

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

Present:

Mr. Justice Md. Riaz Uddin Khan
Civil Revision No. 1346 of 2011

IN THE MATTER OF :

An application under section 115(4) of the Code of
Civil Procedure

-And-

In the Matter of:

Mrs. Sahana Begum

..... Petitioner

Versus

Mrs. Akbari Ahmad Tandra and another

.....Opposite parties

Mr. Md. Mozammel Hossain, Advocate

.... For the petitioner

None

.... For the opposite parties

Heard and Judgment on: 30.05.2024

Md. Riaz Uddin Khan, J:

Rule was issued after granting leave upon an application filed under section 115(4) of the Code of Civil Procedure asking the opposite parties to show cause as to why the Judgment and Order dated 08.03.2011 passed by the Additional District Judge, 6th Court, Dhaka in Civil Revision No. 177 of 2010 and thereby affirming the order dated 17.06.2010 passed by the Joint District Judge, 3rd Court, Dhaka in Miscellaneous Case No. 02 of 2010 suffers from an error of important question of law resulting in an erroneous decision occasioning failure of justice should not be set aside and or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

At the time of granting leave and issuance of rule the operation of impugned judgment and order passed by the Additional District Judge was stayed and the Lower Court Record was called for by this Court and thus the Lower Court Record is presently laying with this civil revision for which the original proceeding in Miscellaneous Case. 02 of 2010 could not be proceeded.

Succinct facts for disposal of the rule are that the present opposite party no.1 as 3rd party applicant filed the Miscellaneous Case No. 1438 of 2008 which is renumbered as Miscellaneous Case No. 02 of 2010 under Rule-101 of Order-XXI of the Code of Civil Procedure for recovery of possession from the illegal possessor. In that proceeding the applicant on 01.04.2009 filed an application for local investigation under Rule-9 of Order-XXVI of the Code of Civil Procedure for appointing an advocate commissioner to ascertain that whether the present petitioner is enjoining 2 katha or 4 katha of land which was handed over to her on 10.11.2008 by dispossessing the applicant-opposite party no.1 in Decree Execution Case No.14 of 2000. The present petitioner filed written objection against the said application for appointing advocate commissioner.

Meanwhile, the present petitioner filed an application on 08.04.2010 praying for rejecting the Miscellaneous Case No. 02 of 2010 as being not maintainable. The learned Joint District Judge kept the application dated 08.04.2010 pending and taken up the application dated 01.04.2009 for local investigation filed under Rule-9 of Order-XXVI by the present opposite party. After hearing both the parties, the Joint District Judge by his order dated 17.06.2010

allowed the application for local investigation appointing an advocate commissioner for ascertaining the truth of the allegation by spot visiting and measuring the land in dispute.

Against that order dated 17.06.2010 passed by the Joint District Judge the present petitioner filed Civil Revision No. 177 of 2010 before the District Judge, Dhaka which was ultimately heard by the Additional District Judge, 6th Court, Dhaka. After hearing both the parties the Additional District Judge by his judgment and order dated 08.03.2011 rejected the revision and thereby affirmed the order passed by the Joint District Judge.

Being aggrieved by and dissatisfied with the said judgment and order passed by the District Judge the petitioner moved this Court and obtained the Rule and order of stay as stated at the very outset.

Mr. Md. Mozammel Hossain, the learned Advocate appearing for the petitioner decree-holder submits that both the courts below committed an error of law as the application for local investigation under Order-XXVI, Rule-9 is not maintainable. According to the learned advocate there is no scope to file any application under Order-XXVI, Rule-9 in a proceeding/case rather it can only be filed in a suit. He then submits that there is no scope of appointing an advocate commissioner in the instant case for measuring the land to ascertain the possession but it is the only Court which can decide whether the applicant of the Miscellaneous Case No.02 of 2010 (present opposite party no.1) was in possession and /or dispossessed during handing over possession to her through Court.

