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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 2095 of 2019

Monjur Hossain Khan and others

Petitioners

-Versus-

Md. Kamrul Hassan and others

Opposite parties

Mr. A.B. Roy Chowdhury, Advocate

...For the petitioners

Mr. Ahmed Nowshed Jamil, Advocate

... For the opposite parties

Heard on: 27.10.2024, 01.12.2024 and 09.12.2024
Judgment on: 17.12.2024

Miscellaneous Case No. 39 of 2008 filed by the present petitioners under Order XXI rules 100 and 101 of the Code of Civil Procedure (CPC) for restoration of possession of the property mentioned in the schedule of the application from which the petitioners were evicted on 02.03.2008 through Court in Execution Case No. 05 of 2004 (former 06 of 1981) arising out of Title Suit No. 73 of 1981 was rejected by the learned Joint District Judge, Court No. 1, Chandpur on 05.04.2017. Civil Revision No. 07 of 2017 was also

rejected by the learned District Judge, Chandpur on 17.04.2019. Thereafter, the present petitioners filed the instant revision under Section 115(4) of the CPC. This Court on 01.08.2019 granted leave and issued a Rule.

Opposite party Nos. 1, 2, 4, 7-10, 11(a), 11(b), 12, 14-17 entered appearance in the Rule.

Abdul Jalil became the owner of the property in question through Court. Eyakutenessa, who is the predecessor-in-interest of the present petitioners, was the possessor of the said property. She was dispossessed from the property in an execution case. The core issue in this Rule is whether the possession of the successors-in-interest of Eyakutenessa can be restored. Before addressing the issue, the chequered history of multiple litigations involved in the case is set out below.

T.S. No. 73 of 1981, Execution Case No. 6 of 1981 renumbered as 5 of 2004 and Miscellaneous Case No. 39 of 2008 under Order 21 rules 100 and 101 giving rise to the instant Rule:

Abdul Jalil as sole plaintiff filed T.S. No. 73 of 1981 on 24.03.1981 in the 3rd Court of Sub-Judge, Cumilla for specific performance of contract in respect of the bainanamapatra dated 16.02.1968 entered into with Sukumar Roy impleading Sukumar Roy and the government as defendant. The suit was decreed *ex parte* on 30.06.1981 (decree signed on 06.07.1981). Thereafter, Execution

Case No. 06 of 1981 subsequently renumbered as 05 of 2004 was filed by the decree holder. In the execution case, Eyakutenessa and members of her family were evicted from the case land on 02.03.2008. Thereafter, she filed Miscellaneous Case No. 39 of 2008 under Order XXI rules 100 and 101. The miscellaneous case and the civil revision were rejected by the Courts below. Thereafter, the legal heirs of Eyakutenessa filed the instant revision.

T.S. No. 278 of 1981:

Eyakutenessa and her brother as plaintiff filed T.S. No. 278 of 1981 in the Court of Sub-Judge, Cumilla impleading Kiranesha and 09 (nine) others as defendant for declaration of title in the suit land and also for setting aside the *ex parte* judgment and decree passed in T.S. No. 73 of 1981. The suit was dismissed on contest on 31.03.1985. Title Appeal No. 51 of 1985 was also dismissed. Rule issued in Civil Revision No. 194 of 1997 was discharged on 07.01.2009. Civil Petition For Leave To Appeal No. 631 of 2009 was dismissed on 06.12.2009.

T.S. No. 102 of 1987:

Dil Afroj Begum and others (legal heirs of Abdul Jalil) as plaintiff filed T.S. No. 102 of 1987 impleading Eyakutenessa and others as defendant in the Court of 1st Munsif, Chandpur for declaration of title and recovery of khas possession of the suit land. It is stated in the plaint that Abdul Jalil and Sukumar Roy executed a

bainanamapatra dated 16.02.1968 in respect of the suit land and Abdul Jalil got possession of the same. Thereafter, Abdul Jalil obtained *ex parte* decree in T.S. No. 73 of 1981 for specific performance of contract and the execution case was pending. On 30.07.1981, while the plaintiffs went to their village home to celebrate Eid-ul-Fitr leaving the home situated in the suit land under lock and key, the defendants forcibly entered into the said home and took possession of the same. Eventually, the plaintiffs filed an application before the trial Court stating that they had obtained the possession of the home and the suit land through Court in Execution Case No. 05 of 2004 on 02.03.2008 and as such, there was no necessity to proceed with the suit. According to the prayer of the plaintiffs, T.S. No. 102 of 1987 was dismissed for non-prosecution on 16.01.2011.

