

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO. 2146 OF 2019

In the matter of:

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

And

Md. Ataur Rahman

... Petitioner

-Versus-

Md. Abu Said and others

... Opposite parties

Mr. Md. Al Amin, Advocate

... For the petitioner.

Mr. Md. Sk. Jalal Uddin, Advocate

... For the opposite party Nos.1

Heard and Judgment on 20.06.2023

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 26.06.2019, passed by the learned District Judge, Bogura in Other Class Appeal No.242 of 2018 allowed the appeal and thereby remanding the suit after setting aside the judgment and decree dated 13.11.2018 passed by the learned Assistant Judge, Kahalu, Bogura in Other Class Suit No.48 of 2016 dismissing the suit should not be set aside.

Facts in short are that the opposite party as plaintiff instituted above suit for declaration that the plaintiff is entitled to be appointed for the position of Daptari cum Security Guard of Akhunja Government Primary School and further for a decree of mandatory injunction upon

the defendant Nos.1-2 and 4 so that they appoint the plaintiff in the above position.

It was alleged that through a competitive selection process the plaintiff stood second for appointment as Daptari cum Security Guard in above school and defendant No.5 Aaur Rahman stood first and another Tarikul Islam stood third. Above panel was sent to defendant No.4 for giving of appointment. Due to an allegation as to above selection process the Upazilla Education Officer conducted an inquiry and submitted a report to defendant No.4 on 17.12.2014 stating that the age of defendant No.5 was 1 year 2 months and 29 days more than the required age and his National Identity Card was forged. As such defendant No.5 was not entitled to be appointed in the above position and since the plaintiff stood second he was legally entitled to be appointed. But defendant Nos.1-2 and 4 are not giving appointment of the plaintiff in the above position.

The suit was contested by the defendant Nos.1-4 and defendant No.5 by filing two different set of written statements.

In their joint statement the defendant Nos.1-4 stated that in the selection process defendant No.5 stood first but due to an allegation the matter was inquired and it was found that the age of defendant No.5 was 1 year 2 months and 29 days above the required age and the matter was sent to the Deputy Commissioner which is still remaining unresolved.

PW5 denied all material claims and allegations made in the plaint and stated that he was lawfully selected for the position of Daptari cum Security Guard of above school since he stood first in the selection process. The defendant has already resumed duty in above position since January 2019.

At trial plaintiff examined 4 witnesses, defendant Nos.1-2 examined 1 witness and defendant No.5 examined 1 witness. Documents produced and proved by the plaintiff were marked as Exhibit-I and II and those of the defendant were marked as Exhibit- Ka series, Ga series and Gha series respectively.

On consideration of facts and circumstances of the case and materials on record the learned Assistant Judge dismissed the suit holding that the plaintiff could not prove that at the time of submission of application the age of defendant No.5 was 1 year 2 months and 29 days more than the required age.

Being aggrieved by above judgment and decree of the learned Assistant Judge the plaintiff preferred Other Class Appeal No.242 of 2018 to the District Judge, Bogura who on consideration of the facts and circumstances of the case and materials on record allowed the appeal and set aside the judgment and decree of the Trial Court and remanded the suit for retrial.

Being aggrieved by above judgment and decree of the learned District Judge respondent No.5 as petitioner moved to this Court and obtained the Rule.

Mr. Md. Al Amin, learned Advocate for the petitioner submits that the plaintiff could not prove by legal evidence that he is entitled to be appointed for the position of Daptari cum Security Guard of above school although he stood second in the selection process. On analysis of the evidence on record and facts and circumstances of the case the learned Assistant Judge had rightly dismissed the suit. The learned District Judge found that the plaintiff could not prove by legal evidences that he was lawfully entitled to be appointed in the above position by legal evidence but instead of dismissing the appeal on

above findings the learned District Judge has remanded the suit for retrial to give an unlawful advantage to the plaintiff and causing unnecessary sufferings to the defendant No.5 who is working in the above position since January 2019. The learned District Judge has committed serious illegality in remanding the suit for retrial instead of dismissing the appeal which is not tenable in law.

On the other hand Mr. Md. Sk. Jalal Uddin, learned Advocate for the opposite party No.1 submits that the learned District on analysis of the evidence on record concluded that the defendant No.5 was legally disqualified to be selected for appointed for the position of Daptari cum Security Guard of above school since he exceeded the age limit for above position. But since the plaintiff did not adduce positive evidence as to his competence and entitlement to be appointed in the above position the learned District Judge has rightly remanded the suit for retrial giving both the parties an opportunity to adduce further evidence which calls for no interference.

I have considered the submission made by the learned Advocates for the respective parties and carefully examined the pleadings, evidence, impugned judgment and decree and other materials on record.

It is admitted that through a selection process a panel of eligible candidates for the position of Daptari Cum Security Guard of above school was prepared and in above panel defendant No.5 stood first, plaintiff stood second and another person namely Tarikul Islam stood third.

This is a suit for declaration that the plaintiff who stood second is entitled to be appointed in above position and a decree for mandatory injunction directing defendant Nos.1-2 and 4 to appoint the plaintiff.

In the plaint there is no statement of facts as to what entitles the plaintiff who stood second to be appointed in above position. An allegation has been made against the defendant No.5 who stood first to the effect that in an inquiry conducted by the Upazilla Education Officer his age was found to be 1 year 2 months and 29 days more than the required age. There is no allegation against Tarikul Islam who stood third in the above panel but he has not been made a party in this suit.

In the plaint there is no allegation that defendant No.5 created false National Identity Card or any other document in order to reduce his age to the point of required age nor there is mention of any document showing that the age of the defendant No.5 was excess than the required age on the date of submission of the application for above appointment. At trial two documents were produced by the plaintiff to show that the date of birth of the defendant No.5 was 10.10.1982. All above documents are out of pleadings. However, the learned Assistant Judge on a detailed scrutiny of above documents found that the school testimonial certificate submitted by the plaintiff does not bear any seal of the concerned school and the same was not an authenticated document.

As far as the inquiry report prepared by the Upazilla Education Officer is concerned above inquiry officer gave evidence as DW2 and stated that he did not give any notice upon defendant No.5 nor defendant No.5 was heard in course of above inquiry. While giving evidence as PW1 plaintiff Abu Sayed stated that at the time of inquiry defendant No.5 was not present. It is crystile clear from above evidence that the defendant No.5 had no opportunity to defend himself in the above inquiry and above enquiry was held behind the back of defendant No.5.

The learned Advocate for the opposite party repeatedly stated that the learned District Judge on an independent assessment of evidence on record rightly held that defendant No.5 was not qualified for appointment due to age bar. But in this suit no declaratory relief has been sought against the defendant No.5 for his above alleged disqualification or incompetence. But evidence has been adduced at trial out of pleadings to prove that the defendant No.5 did not have the required age to be considered for appointment in above position.

In view of above pleadings and evidence I find that the learned Assistant Judge correctly arrived at a decision that the plaintiff could not prove his case by legal evidence. But the learned District Judge has misdirected himself and failed to appreciate the materials on record correctly and most illegally allowed the appeal and remanded the suit for retrial is not tenable in law.

On consideration of the above facts and circumstances of the case and materials on record I find substance in this Civil Revision and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 26.06.2019, passed by the learned District Judge, Bogura in Other Class Appeal No.242 of 2018 is hereby set aside and those dated 13.11.2018 passed by the learned Assistant Judge, Kahalu, Bogura in Other Class Suit No.48 of 2016 is hereby restored.

However, there is not order as to costs.

Send down the lower Court's record immediately.