

District-Chattogram.

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr. Justice Md. Anowarul Islam

Civil Revision No. 3493 of 2024

IN THE MATTER OF :

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

-And-

In the Matter of:

Abu Taher

.....Petitioner

Versus

Abu Bakar and others

.....Opposite parties

Mr. M. A. Azim Khair, Senior Advocate with

Mr. Md. Iqbal Hossain, and

Mr. Md. Sultanuzzaman Sumon, Advocates

.....For the petitioner

Mr. Mohammad Abdul Alim, Advocate

.....For the opposite parties

Heard on: 04.05.2026 and 07.05.2026

Judgment on: 18.05.2026

Md. Anowarul Islam, J:

Introduction

1. This Rule was issued calling upon the Opposite Party No. 1 to show cause as to why Order No. 04 dated 14.02.2024 passed by the learned Senior District Judge, Chattogram, in Civil Revision No. 263 of 2023, allowing the revisional application and thereby setting aside Order No. 87 dated 30.07.2023 passed by the learned Senior Assistant Judge, 5th Court, Sadar, Chattogram, in Other Suit No. 1669 of 2021, rejecting the defendant's application for marking an affidavit dated 09.10.1979 as an exhibit, should not be

set aside and/or such other or further order be passed as this Court may deem fit and proper.

2. At the time of issuance of the Rule, operation of the impugned order dated 14.02.2024 was stayed for six months. The order of stay has thereafter been extended from time to time and was lastly extended on 23.02.2026 for a further period of one year.

The Facts

3. The present revisional application, at the instance of defendant No.1, arises out of an interlocutory order passed during the pendency of a partition suit. The controversy is confined to the admissibility of an affidavit dated 09.10.1979, which the defendant sought to produce as documentary evidence during trial.

4. The relevant facts, in brief, are that the plaintiff instituted Other Suit No. 265 of 2007 before the Court of the learned Joint District Judge, 1st Court, Chattogram, seeking partition of the immovable properties described in the schedule to the plaint. Upon transfer, the suit was renumbered as Other Suit No. 1669 of 2021 and came before the Court of the learned Senior Assistant Judge, 5th Court, Sadar, Chattogram.

5. The plaintiff's case is that one Abul Jafur Showdagar was the original owner of the suit property, whose name was duly recorded in the B.S. Khatian. During his lifetime, he gifted portions of his

property to defendant Nos. 11,12 and 13 by registered deeds. Upon his death, he left behind two wives, three sons and eight daughters, who inherited the remainder of his estate according to Muslim law.

6. According to the plaintiff, disputes subsequently arose amongst the heirs regarding their respective shares. Although an amicable settlement was allegedly reached through a local *salish*, disagreements later resurfaced. The plaintiff further claims that after the death of the first wife, her heirs relinquished their respective shares in his favour and that, by virtue of a decree obtained in Other Suit No. 273 of 2004 and the subsequent execution of a registered sale deed, he acquired an additional interest in the suit property.

7. It is further alleged that defendant No.1 refused to honour the earlier family arrangement, asserted a larger share than that to which he was entitled, and attempted to disturb the plaintiff's possession. Proceedings under sections 107 and 145 of the Code of Criminal Procedure were initiated but failed to resolve the dispute. Consequently, the plaintiff instituted the present suit seeking partition by metes and bounds.

8. Defendant No.1 entered appearance and contested the suit by filing a written statement denying the material allegations made in the plaint. It was contended that the plaintiff, defendant Nos. 10 and 11, being the children of the first wife, had already received

substantial properties by way of gifts from Abul Jafur Showdagar and were not entitled to any further share in his estate.

9. The defence further alleged that Abul Jafur Showdagar had divorced his first wife, Maleka Begum, during his lifetime and that, consequently, neither she nor her children acquired any right, title or interest in the remaining estate. It was also contended that the plaintiff had acted dishonestly in causing certain gifted properties to be registered in the names of his own sons instead of in his own name. The defendants additionally challenged the maintainability of the suit on various grounds, including defect of hotchpot, absence of declaration of title, incorrect mutation records and lack of possession.

