Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO. 851 OF 2019.

IN THE MATTER OF:

An application under Section 115(4) of the Code of Civil Procedure.

- AND -

IN THE MATTER OF:

Golzar Rahman and others.

....Plaintiff-petitioners.

-Versus –

Nazrul Islam and others.

....Defendant-opposite parties.

Mr. Md. Zahedul Bari, Advocate.

..... For the petitioners.

Mr. Bhavesh Chandra Mustafi, Advocate with
Mrs. Shamsun Naher Begum, Advocate.

..... For opposite parties.

Heard on: 20.05.2024, 28.05.2024 and Judgment on 29.05.2024.

On an application of the petitioners Golzar Rahman and others under section 115 (4) of the Code of Civil Procedure the leave was granted and the Rule was issued calling upon the opposite party Nos. 1-3 to show cause as to why the impugned judgment and order dated 23.09.2018 passed by the learned Senior District Judge, Gaibandha in Civil Revision No. 30 of 2017 rejecting the civil revision and affirming the order dated 08.06.2017 passed by the Senior Assistant Judge, Sadullapur, Gaibandha in Other Suit No. 96 of 2013 allowing an application for examination of a new witness along with the document No. 6912 dated 18.10.1972 at the argument stage should not be set aside.

Facts necessary for disposal of the Rule, in short, is that the present petitioners as plaintiffs instituted Other Class Suit No. 96 of 2013 in the court of Senior Assistant Judge, Sadullapur, Gaibandha for a declaration that the gift deed being No. 1144 dated 20.02.2013 is illegal, fraudulent, null, void, fourged, collusive, ineffective and not binding upon the petitioner.

The suit was contested by the defendant Nos. 1-4 by filing written statement denying all the material facts of the case.

The trial court thereafter framed issues for disposal of the suit and the plaintiff side examined 3 (three) witnesses as P.W.s and the defendant side also examined 3 (three) witnesses as D.W.s to prove their respective cases. The matter was fixed for argument and on the same day the defendant side filed an application for withdrawal of the matter from the argument and to allow to examine one of the witness namely Moslem Uddin son of Khabir Uddin Sarker and to produce a deed being No. 6912 dated 18.10.1972 as evidence in support of the case of the defendant.

The trial court after hearing the parties and considering the facts of the case allowed the said application with the cost of Tk. 500/- and also allowed the defendant to produce the said Moslem Uddin as witness by its order No. 38 dated 08.06.2017.

Against the said order of the trial court the plaintiff side filed revisional application under section 115(2) of the code of civil procedure before the learned District Judge, Gaibandha. The learned District Judge,

Gaibandha after hearing the parties and considering the facts and circumstances of the case rejected the revisional application and upheld the judgment and order of the trial court by its judgment and order dated 23.09.2018.

Being aggrieved by and dissatisfied with the impugned judgment and order of the courts below the plaintiff-petitioners filed this revisional application under Section 115(4) of the Code of Civil Procedure and accordingly the leave was granted and the Rule was issued.

Mr. Bhavesh Chandra Mustafi, the learned Advocate along with Mrs. Shamsun Naher Begum, Advocate enter appeared on behalf of the defendant-opposite-parties through vokalatnama to oppose the Rule.

Mr. Md. Zahedul Bari, the learned Advocate appearing on behalf of the plaintiff-petitioner submits that both the courts erroneously passed the impugned judgment. He further submits that as per provision of Order VIII Rule 1 Sub-rule 4 of the code of civil procedure where the defendant relies on any other documents not in his possession or power in support of his defence or claim of set off, he shall enter such documents in a list to be added on annexing to the written statement and state in whose possession or power they are, but both the courts without considering the aforesaid provision of law allowed the application of the petitioner which they committed error in law resulting in an error in the decision occasioning failure of justice. He further submits that both the courts committed error in law in not considering the above important question

of law resulting in an erroneous decision occasioning failure of justice that the defendant should not be allowed to introduce the new facts and to prove new document which is out of pleading. He prayed for making the Rule absolute.

