

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 3546 OF 2010

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Md. Delowar Hossain

--- Defendant-Appellant-Petitioner.

-Versus-

Most. Mofela Khatun died leaving behind her
legal heirs: 1(a)-1(f) and others

--- Opposite Parties.

Mr. Mohiuddin M. A. Kader, Advocate

--- For the Defendant-Appellant-Petitioner.

Mr. Md. Shahadat Tanveer Amin, Advocate

---For the Opposite Parties.

**Heard on: 28.05.2023, 05.06.2023 and
06.06.2023.**

Judgment on: 06.06.2023.

At the instance of the present defendant No. 2 - appellant-petitioner, Md. Delowar Hossain, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party No. 1 to show cause as to why the judgment and decree dated 04.05.2010 complained of in the petition moved in court today should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present opposite party No. 1, Most. Mofela Khatun (now deceased and substituted), as the plaintiff filed the Other Class Suit No. 100 of 2003 before the learned Senior Assistant Judge, Parbotipur, Dinajpur impleading the present petitioner and others for cancellation of the partition deed No. 8255 dated 06.09.1989 which is illegal, fraudulent and not binding upon her. The plaint further contains that some portion of the suit property described in the schedule of the plaint owned by Chhutom Sarder, some portion of the suit property described in the schedule of the plaint owned by Mohammad Ali Sarder and others, some portion was abandoned by Mohir Uddin and some portion of the suit land of the schedule of the plaint inherited by Mohammad Ali Sarder and some portion of these rest property of the schedule land owned by Chhuton Sarder and Most. Mofela Khatun who are the proforma-opposite parties. The plaintiff-opposite party No. 1 further claims that some proforma-plaintiffs purchased land and some portion of land was gotten by inheritance. The said Mohammad Ali Sarder died leaving behind a wife Hafiza Khatun, 3 sons, Md. Haksed Ali, Delowar and Aynul and 3 daughters, Momeja Khatun, Jahera Khatun and Delowara Khatun

inherited the property by way of purchase and by way of inheritance. Some of the above-mentioned owners died leaving behind their legal heirs/successors who inherited the property. Momeja Khatun died leaving behind her husband Maser Ali, son Mahabur, Mamnur Rashid, Mojibor Rahman and daughter Moriom Khatun. Kafil Uddin died leaving behind his son Mozammel Haq @ Chhuton and the only daughter, namely, Most. Mofela Khatun who is the plaintiff. The plaintiff got some portion of the property by way of purchase and got some portion of the property by way of inheritance. The plaintiff got married to defendant No. 1. Mohammad Ali Sarder died leaving behind a wife, 3 sons as the defendants- namely, Haksed Ali Sarder, Delwar and Aymul and 3 daughters- namely, Mofeza, Zahera and Delwara. Mohammad Ali Sarder, the father of the defendants, gifted total land measuring $(58 \text{ decimals} + 43\frac{1}{2} \text{ decimals} = 1.01\frac{1}{2} \text{ acres})$ $1.01\frac{1}{2} \text{ acres}$ of land from the R. S. Dag Nos. 1188 and 1189 to the plaintiff by way of Heba-Bill-Ewaj Deed No. 13957 dated 29.09.1967 and the plaintiff remains in possession for more than 12 decimals without any interruptions. The above land used by the present plaintiff-opposite party No. 1

where included in the Partition Deed No. 8255 dated 06.09.1989 which she was not awarded earlier but later on she could learn through other parties as to the said partition deed and after ensuring on 05.10.2003 regarding the execution of the partition deed the suit for declaration/cancellation was filed.

The suit was contested by the present petitioner along with the other defendants by filing a written statement contending, *inter alia*, that Mohammad Ali Sarder purchased some land of the suit land and also purchased other properties. On the other hand, C. S. Khatian No. 196, 198 and 239 under Mouza-Hamidpur, Police Station-Parbotipur, District- Dinajpur was published in the name of Mohammad Ali Sarder, Mahatab Uddin Sarder, Kofil Uddin Sarder and Abdul Hamid Sarder. Mohammad Ali Sarder purchased the suit land and other properties at various time by various deeds. But Kafil Uddin died leaving behind his son Mozammel Haq @ Chhuton Sarder and his only daughter, namely, Most. Mofela Khaton as the plaintiff-opposite party No. 1. Mozammel Haq @ Chhuton Sarder son of late Kafil Uddin got the record of rights wrongly (instead of after the death of Mohammad Ali Sarder) in the C. S. Khatian No. 11 and subsequently, Mohammad Ali Sarder got the record of rights