Proceedings Before the Courts Below

10. During the pendency of the suit, defendant No.1 filed an application under Order VI Rule 17 read with section 151 of the Code of Civil Procedure seeking amendment of the written statement. By the proposed amendment, the defendant sought to introduce an entirely new case alleging that the plaintiff was not the biological son of Abul Jafur Showdagar but was born from an illicit relationship between Maleka Begum and one AbuTaleb. Reliance was placed upon an affidavit dated 09.10.1979 allegedly sworn by Abul Jafur Showdagar before a First Class Magistrate declaring the plaintiff to be his illegitimate child.

11. The plaintiff opposed the application by filing a written objection.

12. By Order No. 28 dated 07.06.2010, the learned trial Court allowed the amendment.

13. The plaintiff challenged the said order before the High Court Division in Civil Revision No. 3077 of 2010. By judgment and order dated 15.10.2012, a Division Bench made the Rule absolute and set aside the order allowing amendment. The High Court Division held that the proposed amendment sought to introduce an entirely new case and to alter the defendants' original stand after commencement of the trial without any satisfactory explanation. The Court further observed that the proposed amendment would necessitate further evidence and was neither necessary nor proper for determining the real controversy between the parties.

14. Against the aforesaid judgment, defendant No.1 preferred Civil Petition for Leave to Appeal No. 809 of 2014 before the Appellate Division. Although the petition was filed beyond time, it was heard on merit and, by judgment dated 21.11.2016, was dismissed, thereby affirming the decision of the High Court Division.

15. After the proceedings resumed before the trial Court, defendant No. 1 filed an application on 09.07.2023 praying that the affidavit dated 09.10.1979 be marked as an exhibit. The defendant contended that neither the High Court Division nor the Appellate Division had

declared the affidavit to be void or inadmissible and that, notwithstanding the rejection of the amendment, there was no legal impediment to exhibiting the document during trial.

16. The plaintiff opposed the application, contending that, since the proposed amendment introducing the allegations contained in the affidavit had been finally rejected, there remained no pleading to support the document. It was submitted that a document inconsistent with or beyond the pleadings could not be admitted in evidence.

17. Upon hearing the parties, the learned Senior Assistant Judge, by Order No. 87 dated 30.07.2023, rejected the application. The learned trial Court held that the affidavit related to matters which had already been excluded from the pleadings by virtue of the earlier judgment of the High Court Division and that, in the absence of any corresponding pleading, the affidavit could not legally be exhibited.

18. Defendant No. 1 thereupon preferred Civil Revision No. 263 of 2023 before the learned Senior District Judge, Chattogram. By the impugned Order No. 04 dated 14.02.2024, the learned Senior District Judge allowed the revision and directed the trial Court to take steps for marking the affidavit as an exhibit in accordance with law after securing the original record, if available, and the attendance of the identifying advocate, if alive.

19. Being aggrieved by the said order, defendant No. 1 has preferred the present revisional application under section 115(1) of the Code of Civil Procedure.

Submissions on Behalf of the Petitioner

20. Mr. M. A. Azim Khair, the learned Senior Advocate, assisted by Mr. Md. Iqbal Hossain and Mr. Md. Sultanuzzaman Sumon, the learned Advocates appearing on behalf of the Petitioner, submits that the learned Senior District Judge committed a manifest error of law in reversing the well-reasoned order passed by the learned trial Court and directing that the affidavit dated 09.10.1979 be marked as an exhibit.

21. The learned Senior Advocate submits that the affidavit dated 09.10.1979 formed the sole foundation of the proposed amendment of the written statement, whereby defendant No. 1 sought to introduce an altogether new defence alleging that the plaintiff was not the legitimate son of the common predecessor, Abul Jafur Showdagar. That amendment was ultimately rejected by the High Court Division in Civil Revision No. 3077 of 2010, and the said decision was affirmed by the Appellate Division upon dismissal of Civil Petition for Leave to Appeal No. 809 of 2014. Consequently, the allegations sought to be introduced by the proposed amendment never became part of the defendants' pleadings.

22. It is contended that once the amendment stood finally rejected, there remained no pleading to support the affidavit. It is a settled principle of civil procedure that evidence cannot be adduced on a matter which is not pleaded. Since the allegations contained in the affidavit are entirely outside the scope of the written statement, the document itself became legally irrelevant and incapable of being admitted in evidence.

23. The learned Senior Advocate further submits that the learned trial Court correctly appreciated this principle and rightly held that, in the absence of any corresponding pleading, the affidavit could not legally be marked as an exhibit. The trial Court also correctly observed that permitting the document to be exhibited would effectively allow the defendants to achieve indirectly what they had been expressly prohibited from doing by the judgments of the High Court Division and the Appellate Division.

