IN THE SUPREME COURT OF BANDLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO. 1726 of 2019.

Masud Parvez and others
...Petitioners.
-Versus-
Md. Golam Mostafa and others
....Opposite parties.
Mr. Zahid Ahmed, Advocate
… for the petitioners
Mr. Kamruzzaman Bhuiyan, Advocate
… for opposite party Nos.1-7.

Heard On: 19.10.2022 and 01.11.2022.
Judgment on: 09.11.2022.

Present:
Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon the opposite parties to show cause as to why judgment and order dated 11.06.2019 passed by learned Joint District Judge, 2nd Court, Gazipur in Title Appeal No. 72 of 2017 rejecting an application for amendment of the written statement should not be set aside.

At the time of issuance of Rule, this Court vide *ad interim* order dated 07.07.2019 stayed further proceeding of Title Appeal No. 72 of 2017 for a period of 6(six) months which is still in force.

Facts, relevant for the purpose of disposal of the Rule are that, opposite party Nos. 1-7 instituted Title Suit No. 87 of 2015 before 5th Court of Senior Assistant Judge, Gazipur against the present petitioners for declaration of title in respect of .30 acre land and another declaration that registered power of attorney deed dated 5.11.2014 being No. 9696 was exclusive, forged and not binding upon the plaintiffs. The case of the plaintiffs, mainly, is that the suit land

along with other land belonged to Jabed Ali who died leaving behind four sons to inherit his share. Being owners in possession of said land they transferred the suit land by registered sale deed dated 02.04.1979 being No. 1519 to Foyzur Rahman and thereafter, R.S. record was published in his name who died leaving behind the plaintiffs and they have got the suit land. Plaintiffs have been owning and possessing the suit land by erecting house and cultivating crops and fish therein. They have mutated the suit land vide Mutation Case No. 566/14-15 dated 25.2.2015 and paying rents. Defendant Nos. 1-2 by creating forged power of attorney dated 5.11.2014 denied the title of the plaintiffs to the suit land and as such, the suit.

Defendant Nos.1-4, the petitioners contested the suit by filing written statement on 13.8.2015 stating that the land of C.S Khatian No. 24 measuring 1.12. acre was originally belonged to three brothers namely, Doud Ali, Abed Ali and Zabed Ali in equal share and accordingly, C.S Khatian was published in their name. The land of C.S Khatian Nos. 64 was originally belonged to Doud Ali, Abed Ali, Zabed Ali and Sagorjan Bibi. Then Jabed Ali died unmarried leaving behind other two brothers. During his lifetime, Zabed Ali transferred his entire share to the heirs of his brother Daud Ali and S.A. record was finally published in the name of heirs of Daud Ali. Daud Ali while was owning and possessing total 1.1812 acre land of two khatians died leaving behind three sons namely, Biramdi, Danesh and Foyzur Rahman. Danesh died leaving behind two sons namely, Suruj Mia, Momen Mia (defendant No. 3) and two daughters namely, Nilufa Begum (defendant No.4) and Helena Begum. Helena Begum transferred .0526 acre land to her brother, Suruj Mia vide registered declaration of heba deed dated 28.8.2007 and after the death of Suruj Mia his son Selim Mia transferred his share to defendant No.3

by registered sale deed No. 5670 dated 12.5.2011. Defendant Nos. 3 and 4 being owners in possession of the suit land along with other land appointed defendant Nos. 1-2 as their attorney vide registered power of attorney deed being No. 9696 dated 5.11.2014 and have been owning and possessing the same through their attorney. The plaintiffs have no right, title or interest in the suit land and as such, the suit is liable to be dismissed.

After submission of written statement the plaintiffs amended the plaint seeking another decree of declaration that heba deed dated 28.8.2007 and registered sale deed No. 5670 dated 12.5.2011 were exclusive, forged and not binding upon the plaintiffs.

Both parties adduced evidence to prove their respective case before the trial Court and the trial Court, upon consideration of the materials on record and the evidence of the parties, decreed the suit vide judgment and decree dated 15.05.2015.

Being aggrieved by said judgment and decree the defendant petitioners preferred Title Appeal No. 72 of 2017 before the learned District Judge, Gazipur which was transferred to learned Joint District Judge, 2nd Court, Gazipur for disposal.

During pendency of the appeal the defendant-appellants filed application for amendment of their written statement against which the plaintiff-respondents filed written objection and the Court of appeal, upon hearing, vide order dated 11.06.2019 rejected the application against which they have preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained Rule and order of stay, as stated above.

The plaintiff-opposite parties have entered appearance by filing Vokalatnama to contest the Rule.

Mr. Zahid Alam, learned Advocate appearing for the petitioners by taking me to the application for amendment of the written statement, impugned order and other relevant documents submits that the Court of appeal without assigning any proper reason and without considering provisions of law most illegality rejected the application for amendment. Learned Advocate further submits that amendment of the written statement was necessary to resolve the real questions in controversy between the parties but the Court of appeal did not consider such aspect of the matter and accordingly, committed an error of law resulting in an error in the decision occasioning failure of justice.