Now, I turn to the instant miscellaneous case filed under Order XXI rules 100 and 101 for restoration of possession. It is already noted that the miscellaneous case was rejected by the Courts below.

Case of present petitioners (successors-in-interest of Eyakutenessa):

The case of the petitioners is that Monmohon Roy and his brother Sukumar Roy were the recorded owners of 21 decimals of land of C.S. Khatian No. 334, C.S. Plot No. 475 corresponding to S.A. Khatian No. 379, S.A. Plot No. 2013 in equal share. Sukumar did not marry. He died leaving behind his brother Monmohon as the sole legal

heir. Thus, Monmohon became the owner of 21 decimals of land. Monmohon sold the said 21 decimals of land to Eyakutenessa and his brother Ruhul Amin by a registered sale deed No. 11397 dated 19.12.1969. Ruhul Amin gifted 10.50 decimlas of land to Eyakutenessa by a registered gift deed No. 39972 dated 20.09.1980 and thus, Eyakutenessa became the owner of 21 decimals of land and had been possessing the same till dispossession through Court in Execution Case No. 05 of 2004.

Case of present opposite parties (successors-in-interest of Abdul Jalil):

The case of the opposite parties is that Monmohon and Sukumar were the recorded owners of 21 decimals of land in equal share. By a mutual partition, Sukumar became the owner and possessor of 10 decimals of land at the western side. Abdul Jalil was the allottee and possessor of 10 decimals of land owned by Sukumar. Abdul Jalil executed an unregistered bainanamapatra with Sukumar on 16.02.1968 at the price of Tk. 10,500/-. Sukumar did not execute the sale deed. Abdul Jalil filed T.S. No. 73 of 1981 for specific performance of contract and obtained the *ex parte* decree. The decree was put into execution and eventually, Eyakutenessa and members of her family were evicted from the suit land through Court on 02.03.2008 in Execution Case No. 5 of 2004 arising out of the T.S. No. 73 of 1981. The further case of the opposite parties is that the sale

deed dated 19.12.1969 and the gift deed dated 20.09.1980 by which the petitioners claim ownership of 21 decimals of land are forged and fabricated.

Both the parties adduced oral and documentary evidence in the miscellaneous case. An Advocate Commissioner was appointed to ascertain the case land. He produced the investigation report before the Court and deposed as CW-1. He was cross-examined.

The learned Advocate appearing for the petitioners submits that Eyakutenessa was not a party to the T.S. No. 73 of 1981 and the Execution Case No. 05 of 2004. She was not in possession of the property on behalf of the judgment-debtor Abdul Jalil but on her own account as purchaser. The Courts below did not consider this aspect of the matter.

The learned Advocate appearing for the judgment-debtor-opposite parties, on the other hand, submits that the materials on record including the lower Court records (LCR), which are available before this Court, suggest that the Courts below rightly rejected the miscellaneous case under rules 100 and 101.

Rules 100 and 101 of Order XXI of the CPC are to be read together. When in the course of execution, the holder of a decree for possession dispossesses a person other than the judgment-debtor, he may apply to the Court under rule 100 for a summary investigation of the matter. After investigation on such application when the Court is

satisfied that the applicant was in possession of the property on his own account or on an account of some person other than the judgment-debtor, the Court shall under rule 101 direct that the applicant be put into possession of the property.

The standing of Eyakutenessa to file the miscellaneous case under Order XXI rules 100 and 101 has not been challenged. Admittedly, she was in possession of the case land on her own account. It is now settled through judicial pronouncements that the question involved in an application under rule 100 being one exclusively of possession, the fact that the applicant's suit for declaration of title to the property has been dismissed is no bar to such application. It was held in ***Sultan Mia (Md.) vs. Hazi Md. Yusuf***, 53 DLR 555 that inquiry contemplated under rule 100 is restricted to the question of possession only and even though the applicant may not have good title to the property, if he can show that he was not in possession on behalf of the judgment-debtor but on his own account, he must be put into the possession under rule 101.

