IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO. 05 OF 2024.

Abdul Alim and another
...Petitioners.
-Versus-
Hazi Md. Aiyub and others
....Opposite parties.
Mr. S.M Tariqul Islam , Advocate
… For the petitioners
Mr. M. Belayet Hossain, Advocate
… For opposite party Nos. 1-12, 14-17 and 19-29

Heard on: 11.02.2025, 25.02.25, 31.08.2025, 29.10.2025 and 05.11.2025.
Judgment on: 16.11.2025.

Present:
Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon opposite party Nos. 1-29 to show cause as to why judgment and order dated 12.11.2023 passed by learned Additional District Judge, 2nd Court, Chattogram in Other Class Appeal No. 242 of 2017 allowing an application filed under Order VI rule 17 of the Code of Civil Procedure for amendment of the plaint should not be set aside.

Facts, relevant for the purpose of disposal of this Rule, are that the opposite parties as plaintiffs instituted Other Suit No. 261 of 2005 in the Court of Lohagara Assistant Judge, Satkania Chouki, Chattogram against the present petitioners and others for a decree of declaration of title to the suit land and another declaration that B.S Khatian was wrong with further declaration that R.S Plot No. 3517/10359 was wrongly inserted instead of R.S Plot No. 3514/10359 in sale deed No. 1740 dated 21.06.1937. The case of the plaintiffs, in brief, was that the

suit land originally belonged to Boksu Sikder, Obaidullah, Nazir Ahmed, Bodiur Rahman, Abdul Ali, Fazlur Rahman and others and accordingly C.S Khatian was prepared and finally published in their name and by a partition deed No. 3308 dated 20.12.1906 the owners partitioned their land and according to that partition Obaidullah got the land of C.S Plot No. 3514 and thereafter, transferred the same to Fazlur Rahman by registered sale deed No. 681 dated 15.04.1919 who transferred the same to Md. Solaiman by registered sale deed No. 3878 dated 15.09.1920. Said Solaiman transferred the said land to Jorimunnessa by registered sale deed No. 1740 dated 21.06.1937 and while she was owning and possessing the same S.A Khatian No. 901/17 was prepared and finally published and thereafter she died leaving behind three sons namely plaintiff Nos. 1-2 and predecessor of plaintiff Nos. 3-9, Saleh Ahmed. Thereafter Saleh Ahmed died leaving behind plaintiff Nos. 3-9 as his legal heirs. The land of C.S Plot No. 3514 was divided into six plots during R.S operation and separate R.S Khatians were prepared and finally published in their name. The predecessor of the defendant Nos. 4-13 namely Ekram Mia and their mother Majeda Khatun while trying to dispossess the predecessor of the plaintiff Nos. 3-9, Saleh Ahmed, and plaintiff Nos. 1-2, they filed Other Suit No. 119 of 1973 in the Court of Satkania Munsif and got a decree of permanent injunction against which said Majeda Khatun preferred Other Appeal No. 122 of 1977 which was transferred to 2nd Court of Sub-ordinate Judge for disposal who vide judgment and decree dated 20.06.1981 set aside the judgment of the trial Court and sent the suit back on remand for fresh trial. Thereafter, Saleh Ahmed and plaintiff Nos. 1-2 filed Miscellaneous Appeal No. 11 of 1981 before the High Court Division and the Hon'ble High Court Division without interfering with the judgments of the

Courts below directed to hold local investigation but when the record of the suit was sent to the trial Court the plaintiffs could not trace out the records of the suit. In the above situation, the plaintiffs have constrained to institute the present suit.

Defendant Nos. 1 and 3 jointly filed written statements to contest the suit contending that the suit land along with other land was partitioned by partition deed No. 3308 dated 20.12.1906 and on the basis of the partition deed Obaidullah got the land of B.S Plot No. 3514 and thereafter he transferred the same to Fazlur Rahman by registered sale deed No. 681 dated 15.04.1919 and Fazlur Rahman transferred the same to Md. Solaiman by registered deed of sale No. 3878 dated 15.09.1920. While Solaiman was owning and possessing the suit land transferred the same to Majeda Khatun by registered sale deed No. 509 dated 26.02.1937 and handed over possession to her and accordingly B.S Khatian was prepared in her name against which the plaintiffs filed objection under rule 30 of the SAT Rules and lost against which they filed appeal under rule 31 of the SAT Rules but lost. Thereafter, they filed Other Suit No. 119 of 1973 against the defendants by suppression of facts and got an ex-parte order against which Other Appeal No. 122 of 1977 was filed in which the judgment and decree passed by the trial Court was set aside against which the plaintiffs preferred Second Appeal No. 11 of 1981 in which the judgment of the appellate Court was affirmed. The plaintiffs have no right, title to or possession in the suit land and for harassing them, the plaintiffs have instituted the present suit.

