Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 413 of 2011

Abdul Wahab being dead his heirs Md. Shahidul Islam

……Petitioner.

-Versus-

Md. Saleh Ahmed and others

…….Opposite parties.

Mr. Md. Faruque Ahmed, Advocate

…….For the petitioner.

Mr. Mridul Datta, Advocate

.....For the opposite parties.

Heard and judgment on 19th June, 2023.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 29.07.2010 passed by the Additional District Judge, 5th Court, Sylhet in Title Suit No. 330 of 2001 affirming those dated 30.9.2001 passed by the Senior Assistant Judge, Balagonj, Sylhet

in Title Suit No. 31 of 1993 dismissing the suit should not be set aside.

Petitioner and his brother Abdul Aziz as plaintiffs instituted Title Suit No. 267 of 1983 before the Court of Assistant Judge against the opposite parties for declaration of title.

Plaint case in short, inter alia, is that the schedule I and II lands were owned by Banowari Lal Das and others. From them one Prafulla Chandra Das and wife Panchi Rani Das purchased the schedule lands by a registered kabala dated 15th Magh, 1345 B.S. and got the possession of the schedule lands. After purchase Profulla Chandra and his wife constructed houses on the schedule lands by improving the land stated residing there with their family peacefully till the scheduled lands were sold to the plaintiffs and their brother Abdur Rahman at a consideration of Tk. 8,00,000/- by registered kabala dated 29th of Ashar, 1359 B.S. i.e. on 13.07.52 A.D. followed by delivery of possession of the same. During the last survey and settlement operation, the schedule lands were recorded in the name of the plaintiffs and Abdur Rahman in the settlement records. The plaintiffs and Abdur Rahman had more other properties both in the town and the

village and for convenience of possession and enjoyment by a mutual exchange the plaintiff got the suit land exclusively and a document of exchange was duly executed and registered in between the plaintiffs and Abdur Rahman on 18.05.77. Thereafter the plaintiffs constructed a separate pucca building along with other improvements, one of there is situated on the southern half and the other on the northern half of the land; plaintiff no. 1 got the building of the southern half. The plaintiffs, since purchase are possessing the schedule land peacefully and continuously since 1345 B.S. to the knowledge of all including the defendants and their predecessor and they acquired an indefeasible right, title and interest in the suit land both by purchase and adverse possession. On the western side of the schedule land and house a big tank, known as "Ramudighi" is situated in plot no. 3672 the water of which is used by the local people for generations together as of their right. Hazi A. Bari, father of the defendant nos. 1-8 recently purchased the aforesaid tank in the name of the defendants nos.1-8, and most illegally and collusively mutated their names in the R.O.R and after purchase Abdul Bari started creating impedimenta in peaceful enjoyment of the tank by the local people and also

started reducing the breadth of the brain for which the local people were compelled to file T.S. No. 156 of 1983 in the 1st Court of Sadar Munsif, Sylhet which is pending for decision. Due to this T. S. No. 156 of 1983 A. Bari in connection of with the Government Officials managed to serve a notice upon the plaintiffs for survey of S.S. plot no. 3672 including schedule II claiming the schedule II land as a part and parcel of plot no. 3672 on 10.07.83. This notice was made illegally by the government officials (govt. defendants) on receipt of this notice the plaintiff's enquired into the Tahshil Office on 14.07.83 and came to know that the schedule II land has been wrongfully and illegally recorded as part of S.S plot no. 3672. In fact schedule II land was is never a part of plot no. 3672, rather it was always in possession of the plaintiffs and their predecessor in interest as appertaining to plot no. 3670 by purchase for over 60 years. The defendant nos. 1-8 or their predecessor in interest never held and possessed the schedule II and as part of plot no. 3672. There is 2 pucca ghat situated toward west of the schedule II land constructed by the predecessor in interest of the plaintiffs for using water of the tank recorded as plot no. 3672 and demarcated the schedule II land by fencing

barbed wire. Because of illegal and collusive R.O.R prepared by the settlement staffs in respect of the schedule II land as part of plot no. 3672, the defendant nos. 1-8 and Hazi A. Bari have been illegally claiming the schedule II land as part of plot no. 3672 without any right, title or possession; and such wrong R.O.R has cast a cloud on the clear title of plaintiff on schedule II land.

