

Present:

***MR. JUSTICE S.M. EMDADUL HOQUE***

CIVIL REVISION NO. 246 OF 2019.

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Omar Faruk and others.

...Plaintiff-appellant-petitioners.

-Versus –

Government of Bangladesh and others.

...Defendant- respondent-opposite parties.

Mr. Moteen Uddin Anwar, Advocate, with

Mr. Ali Akbar Rigan, Advocate

..... For the petitioners.

Mr. Md. Shahidul Islam, Advocate

..... For opposite parties.

**Heard on: 14.01.2024, 15.01.2024 and Judgment on 29.01.2024.**

On an application of the petitioners Omar Faruk and others under section 115 (1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party Nos. 1 and 8 to show cause as to why the impugned judgment and order dated 27.11.2018 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Cox's Bazar, in Other Appeal No. 124 of 2015 disallowing the application for amendment of the plaint and for recalling the P.W.1 and rejecting the application for cancelling the local investigation report filed by the appellant petitioners should not be set aside and/or such other or further order or orders passed as to this court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the plaintiff instituted Title Suit No. 15 of 2005 renumbered as Other Class Suit No. 2036 of 2014 before the Assistant Judge, Kutubdia, Cox's Bazar for declaration of title, confirmation of possession and for a decree of permanent injunction in respect of the schedule land of the plaintiff.

The suit was contested by the defendants by filing written statements denying all the material assertions of the plaintiff.

The trial court after hearing the parties and considering the evidence on record dismissed the suit by its judgment and decree dated 12.08.2015.

Against the said judgment and decree of the trial court the plaintiff petitioners preferred Other Class Appeal No. 124 of 2015 before the learned District Judge, Cox's Bazar. The appeal was sent to the learned Joint District Judge, 1<sup>st</sup> Court, Cox's Bazar for disposal.

During the pendency of the appeal the defendant respondent opposite parties filed an application for local investigation. The said application was allowed on 22.07.2018 and an Advocate commission was appointed.

Thereafter the petitioners filed three applications; one is for recalling the order of appointment of Advocate Commission dated 22.07.2018, the another application for amendment of the plaint under order VI Rule 17 read with section 151 of the code civil procedure and another application for recalling the P.W.1.

The appellate court after hearing the parties and considering the facts and circumstances of the case rejecting all the applications by its judgment and order dated 27.11.2018.

Being aggrieved by and dissatisfied with the impugned judgment and order of the appellate court the plaintiff petitioners filed this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the Rule.

At the time of hearing of the Rule the learned Advocate of the petitioners filed supplementary affidavit annexing some material documents which are on record though the record is also available before this court.

Mr. Md. Shahidul Islam, the learned Advocate enter appeared on behalf of the opposite party No.5 through vokatnama to oppose the Rule and Mr. Abu Naser Swapon, the learned Assistant Attorney General represented on behalf of the opposite party Nos. 1-4.

Mr. Moteen Uddin Anwar, the learned Advocate along with Mr. Ali Akbar Rigan, Advocate appearing on behalf of the petitioners submits that the petitioners filed an application for amendment of the plaint as well as recalling the P.W.1 to adduce some documents and to prove the same as per amendment.

He submits that at the trial stage the defendant side sought for local investigation which was also allowed on 18.04.2013 but subsequently against which the plaintiff petitioner filed Civil Revision No. 18 of 2013 and

the said revisional application was allowed on 03.10.2013 but against the said order the defendant opposite party did not take any step thus he further submits that since the matter of local investigation has already been disposed of at the trial stage and since the defendant did not take any further step against the same so, at the appellate stage the defendant side is not permitted to file the same application for local investigation.

The learned Advocate submits that the defendant opposite parties filed application for local investigation in respect of 2.18 acres of land whereas the plaintiff claimed 1.16 acres of land and submits that specific boundary has been mentioned in the plaint and in such a case local investigation for 2.18 acres of land if allowed the petitioner should be prejudiced.

He further submits that at the appellate stage the petitioner filed application for amendment of the plaint stating the detail facts specially the two materials; one is registered deed being No. 565 dated 04.09.1934 and also a sale certificate dated 17.10.1934 and in the application the petitioner specifically mentioned that he was an old man of 80 years and thus could not understand the facts and could not produced the said materials before the trial court. He further submits that since both are the certified copy of the registered deed and the sale certificate of the year 1934 in such a case the said materials should be considered and by which the nature and character of the suit has not been changed and in such a case the prayer for recalling the P.W.1 is also necessary to produce the

said documents. He further submits that if the amendment application is allowed the defendant has scope to file additional written statement and also cross examine the P.W.1 and in such a case the defendant will not prejudice. He prayed for making the Rule absolute.

On the contrary Mr. Md. Shahidul Islam, the learned Advocate appearing on behalf of the defendant opposite party submits that admittedly the defendant side filed an application for local investigation at the trial stage and which was allowed on 18.02.2013 but against which the plaintiff side filed revisional application being Civil Revision No. 18 of 2013 and the said order was set-aside by the revisional court on 03.10.2013 on the ground that the impugned order is a non-specking order and as such no bar to file a fresh application for local investigation. He further submits that though the said order has not been challenged but there is no bar to file application under Order XXVI Rule 9 of the code of civil procedure for fresh local investigation.

