

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.523 of 2020.

In the matter of:

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

And

Amena Begum

...Petitioner

-Versus-

Md. Rustom Ali being dead his
heirs:

1(a) Most Pori Vanu and others

...opposite parties

Mr. Syed Mahbub Hossain, Advocate

...For the petitioner

Mr. Mohammad Eunos, Advocate

**...For the opposite party
No.1(a)-1(i).**

Heard on:07.01.2025.

Judgment on: 19.02.2025.

This Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and decree dated 30.04.2019 passed by the learned Additional District Judge, Patuakhali in Title Appeal No.115 of 2018 allowing the appeal and thereby setting aside the judgment and decree dated 04.07.2018 passed by the learned Assistant Judge, Mirzaganj, Patuakhali in Title Suit No.103 of 2015 dismissing the suit should not be set aside and/or pass such other or

further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite party as plaintiff instituted above Title Suit No.103 of 2015 for setting aside the ex-parte judgment and decree passed in Title Suit No.116 of 1970 on 11.11.1974 alleging that 48 decimal land appertaining to S. A. khatian No.146 belonged to Abutar, Arob Ali and Sabar Ali and rent of above property fell due and the government filed Certificate Case No.2227 of 1966-1967 and above property was sold in auction which was purchased by Rustom Ali predecessor of plaintiffs on 30.07.1968 who possessed above land by constructing dwelling house and cultivation.

Chan Baru Bibi and others the predecessors of the defendants filed Title Suit No.116 of 1970 for setting aside above auction sale of disputed 48 decimal land and the learned Assistant Judge dismissed above suit ex-parte.

Being aggrieved by above judgment and decree of the trial court above plaintiffs as appellants preferred Title Appeal No.115 of 2018 to the District Judge, Patuakhali which was heard by the learned Additional District Judge who allowed above appeal and set aside above ex-parte

judgment and decree of the trial court and decreed the suit.

Challenging the legality and propriety of above judgment and decree of the court of appeal below respondent No.1 of above appeal as petitioner moved to this court with this petition under section 115(1) of the Code of Civil procedure and obtained this rule.

Mr. Syed Mahbub Hossain learned Advocate for the petitioner submits that the petitioners were rightful owners and possessor of 48 decimal land and in the name of their predecessor S.A. khatian No.146 was rightly prepared and above property was never sold in auction and the petitioners predecessors did not receive any process of above certificate case. After being informed above unlawful auction sale of above land they filed Title Suit No.116 of 1970 and lawfully obtained an ex-parte judgment and decree on 11.11.1974. The opposite party for setting aside above judgment and decree of Title Suit No.116 of 1970 preferred Title Suit NO.103 of 2015 and without service of any process upon the petitioner who was defendant in above suit tried to obtain an ex-parte decree but the learned Judge of the trial court rightly dismissed above suit ex-

parte. The opposite party preferred Title Appeal No.115 of 2018 against above judgment and decree of the trial court but again suppressed process issued upon the petitioner in above appeal who was respondent No.1 and obtained impugned judgment and decree ex-parte. Before filing above suit predecessor of the opposite party filed Miscellaneous Case No.129 of 1974 for setting aside above ex-parte judgment and decree of Title Suit No.116 of 1970 which was dismissed. The learned Additional District Judge utterly failed to appreciate above facts and materials on record and most illegally allowed above appeal and set aside the judgment and decree of Title Suit No.116 of 1970 which is not tenable in law.

Mr. Mohammad Eunos learned Advocate for the opposite parties submits that there is no mention of Miscellaneous Case No.129 of 1974 in the plaint of this suit and learned Judge of the court of appeal below had no opportunity to consider above submissions of the learned Advocate for the petitioner. The learned Advocate further submits that all documents relating to Miscellaneous Case No.129 of 1974 was fraudulent, collusive and forged documents. The learned Advocate further submits that in a petition for

revision under section 115 of the Code of Civil Procedure this court can consider only errors of law committed by the court below occasioning failure of justice but no revision lies if there is a provision for preferring an appeal or other equally effective remedies. The main grievance of the petitioner is that the learned Judge of the court of appeal below allowed the appeal ex-parte and no summons of above appeal was served upon the petitioner who was respondent No.1. In order to redress above grievance the petitioner could resort to the provision of order 41 rule 21 of the Code of Civil Procedure. But the petitioner has committed serious error and approached directly to this court with an application under section 115(1) of the Code of Civil Procedure and since the impugned judgment and order does not suffer from any illegality this petition under section 115(1) of the Code of Civil Procedure is devoid of any substance and the rule issued in this connection is liable to be discharged.

I have considered the submissions of the learned Advocates for respective parties and carefully examined all materials on record.

It is admitted that 48 decimal land of S.A. khatian No.146 belonged to the predecessor of the

petitioner which was alleged sold in auction on 30.07.1968 and purchased by the predecessor of the opposite party namely Rustom Ali and for setting aside above auction sale petitioner as plaintiff filed Title Suit NO.116 of 1970 which was dismissed ex-parte and against above judgment and decree opposite party preferred Title Appeal No.115 of 2018 to the District Judge, Patuakhali which was heard by the learned Additional District Judge who allowed above appeal ex-parte by impugned judgment and decree dated 30.04.2019.

It was alleged by the learned Advocate for the petitioner that the summons of the both Title Suit NO.130 of 2015 and Title Appeal No.115 of 2018 issued by the courts upon the petitioner were suppressed and she could not appear in court and contest above the suit and the appeal respectively.

The Code of Civil Procedure provides specific provision in order 9 rule 13 for setting aside an ex-parte judgment and decree on the ground on non service of process upon the defendant and order Or 41 Rule 21 of the Code of Civil Procedure provides for setting aside an ex-parte judgment and decree passed by a court of appeal against a respondent upon whom no summon of above appeal

was served. Besides a plaintiff can prefer an appeal against the judgment and decree passed ex-parte or file a suit challenging the legality and propriety of the judgment and decree passed ex-parte. But the petitioner instead of utilizing above forums or procedures approached directly to this court with an application under section 115 of the Code of Civil Procedure. A civil revision under section 115 does not lie when there is a provision for appeal and the jurisdiction of this court under above provision is very specific and limited. This court can interfere under above provision only if the learned judge of the court below has committed an error of law causing failure of justice.

The learned Advocate for the petitioner could not show from the impugned judgment and decree any illegality excepting repeated mention that before filing of above suit the opposite party filed Miscellaneous Case No.129 of 1974 which is outside of the plaint. Since both the parties obtained ex-parte decree the petitioner be at liberty to resort to any of the provisions provided in the Code of Civil Procedure for avoiding above ex-parte judgment and decree but since this petition under section 115(1) of the

Code of Civil Procedure is devoid of any substances the rule issued in this connection is liable to be discharged.

In the result, the rule is discharged.

Let the lower Court's record along with a copy of this judgment be transmitted down to the Court concerned at once.

Md.Kamrul Islam
Assistant Bench Officer