Defendant Nos. 3-11 contested the suit by filing written statement denying the plaint case, alleging, inter alia, that the existing Dighi Known as Ramerdighi comprised of the land S.S. plot nos. 3669, 3670, 3671, 3672, 3683, 3638 & 3839 and total area of it was 7 kedars 2 poas ¾ jaisthas. The dihgi belonged to Banowari Lal Das and others. The plaintiffs vender Profulla purchased from the aforesaid owners an area of 9000 sq. cubits (east to west 100 cubits & north to 90 cubits) in the north eastern portion of the dighi on a consideration of Tk. 3,000/- by a registered kabala of 21.01.1939 without any cash consideration. As per terms of the kabala Prafulla Chandra was to spend the money in filling up the eastern portion of the dighi earth dug from the western portion and if necessary by carrying earth from elsewhere and in case the said sum of Tk. 3,000/- did not cover the

expenses Profulla Chandra Das was to bear the additional expenses. The area of the dighi to be filled up by Profulla measured 90 cubits from east to west and 140 cubits from north to south. Profulla drained out water of the dighi and with earth dug from the western portion of the original dighi filled up the eastern portion as terms of the kabala, i.e. area of 100 cubits east to west 90 cubits north to south in the north eastern portion of the dighi and an area of 140 cubits north of the land purchased by him. Profulla constructed a number of hut on the aforesaid land purchased by him and possessed through baratia tenants. After easter portion, the owners decided to fill up the northern portion of the dighi to the west of the land sold to Profulla. After filling up of area of about 90 cubits north to south and about 6 cubits east to west rain set in and the work could not be proceeded with and the plan of further filing up was abandoned. The owners planted trees on the said filled up land which in the land of schedule II and were in possession there. Profulla Das constructed house on the procured land but never resided there. He was given the license for user of water and as such his tenants were also allowed to use the water of the dighi. Profulla was not owner of schedule II and

that land is not a portion of schedule I land. During the survey operation, the plaintiffs were physically present in the locality and got their land recorded in plot no. 3670. The plaintiffs constructed a pucca wall east to west, along the southern boundary of their land which is still in existence. This wall ends on the south eastern corner of the schedule II land. They also constructed a motor garage on the south western corner of their land and the garage is also in existence. The land of Profulla Das did not extend upto the water edge of the dighi, but lay about 6 cubits to the east of water edge, i.e. the east of schedule II land. The plaintiffs in collusion with Profulla fraudulently described in the kabala the western boundary of the land as the eastern water edge of Ramerdighi. This wrong and fraudulent boundary description did not and could not vest any title on the plaintiffs and their brother A. Rahman in schedule land. The heirs of the original owners i.e. Banwari Lal Das and others sold the Ramerdighi i.e. S.S. plot no. 3672 to defendant nos. 1-8 and 10 by a number of registered kabalas in 1979 on proper consideration. The dighi consists S.S. plot no. 3672 which also includes schedule II land. After purchase the defendants converted the dighi into a fishery. The house of the

defendant no. 9, father of defendant nos. 1-8 is situated on S.S plot no. 3671/3839. The north eastern portion of the dighi to the west of schedule II land is not easily visible from the defendants homestead which was a reason for easy stealing of fish from the dighi by miscreants. To obstruct such theft defendants put a barbed wire fencing to the west of the schedule II land in 1980. The defendants wanted to place a similar barbed wire fencing along the western and northern boundaries of schedule II land. The plaintiffs laid false claim to the land on the plea that it was a portion of their land of plot no. 3670 and opposed putting the fencing. The defendants with a view to avoid physical clash abstained from doing so, but the plaintiffs placed a C.I sheet fencing along the northern boundary of schedule II land closing the entrance to the land from the northern path. To put an end to the dispute defendant no. 9 filed a petition to the S.D.O. Sylhet in May, 1983 for demarcation of the boundary between plots 3670 and 3672. The plaintiff no. 2 filed an objection against the demarcation of boundary. S.D.O. fixed 15.08.83 for hearing the objection and issued notices accordingly plaintiffs with the malafide motive to prevent demarcation filed this suit and got the

demarcation matter stayed. The plaintiffs wanted but failed to purchase the dighi due to defendants higher price offer plaintiffs filed petition to the Martial Law Authorities and others against the defendants on a false plea that sale price of the dighi was under valued resulting loss of the government revenue in stamp. A.D.C. (revenue) arranged an enquiry into the matter by the District Kanungo, who after through examinations found that the price of the dighi was marked value and therefore the charge was dropped. The eastern boundary, Sylhet Municipality extended the road by 13 feet to the west covering the eastern 3 feet of the plaintiffs land in 1951. There was a pillar in the south eastern corner of the plaintiff land to the west of the original Municipal road which has gone under the road during the extension work. The plaintiffs to harass the defendants have got a suit being T.S. No. 156/82 in the 1st Court of Munsif, filed by their henchmen Awlad Ali and others claiming easement right of user of water from the dighi, making other false allegations against the defendant. The suit is pending. Schedule II land never belonged to the plaintiffs venders and the plaintiffs acquired no title therein. Their vendor never possessed the land and the plaintiffs has neither title nor possession

in the same. Therefore the whole suit of the plaintiffs is false, hence it is liable to be dismissed. Defendant no. 12 also filed a W.S and denied plaintiffs case. The claim of defendant no. 12 in short is that no land of khatian no. 2435 is included in the vested property list, and schedule II land is a part of plaintiffs homestead within plot no. 3670, even if it is recorded as a part of the plot no. 3672. This defendant also claim that, this suit is liable to be dismissed.

