

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 3707 of 2010

Amin Ali alias Md. Amin Ali and others
..... petitioners

-Versus-

Ataur Rahman and others
..... opposite parties

Ms. Shamima Binte Habib with
Ms. Sabina Parvin, Advocates
..... for the petitioners

Ms. Farhana Siraj for
Mr. Surojit Bhattacharjee, Advocate
..... for the opposite parties

Judgment on 04.03.2024

At the instance of the defendants leave was granted and the rule was issued calling upon the plaintiffs to show cause as to whether in passing the judgment and order on 07.10.2009 the Additional District Judge, Court No. 5 (in charge), Sylhet in Civil Revision No. 20 of 2007 allowing the revision by setting aside the order of the Joint District Judge, Court No. 3, Sylhet passed on 10.10.2006 in Title Suit No. 26 of 1996 rejecting the Advocate Commissioner's report under Order 26 Rule 9 the Code of Civil Procedure (the Code) has committed any error on an important question of law which has resulted in erroneous decision occasioning failure of justice and or such other or further order or orders passed to this Court may seem fit and proper.

The material facts for disposal of the rule, in brief, are that the plaintiffs instituted the aforesaid suit praying for declaration of title in respect of the suit land measuring in area of 3.18 acres as described to the schedule of the plaint. The defendants appeared in the suit and filed several sets of written statement denying the facts of the plaint. During pending of the suit the plaintiffs filed an application under Order 26 Rule 9 of the Code on 18.01.2003 for holding local investigation as to whether the land described in the registered *kabuliyat* dated 08.09.1941 attracts the land in the schedule to the plaint. The Joint District Judge allowed the said application and appointed Md. Abul Lais as Advocate Commissioner to investigate the claim as stated in the application for holding local investigation. The Commissioner after holding investigation submitted a report on 07.08.2004. Defendant 1 submitted objection against it stating that the Commissioner did not follow the procedure for investigation and submitted a biased report and as such it would be rejected. The Advocate Commissioner was examined as witness and his report was exhibited as 'Ka'. He was also cross-examined by the defendants. However, the Joint District Judge by its judgment and order passed on 10.10.2006 rejected the report against which the plaintiffs filed Civil Revision No. 20 of 2007 under section 115(2) of the Code before the District Judge, Sylhet. The revision was

heard on transfer by the Additional District Judge, Court No. 5 (in charge), Sylhet who by its judgment and order dated 07.10.2009 allowed the revision and set aside the judgment and order passed by the Joint District Judge, and consequently accepted the report of the Commissioner. In this juncture, the defendants approach this Court and obtained this rule with an interim order of stay of the proceeding of Title Suit No. 26 of 1996.

Ms. Shamima Binte Habib, learned Advocate for the petitioners takes us through impugned judgment and the documents appended with the rule petition and submits that the report submitted by the Advocate Commissioner is not a report in the eye of law. The Commissioner did not comply with the law and procedure required to be followed in holding local investigation. She refers to the evidence of the Advocate Commission and submits that in cross-examination he admitted that the plaintiffs did not supply the touzi, wazib ul aroz, index and thak map to him and without those relay of the suit land was not possible. The Joint District Judge although did not discuss in his order elaborately but his ultimate decision was correct. The lower revisional Court without adverting the findings of the Joint District Judge allowed the revision and set aside the judgment and order passed by him and thus committed error on an important question of law which is

required to be interfered with by this Court in a revision 115(4) of the Code. The rule, therefore, should be made absolute.

Ms. Farhana Siraj, learned Advocate appearing for Advocate Mr. Surojit Bhattacharjee for opposite parties 1-12 on the other hand, opposes the rule. She submits that the report of an Advocate Commissioner under Order 26 Rule 9 of the Code is mere a piece of evidence but not conclusive. If the report is found defective on any point the proper remedy would be to direct the Commissioner to remedy the defect. The report is a part of record and the petitioners have nothing to be prejudiced. The proof of defendants' case will not depend on the report of the Commissioner only. The Joint District Judge formed his own opinion which is beyond the objection filed by the defendants. She refers to the case of Boni Ahmed and others vs. Badsha Miah and others, 10 MLR (AD) 161 and relied on the *ratio* laid therein. She finally submits that report of an Advocate Commissioner is a piece of evidence like other evidence which the Court will take into consideration while deciding the issues. The Commissioner's report by itself alone does not establish the case of either party. The parties must prove their respective cases by legal and reliable evidence. The revisional Court below on correct assessment of fact and law allowed the revision and accepted the report which may not be interfered with in this second revision.