The learned advocate further submits that the applicant (present opposite party no.1) cannot get remedy in the present miscellaneous case rather she can file suit for partition along with declaration of title. Mr. Hossain lastly submits that the petitioner is the decree-holder who got the possession of the land through Court in a decree execution case and as such the Miscellaneous Case No.02 of 2010 filed under Order-XXI, Rule-101 of the Code of Civil Procedure itself is not maintainable and in that view both the courts below committed error of law resulting in error in decision occasioning failure of justice.

One Mr. Syed Mohammad Javed Parvez filed Vokalatnama on behalf of the Opposite parties but did not appear before this Court when the matter was taken up for hearing though it was in the list for several dates.

I have heard the submissions of the learned advocate for the petitioner, perused the application along with the annexures including both the judgment and orders passed by the courts below. I have also perused the lower court record.

It appears from record that this Rule was ready for hearing from 12.11.2012 but neither the petitioner nor the opposite party took any endeavour or step for hearing the same. Since it a very old case I took up the matter for hearing though only the petitioner appeared and the learned advocate for the opposite party has chosen not to appear.

The learned advocate for the petitioner raised a question before us whether the application for local investigation was at all maintainable. The

miscellaneous case is filed for restoration of possession from the decree holder under Rule-101 of Order-XXI of the Code of Civil Procedure. Regarding dispossession of any person other than a judgment-debtor by a decree holder is to be dealt with Rule-100 and 101 of Order-XXI of the Code of Civil Procedure and to understand the legal position we have to read both the Rules together. When in the course of execution the decree-holder dispossess a person other than the judgment-debtor, he may apply to the court for a summary investigation of the matter under Rule-100 and the court is under legal obligation to fix a day for investigating the matter and shall summon the party against whom the application is made to answer the same. After investigation on such application when the court is satisfied that the applicant was in possession of the property on his/her own account or on account of some person other than the judgment-debtor, the court shall under Rule-101 direct that the applicant be put into possession of the property. After investigation if the court is not satisfied he can dismiss the application. The proceeding under Rule-100 and 101 are summary in nature and the wrong done to a party by an executing court at the instance of the decree-holder without any fault of such party must be remedied by the executing court. The object of Rule-100 and 101 is to sustain the possession of person who was not party to the suit and who was in possession of his own account or on behalf of others who are not judgment-debtors. Under these rules the court is concerned only with the factum of possession and the question of title cannot be gone into. The burden of proof is on the claimant.

Our Appellate Division in the case of Abdul Kiyum Vs. Krishnadhan Banik reported in 49 DLR (AD) 140 held that the court's direction restoring *bona fide* claimant to possession cannot be held back on the ground of institution of a suit claiming present possession of the property. In the case of Munnilal Vs. Sasi Bhusan, AIR 1927 Cal 339 the Calcutta High Court held that if the claimant was in possession of his own account or on account of some persons other than the judgment-debtor, he is entitle to succeed under this rule, though he is a trespasser or has no title to the property. Similar view was expressed by another High Court of India in the case of Bal Kishen Vs. Md Hafiz, AIR 1937 Oudh 400, that the question involved in an application under Rule-100 being one exclusively of possession, the fact that the applicant's suit for declaration of title to the property has been dismissed is no bar to such application.

In the case of Saleh Ahmed Vs Md. Zakaria reported in 37 DLR 296 the applicant filed the miscellaneous case under Order-21, Rule-100 read with section 151 of the CPC on the apprehension that he might be dispossess from plot no.339A by the decree-holder who got plot no.339 in the decree and prayed for local investigation by appointing an advocate commissioner to measure and ascertain the decretal property. It was allowed by the lower court against which a Division Bench of the High Court Division held that before dispossession the case under Rule-100 is not maintainable and section 151 of the CPC is also not applicable but **“it is the duty of the executing court to give delivery of possession of the decretal property to the decree-holder and he may**

pass necessary order if he finds that the ascertainment of the suit property by local investigation is necessary in order to see that the decree of the court is correctly executed although he cannot pass such order on an application of a 3rd party who has no *locas standi* in law at this stage before being evicted.”