During trial, the plaintiffs adduced two oral witnesses and the defendants adduced three oral witnesses and both parties adduced documentary evidence to prove their respective case. Moreover, during

trial Advocate Commissioner was appointed who, after investigation, submitted report and he was adduced as C.W.1. The trial Court, on considering the evidence of the parties, dismissed the suit by judgment and decree dated 30.04.2017. Being aggrieved by said judgment and decree the plaintiff-opposite parties preferred Other Appeal No. 242 of 2017 before the learned District Judge, Chattogram which was transferred to learned Additional District Judge, 2nd Court, Chattogram for disposal.

During pendency of the appeal, the plaintiffs filed an application under Order VI rule 17 of the Code of Civil Procedure for amendment of the plaint against which the defendants filed written objection. The learned Additional District Judge, 2nd Court, Chattogram, after hearing the parties, allowed the application by order dated 12.11.2023. Challenging the legality of said order dated 12.11.2023 the contesting defendants have preferred this civil revisional application under section 115(1) of the Code of Civil Procedure and obtained the instant Rule.

Mr. S.M Tariqul Islam, learned Advocate appearing for the petitioners submits that by proposed amendment the plaintiffs are trying to introduce an alternative and completely different kind of plea which will have the effect of introducing a new controversy between the parties. Learned Advocate further submits that the application for amendment was filed after conclusion of trial and at appellate stage without explaining due diligence and as such, it was liable to be rejected with cost in view of the provisions under the provisos to rule 17 of Order VI of the Code of Civil Procedure. Learned Advocate further submits that by proposed amendment the plaintiffs changed the cause of action of the suit which is not permitted under law and that the Court of appeal did not consider that the proposed amendment would

fill up the lacuna of the pleading of the plaintiffs. Learned Advocate further submits that by proposed amendment the plaintiffs have introduced a new prayer challenging sale deed No. 509 dated 26.02.1937 executed by Solaiman in favour of Majeda Begum and that the claim was barred by limitation on the date of institution of the suit. Learned Advocate finally submits that without assigning any reason the Court of appeal allowed the application illegally resulting in an error in the decision occasioning failure of justice and as such, interference is called for by this Court.

In support of his contention learned Advocate has referred to the cases of Atiqullah and others vs. Zafala Begum and others 7 MLR (AD) 107, Md. Atiquir Rahman vs. Khan Mohammad Ameer and others 26 BLT (AD) 49, Abdul Wadud and others vs. Abdul Wahed and others 14 MLR (AD) 106.

Mr. M. Belayet Hossain, learned Advocate appearing for opposite party Nos. 1-12, 14-17 and 19-29 submits that the application for amendment of plaint was filed to introduce some facts for the purpose of determining the real questions in controversy between the parties and to introduce a prayer for a decree that the defendants did not acquire title to the suit land by sale deed No. 509 dated 26.02.1937 executed by Solaiman in favour of Majeda Begum. Learned Advocate further submits that by proposed amendment the nature and character of the suit will not change and that amendment of plaint can be allowed at any stage of the proceeding and that the restrictions imposed by the provisos to rule 17 of Order VI of the Code of Civil Procedure in respect of due diligence should be liberally interpreted. Moreover, the plaintiffs stated in the application as to why they could not file the application during trial of the suit. Learned Advocate further submits that the claim

of the plaintiffs in regards sale deed dated 26.02.1937 was not barred by limitation on the date of institution of the suit. Learned Advocate finally submits that in deciding the matter of amendment, the Court of appeal considered the case of the parties and found that by proposed amendment the nature and character of the suit would not change and as such, interference is not called for by this Court.

In support of his contention learned Advocate has referred to the cases of Managing Committee vs. Obaidur Rahman Chowdhury, 31 DLR (AD) 133; Radha Krishno Jogani vs. Dwarkadas Agarwalla and others, 36 DLR (AD) 253; Sufia Khannom Chowdhury vs. Faizunnessa Chowdhury, 39 DLR (AD) 46 and Sree Susil Ranjan Dotta vs. Alhaz Moulavi Idrish Mia, 42 DLR (AD) 110.