I have considered the submissions of both the sides, gone through the materials on record and *ratio* of the case cited by the opposite parties.

It transpires the during pending of the aforesaid suit for declaration of title, the plaintiffs filed an application for holding local investigation by a survey knowing Advocate to ascertain whether the land described in the registered *kabuliyat* dated 08.09.1941 attracts the land described in the schedule to the plaint. Accordingly, the Advocate Commissioner was appointed to ascertain the abovesaid fact. Md. Abul Lais, the Advocate Commissioner after investigation submitted a report on 07.08.2004 annexure-D to the rule petition. In the report he opined that the land described in the *kabuliyat* attracts the suit land. The defendants filed written objection against the report stating that the Commissioner being biased by the plaintiffs submitted the report which cannot be taken into account for adjudication of the suit and that the other reasons would be raised at the time of cross-examining the Commissioner. The Joint District Judge rejected the report relaying on the submissions made by the learned Advocate for the defendants. But the lower revisional Court scrutinized the report and found it correct and has been prepared complying with provisions of the law.

In evidence, the Advocate Commissioner as PtW1 replied:

“কবুলিয়াতের তফসিলে ২০৫৭/ ৪৪ নং তালুক শেখ ফাতেউল্লা চৌধুরী
 সংক্রান্ত ২০৬১/ ৪৭ নং তালুক কমরউল্ল্যা সংক্রান্ত উক্ত তালুকের ভূমি রিলে
 করার জন্য বাদীপক্ষ তৌজি, ওয়াজিব-উল-আরজ, সূচী ও থাক ম্যাপ সরবরাহ
 করে নাই। এইগুলি ছাড়া তালুকের ভূমি সেটেলমেন্ট জরিপে দাগের ভূমি রিলে করা
 সম্ভব নয়।..... বাদী পক্ষ কর্তৃক সরবরাহ কাগজের মধ্যে এস. এ পরচাও
 সরবরাহ করে নাই।” (emphasis supplied)

I have scrutinized the report submitted by the Commissioner also. It does not reflect that the plaintiffs supplied any documents to the Commissioner to relay the suit land. Without SA porcha, touzi, index and thak map proper relay to ascertain whether the lands of *kabuliyat* attract the land in the schedule to the plaint is absurd. It further appears that the report has been prepared by the Commissioner without following the procedure of holding Local Investigation. The submission of Ms. Siraj thus bears no merit. The principle of case referred to by her reported in 10 MLR (AD) 161 do not match this case considering the facts upon which the *ratio* has been laid.

In view of the discussion made hereinable, the report of the Commissioner is not a report in the eye of law. The Joint District Judge although rejected the report in a *slipshod* manner but his ultimate decision was correct. The lower revisional Court failed to take into consideration the aforesaid facts as well as the evidence of Advocate Commissioner and thereby committed serious error

on important question of law which has resulted an erroneous decision occasioning failure of justice. Therefore, the revisional order is required to interfered with by this Court.

Consequently, this Rule merits consideration. Accordingly, the rule is made absolute without any order as to costs. The judgment and order passed by the Additional District Judge, Court No. 5 (in charge), Sylhet in Civil Revision No. 20 of 2007 is hereby set aside and that of the Joint District Judge is restored.

The order of stay stands vacated.

However, the Joint District Judge is directed to dispose of the suit expeditiously preferably within 06 (six) months from date of receipt of this judgment and order. In dealing with the suit, the Joint District Judge shall not allow either party any adjournment without dire necessity.

Communicate this judgment and order to the concerned Courts.