In the present case the applicant (present opposite party No. 1) as 3rd party filed the Miscellaneous Case No. 02 of 2010 claiming that she is the owner of 2 katha out of 4 katha of disputed land and was in possession of the same but was dispossessed by the present petitioner with the help of unscrupulous court staff during taking possession in a decree execution case. Her further claim is that since the present petitioner illegally possessing 4 katha of land instead of 2 katha dispossessing her, she filed the miscellaneous case for restoration of her possession. Thereafter, she filed an application for local investigation by appointing advocate commissioner to ascertain that whether the present petitioner decree-holder is enjoining more than 2 katha of land which was handed over to her by dispossessing the applicant (present opposite party no.1) on 10.11.2008 in a decree execution case. This application was filed under Rule-9 of Order-XXVI of the Code of Civil Procedure which was allowed. We have already discussed that according to law in such position it is the duty of the court to investigate the matter whether the claimant was in possession who was dispossessed during handover the possession in executing a decree and after investigation if the court is satisfied that the applicant was in possession then the court shall direct

that the applicant be put into possession of the property. That being the position of law the application filed under Rule-9 of Order-XXVI of the CPC was not necessary rather it was the duty of the court to investigate the matter on the application filed under Rule-101 of Order-XXI of the CPC. In such nature of allegation made by the applicant the court has ample power to appoint an advocate commissioner to ascertain the truth of the claim of opposite party-claimant. Mr. Hossain, the learned advocate is right that an application under Rule-9 of Order-XXVI of the CPC can be filed only in a suit. Now whether the present miscellaneous case filed under Order-XXI, Rule-101 can be said to be of the same category of 'suit'. A full bench of the Bombay High Court in Farkhundali Vs. VB Potdar, AIR 1962 Bombay 162 observed that the word 'suit' is a term of art and ordinarily means a proceeding instituted in the civil Court by presentation of a plaint. Relying on that decision our Appellate Division took same view in the case of Bangladesh House Building Finance Corporation Vs. Jahan Ara Akhtar & others reported in 49 DLR (AD) 80 and held- "We find ourselves in agreement with the statement of law as above and do not think that there will be two opinions on the point." Then the apex court further opined- "Applying the said test there cannot be any difficulty in holding that an application under article 27 (House Building Finance Corporation Order, 1973) cannot be equated with a suit, for, in an application under that article none of the requirements as in a suit is attracted. No plaint, no court fee, no limitations, no written statement, no other necessary

steps, no decree, nothing, the financial institution will get the relief or reliefs in a summary manner which is not available in the form of a suit.” In the present case we find the same connotation. As such the instant miscellaneous case cannot be considered as ‘suit’. In that view of the matter, the application filed under Rule-9 of Order-XXVI is a misconceived one. However, since in the miscellaneous case filed under Rule-101 of Order-XXI, it was obligatory upon the court to investigate the matter claimed by the opposite party claimant, the court for the ends of justice may appoint an advocate commissioner for local investigation only on possession and dispossession of the claimant from the decretal property at the time of execution of a decree. In that view, by the impugned order passed by the courts below, there was no failure of justice which calls for interference by this Court in the instant case. It is well settled that for mis-quotation of law the litigant cannot suffer, if the relief can be granted otherwise by or under law.

In the facts and circumstances of the case and the point of law discussed above I am of the view that there was no error in the impugned decision occasioning any failure of justice and as such there is no merit in the Rule.

In the result the Rule is **discharged**.

The concerned court below is directed to dispose of the miscellaneous case as early as possible in accordance with law keeping in mind that the same is pending for more than 15 years.

The order of stay passed earlier by this Court stands vacated.

Communicate the judgment and order at once. The office is directed to send down the Lower Court Record at once.