in his favour after measures above by taking legal steps through the Miscellaneous Case No. 297 of 1969 vide order dated 01.01.1970. Thereafter, Struck out the name of Mozammel Haq @ Chhoton Sarder and Mohammad Ali Sarder got the record for the land of C. S. Khatian No. 11 alone. As such, the plaintiff had no title by inheritance but the father of the plaintiff, Kofil Uddin, inherited the land by separate Saham and he died leaving behind the plaintiff, Most. Mofela Khatun married defendant No. 1, Md. Hoksed Ali Sarder and he possessed the land of the portion of Kofil Uddin (father-in-law of Md. Haksed Ali Sarder). The plaintiff-opposite party No. 1 did not inherit any land on the property owned by Mohammad Ali Sarder. The said Mohammad Ali Sarder, the father of the defendants did not execute any deed regarding the property in favour of the present plaintiff-opposite party No. 1, as such, the plaintiff was not included in the partition suit, as such, the deed dated 06.09.1989 was executed among the heirs of Mohammad Ali Sarder including the defendant No. 1 which was signed by Md. Haksed Ali Sarder the husband of the plaintiff, Most. Mofela Khatun, thus, all the properties left behind to Mohammad Ali Sarder were inherited after his death but the son of Mohammad Ali Sarder inherited

from his father Mohammad Ali Sarder and he has been made a party in the said partition suit. He died leaving behind his legal heirs and Kafil Uddin died leaving behind his son Mozammel Haq @ chhuton Sarder but the record of rights wrongly in the C. S. Khatian No. 11, therefore, the case filed by the plaintiff.

After considering the evidence provided by the parties before the learned Senior Assistant Judge, Parbotipur, Dinajpur and the learned trial court decreed the suit by his judgment and decree dated 03.01.2006. Being aggrieved the present petitioner along with other defendants preferred the Other Class Appeal No. 23 of 2006 before the learned District Judge, Dinajpur which was subsequently transferred to the learned Joint District Judge, Court No. 3, Dinajpur for hearing who after hearing the parties disallowed the appeal and thereby affirming the judgment and decree of the learned trial court. Being aggrieved the present petitioner as the defendant No. 2 filed this revisional application under section 115(1) of the Code of Civil Procedure and the Rule was issued thereupon.

Mr. Mohiuddin M. A. Kader, the learned Advocate, appearing for the defendant-2-appellante-petitioner submits that the learned appellate court below failed to realize that an appeal

is the continuous process of the suit but the learned appellate court erroneously did not consider the documents submitted by the defendants under Order 41 Rule 27 of the Code of Civil Procedure, as such, committed an error of law resulting in the decision an occasioning failure of justice, therefore, the Rule should be made absolute.

The learned Advocate also submits that both the courts below failed to consider that the partition deed was executed on 06.09.1989 under the signature of the husband of the plaintiff but the plaintiff filed this suit on 12.11.2003 i. e. after 13 years, showing the cause of action on 10.08.2003 and 20.10.2003 which is an unbelievable story that husband of the plaintiff signed the partition deed but wife did not know about the same, as such, the case is not maintainable and barred by limitation, therefore, in any view of the matter the impugned judgment and decree is not sustainable in law, as such, the impugned judgment should be *set aside*.

The present Rule has been opposed by the present opposite party No. 1, Most. Mofela Khatun who is now deceased and substituted by her legal heirs as Opposite Party Nos. 1(a)-1(f).

Mr. Md. Shahadat Tanveer Amin, the learned Advocate, appearing along with the learned Advocate Mr. Md. Abdul Mukit on behalf of the present opposite parties submits that the learned trial court examined all the documents and evidence adduced and produced by the parties and decreed the suit filed by the present plaintiff-opposite party No. 1 (now deceased and substituted) by cancelling the partition deed and the learned appellate court below also examined the documents filed by the parties in favour of their respective cases and disallowed the appeal preferred by the defendant-2 as the petitioner including the other defendants and thereby affirming the judgment and decree passed by the learned trial court but the present defendant-2-petitioner obtained the present Rule by misleading the court, as such, the Rule is liable to be discharged.

The learned Advocate also submits that under Order 41 Rule 27 of the Code of Civil Procedure, the learned appellate court below applied the judicial mind to reject the petition for submitting some additional evidence and the learned appellate court below rightly passed the impugned judgment and decree but the present petitioner did not challenge the said rejection order of submitting additional evidence before the learned

appellate court, therefore, the learned appellate court below passed the order by applying his judicial mind. However, the plaintiff-opposite party No. 1 could prove her case which is the matter of discretion of a court, therefore, disallowed the appeal by affirming the judgment and decree of the learned trial court.

The learned Advocate also submits that both the learned courts below concurrently found that the suit was not barred by the limitation period as the plaint contains that the suit was filed beyond the limitation period which was examined by the learned courts below, as such, the suit was not barred by limitation, therefore, this 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 present petitioner 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 records, it appears to this court that the present plaintiff-opposite party No. 1 filed the title suit by impleading the present petitioner as the defendant-2 and other defendants praying for

cancellation of the partition deed dated 06.09.1989 as she was not included her in the said partition deed dated 06.09.1989.

In this regard, she (plaintiff-opposite party No. 1) claimed that Mohammad Ali Sarder executed a Heba-Bill-Ewaj Deed in favour of her on 29.09.1967 and transferred the certain measurement of land, as such, partition deed which should have been made her a party to any partition deed. On the other hand, the defendant-2-petitioner alone filed this revisional application challenging the concurrent findings of the learned courts below as to the validity of the partition deed. The present petitioner raises a question of the limitation period for filing a suit for declaration/cancellation of partition deed as to why not binding upon the plaintiff.

