Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No.4297 of 2015

Md. Tota Miah.

……Petitioner.

-Versus-

Md. Dilbor Miah and others.

…….Opposite parties.

Mr.Ranjan Kumar Chakravorty, Adv.

…….For the petitioner.

Mr. Bivash Chandra Biswas, Adv.

.....For the Opposite parties.

Heard and Judgment on 04.03.2024.

A.K.M.Asaduzzaman,J.

This Rule was issued calling upon the opposite party nos. 1-5 to show cause as to why the judgment and decree dated 13.09.2015 passed by the Joint District Judge, 2nd Court, Manikgonj in Title Appeal No. 266 of 2011 reversing those dated 26.07.2005 passed by the Senior Assistant Judge, Ghior, Manikgonj in Title Suit No. 46 of 2000 decreeing the suit in part should not be set aside.

Petitioner as plaintiff filed Title Suit No. 46 of 2000 before the Court of Senior Assistant Judge, Ghior, Manikgonj against the opposite parties for title, partition and also for recovery of khas

possession along with prayer for manse profit in respect of .07 acres of land as mention in the schedule of the plaint.

Plaint case in short inter alia is that suit land of C.S. khatian No.533 originally belonged to Jaigir Pramanik, who sold the entire land of Plot No. 824 to one Sona Miah. Sona Miah also transferred .04 acres land of suit plot along with other land to the plaintiff by way of ewaj deed dated 08.05.1961 and the rest land of suit plot also sold to Barkat Ali and thus the defendant no. 7 Barkat Ali also being the owner of .16 acres of land of suit plot was in possession and thereafter exchanged the same with the plaintiff by taking the plaintiff's .16 acres of land of two non-suited plots by ewaj deed dated 08.06.1960. Subsequently the plaintiff in his ewaj .16 acres of land of suit plot sold western side .09 acres of land from suit plot to Tofani and rest .07 acres of middle portion suit land is under possession of the plaintiff within the knowledge of defendants and others for more than 12 years. Plaintiff also mutated his name in the khatian in 1988 paid rents regularly. The land of Suit Plot No. 1640 in khatian No. 900 was wrongly recorded of some title less persons and the heirs of those names also have been impleaded in the suit as parties. The three brothers Ayub Ali, Shaheb Ali and Mozam Ali where Mozam Ali died childless. Thereafter Shaheb Ali died leaving behind defendant Nos. 12-18 as heirs where Ayub Ali and his wife

Baharjan Bibi died leaving behind their only son Nurul Islam. Another R.S. recorded owner Sakalinessa died leaving her two sons Momrej and Badsha as heirs. Again Badsha died leaving behind his son Monsur as her. Monsur has been impleaded as party. Thereafter Momrej Ali died leaving behind 3 sons and so all heirs of recorded owners have been made parties in the suit. Defendants are fully title less in respect of suit land. Defendants forcefully on the last part of Jaistha, 1405 B.S. entered some portion of suit land and erected two chhapra ghars and also took under their possession for .02 acres and thereafter on 6th Magh, 1407 B.S. forcefully dispossessed from the rest land of .05 acres and also loosed of taka 55/60 thousands of the plaintiff by cutting valuable tress and digging earth from the suit land. It may be mentioned here that a salish was held for the purpose of above dispossession and hence the plaintiff filed the suit.

Opposite party nos. 1-5 jointly contested the suit as defendant nos. 2-5/8 by filing written statement denying the plaint case alleging, inter alia, that admittedly Barkat Ali became the owners possessor of the suit land along with other land, sold .04 acre land out of .20 acre of suit Plot No. 824 to Sona Mia and Barkat Ali while was owning possessing the rest .16 acre land of suit Plot No. 824 exchanged with the land of the plaintiff in respect of .016 acre land of Plot Nos. 32, 2524 by ewaj. Plaintiff

after getting .16 acre land of suit plot by ewaj sold. 09 acre land of suit plot to the father of the defendant No. 1 Tofani. Thereafter plaintiff and father of defendant Nos. 1-2 namely Tofani with Malancha Bewa, for their interest of possession exchanged between plot Nos. 808 and 824, where defendant Nos. 1-3 by oral ewaj got the land of plot No. 824 and abandoned their claim of the land of Plot No. 808, where Malancha Bewa and Tofani evicted their house of Plot No. 808 and while were in possession, Tofani died leaving behind two sons and a wife, the defendants Nos. 1-3 as heirs, who are in possession. Plaintiff have no title and possession over the suit land. Title Suit No. 59 of 2000 for partition in respect of suit land with other land is pending, where the defendant No. 1 is being the plaintiff and so the plaintiff cannot get any relief and so the suit of the plaintiff is liable to be dismissed.

By the judgment and decree dated 26.07.2005 Senior Assistant Judge, Ghior, Manikgonj decreed the suit in part in favour of the plaintiff.