The trial Court rejected the miscellaneous case holding that the applicant Eyakutenessa failed to establish her ownership in the case land and Abdul Jalil's title in the land was established up to the Apex Court. The trial Court also relied on the local investigation report and the evidence of the Advocate Commissioner CW-1 in reaching its decision. The revisional Court below concurred with the findings of

the trial Court and concluded that Eyakutenessa was evicted from the case land in accordance with law.

In view of the defined scope of investigation under rule 100 as discussed above, both the Courts below clearly committed illegality in putting emphasis on the question title of Eyakutenessa and ignoring the fact that she was in possession of the land on her own account, not on the account of the decree holder Abdul Jalil.

Subsequent insertion of boundary in the decree:

I note that no boundary of the suit land was given in the *ex parte* decree passed in T.S. No. 73 of 1981. The decree and the schedule contained in the decree run as follows:

> "Plaintiff to get kabala of the suit land from defdt No. 1 who is directed to execute and register the same within 30 days from this day in default the plaintiff shall get a kabala a deed of the suit land executed and registered through Court at his (plaintiff's) cost.
>
> Schedule
>
> District-Comilla, P.S. Chandpur, Mouza- Chandpur town within Chandpur Municipality.
>
> C.S. Khatian No. 334, C.S. Plot No. 475, R.S. Khatian No. 379, R.S. Plot No. 2013, Nature-Town Land. Area- 10 dec. out of 85 dec. in the west. And a four roofed tin hut measuring 16 cubits x 16 cubits with veranda of 5 cubits".

On 14.07.2005, the decree holder filed an application in the Execution Case No. 05 of 2004 (arising out of T.S. No. 73 of 1981) under Order VI rule 17 of the CPC for amendment of the decree. Be it

mentioned that the decree holder got the kabala registered through Court on 27.04.2006. The relevant portion of the said application for amendment of the decree is reproduced below:

"দেঃ কাঃ বিধির ৬ আদেশ ১৭ রুলের বিধানমতে সংশোধনের প্রার্থনাঃ

ডিক্রীদারপক্ষে দরখাস্তে নিবেদন এইঃ

উক্ত মোকদ্দমার তপছিল বর্ণিত গৃহাদী পরবর্তীতে দায়িকপক্ষ কর্তৃক পরিবর্তন পরিবর্ধন করা হইয়াছে এবং সরলভ্রম বশত ডিক্রী জারীর দরখাস্তে চৌহুদ্দী উল্লেখ করা হয় নাই। তাই ন্যায় বিচারের স্বার্থে চৌহুদ্দী অন্তর্ভুক্ত করা একান্ত প্রয়োজন। নতুবা ডিক্রীদার পক্ষের গুরুতর ক্ষতির কারণ বটে। উল্লেখ্য যে উক্তরুপ সংশোধন দ্বারা মোকদ্দমার আকৃতি প্রকৃতি পরিবর্তনের সম্ভাবনা নাই।

অতএব বিনীত প্রার্থনা বিজ্ঞ আদালত দয়া পরবশে উপরোক্ত অবস্থা ও কারণাধীনে ডিক্রীজারীর দরখাস্তের তপছিলে চৌহুদ্দী অন্তর্ভুক্তির আদেশ দানে সু-বিচার করিতে মর্জি হয়। ইতি, তাং- ১৪/৭/০৫ ইং।

তপছিল সংশোধন

ডিক্রীজারীর দরখাস্তের ২য় পৃষ্ঠায় তপছিলের শেষ লাইনে লিপি থাকা শব্দের পর লিপি হইবে যথা উত্তরে- খোরশেদ আলম মজুমদার, দক্ষিণে- অজয় ভৌমিক গং, পূর্বে- হাফিজদ্দিন খান, পশ্চিমে- রাস্তা।

সত্যপাঠ
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....."

