

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO.1734 OF 2021.

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Humayun Kabir and another
..... Defendant-petitioners.

-Versus-

Most. Mafia Khatun and others
..... Opposite parties.

Mr. Md. Mubarak Hossain, Advocates
..... For the petitioners.

Mr. Md. Osman, Advocate
.... For the opposite parties.

Heard on: 04.02.2024, 25.02.2024
and Judgment on: 03.03.2024.

On an application of the petitioner Humayun Kabir and another under section 115 (4) of the Code of Civil Procedure the Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and order dated 18.02.2021 passed by the learned Additional District Judge, 2nd Court, Cumilla in dismissing the Civil Revision No.81 of 2019 and thereby affirming the judgment and order No.24 dated 20.08.2019 passed by the Assistant Judge, Debidwar, Cumilla in accepting the Commissioner Report in Title Suit No.23 of 2012 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 opposite party No.1 as plaintiff instituted Title Suit No.23 of 2012 for partition of the schedule land against the present petitioners and the opposite party Nos.2-24 contending *inter-alia*, that one Chaitannaya Das Nomo and Dwaroka Nath Nomo were owners and possessors of scheduled 73 decimals land in equal share and accordingly the C.S. Khatian No.480/1 was prepared in their names and during S.A. operation, S.A. Khatian No. 608 was prepared in their names along with other co-sharers. Subsequently, Dwaroka Nath died issue less and his brother Chaitannaya Das became the owner of the entire land of C.S. Khatian No.480/1. Chaitannaya Das died leaving behind one son namely, Nidhiram Nomo and thereafter Nidhiram Nomo died leaving behind one son namely, Ashwini Kumar Nomo. Subsequently, Ashwini Kumar Sarker sold 08 decimals land out of suit plot No.1214 to the plaintiff vide saf-kabala deed No.8031 dated 12.12.73.

The B.S. Khatian in respect of the land of suit plot has been prepared in the name of the defendants and their predecessors for which they claimed title of the suit land. The suit land has not been partitioned by metes and bounds and the plaintiff requested the defendants to partition the suit land but they ignored to do so and lastly on 25.02.2012, the defendants denied to partition the suit land and as such, the plaintiff constrained to file the title suit.

The suit was contested by defendant No.1 by filing written statement denying all the material assertions made in the plaint contending *inter-alia*, that Chaitannaya Das Nomo and Dwaroka Nath Nomo were owners and possessors of the land of item No.2 in equal eight annas share and accordingly the C.S. Khatian No.480/1 was prepared in their names. Dwaroka Nath being unmarried died leaving behind one brother namely Chaitannaya Das who became owner and possessor of entire 08 decimals of land of plot No.1214. During S.A. operation, S.A. Khatian No.608 was prepared in the name of said two brothers.

One Joynal Abedin Master has been owing and possessing the land of item No.2 of the plaint by way of purchase and the plaintiff has included the said 08 decimals land of the Joynal Abedin Master without making him party. The defendants are owners of non-suited land of separate khatian and the plaintiff filed this suit only for harassing the defendants.

The contesting defendants have purchased non-suited 08 decimals land of same plot of C.S. Khatian No.480 from Rangmala Boishnabi, daughter of C.S recorded tenant Rajdhar Nomo vide saf-kabala deed No.8545 dated 20.03.1975. There exist a Mosque, graveyards, shops and different types of trees in the same plot of 1214 of non-suited 08 decimals of land of C.S khatian No. 480. There are total 29 decimals of land in suit plot No. 1214 and the defendants have been

owing and possessing the non-suited land of plot No.1214 of non-suited C.S. Khatian No. 480 corresponding to non-suited R.S. Khatian No. 607.

The plaintiff has no title and possession over the suit land or non-suited land of plot No.1214. That the name of son of Choitanya Das Namu of Debendra Chandra das who had one wife, one son and five daughters. The claim of the plaintiff that Awshwini Kumer was son of Nidhiram and Nidhiram was son of Choitanya Das is false and as such, the instant suit is liable to be dismissed.

At the trial plaintiff side produced one witness as P.W-1 and also submitted some documents as exhibit Nos.1-3.

The defendant side also produced two witnesses as D.W-1 and D.W-2 and exhibited some documents as exhibit-(Ka) to (Ga) examination.

The trial Court after hearing the parties and considering the evidence on record decreed the suit by its judgment and decree dated 30.08.2015 (decree signed on 06.09.2015). But the defendant side did not prefer any appeal against the judgment and decree of the trial Court.

Thereafter, the plaintiff side filed an application for Advocate Commission and accordingly Shah Alam the learned Advocate was appointed as Advocate Commissioner who after completing all the procedure prepared the commission report along with separate saham and submitted the same on 04.01.2016.