I have heard the learned Advocates, perused the plaint, written statements filed by the defendants, the application for amendment of the plaint, impugned order, the judgment and decree of the trial Court and the evidence adduced by the parties.

The application for amendment was filed after conclusion of trial and before the Court of appeal. The proposed amendment runs as follows:

> "সংশোধনের বিষয়ঃ
> (ক) আর্জির ৫ম দফার শেষে 'বিগত ১৫/০৫/২০০৫ ইং তারিখে তপশীলোক্ত সম্পত্তির বি.এস খতিয়ানের সহি মুহুরী নকল পাওয়ার পর মাজেদা খাতুনের নামে ভুল বি.এস খতিয়ান বিষয়ে অবগত হয়' কর্তন হইবে তৎস্থলে "বিগত ১০/০৫/২০০৫ ইং তারিখে সকাল বেলা বিবাদী পক্ষ নালিশী সম্পত্তি বিএস রেকর্ডীয় মালিক ও স্বত্ববান দাবী করিয়া বাদী পক্ষকে নালিশী সম্পত্তি হইতে জোরপূর্বক বেদখলের চেষ্টার করার কাল হইতে মোকদ্দমার হেতু উদ্ভব হইয়াছে এবং ১৫/০৫/২০০৫ ইং তারিখে তপশীলোক্ত সম্পত্তির বি .এস খতিয়ানের সহি মোহরী নকল পাওয়ার পর বাদী পক্ষ অত্র মোকদ্দমা দায়ের করিয়াছে।" বসিবে ।
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> (খ) বাদীপক্ষে বিজ্ঞ নিম্ন আদালতে দায়েরী সংশোধিত আর্জির অবিকল কপি এর ৬ষ্ট দফার ১১শ লাইনে "সর্বপ্রথম অবগত" শব্দ কর্তন হইবে তৎস্থলে "চুড়ান্তভাবে নিশ্চিত" যোগ হইবে এবং একই দফার শেষে নিম্নরুপ যোগ হইবে, "১নং বিবাদীর ফুফু গোলবাহার খাতুন বাদী হইয়া বাদীগণকে বিবাদী করিয়া নালিশী সম্পত্তির খাস দখলের ওয়াশিলাত দাবীতে

সাতকানিয়া ১ম মুন্সেফী আদালতে স্বত্ব মোকদ্দমা নং -২/১৯৪৯ দায়ের করিয়াছিল। বিজ্ঞ আদালত উক্ত মোকদ্দমা ২৭/০২/৫২ ইং তারিখে রায়ে দোতরফা সূত্রে খারিজ করিয়াছেন । বিজ্ঞ আদালত উক্ত রায়ে উল্লেখ করিয়াছেন 'without local investigation and relay it is not possible to say with any amount of certainty whether the R.S. Plot 3517/10359 is part of CS Plot 3514 or CS Plot 3517' এবং একই রায়ে পুনরায় উল্লেখ করিয়াছেন "The above calculation are no doubt unscientific and inaccurate but I have got no alternative but depend on this unscientific method. The disputed land has always been treated as part of C.S Plot 3514". বিজ্ঞ আদালত উক্ত রায়ে নালিশী সম্পত্তি সি.এস ৩৫১৪ দাগের অংশ হিসাবে সিদ্ধান্ত দিয়াছেন এবং উক্ত মোকদ্দমা অত্র মোকদ্দমার বাদীর পূর্ববর্তীর বিরুদ্ধে ১নং বিবাদীর ফুফু বাদী হইয়া নালিশী সম্পত্তিতে খাস দখলের মোকদ্দমা দায়ের করিয়া নালিশী সম্পত্তিতে এই বাদীর পূর্ববর্তীর দখল স্বীকার করা হইয়াছে। বাদী পক্ষ ঐ সময় হইতে নালিশী সম্পত্তিতে পূর্ববর্তীর ক্রমে নিরবচ্ছিন্নভাবে ভোগ দখল করিয়া আসিতেছে। বিবাদী পক্ষের দলিলে নালিশী বাটা ১০৩৫৯ দাগ নাই, দাবীও করে নাই। বাদী পক্ষের পূর্ববর্তী তথা উক্ত মোকদ্দমার বিবাদী পক্ষ অশিক্ষিত ও আইন সম্পর্কে সঠিক জ্ঞানের অভাবে ও বিজ্ঞ কৌশলীর সঠিক কোন পরামর্শ না দেওয়ায় আর.এস খতিয়ান নং ৯০১ ও দলিল নং-১৭৪০ সংশোধনের জন্য ঐ সময়ে কোন পদক্ষেপ গ্রহণ করেন নাই। বর্তমানে বিজ্ঞ কৌশুলীর পরামর্শের ভিত্তিতে বাদী পক্ষ অত্র মোকদ্দমা দায়ের করিয়াছে। ইহাতে বাদীর পদের অনিচ্ছাকৃত বিলম্ব হইয়াছে। যাহা ন্যায় বিচারের স্বার্থে মওকুপযোগ্য।''