The learned Advocate appearing for the opposite parties submits that the boundary was required to be inserted in the decree to satisfy the requirements of clause (e) of Section 52A of the Registration Act, 1908. Section 52A was inserted in the Registration Act in 2004 and the said Section came into force on 01.07.2005. Section 52A clause (e) runs as follows:

> "52A. Upon presentation of an instrument of sale of any immovable property, the Registering Officer shall not register the instrument unless the following particulars are included in and attached with the instrument, namely-
>
> (a)……
>
> (b) ……
>
> (c) ……
>
> (d) ……
>
> (e) a map of the property together with the axes and boundaries;
>
> (f) ……
>
> (g) ……"

The learned Advocate next submits that a decree can be amended under Order XXI rule 17 of the CPC.

The general principle is that when a decree is signed by the Court with due notice to the party lawyers, it should be deemed to have been correctly drawn (23 DLR 45). Once a judgment is delivered, signed and sealed, it can be changed only under Section 152 of the CPC which provides provisions for amendment of judgments, decrees or orders on the ground of clerical or arithmetical mistakes or by way of review [55 DLR (AD) 86]. Review under order XLVII or appeal shall lie if the decree or order is sought to be varied for any reason other than clerical or arithmetical mistake (AIR 1948 Mad 13). It was held in ***Niyamat Ali Molla vs. Sonargaon Housing***

Co-op Society, AIR 2008 SC 225 that where the statements in the body of the plaint sufficiently described the suit lands, the executing Court can correct the schedule of the property in the decree accordingly.

Order VII rule 3 requires that where the subject matter of suit is immovable property, its description in the plaint must be sufficient to identify it and must not be vague or unspecified. Thus, where there was no dispute regarding the identity of the suit premises and plot number was wrongly typed, the mistake can be rectified under Sections 151, 152 and 153 of the CPC [9 BLT (AD) 197]. However, an amendment of a substantial nature is beyond the scope of Section 152 [47 DLR(AD) 9].

In the case in hand, the *ex parte* decree was signed on 06.07.1981. The execution case was filed in 1981. The execution proceedings proceeded *ex parte*. After 24 years, the decree holder filed the application for amendment of decree on 14.07.2005 for insertion of the boundary of the suit property. The application for amendment of the decree filed under Order VI rule 17 is not maintainable. Wrong citation of a codified law should not be a ground for rejection of an application if the same fulfils the requirements of law. It is stated in the application for amendment of the decree, "মোকদ্দমার তপছিল বর্ণিত গৃহাদী পরবর্তীতে দায়িকপক্ষ কর্তৃক পরিবর্তন পরিবর্ধন করা হইয়াছে এবং সরলভ্রম বশত ডিক্রী জারীর দরখাস্তে চৌহুদ্দী উল্লেখ করা হয় নাই". The statements

imply that as on drawing up the decree in 1981 the boundary proposed to be inserted in the decree existed in 1981 when the suit was filed. The application for amendment of the decree is silent as to whether the schedule of the plaint contained any boundary. The statements made in the application for amendment suffer from vagueness. The proposed amendment does not come within the ambit of Section 152. Order XXI rule 17 contemplates amendment of defects in execution petition before admission and registration. If the Court overlooks the defects and registers the application, it can subsequently amend the defects during the pendency of the application. In the instant case, the proposed amendment was substantial in nature. The amendment is not covered by Order XXI rule 17. The executing Court allowed the application for amendment mechanically without applying any judicial mind.

In ***Jatindra Nath Nandi and ors. v. Krishnadhan Nandi and ors.,*** 56 CWN 858, it was held:

> "In any event, this Court is perfectly competent to see that proper orders are made when the matter comes up in revision before this Court. The mere fact that the plaintiffs did not move should not stand in the way of this Court making an order in accordance with law, as all the necessary parties are represented before us".

In ***Md. Shajahan Khan v. Additional Deputy Commissioner (Revenue), Munshiganj and others,*** 11 BLT (AD) 60, it was held by our Apex Court:

> "It is well settled that once the conditions in section 115(1) of the Code of Civil Procedure are satisfied and the High Court's jurisdiction to interfere is established, the proceedings as a whole from start to finish can be scrutinized and any order necessary for doing justice may be passed. There is no limit to the area in which the revisional power is to be exercised by the High Court Division in the facts and circumstances of each case".