24. It is next submitted that the learned Senior District Judge failed altogether to address the principal reason assigned by the learned trial Court for rejecting the application. Instead of examining whether the document could legally be admitted without any supporting pleading, the revisional Court proceeded on the erroneous assumption that, since neither the High Court Division nor the Appellate Division had declared the affidavit to be void, the document could be marked as an exhibit. According to the learned Senior Advocate, this approach overlooks the distinction between the

admissibility of a document and its relevancy in the absence of pleadings.

25. The learned Senior Advocate further argues that the revisional Court exceeded its jurisdiction under section 115(2) of the Code of Civil Procedure. Having found fault with the order of the trial Court, the learned Senior District Judge ought, at most, to have remanded the matter for fresh consideration. Instead, without setting aside the reasoning of the trial Court or recording any finding on the legal issue involved, the revisional Court finally disposed of the application by directing the trial Court to procure the original affidavit, secure the attendance of the identifying advocate, if available, and mark the document as an exhibit. Such a direction, it is submitted, amounts to granting substantive relief without first determining the legal admissibility of the document.

26. Referring to the earlier judgment of the High Court Division in Civil Revision No. 3077 of 2010, the learned Senior Advocate submits that the Division Bench expressly held that the proposed amendment sought to introduce a completely new case, would require further evidence and amounted to an impermissible departure from the defendants' original stand. That finding, having attained finality upon affirmation by the Appellate Division, binds the parties. The learned revisional Court, however, failed to appreciate the legal consequences flowing from that judgment.

27. It is further contended that permitting the affidavit to be exhibited would, in substance, reopen an issue already concluded by judicial determination. Although the document itself was not expressly declared inadmissible by the High Court Division, the factual foundation necessary for relying upon it ceased to exist once the proposed amendment incorporating those allegations was finally rejected. Consequently, the document cannot be introduced through evidence to establish a case which the defendants are not permitted to plead.

28. The learned Senior Advocate finally submits that the impugned order, if allowed to stand, would seriously prejudice the plaintiff by permitting evidence on matters entirely outside the pleadings, contrary to the settled principles governing civil trials. The impugned order, therefore, suffers from material illegality resulting in failure of justice and calls for interference under section 115(1) of the Code of Civil Procedure.

Submissions on Behalf of the Opposite Parties

29. Mr. Mohammad Abdul Alim, the learned Advocate appearing on behalf of the Opposite Parties, opposes the Rule and supports the impugned order passed by the learned Senior District Judge.

30. The learned Advocate submits that the learned revisional Court committed no illegality in directing the affidavit dated 09.10.1979 to be marked as an exhibit. According to him, the sole issue before the

learned Senior District Judge was whether the affidavit was admissible in evidence. The revisional Court rightly held that the trial Court ought first to admit the document into evidence, leaving its evidentiary value and legal effect to be assessed at the time of final disposal of the suit.

31. Referring to the written statement, the learned Advocate submits that the defendants had consistently pleaded that the plaintiff and defendant Nos. 10 and 11 had no right, title or interest in the estate of Abul Jafur Showdagar because Maleka Begum had been divorced during his lifetime. According to him, the affidavit dated 09.10.1979 does not introduce an entirely new case but merely constitutes documentary evidence in support of the defendants' existing plea regarding the divorce.

32. The learned Advocate further submits that the earlier proceedings arising out of Civil Revision No. 3077 of 2010 do not create any legal bar to the production of the affidavit. The issue before the High Court Division in that proceeding was confined to the propriety of allowing the amendment of the written statement under Order VI Rule 17 of the Code of Civil Procedure. Neither the High Court Division nor the Appellate Division examined the admissibility, authenticity or legal effect of the affidavit itself. Consequently, it cannot be said that the document has been excluded from evidence by any judicial pronouncement.

33. It is next contended that the affidavit constitutes primary documentary evidence within the meaning of the Evidence Act, 1872. According to the learned Advocate, the original affidavit is preserved in the office of the Deputy Commissioner, Chattogram, and forms part of a public record. Being a public document, it is admissible in evidence without formal proof. In support of this contention, reliance has been placed upon the decision reported in 3 BLT 40, wherein it was held that an affidavit of divorce, being a public document, may be admitted in evidence without formal proof.