(গ) আর্জির ৭ম দফার প্রথমে ''মোকদ্দমার হেতু'' শব্দের পর নিম্নরুপ যোগ হইবে ''বিগত ১০/০৫/২০০৫ ইং তারিখে বিবাদী পক্ষ বাদী পক্ষকে নালিশী জায়গা হইতে জোর পূর্বক বেদখল করার জন্য চেষ্টা করার কাল হইতে এবং'' যোগ হইবে এবং উক্ত দফার ৪র্থ লাইনে ''চূড়ান্তভাবে নিশ্চিত'' শব্দ যোগ হইবে।

(ঘ) আর্জির ''গ'' প্রার্থনার পর ''গগ'' প্রার্থনা হিসাবে নিম্নরুপ যোগ হইবে ''বিবাদীর পূর্ববর্তী মাজেদা খাতুনের নামে খরিদা ২৬/০২/১৯৩৭ ইং তারিখের ৫০৯ নং দলিল মূলে নালিশী আর. এস ৩৫১৭/১০৩৫৯ দাগে তৎ বিএস ১৫০১৬ দাগে বিবাদী পক্ষ কোন প্রকার স্বত্ববান নয় মর্মে উচ্চারনের ডিক্রি হয়''।

The Court of appeal allowed the amendment observing as follows:

"তৎপর আপীলকারী পক্ষের আর্জি সংশোধনের দরখাস্ত্ম সহ আপত্তির উপর শুনানীর জন্য নেওয়া হল। উভয়পক্ষের বক্তব্য বিস্ত্মারিত শুনলাম। সংশোধনের দরখাস্ত্ম সহ তৎ বিরম্নদ্ধে প্রতিযোগী ১/৩ নং রেসপন্ডেন্ট পক্ষের বিজ্ঞ কৌসুলী প্রদত্ত বক্তব্য পর্যালোচনা করলাম। দেখা যায় আপীলকারী পক্ষে আর্জির ৫ম ও ৭ম দফার শেষে কতেক বক্তব্য সংযোজন পূর্বক 'গগ' প্রার্থনা হিসাবে ১ টি নতুন প্রার্থনা সংযোজনের প্রার্থনা করেন। প্রতিযোগী রেসপন্ডেন্ট পক্ষ প্রার্থীত সংশোধনীর বিরম্নদ্ধে জোর আপত্তি করলেও পার্থীত সংশোধনীর দ্বারা মোকদ্দমার আকৃতি প্রকৃতি পরিবর্তন হবে মর্মে প্রতীয়মান নহে এবং সংশোধনীর প্রার্থনা করা হলে পক্ষগনের মধ্যে প্রকৃত বিরোধ নিস্পত্তিতে সহায়ক হবে মর্মে প্রতীয়মান। তবে বিলম্বে দরখাস্ত্ম দাখিল করায় উক্ত দরখাস্ত্ম খরচা সহ মঞ্জুরযোগ্য

বিবেচিত হল। উক্ত মতে আপীলকারী পক্ষের আর্জি সংশোধনের দরখাস্ত্ম ১০০০/- টাকা খরচা সহ মঞ্জুর করা হল। ”

Order VI rule 17 of the Code of Civil Procedure provides that an amendment of the pleading may be allowed at any stage of the proceeding in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Amongst others, a cryptic law point is raised in this case. It is, whether in view of the amendment of the Code of Civil Procedure by Gazette Notification dated 24th September, 2012 adding two provisos to rule 17 of Order VI after the ward “parties” by substituting colon mark (;) for the full stop, an amendment to the plaint can be allowed at the appellate stage.

For ready reference those added provisos to rule 17 of Order VI of the C.P.C is quoted below:

> “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 payment to the objector such cost by way of compensation as it things fit.”