On the contrary the learned Advocate Bavesh Chandra Mustafi, submits that the plaintiff's main case is that the impugned deed executed by the heirs of Kawsani Bibi and the defendant side purchased the land from the heirs of deceased Kawsani Bibi whereas the plaintiff claimed that she has no issue. He submits that the defendant side examined the grand-son of Kawsani Bibi as D.W.2 and in his deposition he disclosed the facts and also stated that Kawsani Bibi inherited by her two sons, his father Altaf Sarker and another uncle Khoka Sarker. He further submits that these facts has also been disclosed in the written statement and only to ascertaine and for relevancy of the case they filed application for examining one of the witness in those custody the alleged deed is available and the P.W.2 obtained the land from his father who purchased the said land from Kawsani Bibi and the aforesaid application is nothing but very much relevant in the instant case since the facts as sought for in connection with other facts the existence or non-existence of any facts in issue or relevant should be considered under section 11 of the Evidence Act. He prayed for discharging the Rule.

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

The plaintiffs side challenged the deed of the defendant that they have purchased the land from the heirs of Kawsani Bibi but said Kawsani Bibi was issueless and as such the impugned deed is illegal, void, collusive and not binding upon the plaintiff. The defendant side contested the suit by filing written statement stated the facts that Kawsani Bibi by her 1st husband inherited two sons namely Altaf Sarker and Khoka Sarker and the defendant side also purchased land from Altaf Sarker and in support of the case the son of Altaf Sarker was also examined.

The case was fixed for argument and at the date fixed for, the defendant side filed an application that the heirs of Kawsani Bibi the aforesaid Altaf Sarker and other transferred some portion of land in favour of Khabir Uddin Sarker and after his death the said deed is in the custody of his son Moslem Uddin and he is to be examined to produced the said deed for considering the said facts.

It appears that that the trial court as well as the appellate court allowed the said application considering the written statement and also considering the application. The learned Advocate Mr. Zahedul Bari argued that as per provision of Order VIII Rule 1(4) and (5) of the code of civil procedure without any amendment of the pleadings the new facts

should not be brought and no witness should be examined for producing any document which was not in the pleadings.

Admittedly in the written statement though the defendant side disclosed the facts that Kawsani Bibi inherited by her two sons but did not mention the facts that heirs of Kawsani Bibi transferred some portion of land to one Khabir Uddin Sarker in such a case where the defendant relies any other documents is not in his possession or power in support of his defence or claim of set off, he shall enter such documents which in a list to be added or annexed to the written statement and state in whose possession or power and the said document ought to be produce in the court by the defendant when the witness statement is presented or to be entered in the list to be added or annexed to the written statement, and which is not produced or entered accordingly, should not without the leave of the court be received in evidence on his behalf at the time of hearing of the suit.

It appears that the defendant side specifically mentioned the said facts in their application. It appears that the defendant unfortunately did not file application for amendment of the pleading and also produce the same but firisty form with the written statement. But considering the provision of Order VIII Rule 1(4) and (5) of the code of civil procedure the court may allow the defendant to produce the same which was not presented or not submitted with the list or annexed in the written statement.

Considering the aforesaid facts it is my view that the said documents is relevant to consider the main issue. However, it is better to amend the written statement of the defendant. If the amendment application will file, if so advice, the trial court may allow the same to abuse the process of the court and for ends of justice.

Thus it is my view that it is better to dispose of the Rule with a direction that the defendant side may file an application for amendment of the written statement inserting the aforesaid facts as part of the written statement and then the plaintiff side also should have given scope to reply about the same.

In the result the Rule is disposed of with the above observations.

Since this is a long pending case the trial court is directed to dispose of the suit as early as possible preferably within 6 (six) months from the date of receipt of this order considering the findings as made above and in accordance with law.

Communicated the order at once.

M.R.