As against the above submissions, Mr. Kamruzzaman Bhuiyan, learned Advocate appearing for the plaintiff-opposite parties submits that after amendment of rule 17 of Order VI of the Code of Civil Procedure by the "Code of Civil Procedure (Amendment) Act, 2012", by introducing new provisions therein, there is no scope to allow amendment of pleadings after commencement of trial unless the Court is of opinion that in spite of due diligence the party could not have raised the matter before the commencement of the trial. Learned Advocate further submits that in the instant case trial of the suit has concluded and the appeal is pending and the defendants could not state anything in the application whether in spite due diligence they could not have raised the matter before commencement of trial. Learned Advocate further submits that under order VI rule 17 of the Code of Civil Procedure amendment can be made only for the purpose of determination of real question in controversy between the parties and in the instant case the question was whether the plaintiffs have acquired title in the suit property by sale deed dated 2.4.1979 which, upon evidence, has been resolved

by the trial Court on contest against the defendants and as such, there was no issue left to be resolved by the appellate Court. Learned Advocate also submits that by proposed amendment the defendants have deviated from their original defense plea in respect of their acquisition of title and sought to include some persons in the suit who have inherited some portion of land from the suit plots from original owner, Jabed Ali as well as by proposed amendment they have challenged the genuineness of sale deed dated 2.4.1979 being No. 1519, which the trial Court has found as genuine. Learned Advocate finally submits that the application for amendment was filed only for delaying disposal of the appeal and as such, the Court of appeal rightly rejected the application and thus committed no illegality.

I have heard the learned Advocates at length, perused the revisional application, application for amendment of written statements, plaint, written statement, judgment of the trial Court, impugned order and other relevant papers as available on record.

It appears that the present petitioners as defendants contested the suit by filing written statements, denied the title deed of the plaintiffs and claimed their title to the suit land by inheritance and purchase and in their written statements, they have categorically stated genealogy of their title and adduced evidence in support of their case.

The main issue before the trial Court was whether the plaintiffs have acquired title to and possession in the suit land by sale deed dated 02.04.1979. To establish their claim, the plaintiffs along with other documents have produced the certified copy of registered deed of sale dated 2.04.1979 being No. 1519 which was marked as exhibit-4. The defendants, by challenging genuineness of

said deed, cross-examined the PWs and also adduced evidence on this point and the trial Court, upon consideration of the materials on record, disbelieved the plea of the defendants and decreed the suit, considering the deed of 1979 as genuine. But by proposed amendment, the defendants have sought to introduce the fact that sale deed dated 2.04.1979 was forged, collusive and not binding upon the defendants which is misconceived one.

By proposed amendment, the defendants have also sought to introduce a new genealogy of some persons in regards acquisition of their title to some portion of land from the suit plots.

Now question arises whether, after amendment of rule 17 of Order VI of the Code of Civil Procedure in 2012, the proposed amendment could be allowed by the appellate Court.

The "Code of Civil Procedure (Amendment) Act, 2012 (Act No. 36 of 2012) came into force on 24.9.2012. By section 6 of the Act, 2012 two provisos have been introduced in rule 17 of Order VI of the Code of Civil Procedure, 1908 which reads as follows:

> "Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court is of opinion that in spite of due diligence, the party could not have raised the matter before the commencement of trial:
>
> Provided further that if an application for amendment is made after the trial has commenced and the Court is of opinion that the application is made to delay the proceedings, the Court shall make an order for the payment to the objector such cost by way of compensation as it thinks fit."

The language of the first proviso to rule 17 of Order VI of the Code of Civil Procedure is clear and unambiguous which clearly stipulates that no application for amendment of pleadings shall be allowed after the trial has commenced. However, such amendment may be allowed if the Court is of opinion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. Accordingly, it is imperative for the party to make out a specific case in the application for amendment of pleadings stating that in spite of due diligence, he/she could not have filed such application before commencement of trial of the suit and before allowing such amendment, Court must form an opinion to that effect.

On perusal of the application for amendment, it appears that the defendants did not state anything as to what prevented them from seeking amendment before the trial of the suit has commenced or that in spite of due diligence they could not have raised the matter before the commencement of trial of the suit.

In view of the above facts and relevant provisions of law, I am of the view that the Court of appeal committed no illegality in rejecting the application for amendment of the written statements by the impugned order. Though the appellate Court did not discuss above provisions of law while rejecting the application but otherwise, the order of the appellate Court is legal and proper which calls for no interference by this Court.

In view of the above, I find no merit in this Rule.

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

The Court of appeal is directed to dispose of the appeal within 3 (three) months from the date of receipt of the copy of this judgment in accordance with law.

Communicate a copy of this judgment and order at once to the appellate Court.