In this regard, the learned Advocate for the petitioner raised a question and submitted that both the learned courts below failed to apply their judicial mind as to the suit was filed by the plaintiff-opposite party No. 1 after 13 (thirteen) years from the execution of the Heba-Bill-Ewaj deed.

In this regard, I have carefully examined Article 92 of the Limitation Act, 1908 describes the limitation period as 3 (three) years from the date of knowledge of the plaintiff regarding

execution of the deed to cover the limitation period to the plaintiff provided that she was aware of the partition deed, even though, the partition deed was executed on 06.09.1989. The plaintiff adduced and produced evidence as to the limitation period from the date of knowledge on 20.10.2003 and the suit was filed on 12.11.2003. In this regard, the plaint contains that the cause of action for filing the title suit by the present plaintiff has been described in the plaint itself as to the above matter of limitation, therefore, the learned trial court, as well as the learned appellate court below, committed no error of law as to the limitation period described by the plaintiff in the plaint as to the cause of action for filing the suit for cancellation of deed.

The learned trial court came to a decision to decree the suit on the basis of the following findings:

...“Both parties file the copy of the BANTON DEED which are exhibited as 1 and C(1). This shows that the plot Nos. 1188 and 4310 have been included in the partition deed. It is already proven that the plot Nos. 1188 and 4310 belong to the plaintiff since the plaintiff is not a party to this disputed BANTON DEED and since her lands have been illegally included, so, this BANTON DEED needs to be declared illegal. For this issue No. 2 and 3 have jointly

been decided for the plaintiff that the plots of the plaintiff have been illegally included in the partition deed dated 06.09.89 AD by the defendant Nos. 2 to 7 and so, it needs to be declared void and illegal.”...

The learned appellate court below also concurrently found in favour of the present plaintiff-opposite party No. 1 on the basis of the following findings:

...“এইরূপ অবস্থায় উভয়পক্ষের বিজ্ঞ কৌশলীর যুক্তিতর্ক, আপীল-লর মে-মা, মূল মামলার আরজী, জবাব, সাক্ষীগ-ণর সাক্ষ্য, জেরা, প্রদর্শনী চিহ্নিত কাগজাদি পর্যা-লাচনায় দেখা যায় যে, নিম্ন আদালত তর্কিত রায়-ডিক্রি প্রদানে আইনগত ও তথ্যগত কোন ভুল করেন নাই। বন্টননামা Deed এ যদি বাদীর অংশ বা বন্টননামা Deed এ বাদীর সম্পত্তি থাকা স-ত্ত্বও নাম না থাকে তাহলে ঐ বন্টননামা Deed বাদীর উপর বাধ্যকর নয়। আপীল নামঞ্জুরযোগ্য। আপীল মোকদ্দমায় যুক্তিতর্ক শ্রবণকালে আপীলকারী পক্ষের বিজ্ঞ কৌশলী দেওয়ানী কার্যবিধি আইনের অর্ডার ৪১ রুল ২৭ ম-ত দরখাস্ত দিয়া ২ টি দলিল নথি-ত নেওয়ার জন্য ব-লন। কিন্তু এই দলিল দুইটি প্রমা-ণর জন্য কোন ব্যবস্থা নেন নাই। ফ-ল ঐ দলি-লর Foundation সম্প-র্কও স-ন্দ-হর সু-যাগ থাকিয়া যায়। সার্বিক পর্যা-লাচনায় বাদীর আপীল নামঞ্জুরযোগ্য হয়।”...

In view of the above discussions, I consider that the learned appellate court below who passed the impugned judgment and decree by declaring that the partition deed is illegal, fraudulent and not binding upon the plaintiff, thus, concurrently found with the judgment and decree passed by the

learned trial court and thereby committed no error of law by passing the impugned judgment and decree by the learned appellate court below.

In such a situation, I am not inclined to interfere upon the impugned judgment and decree passed by the learned appellate court below, thus, this Rule does not have to be considered any further at this stage.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

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 04.05.2010 passed by the learned Joint District Judge, Court No. 3, Dinajpur in the Other Class Appeal No. 23 of 2006 disallowing the appeal and affirming the judgment and decree dated 31.01.2006 passed by the learned Senior Assistant Judge, Parbotipur, Dinajpur in the Other Class Suit No. 100 of 2003 decreed the suit for a period of 6 (six) months and subsequently the same has been extended from time to time and lastly the same was extended till disposal of this Rule are hereby recalled and vacated.

The impugned judgment and decree dated 04.05.2010 passed by the learned Joint District Judge, Court No. 3, Dinajpur in the Other Class Appeal No. 23 of 2006 disallowing the appeal and thereby affirming the judgment and decree dated 31.01.2006 passed by the learned Senior Assistant Judge, Parbotipur, Dinajpur in the Other Class Suit No. 100 of 2003 decreeing the suit is hereby upheld.

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