

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.957 of 2018.

In the matter of:

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

And

Md. Abu Jafar

...Petitioner

-Versus-

Munshi Khalilur Rahman and
others

...opposite parties

Mr. Md. Zahedul Bari, Advocate

...For the petitioner

Mr. Md. Hamidur Rahman, Advocate with
Ms. Aklima Parven, Advocate

...For the opposite party Nos.1-2

Heard on: 20.04.2025

Judgment on: 29.04.2025.

This Rule was issued calling upon the opposite party Nos.1-2 to show cause as to why the judgment and decree dated 12.02.2018 passed by the learned District Judge, Kuhtia in Title Appeal No.122 of 2017 disallowing the appeal and affirming the judgment and decree dated 16.07.2017 passed by the learned Assistant Judge, Sadar Court, Kushtia in Title Suit No.465 of 2012 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short that the opposite party as plaintiffs instituted Title suit No.465 of 2012 for partition. Defendant Nos.1-3, 9-10 and 11-12 contested above suit by filling separate written statements.

Above suit was fixed for preemptory hearing and P.W.1 was examined and cross examined but the defendants did not appear to contest above suit and the same was decreed on 27.01.2015 in preliminary form. Defendant No.12 for setting aside above ex-parte judgment and decree filed a miscellaneous case under Order 9 Rule 13(A) of the Code of Civil Procedure on 27.01.2015 which was dismissed for default on 23.05.2017.

On an application filed by the plaintiff the court appointed an advocate commissioner for partition of above land who submitted a report on 10.05.2015 and on the basis of above report the trial court passed a final decree on 16.07.2017. The defendant did not file any objection against above report of the advocate commissioner.

Being aggrieved by and dissatisfied with above judgment and final decree defendant No.12 preferred Civil Appeal No.112 of 2017 to the District Judge, Kushtia who dismissed above

appeal and affirmed the judgment and decree of the trial court.

Being aggrieved by and dissatisfied with above judgment and decree of the court of appeal below above appellant as petitioner moved to this court and obtained this rule.

Mr. Md. Zahedul Bari learned Advocate for the petitioner submits that the impugned preliminary judgment and decree passed in above suit has seriously affected the title and interest of the petitioner and he filed a miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure for setting aside above ex-parte preliminary decree but unfortunately the same was dismissed for default. The petitioner could not file an objection against the report of the advocate commissioner submitted on 10.05.2015 and on the basis of above report above preliminary decree was made final without giving the petitioner an opportunity of being heard. The learned District Judge utterly failed to appreciate above facts and circumstances of the case and materials on record and most illegally dismissed the appeal and affirmed the erroneous final decree of the trial court which is not tenable in law.

Mr. Md. Hamidur Rahman learned Advocate for the opposite party No.1-2 submits that Section 97 of the Code of Civil Procedure prohibits disputing the correctness of the preliminary decree by preferring an appeal against the final decree in a suit for partition. The petitioner was present and contested the suit by filling written statement but subsequently he deliberately abandoned the suit and the same was rightly decreed ex-parte in preliminary form. The petitioner was given enough opportunity to file an objection against the report of the Advocate Commissioner but the petitioner did not submit any objection and the final decree was rightly drawn. On consideration of above materials on record the learned District Judge has rightly dismissed the appeal and affirmed the judgment and decree of the trial court which calls for no interference.

I have considered the submissions of the learned Advocates for respective parties and carefully examined all materials on record.

It is admitted that the opposite party Nos.1-2 as plaintiffs instituted Title Suit No.465 of 2012 for partition and the petitioner who was defendant No.12 contested above suit by filling

written statement but on the date of further hearing of above suit above defendant was found absent and the suit was decreed ex-parte in a preliminary form and above defendant as petitioner filed a miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure for setting aside above ex-parte preliminary decree which was dismissed for default. It is also admitted that the Advocate Commissioner submitted a report on 10.05.2015 on the partition of above property but no defendant including the petitioner filed any objection against above report and above preliminary decree was made final on the basis of above Advocate Commissioner report.

The petitioner did not dispute the preliminary decree by preferring an appeal and he filed an appeal against above final decree. A defendant can challenge the legality and propriety of a final decree of a partition suit and dispute the partition of above property as proposed by the Advocate Commissioner report in the preliminary decree. But in an appeal against final decree the appellant cannot dispute the correctness and legality of the quantum of share allocated by the trial court to the plaintiff and

other defendants. Since the defendant did not prefer any appeal against the preliminary decree he was debarred from disputing the correctness of the preliminary decree in an appeal filed against the final decree. But it turns out from the memo of appeal that the petitioner alleged that the plaintiff had lawful title in 16.7 decimal land of plot No.4053 but the learned judge most illegally allocated separate sahum for the plaintiff for 4.692 decimal which was unlawful.

In above view of the facts and circumstances of the case and evidence on record I am unable to find any illegality or irregularity in the impugned judgment and decree passed by the learned District Judge nor I find any substance in this civil revisional application under Section 115(1) of the Code of Civil Procedure and the rule issued in this connection liable to be discharged.

In the result, the Rule is discharged.

Let the lower Court's record along with a copy of this judgment be transmitted down to the Court concerned at once.