The learned Assistant Attorney General submits that the Government also acquired .73 acres of land out of 4.63 acres in such a case the local investigation is necessary.

I have heard the learned Advocates of both the sides, perused the impugned judgment and the order of the courts below and the papers and documents as available on the record.

By the impugned judgment the appellate court disposed of three applications, one is for amendment of the plaint under Order VI Rule 17 of

the code of civil procedure and for recalling the P.W.1 if the amendment application is allowed to submit and prove the documents as mentioned in the amendment application.

It appears that the plaintiff filed application for amendment of pleading stated some facts that the predecessor of the plaintiff obtained registered kabala deed No. 656 dated 04.09.1934 and also obtained sale certificate dated 17.10.1934. In support of the same the plaintiff petitioner submitted the certified copy of the said documents and claimed that the plaintiff as an old man of 80 years and illiterate and could not produce the said documents at the trial stage.

We have considered the provision of law and the application. In application the plaintiff side wants to produce two documents of his title which was left out at the time of trial and the plaintiff explained the said facts in the application why he could not produce the same at the trial stage. On perusal of the application, it appears that by the proposed amendment the nature and character has not been changed whereas the appellate court without considering the said facts rejected the application. It is my view that the application filed by the petitioner is nothing but to produce some documents and for proper disposal of the case the same may be allowed and in such a case it requires to re-call the P.W.1 to produce the said documents. Furthermore if the amendment is allowed the defendant has scope to file additional written statement and also

could cross examine the P.W.1 so no question for prejudice of the defendant.

Next question is that the defendant side filed application for local investigation under Order XXVI Rule 9 of the code of civil procedure in respect of suit land of plot No. 141 and total land is 2.18 acres and wherein the Eidgah, Mosque, Madrasah, Graveyard, Pond and dwelling hats etc. situated in the said plot No. 141.

It appears that the total property is 4.63 acres out of which the plaintiff claimed 1.16 acres of land in plot No. 141 of khatian No. 154 and in the said Khatian the total land is 2.45 acres.

The Order XXVI Rule 9 of the code of civil procedure provides that:  
*“In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount or any mense profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court.”*

This provision is for the purpose of elucidating any matter in dispute if the court thinks fit then may direct to make such investigation.

It appears that earlier in the trial court the defendant side also filed application for local investigation which was allowed against which the plaintiff side filed Civil Revision No. 18 of 2013 and the said revisional application was allowed and the order of the trial court was set-aside by

the Hon'ble court on 03.10.2013 but against which no step has been taken by the defendant side.

The trial court after hearing the parties and considering the evidence on record dismissed the suit. Against which the plaintiff as appellant preferred Title Appeal No. 124 of 2015 and at the appellate stage the defendant respondent filed application for local investigation almost on the same prayer and which was allowed and the plaintiff petitioner filed application for recalling the said order which was also rejected by the impugned order. Since the suit land of plot No. 141 is 2.18 acres and the plaintiff side claimed only 1.16 acres of land with giving specific boundaries. It appears that the Government has also acquired .73 acres of land from plot No. 141 and 142.

Considering the provision of local investigation provides under Order XXVI Rule 9 of the code of civil procedure there is no bar to file application for fresh local investigation.

In the instant case the plaintiff claimed 1.16 acres of land in plot No. 141 and the Government acquire .73 acres of land from plot No. 141 and 142 and the defendant respondent side filed application for local investigation for entire 2.18 acres of land of plot No. 141 in such a case for considering the entire material facts of the case and for resolving all the dispute of the parties the appellate court since the court of original jurisdiction provided under section 107 of the code of civil procedure, may allow the application for local investigation to ascertain all the dispute.



However, the plaintiff since claimed 1.16 acres of land out of 4.63 acres specially only in plot No. 141 and the defendant side filed application for local investigation for ascertaining the structure and others in respect of 2.18 acres of land in such a case the local investigation if allow the Advocate Commission should consider the facts whether the structures as mentioned in the application covered in how many portion of the land and the claimed land of the plaintiff also should be considered the specific portion of land such as Eidgah, Mosque, Madrasah, Graveyard, Pond and dwelling hats etc also should be demarcated.

Considering the facts and circumstances of the case, the impugned order of the appellate court is set-aside so far as relates to the amendment of the pleading and recalling the P.W.1.

In the result the Rule is made absolute-in-part. The impugned order dated 27.11.2018 is set-aside so far as relates to the amendment of the pleadings and recalling the P.W.1. Thus the prayer for amendment of the pleadings and recalling the P.W.1 filed by the plaintiff petitioner is allowed.

The defendant is at liberty to file additional written statement if requires regarding the amendment of the plaint.

However, the Advocate commissioner should keep in mind that in how may portion of the land in plot No. 141 and 142 attract and covered of the structures of Eidgah, Mosque, Madrasah, Graveyard, Pond and dwelling hats etc.

Since this is long pending case the appellate court is directed to dispose of the appeal as early as possible preferably within 6 (six) months from the date of receipt of this judgment and order.

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

Send down the lower court's record at once.

M.R.