

District- Cox's Bazar

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr Justice Md Atoar Rahman

Civil Revision No 676 of 2019

Alkuma Begum

... defendant-petitioner

- versus-

Foyez Ullah and others

...plaintiff-opposite parties

Mr Rahat Imran Hossain, Advocate

... for the defendant-petitioner

Mr Md Kamrul Alam (Kamal), Advocate

... for the plaintiff-opposite parties

**Heard on: 06.12.2023, 17.12.2023 and
22.01.2024**

Judgment on: 11.02.2024

This Rule was issued by leave on an application under section 115(4) of the Code of Civil Procedure, 1908 calling upon the opposite parties No 1 to 9 to show cause as to why the order dated 07.02.2019 passed by the learned District Judge, Cox's Bazar in Civil Revision No 39 of 2018 affirming the order No 94 dated 01.07.2018 passed by the learned Assistant Judge, Ukhiya, Cox's Bazar rejecting the application under Order XXI rule 29 and section 151 of the Code of Civil Procedure in the Other Class Suit No 46 of 1997 should not be set aside and/or passed such other or further orders as to this court may seem fit and proper.

At the time of issuance of the Rule further proceeding of the Execution Case pending before the learned Assistant Judge, Ukhiya, Cox's Bazar, so far as it relates to the share of the defendant No 15-petitioner, was stayed.

The short facts for the purpose of disposal of the Rule are that one Moulana Nurul Alam, father of the opposite parties No 1 to 9, as plaintiff filed Other Class Suit No 46 of 1997 against Yeakub Ali, father of the petitioner Alkuma Begum praying for declaration of title and partition in respect of 00.10 acres of land in the Court of Assistant Judge, Ukhiya, Cox's Bazar. During pendency of the suit the present petitioner Alkuma Begum was added as defendant No 15 in the suit vide order No 21 dated 16.08.1998; but her name was not inserted in the plaint. The suit was decreed in preliminary form on 18.05.1999 on contest against the contesting defendants and ex parte against present petitioner Alkuma Begum. The contesting defendants filed Other Appeal No 107 of 1999 against the above judgment and decree which was dismissed for none compliance of the order of the court vide its order dated 30.04.2009. Thereafter an application for restoration was filed, but the same was rejected on 22.06.2009 and the said order of rejection was not challenged. Thereafter the plaintiff decree holder filed Execution Case No 01 of 2010 for execution of decree and one Mr Md Sirajullah was appointed as an Advocate commissioner who on 05.01.2011 submitted his report which was ultimately accepted by the

executing court on 10.05.2011 and final decree was made on 26.05.2011 treating the commissioner's report as part of the decree.

Subsequently the present petitioner filed Miscellaneous Case No 12 of 2013 under Order IX rule 13 of the Code of Civil Procedure along with an application under Order XXI rule 29 of the Code of Civil Procedure for staying further proceedings of the execution case. The order of stay was passed on 12.09.2013 and the miscellaneous case was disallowed by the trial court on 25.09.2014 and order of stay was vacated by the same judgment and order. Against which Miscellaneous Appeal No 35 of 2014 was filed by the present petitioner that was heard by the learned Additional District Judge, Cox's Bazar who allowed the miscellaneous appeal in part and upheld the vacating order of stay having directed the executing court to continue execution proceeding accept saham of the present petitioner by his judgment and order dated 24.01.2018. The present petitioner did not challenge the said judgment and order dated 24.01.2018 and she having filed written statement in the original suit filed an application on 21.03.2018 before the executing court praying for stay all further proceedings of Execution Case No 01 of 2010. The learned Senior Assistant Judge on 01.07.2018 rejected the prayer for stay by her judgment and order dated 01.07.2018 against which the present petitioner filed a civil revision being Civil Revision No 39 of 2018 before the learned District Judge, Cox's Bazar under

section 115(2) of the Code of Civil Procedure who was pleased to disallow the same by his judgment and order dated 07.02.2019.

Being aggrieved by and dissatisfied with the above judgment and order dated 07.02.2019 the present petitioner moved before this court with an application under section 115(4) of the Code of Civil Procedure and obtained the present Rule by leave and order of stay.

Mr Rahat Imran Hossain, the learned Advocate appearing on behalf of the petitioner has submitted that admittedly the present petitioner is a co-sharer in the suit land who was added as defendant and, as such, no decree can be executed in part without determining her saham. Thus, the impugned judgments and orders of the courts below were passed having committed an error of law resulting in an error in the decisions occasioning failure of justice and accordingly, the Rule deserves to be made absolute.