The defendant Nos.1(Kha) and 17 filed a written objection against the said Advocate Commission report on 28.04.2016 mentioning that the said Advocate Commission without complying with the procedure was prepared even in the said report the Advocate commission showing some portion of the land of Mosque whereas the said Mosque in a separate khatian No.480 nor 480/1. The trial Court after hearing the parties and considering the evidence of the Advocate commission namely, Shah Alam C.W-1 accepted the said commission report by its order No.24 dated 20.08.2019.

Against the said order the defendant No.1 (Kha) and 17 filed Civil Revision No.81 of 2019 under Section 115(2) of the Code of Civil Procedure before the learned District Judge, Cumilla the said revision was heard and disposed of by the Additional District Judge, Cumilla, who after hearing the parties and considering the evidence and documents as available in the record disallowed the said revisional application by its judgment and order dated 18.02.2021.

Being aggrieved by and dissatisfied with the impugned order of the trial Courts below the defendant petitioners filed this revisional application under section 115(4) of the Code of Civil Procedure and obtained the Rule but no leave was granted.

Mr. Md. Osman, the learned Advocate enter appeared on behalf of the plaintiff-opposite party No.1 through vokalatanama to oppose the Rule.

Mr. Md. Mubarak Hossain, the learned Advocate appearing on behalf of the defendant-petitioners submits that the plaintiff claim her Saham of 73 decimal of land mentioning the Khatian No.480/1 and S.A Khtaian No.608 from where she claimed 65 decimal of land from S.A Plot No.114 and also claimed 8 decimal of land from Plot No.1214 and the defendant has no objection against the same but it appears that the Advocate Commission without considering the commission report and distributed the land also from Khatian No.480 which he violates the writ for commission. He further submits that even the Chitha prepared by the said Advocate Commissioner it appears that he mentioned that the 1.20 decimal of land used as yard of Mosque and also mentioned that 1.05 decimal of land from Mosque S.L No.3 and 7 respectively but the plaintiff never claim that in the yard Mosque but both the Court without considering the aforesaid facts erroneously passed the impugned order which he committed error of law resulting in an error in the decision occasioning failure of justice. He prayed for making the Rule absolute.

On the contrary, Mr. Md. Osman, the learned Advocate appearing on behalf of the opposite party submits that the plaintiff obtained decree for her claim land and accordingly the Advocate commissioner was appointed and who after finishing the procedure prepared the commission report and both the Court rightly rejected the application of the defendants and accepted the Commission report. He further submits that the plaintiff obtained the decree and which is

waiting for final decree and in such a case the Court rightly rejected the application of the defendant and accepted the commission report. He prayed for discharging the Rule.

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

It appears that the plaintiff-opposite party No.1 filed a partition suit claiming 73 decimal of land along with 65 decimal from settlement Khatian No.480/1 corresponding to S.A Khatian No.608 and Plot No.114 and also claim 8 decimal of land from the S.A Khatian No.608 corresponding to B.R.S Khatian No.480/1 and plot No.1214 and accordingly the suit was decreed and against which defendant did not prefer any appeal. Thereafter, the plaintiff filed an application for Advocate commission report and accordingly that was allowed and one Mr. Shah Alam the learned Advocate appointed as Advocate Commissioner and who after completing his job/work submitted his Advocate commission report wherein it is found that in Chitha and others the Advocate Commission mention the Plot No.1214 of Khatian No.480/1 whereas in the decree or in the plaint nowhere the plaintiff claim any portion of the Mosque or yard of the Mosque and accordingly depose before the Court. But the learned Advocate Commission inserted in his Chitha from 1.2 decimal from yard of the Mosque and which Chitha Dag No.3 and also inserted 1.05 decimal of land mentioning Chitha Dag No.7 from Mosque but both the Court did not

consider the said facts that in the commission report wrongly the some portion of the land of the Mosque and yard has been inserted in the commission report and accordingly allowed the same. Since no case of the plaintiff opposite party No.1 that she was entitled to some portion of the land from yard of the Mosque in such a case this Commission report should not be accepted.

However, there is no bar to the plaintiff opposite party for claiming fresh commission to executed her decree.

Considering the aforesaid facts and circumstances of the case and the discussions as made above, I find merit in the Rule.

In the result, the Rule is made absolute. The judgment and order dated 18.02.2021 passed by the learned Additional District Judge, 2nd Court, Cumilla in dismissing the Civil Revision No.81 of 2019 and thereby affirming the judgment and order No.24 dated 20.08.2019 passed by the Assistant Judge, Debidwar, Cumilla in accepting the Commissioner Report in Title Suit No.23 of 2012 is hereby set-aside.

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

Send down the lower Court records at once.