In Md. Atiqur Rahman vs. Khan Mohammad Ameer & others, 26 BLT (AD) 49 the amendment was made at the appellate stage. Same

point was raised before the hon'ble Appellate Division. It was argued that the amendment made in the appellate forum is to fill up the lacuna and as such, it is not permissible in law inasmuch as they could not have amended the plaint prior to the trial of the suit. Secondly, though amendment of pleadings is discretionary power, it should not be exercised on mere asking by the plaintiffs and the power of the Court should not be exercised arbitrarily. Thirdly, it was argued that after the amendment of the Code of Civil Procedure, no amendment can be made unless it is proved by sufficient matters that the party seeking amendment was diligent in prosecuting with the proceeding, and the Court cannot take away the right accrued in favour of the appellants under the amended provision of the Code in the absence of sufficient explanation that there was no neglect or latches in not seeking proper amendment in time and that the prayer for amendment was made *bona fide*.

The Hon'ble Appellate Division answered all the arguments raised on behalf of the appellant and in paragraph Nos. 4, 10 and 15 it is held as follows:

> "**4.** On the question of amendment of the pleadings the opinions of the superior Courts of this sub-continent are almost identical. It is that an amendment of the pleadings can be made at any stage of the proceedings but such amendment cannot be made if the nature and character of the suit is changed; that the amendment is barred on the date of institution of the suit; that the amendment should be allowed with a view to resolving all controversies over the same subject matter between the parties and this will prevent the multi-furiousness of proceedings; that all reliefs ancillary to the main relief which is in the nature of additional relief should be allowed as general rule…….

10. If we read the language used in rule 17 of Order 6, the power of the Court to allow amendment is wide. The first sentence is cast in affirmative, that is to stay, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings. It has been enacted with no object to the than to facilitate the task of administration of justice. The language used in it is used very wide terms that the Courts power to allow amendment has been considerably enlarged. In the alternative, the Court should adopt a liberal approach in allowing the amendment and it should not disallow on hypothetical grounds. The second limb of the rule is that the amendment of the pleadings may be allowed on such terms 'as may be just'. So, the Court is required to see whether the amendment is necessary for just and proper adjudication of the case. So, the Court is left with no discretion but to allow the amendment if the proposed amendment is just for proper adjudication of the suit. The other condition is that the Court is required to see that amendment in necessary 'for the purpose of determining the real question is controversy between the parties'. So, the amendment of the pleadings should be allowed which are necessary for determination of the real controversy in the suit.

15. It is now settled that an appeal is the continuation of the original proceeding because of the fact that all rules and procedures applicable to the trial Court are equally applicable to the appellate Court in view of Section 107 read with Order 41 of the Code. In the first proviso the legislature has attached condition that the Court shall not allow amendment after the trial has commenced if the litigant is negligent in pursuing the matter property. It is in conflict with rule 17, inasmuch as, the pleadings are normally prepared by the lawyers of the parties. A litigant has no knowledge about the intricacies of pleadings. On perusal of the pleadings and the documents, if the lawyer

finds defect in the pleadings, he advices his client to amend the pleadings. This defect may be detected at the appellate forum when a senior lawyer conducting the appeal finds the defect. Now under such circumstances how the Court will form opinion that in spite of due diligence, the plaintiff or the defendant has not rectified the defect before the commencement of trial? If the lawyer is competent one, he will make proper amendment at the preliminary stage of the suit after the filing of the written statement. Even if no such advice to amend is given due to oversight or mistake, he may suggest to his client to make amendment showing reasons that his client has not brought the amendment despite his due diligence in prosecuting the matter, but if a lawyer is weak in drafting pleadings naturally it is not expected of him of explain the reasons for the delay properly.

On plain reading of this proviso it suggests that the amendment incorporating facts which are within the knowledge of the party seeking amendment at the earliest opportunity would not be allowed after the commencement of the trail if no proper explanation is given regarding delay. But it is difficult to prove the same. The question is whether the amendment will be rejected if it is found relevant for the purpose of determining the real questions in controversy between the parties. The answer to the question is emphatically in negative. If the defect remains, there will arise multifariousness of proceedings and to obviate it from doing justice this rule 17 has been inserted.

In the second proviso the legislature has given power to award cost if the court finds that the amendment is made with a view to delaying he proceedings. This second proviso conflicts with the first proviso, inasmuch as, if the Court can allow the amendment with costs if it is satisfied that the litigant has made the amendment after the

> commencement of the trial with a view to delaying the matter, then it is not necessary to attach condition in the first proviso. Secondly, in rule 17 it is especially provided that amendment may be made at any stage 'on such terms' that is, the Court can allow amendment with costs. The expression 'on such terms' means if the Court allows amendment, it has discretionary power to award a cost. The terms may be imposed in allowing an amendment must be such as have nexus with the application allowed or relief granted. "

Finally, the hon'ble Appellate Division allowed the amendment of the plaint filed at the appellate stage with cost of Tk 50,000/- having satisfied that the proposed amendment was necessary for the purpose of determining the real questions in controversy between the parties.