Mr Md Kamrul Alam (Kamal), the learned Advocate, appearing on behalf of the opposite parties No 1-9 has submitted that admittedly Yeakub Ali Chowkidar transferred 00.10 acres of land in favour of the plaintiff, Nurul Alam. After such sale Yeakub Ali remained 00.07 acres of land in the eastern side of the Plot No 608 and after his death his six sons and two daughters including the present petitioner (defendants) inherited the same. The lands of the plaintiffs and defendants are divided by betel nut trees.

He has further submitted that the Advocate Commissioner at the time of holding investigation prepared a sketch map of the disputed land and the suit Plot No 608 was demarcated in 3 colors. Thus, the portion of land of the plaintiff and defendants are different which is appeared from the findings and observation made by the trial court. Learned advocate has finally submitted that the learned Additional District Judge while allowing the Miscellaneous Appeal No 35 of 2014 upheld the vacating order of the stay passed by the trial court directing the executing court to continue execution proceeding accept saham of the present petitioner which was not challenged and since the above judgment and order has not been challenged, the learned judge of the executing court or trial court was not in a position to allow the application for staying all further proceedings of the entire execution case as prayed by the present petitioner on 21.03.2018 and, as such, the learned Senior Assistant Judge rightly and perfectly rejected the prayer of the present petitioner and the learned District Judge did not commit any error of law in rejecting the civil revision by the impugned judgment and order and accordingly, the Rule is liable to be discharged.

I have heard the submissions made by the learned Advocates for both the sides and perused the record along with the impugned judgment and order and other connected papers.

It appears that the learned Additional District Judge, Cox's Bazar allowed the Miscellaneous Appeal No 35 of 2014 by his judgment and

order dated 24.01.2018 and at the same order upheld the vacating order in respect of staying all further proceedings of the Execution Case No 01 of 2010 in the following manner:

“আদেশ হলো যে,

এই মিছ আপীল মোকদ্দমাটি মূল প্রতিপক্ষের বিরুদ্ধে দোতরফা সূত্রে অন্যান্য প্রতিপক্ষের বিরুদ্ধে একতরফা সূত্রে মঞ্জুর করা হলো। এতদ্বারা নিম্ন আদালতের গত ২৫/০৯/২০১৪ইং তারিখের মিছ ১২/২০১৩ সংক্রান্ত প্রদত্ত আদেশ রদ রহিত করা হলো। জারী মোকদ্দমা ০১/২০১০ এর অত্র প্রার্থীকের স্বত্বের অংশের জারী কার্যক্রম স্থগিত রেখে অন্যান্য অংশে জারী কার্যক্রম পরিচালনার আদেশ সংশোধিত আকারে বহাল রাখা হলো।”

It transpires that the above judgment and order has not been challenged by the present petitioner. Rather on the basis of the above judgment and order passed in the Miscellaneous Appeal No 35 of 2014, the present petitioner as defendant No 15 is contesting the original suit by filing written statement and ultimately the entire judgment and order including the second part of the ordering portion passed in the Miscellaneous Appeal No 35 of 2014 became final. Thus, learned Assistant Judge was not in a position to allow the application for staying all further proceedings of the entire Execution Case No 1 of 2010 as prayed by the present petitioner on 21.03.2018. As such, learned Senior Assistant Judge rightly and perfectly rejected the prayer of the petitioner by her judgment and order dated 01.07.2018 and the learned District Judge, Cox’s Bazar also did not commit any error of law resulting in an error in the decision occasioning failure of justice in

disallowing the Civil Revision No 39 of 2018 by the impugned judgment and order dated 07.02.2019.

In view of the above discussions, I do not find any merit in the Rule and, as such, the same is liable to be discharged.

In the result, the Rule is discharged without any order as to cost.

The impugned Judgment and order dated 07.02.2019 passed by the learned District Judge, Cox's Bazar in Civil Revision No 39 of 2018 affirming the order dated 01.07.2018 passed by the learned Senior Assistant Judge, Ukhiya, Cox's Bazar rejecting the application under Order XXI rule 29 of the Code of Civil Procedure is hereby affirmed and order of stay granted at the issuance of the Rule is also vacated.

Let a copy of this judgment be transmitted at once.