34. The learned Advocate further submits that the question of divorce is directly relevant to the determination of the parties' respective rights of inheritance under Muslim law. If the defendants ultimately succeed in proving that Maleka Begum had been divorced by Abul Jafur Showdagar during his lifetime, the plaintiff's claim through his mother would necessarily be affected. It is therefore argued that the defendants ought not to be deprived of the opportunity to prove a material fact by producing the best available documentary evidence.

35. It is also submitted that the learned trial Court rejected the application solely on the ground that the affidavit was beyond the pleadings, without considering its nature or evidentiary character. The learned Senior District Judge, in exercise of the revisional jurisdiction conferred by section 115(2) of the Code of Civil

Procedure, was competent to correct that error and to pass such order as the justice of the case required.

36. Placing reliance upon the wide revisional powers conferred by section 115(2) of the Code of Civil Procedure, the learned Advocate argues that the learned Senior District Judge acted within jurisdiction in directing the trial Court to secure the original affidavit, if available, and thereafter to mark it as an exhibit in accordance with law. Such a direction, according to him, neither determines the evidentiary value of the document nor prejudices the issues involved in the suit, but merely facilitates a proper adjudication of the controversy between the parties.

37. In conclusion, the learned Advocate submits that the impugned order suffers from no jurisdictional error or material irregularity warranting interference under section 115(1) of the Code of Civil Procedure. He therefore prays that the Rule be discharged.

Discussion & Analysis

38. I have heard the learned Advocates for the respective parties, perused the impugned order, the order passed by the learned trial Court, the materials on record and the judgments rendered in the earlier proceedings between the parties. Upon careful consideration, I find considerable substance in the submissions advanced on behalf of the petitioner.

39. The principal question requiring determination is whether, after the rejection of the proposed amendment of the written statement by the High Court Division, as affirmed by the Appellate Division, the learned Senior District Judge was justified in directing that the affidavit dated 09.10.1979 be marked as an exhibit during the trial.

40. It is a fundamental principle of civil jurisprudence that evidence must be confined to the pleadings. Pleadings define the scope of the controversy, identify the issues for determination and afford each party notice of the case it is required to meet. It is equally well settled that no amount of evidence can be looked into in support of a case which has not been pleaded.

41. In the present case, the affidavit dated 09.10.1979 was relied upon exclusively to establish the allegation that the plaintiff was not the biological son of Abul Jafur Showdagar but the illegitimate son of one Abu Taleb. Admittedly, this allegation did not form part of the original written statement. It was sought to be introduced only by way of the proposed amendment filed on 23.02.2010.

42. The learned trial Court initially allowed the amendment. However, the order was set aside by the High Court Division in Civil Revision No. 3077 of 2010. The High Court Division categorically held that the proposed amendment introduced an altogether new case, sought to alter the defendants' original stand and would necessitate further evidence at an advanced stage of the suit. That

judgment attained finality upon dismissal of Civil Petition for Leave to Appeal No. 809 of 2014 by the Appellate Division.

43. The legal consequence of those judgments is that the allegations sought to be introduced through the proposed amendment never became part of the pleadings. Once the amendment stood rejected, the defendants were precluded from leading evidence in support of those allegations. To permit the affidavit to be exhibited would, in substance, allow the defendants to establish by evidence a case which they had already been held not entitled to plead. Such a course would defeat the binding effect of the earlier judgments of the High Court Division and the Appellate Division.

44. I am, therefore, in agreement with the learned trial Court that, in the absence of any pleading incorporating the allegations contained in the affidavit, the document has no relevance to the issues arising in the suit. The learned trial Court rightly held that the affidavit could not legally be admitted in evidence.

45. The learned Advocate for the Opposite Parties has argued that the High Court Division merely rejected the amendment application and did not declare the affidavit itself to be inadmissible. The submission, however, overlooks the true effect of the earlier judgment. Although the affidavit was not expressly excluded from evidence, the factual foundation necessary for relying upon it disappeared once the amendment introducing those allegations was

finally rejected. The admissibility of documentary evidence cannot be divorced from its relevance to the pleadings.

46. Considerable emphasis has also been placed upon the contention that the affidavit constitutes a public document preserved in the office of the Deputy Commissioner and therefore requires no formal proof. Reliance has been placed upon the decision reported in 3 BLT 40. In my view, the argument confuses three distinct concepts, namely, the admissibility of a document, the mode of proving the document and its evidentiary value. Even assuming that the affidavit is capable of formal proof as a public document, that circumstance alone does not render it admissible for proving facts which do not arise from the pleadings.