In *Abul Kalam Azad and another vs. Sonher Ali and others 46 DLR (AD) 130* it has held that even amendment of written statement cannot be allowed to introduce an alternative and completely different kind of defense which will have the effect of new controversy between the parties. In *Golam Hafiz Miah vs. Khadem Ali Miah 29 DLR (SC) 311* it has held that in exercising this power the Court would no doubt be reluctant to allow such amendment which would have the effect of totally altering the nature of the suit or take away a valuable right accrued by laps of time. In *Md. Nurul Islam vs. Abdul Malek 6 BLD (AD) 201* it has held that amendment can be allowed at any stage of the proceeding but after an inordinate delay it will be in equitable to allow the prayer for amendment. *In Ajmol Khan vs. Md. Afjal Khan 64 DLR (AD) 17* it has been held that where a party has admitted certain facts, he cannot subsequently be allowed to disown those admission by way of amendment and if such prayer is allowed, it will instead of promoting

ends of justice, defeat the ends of justice. In *Khairunnahar and others vs. Omar Nahar and others 30 BLT 219* it has held that: if such amendment of pleadings are allowed there will ultimately be never ending of any disputes in civil Courts. In *Atiqur Rahman vs. Khan Md. Amir and others 26 BLT (AD) 49* it has been further held that if the amendment substitutes any cause of action that should not be allowed.

In view of the principle of law settled by our Apex Court it is clear that an amendment of the pleadings may be allowed at any stage of the proceeding even at the appellate stage when the Court is satisfied that the proposed amendment is necessary for the purpose of determining the real questions in controversy between the parties. However, if it is made in a belated stage and from the conduct of the party it is apparent that there is neglect or latches in pursuing the suit properly the amendment should be allowed subject to payment of costs. But an amendment of the pleading cannot be allowed: (1) to introduce an alternative and completely different kind of defense which will have the effect of new controversy between the parties; (2) which would have the effect of totally altering the nature of the suit or take away a valuable right accrued by laps of time; (3) where a party has admitted certain facts, he cannot subsequently be allowed to disown those admission by way of amendment (4) if the amendment substitutes any cause of action.

In the instant case the plaintiffs by proposed amendment firstly sought to change the cause of action of the suit from 15.05.2005 to 10.05.2005 by introducing new fact that cause of action of the suit arose on 10.05.2005 when the defendants tried to disposes the plaintiffs from the suit land and on 15.05.2005 when the plaintiffs collected the certified copy of the B.S Khatian. Secondly, they sought to

introduce the fact that in Title Suit No. 02 of 1949 it was decided that the disputed land has always been treated as part of C.S Plot No. 3514 and that the possession of the predecessor of the plaintiffs had been admitted in the title suit. Thirdly, by proposed amendment the plaintiffs mentioned the boundary of the suit land for its specification. Fourthly, they added a prayer to get another decree of declaration that the defendants could not acquired title to the suit land by sale deed No. 509 dated 26.02.1937. It may be mentioned here that the defendants produced the certified copy of the sale deed No. 509 dated 26.02.1937 which was marked as exhibit-'Ga'. They also produced the certified copy of judgment dated 27.02.1952 passed in Title Suit No. 02 of 1949 which was marked as exhibit-'Neo'.

The trial Court on consideration of the evidence on record arrived at the finding of facts as under:

> "অপরদিকে বিবাদীপক্ষ দাবী করেছেন যে, মোঃ সোলায়মান ২৬/০২/১৯৩৭ ইং তারিখের ৫০ নং কবলা মুলে (প্রদ-গ) বিবাদীগণের পূর্ববর্তী মাজেদা খাতুনকে তপশীলোক্ত জমি ও অন্যান্য জমি মোহরানার পরিবর্তে হস্ত্মান্ত্মর করে দখলে দেন। বি.এস. মাঠ জরীপ মাজেদা খাতুনের নামে রেকর্ড হওয়ায় বাদীপক্ষ পূর্ববঙ্গ প্রজাস্বত্ব আইনের ৩০ ধারা মোতাবেক ৯৭৭/৭৭ নং আপত্তি দায়ের করেন (প্রদ-ছ/জ/ঝ)। সেখানে বাদীপক্ষের আপত্তি দোতরফা সূত্রে মঞ্জুর হয়। পরবর্তীতে বিবাদীপক্ষের পূর্ববর্তী মাজেদা খাতুন ৩১ ধারা মোতাবেক ২২৭৮৩/৮০ আপীল দায়ের করেন ৯ (প্রদ-ছ)। উক্ত আপীলে আপত্তির আদেশ বাতিল করে মাজেদা খাতুনের নামে বি.এস. খতিয়ান রেকর্ড করার নির্দেশ দেয়া হয়। বিবাদীপক্ষ দাবী করেন যে মাজেদা খাতুনের নামে বি.এস. জরীপ শুদ্ধভাবে রেকর্ড হয়েছে।
>
> বাদী ও বিবাদী উভয়পক্ষ স্বীকার করেছেন যে, বি.এস. ৩৫১৪ দাগের সম্পত্তি আর.এস ৩৫১৪ /৩৫১৪ /১০৩৩০/ ৩৫১৪/ ১০৩৬১/ ৩৫১৪/ ১০৩৫৯/ ৩৫১৪/ ১০৩৩১/ ৩৫১৪/ ১০৩৬০ দাগে রেকর্ড হয়। বাদীপক্ষ ২১/০৬/১৯৩৭ ইং তারিখের ১৭৪০ কবলা মূলে (প্রদ-৭) নালিশী তপশীলের সম্পত্তি দাবী করেন। উক্ত কবলাতে আর.এস. দাগ ৩৫/১০৩৫৯ লিপি হয়। বাদীপক্ষ দাবী করেছেন যে, প্রকৃতপক্ষে আর.এস. ৯০১ খতিয়ানের উক্ত দাগটি ৩৫১৪/১০৩৫৯ হবে। আর.এস. খতিয়ান ভুল হয়েছে। ফলে কাবলাতেও ৩৫১৭/১০৩৫৯ লিপি করা হয়েছে। অত্র মোকদ্দমায় সার্ভে কমিশনার C.W.-১ প্রতিবেদন (প্রদ-I) দাখিল করে বলেছেন, আর.এস. ১০৩৫৯ বাটা দাগ সি.এস. ৩৫১৪ দাগ থেকে উদ্ভূত এবং আর.এস সিটে ৩৫১৭ দাগ লিপি হয় নাই। এছাড়া, জনৈক গোলাহার খাতুন বর্তমান ৩- ৯নং বাদীগণের পূর্ববর্তী সালেহ আহমদের বিরম্নদ্ধে স্বত্ব ঘোষণার দাবীতে সাতকানিয়া ১ম মুন্সেফ আদালতে ০২/১৯৪৯ (প্রদ-ঞ) মোকদ্দমা দায়ের করেন। উক্ত মোকদ্দমায় ২ নং বিচার্য বিষয় ছিল আর.এস. দাগ ৩৫/১০৩৫৯

সি.এস. অংশ কিনা এবং ৩ নং বির্চায় বিষয় ছিল আর. এস. খতিয়ান ভুল কিনা। উক্ত মোকদ্দমায় আদালত সিদ্ধান্ত্ম দেন যে, আর.এস দাগ ৩৫১৭/১০৩৫৯ সি.এস. ৩৫১৪ দাগের অংশ এবং আর.এস. খতিয়ান ভুল। উক্ত মোকদ্দমায় ২৭/০২/১৯৫২ অর্থাৎ বাদীপক্ষ ২৭/০২/১৯৫২ ইং তারিখ থেকে জানতো যে, আর.এস. ৯০১ খতিয়ান ভুল, অশুদ্ধ। কিন্তু বাদীপক্ষ তাদের ১৭৪০ নং কবলাটি সংশোধনের জন্য কোন পদক্ষেপ গ্রহণ করেন নাই, বরং অত্র মোকদ্দমায় উক্ত কবলা সংশোধনের প্রার্থনা আনয়ন করেছেন"

In regards cause of action, the plaintiffs in the plaint stated that on 15.05.2005 the cause of action arose when the plaintiffs collected certified copy of B.S Khatian and thereafter on 30.05.2005 when they definitely came to learn about wrong R.S Plot mentioned in the R.S Khatian and in the deed No. 1740. By way of amendment of the plaint the plaintiffs are now trying to introduce the fact that cause of action arose on 10.05.2005 when the defendants tried to disposes the plaintiff from the suit land and thereafter on 15.05.2005 when they got the certified copy of the B.S Khatian. So, it appears that by proposed amendment the plaintiffs are changing/substituting the date of cause of action by introducing new controversy between the parties against the settled principle of law that an amendment should not be allowed which substitutes any cause of action. Moreover, the trial Court gave definite findings in regards cause of action of the suit and finally came to conclusion that the suit is barred by limitation.