Thereafter plaintiff filed Title Execution Case No. 01 of 2006 for recovery of possession in the suit land and obtained delivery of possession through court.

Challenging the said judgment and decree no appeal was preferred within time but subsequently on 01.12.2011 defendant nos. 2-5/10 preferred Title Appeal No. 266 of 2011 before the Court of District Judge, Manikgonj with a prayer for condonation of delay of 2243 days delay in preferring the appeal, which was heard on transfer by the Joint District Judge, 2nd Court, Manikgonj, who by the impugned judgment and decree allowed the appeal and after reversing the judgment of the trial court sent back the suit on remand for fresh trial.

Challenging the said judgment and decree plaintiff-petitioner obtained the instant rule.

Mr. Ranjan Kumar Chakrabarty, the learned advocate appearing for the petitioner drawing my attention to the memo of appeal together with the impugned judgment submits that there is no ground taken by the appellant that no notice was served upon the defendant rather delay was caused due to negligence of defendant no. 5, Hanufa Bibi for not taking proper steps to prefer appeal with in time on her illness from a complicated diseases but the Appellate Court without considering this aspect of the case properly most illegally allowed the appeal holding that no notice was served upon the defendant and accordingly the impugned judgment suffers from illegality. Since he travelled beyond the pleadings and as such the impugned judgment is thus not

sustainable in law, which is liable to be set aside. He thus prays for making the rule absolute.

Mr. Bivash Chandra Biswas, the learned advocate appearing for the respondent-opposite parties on the other hand submits that Appellate Court being the last court of fact has rightly sent back the suit on fresh trial to the trial court and accordingly the decree passed by the Appellate Court need not be interfered with. He finally prays that rule contains no merits, it may be discharged.

Heard the learned Advocate of both the sides and perused the impugned judgment and the L.C. Records.

Challenging the order of sending the case back on remand by the Appellate Court in Title Appeal No. 266 of 2011 vide impugned judgment and decree dated 13.09.2015, plaintiff obtained the instant rule. It appears from the record that trial court decreed the suit, which was filed by the plaintiff being Title Suit No. 46 of 2000 on 26.07.2005. .That decree was finally been disposed of on an execution proceedings being Title Execution Case No. 01 of 2006 long before. Thereafter no appeal was filed against the said judgment of the trial court in time but subsequently on 01.12.2011 Title Appeal No. 266 of 2011 was

preferred by some other defendants having a delay of 2243 days with the contention that

> ‘যেহেতু এই বিবাদী আপীলকারীগণ পক্ষের মোকদ্দমার তদ্বীরকারক ৫নং বিবাাদী আপীলকারী হনুফা দীর্ঘদিন জটিল রোগে অসুস্থ থাকায় এবং প্রতারকের ক্ষপ্পরে পড়ায় আপীল দায়ের করিতে বিলম্ব হইল এবং তদ্বীরকারক দীর্ঘদিন অসুস্থ্য থাাকায় মূল মোকদ্দমায় এই বিাবদী আপীলকারী পক্ষে জবাব দেওয়া সম্ভব হইয়াছিল না।’

In support of this contention the appellant filed a discharged certificate obtained from the Infectious Diseases Hospital, Mohakhali. Although the certificate was not been proved, however since lying in the record, I have examined the said report. In the said report, it appears that Hanufa Bibi, wife of late Abdul Barek of Azimpur Shingair, Manikgonj was in the hospital from 28.02.2006 to 28.03.2006 on suffering with tetanus disease and at the time of discharged, she was prescribed the following medicine-

1) Tab: Berdinal (10 mg) for 15 days.

2) Tab: Sedil (5mg) for 15 days.

3) Tab: Pantonix (20 mg) for 01 month.

4) Tab: Calvimax Plus for 01 month.

5) Injection-Tetanus, 01 ample on 29.03.2006 and another ample on 29.04.2006.

That discharged certificate is not sufficient to prove that Hanufa Bibi was suffering from any complicated disease for long period. Accordingly, the contention as being made in Paragraph-8 in memo of appeal not been proved.

In view of the fact, when the contention has been made in memo of appeal in support of the condonation of delay of 2243 days was not been proved as well as there is no ground taken by the appellant to the effect that no notice was ever been served upon the defendant-appellant and accordingly if the delay is not been condoned, she would be deprived from getting justice. Although this memo was not been supported by filing any application under section 5 of the Limitation Act for condoning the delay, however since the grounds taken in the memo of appeal is not sufficient for condoning the delay, the impugned judgment passed by the learned Joint District Judge obviously travelled beyond the pleadings by observing that—

> ‘এই বিষয়ে মূল মামলার নথীতে সন্নিবেতি ২-৫ ও ১০ নং বিবাদী আপীলকারীগণের নামীয় পদাতিক সমন ও ডাক সমন সহ ফাইনাল ডিক্রির নোটিশ পর্যালোচনায় দেখা যায় যে, ২-৫ নং বিবাদীর নামীয় পদাতিক সমন ৫নং বিবাদী ঠান্ডি বিবির উপর স্বয়ং ও ২-৪ নং