In the case in hand, the executing Court travelled beyond the scope of law in allowing the application for amendment of the decree. Being fortified with the *ratio* laid down in 56 CWN 858 and 11 BLT (AD) 60 and the proposition of law that the provisions of rule 100 are certainly provisions relating to the execution of decree and they are applicable to execution of orders (13 DLR 105), I have no hesitation to hold that the insertion of the boundary in the decree on an application under Order 6 rule 17 is an act of nullity and the same cannot be considered in the execution proceedings. It is recalled that Eyakutennesa and her brother unsuccessfully challenged the judgment and the original decree passed in T.S. No. 73 of 1981 up to the Apex Court. The amended decree was never challenged in the Court.

Discrepancy in the boundary:

The instant case can also be looked into from a different aspect. By the amendment dated 21.07.2005, the following boundary was inserted in the decree passed in T.S. No. 73 of 1981:

North - Khorshed Alam Mazumder

South – Ajay Bhoumik and others

East – Hafiz Uddin Khan (it is noted that Hafiz Uddin Khan is the husband of Eyakutenessa whose legal successors-in-interst have filed the instant miscellaneous case)

West – Road

In the schedule of the plaint of T.S. No. 102 of 1987, the following boundary was given:

North – A Mannan Miah

South – Pond

East – Defendants (Eyakutenessa, her brother Ruhul Amin, her husband Hafiz Uddin Khan and Government)

West – BD Hall Road

The boundary given in the application of the instant miscellaneous case is as follows:

North – Khorshed Alam Mazumder

South – Pathwary

East – Abdul Kadir, Basante Devi and others

West – Mohila College Road.

T.S. No. 102 of 1987 may be recalled. On the averments that Eyakutenessa and others forcibly took possession of the land owned and possessed by the legal heirs of Abdul Jalil (decree holder of the execution case) in their absence on 30.07.1981, they filed T.S. No. 102 of 1987 against Eyakutenessa and others for declaration of title and recovery of khas possession. The suit was dismissed for non-prosecution on 16.01.2011 on the ground that the plaintiffs had obtained the possession of the suit land through Court on 02.03.2008 in the instant execution case and as such, there was no necessity to proceed with the T.S. No. 102 of 1987.

A comparison of boundaries given in the decree of T.S. No. 73 of 1981 by way of amendment, T.S. No. 102 of 1987 and the instant miscellaneous case clearly shows that those are not the same and do not attract the same piece of land. We have already taken the view that the subsequent amendment of the decree passed in T.S. No. 73 of 1981 by inserting boundary was done illegally. It appears from the deposition of the Advocate Commissioner CW-1 as well as the report which has been exhibited in the miscellaneous case that the local investigation was conducted based on the boundary inserted in the decree pursuant to a void amendment. As such, the local investigation report can safely be kept out of consideration.

Conclusion and decision:

Rule 100 permits the Court to decide disputed question of fact [17 BLC (AD) 154], but inquiry contemplated under rule 100 is restricted to the question of possession only and even though the applicant may not have good title to the property, if he can show that he was in possession not on behalf of the judgment-debtor but on his own behalf, he must be put in possession under rule 101 as decided in *Sultan Mia*, 53 DLR 555 (*supra*). Regrettably, the Courts below did not address the core issue contemplated under rule 100 as to whether the petitioners possessed the property on their own account or on account of the judgment-debtor (opposite parties), rather they confined themselves to the question of title. It is admitted that the petitioners possessed the suit property in question consisting of 10 decimals of land out of 85 decimals on their own account. The petitioners were dispossessed of the property in the execution case based on the void amended decree containing boundary. There is no bar in law to execute the decree passed in a suit for specific performance of contract to put the decree holder in possession of the land and/or property covered by the decree under Order XXI rule 32 even if the decree is silent on possession [28 DLR (AD) 99, 50 DLR 208]. In this case, there was no boundary in the original decree.

In view of the foregoing discussions, both on facts and law, I find merit in the Rule.

In the result, the Rule is made absolute. The Court concern is directed to restore the possession of the suit land in favour of the petitioners in accordance with law.

Send down the LCR.

Arif, ABO