By the judgment and decree dated 30.09.2001 after getting the suit for hearing on transfer and renumbered as Title Suit No. 31 of 1993 dismissed the suit on contest.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 330 of 2001 before the Court of District Judge, Sylhet, which was heard on transfer by the Additional District Judge, 5th Court, Sylhet. Who by the impugned judgment and decree dated 29.07.2010 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant rule.

Mr. Md. Faruque Ahmed, the learned advocate appearing for the petitioner drawing my attention to an application filed by the defendants respondents in the appeal on 25.12.2002 submits that defendant respondent by way of admission admitted the claim of the plaintiffs accordingly the learned appellate court ought to have decreed the suit on admission as per Order 12 Rule 6 of the Code of Civil Procedure but the appellate court neither disposed of the said application nor considered the same and dismissed the suit after dismissal of the appeal illegally thereby impugned judgment suffers from error of law resulting an error in the decision occasioning failure of justice. He further submits that plaintiff has got the instant land in the suit property and they have possession thereon and also paying rents to the government as well as in support of his contention he cited a number of documents, which has neither been considered by the trial court nor been accepted as evidence by the appellate court. In the premises the judgment passed by the court below is suffering from non reading of the evidence, which is liable to be set aside.

Mr. Mridul Datta, the learned Advocate appearing for the opposite party in reply to the submission made by the learned

advocate for the petitioner submits that since the documents as been placed by the plaintiff petitioner to have shown lying on the record not been considered by the court below as well as not been proved in court, in order have to proper judgment and to consider whether there was at all any admission to the suit as well as to resolve all the queries of the petitioner, it is a fit case to send back on remand to the appellate court.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

From the record it appears that an application was filed by the defendants by way of attestation on 25.12.2012 admitting the claim of the plaintiffs as well as for making the suit decree in allowing the appeal in favour of the plaintiffs. The learned Judge of the appellate court recorded a note to keep the application with the record. But from the order sheet nowhere it appears that the learned Additional District Judge while deciding the appeal at all has considered the said application, although under Order XII Rule 6 of the Code of Civil Procedure the appellate court to whom the application was filed is under an obligation for disposal of the application, keeping aside all the evidences and records. But the

appellate court without applying his judicial mind as well as considering the legal position of the case, in not deciding the same thereby committed error of law. In the case of A Elahee &Co. – Vs- M. M. Aziz and others reported in 44 DLR 131 a judgment passed on allowing the application for admission under Order XII Rule 6 of the Code of Civil Procedure was challenged and their lordships while ordering the decree on admission was passed in accordance with law causing no error or illegality from the court to interfere while found that:

> "11. In the instant case, the point to be decided is whether the provision of Order 12, rule 6 of the Code of Civil Procedure would be application in the facts and circumstances of the case for the Court to pass a decree in part on admission on pleadings of the parties in a suit. Order 12, rule 6 provided that admission made by the parties is to be admission made in pleadings or otherwise. Order 6, rule 1 of the Code of Civil Procedure defines pleading to be the plaint or written statement. Written

> statement, is not the same thing as written objection because Order 6 rule 1 does not include written objection to be a pleading. Written objection filed in an interlocutory matter during the proceeding would not be a part of the pleadings of the parties in the suit as such but we are of the view that if there is an admission in the said written objection it would certainly be regarded as an admission "otherwise" as appearing in rule 6.

In the case of Zafela Begum and others – Vs- Atikulla and others reported in 16 BLC (AD) 46 their lordships further held that:

> "the admission itself being proof, no other proof is necessary"

These are the legal position so far the application of admission is concern. However under Order XII Rule 6 of the Code of Civil Procedure court is of the obligation to dispose of the application for admission without determining any other question

between the parties. In the instant case, the appellate court although found an admission petition was filed and court is under obligation under Order XII Rule 6 of the Code of Civil Procedure to dispose of the application in accordance with law. But the impugned judgment shows that the appellate court did not at all consider into the above legal position rather he has decided the appeal bypassing the legal position.

In that view of the matter, I am accepting the submission made by the learned advocate for the opposite party that the said suit to send back on remand to decide the matter afresh, having legal anxious, legal position and legal infirmity. The impugned judgment is thus hereby set aside.

I find merits in this rule.

In the result, the rule is made absolute. The judgment and decree passed by the appellate court is hereby set aside and the appellate court is hereby directed to decide the matter in the light of the above observation expeditiously as early as possible.

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

Send down the L.C.R along with the judgment at once.