বিবাদী পক্ষে জারী করা হয়েছে। যা কিনা দেওয়ানী কার্যবিধির নিয়ম মেনে জারী করা হয়নি কেননা একজন মহিলা নিজের সমন নিজে রাখতে সক্ষম হলেও তিনি ভিন্ন পরিবার বা একই পরিবারের অপরাপর পুর"ষ/মহিলা সদস্যের সমন রাখতে পারেন না এবং তা জারী বলে গণ্য হবার আইনত: কোন সুযোগ নেই এবং ১০ নং বিবাদী হনুফার নামীয় সমন তার পক্ষে পৃথকান্নে বসবাসকারী তার সহোদর ভাই ২নং বিবাদী দিলবর মিয়ার উপর জারী করা হয়েছে অথচ দিলবর মিয়ার নামীয় সমন স্বয়ং তার উপর জারী না করে অপর মহিলা ঠান্ডি বিবির উপর জারী করা হয়েছে যা থেকে সহজেই প্রতীয়মান হয় যে, বর্ণিত বিবাদীগণের নামীয় পদাতিক সমন যথারীতি জারী হয় নি। একইভাবে ডাক সমন পর্যালোচনায়ও দেখা যায় যে, ২-৫ ও ১০ নং বিবাদীর নামীয় রেজিষ্ট্রি ডাক রশিদের কপি নথিতে থাকলেও তন্মধ্যে শুধুমাত্র ৩ নং বিবাদী মালঞ্জ বেওয়া ও ১০ নং বিবাদী হনুফার নামীয় প্রাপ্তি স্বীকার পত্র নথিতে রয়েছে। এই দুজনের প্রাপ্তি স্বীকার পত্র পর্যালোচনায় দেখা যায় যে, মালঞ্জ নামীয় প্রাপ্তি স্বীকার পত্রে প্রাপকের সাক্ষ্যের স্থলে মালঞ্জের নাম লেখা রয়েছে অথচ ৩নং বিবীদী মালঞ্জ ওকালত নামা ও মেমো অব আপীলে টিপসই প্রদান করেছেন অর্থাত তিনি একজন নিরক্ষর মহিলা তাই তার নামীয় প্রাপ্তি স্বীকার পত্রে প্রদত্ত স্বাক্ষর প্রমাণ করে তা যথাযথ ভাবে জারী হয়নি। আবার ১০ নং বিবাদী হনুফার নামীয় প্রাপ্তি স্বীকার প্রত্র পদত্ত স্বাক্ষরের সাথে ওকালত নামা ও মেমো অব আপীলে প্রদ্ত্ত সাক্ষরের কোন প্রকার মিল নেই যা খালি চোখে স্পষ্ট র"পে প্রতীয়মান হয়। অধিকন্তু ২-৫ এবং ১০ নং বিবাদীর নামীয় ফাইনাল ডিক্রর নোটিশ পর্যালোচনায় ও দেখা যায় যে, দিলবর, মালঞ্জ ও মামলতের নামীয়

নোটিশ তাদের পক্ষে পৃথকান্নে বসবাসকারী চাচাত ভাই তার ম্ মিয়ার উপর দেওয়ানী কার্যবিধির নিয়ম বর্হিভূক্তভাবে জারী করা হয়েছে এবং ১০ নং বিবাদী হনুফার নামীয় নোটিশ স্বয়ং টিপসই গ্রহণের মাধ্যমে জারী করা হয়েছে অথচ পূর্বেই আলোচিত হয়েছে হনুফা ওকালত নামা ও মেমো অব আপীলে স্বাক্ষর প্রদান করেছেন। তাই নোটিশে তার নামীয় টিপসই প্রমাণ করে যে বর্ণিত বিবাদীদের উপর ফাইনাল ডিক্রির নোটিশ ও যথারীতি জারী হয়নি।'

When the appeal appears to be barred by limitation and there was no cogent ground to condone the delay in preferring the appeal against the judgment and decree passed by the trial court, which was disposed of long before after full satisfaction of party concern through an Execution Case No. 01 of 2006 and the parties are enjoying the fruits of their decree since long before, the impugned judgment of sending back the suit on remand to the trial court long thereafter is nothing but starting a fabulous harassing proceedings, which is not tenable in law. Appellate Court without applying his judicial mind allowed the appeal and passed the impugned judgment illegally.

In that view of the matter, I find merits in this rule. Accordingly the rule is made absolute without any order as to costs. The judgment and decree passed by the Appellate Court is hereby set aside and the judgment of the Trial Court is upheld.

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

Send down the L.C.Records and communicate the judgment to the court below at once.