is disposed of with above directions and observations.

The order of stay granted earlier by this court is hereby recalled and vacated.

Send down the L.C.R at once.

Communicate the judgment and order at once.

Arif(B.O)