47. The decision reported in 3 BLT 40 merely lays down that an affidavit of divorce, being a public document, may be proved without formal proof. It does not lay down that every affidavit, irrespective of its relevance to the pleadings or the issues involved, must necessarily be admitted as an exhibit. The reliance placed upon the said decision is, therefore, misplaced.

48. The learned Senior District Judge exercised jurisdiction under section 115(2) of the Code of Civil Procedure. While exercising revisional jurisdiction, the Court is required to examine whether the order under challenge suffers from any jurisdictional error or material error of law resulting in failure of justice.

49. In the instant case, the learned trial Court rejected the application on the specific ground that the affidavit was beyond the pleadings. That was the principal issue requiring determination. The learned Senior District Judge, however, did not examine that question. Instead, the learned Judge directed that the original affidavit be called for and that the identifying Advocate, if alive, be produced before the trial Court for the purpose of marking the document as an exhibit.

50. With respect, the revisional Court thereby addressed only the mode of proving the document without first determining whether the document was legally admissible in view of the pleadings. The reasoning of the learned trial Court was neither answered nor displaced. In effect, the learned Senior District Judge granted the very relief sought by the defendants without deciding the legal objection upon which the application had been rejected.

51. Such an approach, in my view, amounts to a material error of law. The revisional jurisdiction is intended to correct jurisdictional errors and legal infirmities. It cannot be exercised in a manner which indirectly nullifies a binding judgment of the High Court Division or permits a party to circumvent the consequences of a final judicial determination.

52. The affidavit in question constitutes the sole foundation of the defence which the defendants unsuccessfully sought to introduce by

amendment. If it is now permitted to be exhibited, the defendants would, in substance, be allowed to establish by evidence the very case which they have been judicially precluded from pleading. Such a course would seriously prejudice the plaintiff and undermine the finality attaching to the earlier judgments rendered between the parties.

53. For the reasons discussed above, I find that the learned trial Court correctly rejected the defendants' application for marking the affidavit dated 09.10.1979 as an exhibit. The learned Senior District Judge, by overlooking the settled principles governing pleadings and admissibility of evidence, committed a material error of law resulting in an erroneous decision and occasioning failure of justice. The impugned order, therefore, calls for interference by this Court in exercise of its revisional jurisdiction under section 115(1) of the Code of Civil Procedure.

Conclusion

57. In view of the foregoing discussion and analysis, I arrive at the following conclusions:

(i) The affidavit dated 09.10.1979 was relied upon exclusively in support of allegations which the defendants sought to introduce by way of amendment of the written statement.

(ii) The proposed amendment having been rejected by the High Court Division in Civil Revision No. 3077 of 2010, and that judgment having been affirmed by the Appellate Division, those allegations never became part of the pleadings.

(iii) In the absence of any pleading supporting those allegations, the affidavit has no evidentiary relevance in the present suit and cannot be admitted to prove facts outside the pleadings.

(iv) The learned trial Court, therefore, rightly rejected the defendants' application for marking the affidavit as an exhibit.

(v) The learned Senior District Judge failed to determine the central legal issue, namely, whether the affidavit was admissible in the absence of any corresponding pleading, and instead proceeded to address only the mode of proving the document.

(vi) The impugned order, therefore, suffers from a material error of law resulting in an erroneous decision and occasioning failure of justice, warranting interference under section 115(1) of the Code of Civil Procedure.

58. In the result, the Rule is made absolute.

59. The Order No. 04 dated 14.02.2024 passed by the learned Senior District Judge, Chattogram, in Civil Revision No. 263 of 2023 is hereby set aside.

60. The Order No. 87 dated 30.07.2023 passed by the learned Senior Assistant Judge, 5th Court, Sadar, Chattogram, in Other Suit No. 1669 of 2021 is hereby restored.

61. The learned trial Court shall proceed with the hearing of Other Suit No. 1669 of 2021 in accordance with law and shall endeavour to dispose of the suit expeditiously, preferably within six months from the date of receipt of this judgment, if there is no legal impediment.

62. There shall be no order as to costs.

63. Let a copy of this judgment together with the lower Court records be transmitted to the Courts below forthwith for information and necessary action.