In view of the pleadings of the parties and the evidence led by them it appears that the amendment seeking to introduce fact about the judgment passed in Title Suit No. 02 of 1949 and its result was not necessary for the purpose of determining the real question in controversy between the parties because this controversy between the parties has already been resolved by the trial Court on the basis of the evidence of the parties. Moreover, the defendants did not deny the judgment passed in Title Suit No.02 of 1949 and they themselves

produced the certified copy of the judgment of Title Suit No. 02 of 1949 which was marked as exhibit-Neo.

In regards specification of the suit land and possession of the plaintiffs in the suit land the trial Court observed as follows:

> ‘‘পি.ডব্লিউ ১ ও পি. ডব্লিউ ২ এর জেরা পর্যালোচনায় দেখা যায় যে নালিশী জমিতে নিরন্নকুশ দখল আছে মর্মে বাদীগণ কোন সাক্ষ্য উপস্থাপন করতে পারে নাই। বরং নালিশী জমির পশ্চিম পাশে ভিন্ন ব্যক্তির নাম উল্লেখ করেছেন’’

Moreover, the P.W.1 in his cross-examination stated as follows:

> ‘‘জমির উত্তর পাশে সুলতান আহম্মেদ, দক্ষিণ পাশে সরকারী রাস্তা, প্রফেসর ফিরোজ আহম্মেদ গং পশ্চিম পাশে মোঃ ইব্রাহীম গং এ বন্দে জমির পরিমান ১ কাণী খতিয়ান ৩৬ শতক’’

By proposed amendment the plaintiffs sought to introduce different boundary of the suit land which would definitely change the fundamental pleading of the plaintiffs and arise a new controversy between the parties which is not permissible in law. Moreover, by the proposed amendment the plaintiffs are trying to introduce new controversy and to fill in the lacuna in their pleadings. It is a settled principle of law that an amendment cannot be allowed to fill in the lacuna of the pleadings of the parties.

In regards the proposed amendment introducing an additional prayer, the plaintiffs sought to add a prayer that by deed No. 509 dated 26.02.1937 the defendants could not acquire title to the suit land. This amendment cannot be allowed because of the fact that they stated nothing as to the date of their knowledge of the deed or from when cause of action arose to nullify said deed of 1937. On the other hand, the defendants’ claim was that the plaintiffs knew about the said deed dated 26.2.1937 after filing their Title Suit No. 119 of 1973 for a decree of permanent injunction against the predecessor of the present

defendants namely Majeda Khatun in which Majeda Khatun by filing written statements claimed title to the suit land by dint of sale deed dated 26.02.1937. In that suit the present plaintiffs and their predecessor lost up to the High Court Division in Second Appeal No. 11 of 1981 (exhibit-13). Since the plaintiffs did not challenge the said deed dated 26.02.1937 after filing written statement by Majeda Khatun in Title Suit No. 119 of 1973 within the period of limitation, now they have no right to challenge the deed after laps of time because of the fact that the law is now well settled that an amendment cannot be allowed where its effect will take away any legal right which might have accrued to him by laps of time. This view find support in the case of Sree Susil Ranjan Dutta vs. Al haz Moulovi Idrish Mia 42 DLR (AD) 110.

Considering the above scenario of the case it appears that the proposed amendment was a misconceived one and was made to delay the disposal of the appeal but while allowing the amendment the Court of appeal did not appreciate factual and legal aspect of the matter and without any reason allowed the amendment with the omnibus observation that the proposed amendment would not change the nature and character of the suit and it was necessary for proper adjudication of dispute between the parties without detailing how and why the amendment was necessary and accordingly, committed an error of law resulting in an error in the decision occasioning failure of justice.

In view of the above I find merit in this Rule.

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

The impugned order is set aside and the application for amendment is rejected with cost of Tk. 10,000/- to be paid by the

plaintiffs to the defendants before the trial Court within 30(thirty) days from the date of receipt of the copy of this judgment.

The Court of appeal is directed to dispose of the appeal on merit in accordance with law and as expeditiously as possible preferably within 6 (six) months from the date of receipt of the copy of this judgment.

Communicate a copy of this judgment to the Court of appeal at once.

(Justice Md. Badruzzaman)