

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No.3228 of 2008**

Md. Motaleb Khalifa @ Md. Abdul  
Motaleb Khalifa and others

... Petitioners

-Versus-

Md. Akbar Ali Khalifa and others

...Opposite parties

Mr. Md. Belal Hossain, Advocate

...For the petitioners

Mr. Md. Shamsur Rahman with

Ms. Rina Begum, Advocates

...For the opposite party No.1.

**Judgment on 6<sup>th</sup> March, 2025.**

On an application under Section 115(4) of the Code of Civil Procedure, this Rule was issued granting leave to revision to the petitioners calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 15.07.2008 passed by the learned Additional District Judge, 2<sup>nd</sup> Court, Bogura in Civil Revision No.39 of 2005 allowing the same and setting aside the judgment and order dated 05.04.2005 passed by the Senior Assistant Judge, 1<sup>st</sup> Court, Bogura in Partition Suit No.137 of 2003 allowing application for local investigation should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The opposite-party No.1, as plaintiff, instituted Partition Suit No.137 of 2003 in the Court of Senior Assistant Judge, 1<sup>st</sup> Court, Bogura against the present petitioners along with others claiming partition of the suit property. The defendant Nos. 9, 77-79, 95 and 96 appeared in suit and filed written statement. The defendants claimed part of the suit property on the basis of 5 sale deeds of the years 1909, 1914 and 1916. Schedule to those deeds no khatian number and plot numbers have been mentioned, but the property has been described by giving boundary in the deeds. The defendants filed an application before the trial court for appointment of a survey knowing Advocate Commissioner to ascertain the property covered by 5 sale deeds under which khatians and plots. The trial court by its order dated 05.04.2005 allowed the application.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the plaintiff in suit filed Civil Revision No.39 of 2005 before the learned District Judge, Bogura. Eventually, said revision was transferred to the court of learned

Additional District Judge, 2<sup>nd</sup> Court, Bogura for hearing and disposal, who after hearing by the impugned judgment and order dated 15.07.2008 allowed the revision and thereby set aside the judgment and order of the trial court. At this juncture, the petitioners moved this Court by filing this revisional application under Section 115(4) of the Code of Civil Procedure seeking leave to revision and obtained the present Rule and order of stay.

Mr. Md. Belal Hossain, learned Advocate appearing for the petitioners submits that admittedly in the schedule to Sale Deed Nos.566 dated 11.01.1914, 3164 dated 01.12.1916, 3390 dated 14.08.1914, 3392 dated 14.08.1914 and 1348 dated 17.02.1909 khatian numbers and plot numbers have not been mentioned, but the property has been described to the schedule by giving boundary. For proper adjudication of the matter in dispute, the defendants filed an application praying for ascertaining the property by local investigation through court appointing a survey knowing Advocate Commissioner. The trial court allowed the application rightly.

He submits that during pendency of civil revision and absence of any order of stay, the trial court appointed one Md.

Momtazur Rahman a survey knowing Advocate Commissioner who after thorough investigation submitted report on 31.05.2005. The revisional court below without considering the fact that appointment of Advocate Commissioner for ascertaining the property in question is a right process for determination of the dispute between the parties and also failed to take notice that the order passed by the trial court has already been executed by appointing Advocate Commissioner and by submission of report thereto. Hence, the revisional court has committed an error in the decision occasioning failure of justice.

Mr. Md. Shamsur Rahman with Ms. Rina Begum, learned Advocates appearing for the opposite-party No.1 submit that the suit was filed by the opposite party No.1 for a decree of partition of his share in the suit property. The plaintiff is to prove his case independent of the defendants case. In the event of failure of the plaintiff to prove his case the claim will fail, but for a decree of partition in favour of the plaintiff there was no necessity to determine and ascertain the property of the defendants who did not pray for saham.

He finally submits that during pendency of the revision Advocate Commissioner submitted report, as such, the report is not liable to be accepted as the order of appointment of Advocate Commissioner has been set aside by the revisional court, as such, the court below committed no illegality or error in the decision occasioning failure of justice.

Heard the learned Advocates of both the sides, have gone through the revisional application, plaint in suit, application for appointment of Advocate Commissioner, commission report submitted by the Advocate Commissioner and the impugned judgment and order of both the courts below.

Admittedly, the suit was filed by the opposite party No. 1, as plaintiff, for a decree of partition of the suit property. Defendant Nos. 7, 17, 18, 62-67, 77-79 and 92-95 entered into appearance and filed written statement. Out of aforesaid defendants, defendant Nos. 9, 77-79, 95 and 96 filed an application for appointment of a survey knowing Advocate Commissioner to ascertain the khatian and plot numbers covered by 5 sale deeds of the years 1909, 1914 and 1916. The trial court by a short order allowed the application and directed

the applicant to deposit Tk. 800/- as commission fee by its order dated 05.04.2005. The plaintiff in suit being aggrieved by the order preferred Civil Revision No. 39 of 2005. The revisional court after hearing by the judgment and order dated 15.07.2008 allowed the revision and set aside the order of the trial court holding that the suit has been filed by the plaintiff for a decree of partition of his property acquired by way of inheritance and purchase and he is to prove the case by evidence both oral and documentary. In the event of failure of the plaintiff to prove his case the suit will fail, but the defendants in suit has no earthly reason to ascertain the property by appointing Advocate Commissioner where the title of defendants has not been denied by the plaintiff. The revisional court rightly held that the status of the plaintiff and the defendants in a partition suit are same and both the parties can pray for their saham in the same suit, but for ascertaining actual plot and khatian of old deeds Advocate Commissioner is not required to be appointed and survey of the property is not at all needed. Rather, it will create complication among the parties, as such, the order passed by the trial court is liable to be set aside.

I have gone through both the orders of the courts below. It is not disputed that 5 sale deeds of the years 1909, 1914 and 1916 have no khatian numbers and plot numbers. The property covered by those deeds identified in the schedule giving boundary in each deed. The boundary covered which C.S. plots and S.A. plots are required to be ascertained for proper adjudication of the dispute between the parties.

The revisional court though rightly held that the plaintiff is to prove his case, but wrongly observed that for adjudication of the dispute, if the property covered by 5 deeds is ascertained by appointing Advocate Commissioner there will be complication, but failed to assign any reason which are such complications. In the absence of giving any reason for setting aside the order of the trial court I find that the revisional court failed to find that where the sale deeds having no plot and khatian numbers, in the event of allotment of share to the plaintiff or to the defendants there will be more complication in the absence of the khatian numbers and plot numbers.

Therefore, the trial court by allowing application for local investigation of the property committed no illegality at all. Moreover, by this time the court appointed Advocate Commissioner who investigated the property and submitted a report before the trial court on 31.05.2005 as appearing from Annexure-B to the application. Where the order of the trial court has already been executed and acted upon, the revisional court while setting aside the order of the trial court on 15.07.2008 ought to have taken into notice and consideration that the revision has become redundant, but the revisional court failed to find this fact and allowed the revision and as such, it has committed an error of law in the decision occasioning failure of justice.

Taking into consideration the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioners.

In the result, the Rule is made absolute, however, without any order as to costs.



The order of *stay* granted at the time of issuance of the Rule and extended from time to time stands vacated.

The trial court is hereby directed to proceed with hearing of the suit in accordance with law and dispose of the same within a shortest possible time given top most priority.

Communicate a copy of the judgment to the Court concerned at once.

*Helal/ABO*