

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

CIVIL ORDER NO. 4577 OF 2022.

IN THE MATTER OF:

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

-AND-

IN THE MATTER OF :

**Moyej Uddin Shah being dead his heirs  
Most. Hawa Begum**

...Petitioners.

-Versus-

Momtaj Shaha and others

...opposite parties

Mr. Md. Abdul Alim Miah Jewel, Advocate

... For the Petitioners.

**The 31<sup>th</sup> October, 2022.**

**Present:**

**Mr. Justice Md. Badruzzaman**

By this application under section 115(4) of the Code of Civil Procedure the plaintiffs-petitioners has challenged an order dated 27.01.2022 passed by the learned Additional District Judge, 2<sup>nd</sup> Court, Bogura in Civil Revision No. 16 of 2013 allowing in the revision and setting aside an order dated 08.1.2013 passed by learned Senior Assistant Judge, Nandigram, Bogura in Partition Suit No. 44 of 1993 rejecting the report of the Advocate Commissioner.

Relevant facts for the purpose of the disposal of this application are that the petitioners as plaintiffs instituted Partition Suit No. 44 of 1993 in the Court of Senior Assistant Judge,

Nandigram, Bogura and defendant No.3 is contesting the suit by filing written statement and the suit was at the stage of F.P.H. At that stage defendant No.3 (opposite party No.1) filed an application under Order XXVI rule 9 of the Code of Civil Procedure for local investigation to ascertain the land contained in the boundary of a deed of the year 1922 by a survey knowing advocate commissioner and the trial Court, upon hearing, allowed the application and the learned Advocate Commissioner, after local investigation submitted his report on 01.08.2011. Against said report of the Advocate Commissioner defendant No.3 filed written objection and the trial Court vide order dated 08.01.2013 rejected the report.

Being aggrieved by said order dated 08.01.2013 defendant No.3 preferred Civil Revision No. 16 of 2013 before the learned District Judge, Bogura which was transferred to learned Additional District judge, 2<sup>nd</sup> Court, Bogura for disposal and the learned Additional District Judge, after hearing both parties, vide impugned order dated 21.07.2022 allowed the revision by setting aside the order passed by the trial Court with a direction to dispose of the suit by considering the report of the Advocate Commissioner along with other evidence.

Being aggrieved by said order dated 21.07.2022 the plaintiffs have preferred this second revision under section 115 (4) of the Code of Civil Procedure.

Mr. Md. Abdul Alim Miah Jewel, learned Advocate appearing for the petitioners by taking me to the impugned order as well as the order passed by the trial Court submits that the trial Court, after considering the materials on record, rightly rejected the report of the Advocate Commissioner but the Court of revision on

misconception of law set aside the order directing the trial Court to consider the report as evidence as per observations made in its judgment and as such, committed an error of law resulting in an error in the decision occasioning failure of justice.

I have heard the learned Advocate and perused the application, impugned order, the order passed by the trial Court along with other documents as annexed with the application.

It appears that as per prayer of the defendant No.3 the trial Court allowed local investigation under Order XXVI rule 9 of the Code of Civil Procedure and the learned Advocate Commissioner, after investigation, submitted his report before the trial Court against which plaintiffs did not file written objection but defendant No.3 filed written objection.

It appears that the learned Advocate Commissioner was not examined to support his report and the trial Court, after considering the submissions of the learned Advocates for both the parties rejected the report. It appears from the judgment of the Court of Revision that the learned Judge took the view that the report of the Advocate Commissioner may be considered as evidence along with other evidences while disposing of the suit and in that view of the matter set aside the order of the trial Court directing it to dispose of the suit by considering the report of the Commissioner as evidence along with other evidence .

The purpose of local investigation under Order XXVI Rule 9 of the Code of Civil Procedure is to elucidating any matter in a dispute or to ascertain nature, feature and market value of any property.

Sub-rule (2) of rule 10 of Order XXVI of the Code of Civil Procedure provides that the report of the Commissioner and the

evidence taken by the him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record. Sub-rule (2) also provides that the Court or, with the permission of the Court, any parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report or as to his report, or as to the manner in which he has made the investigation. As per sub-rule (3) of rule 2, further inquiry may be directed by the Court where it is for any reason dissatisfied with the proceedings of the Commissioner.

There is no provision under Order XXVI of the Code of Civil Procedure to accept or reject the report submitted by the Commissioner because the law has precisely stated that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. The law has given an opportunity to the parties to the suit to examine the Commissioner with the permission of the Court, to challenge the veracity of the report.

In that view of that matter, I am of the view that the trial Court committed illegality in rejecting the report of the Commissioner.

On perusal of the impugned judgment, it appears that the Court of Revision, upon proper appropriation of the materials on record and relevant provisions of law rightly passed the impugned judgment.

However, the parties to the suit will be at liberty to examine the Commissioner personally in open Court in view of the provisions under rule 10(2) of Order XXVI of the Code of Civil Procedure.

The trial Court shall consider the report of the Advocate Commissioner as a piece of evidence along with other evidences at the time of pronouncement of judgment.

With above observation and direction this application is disposed of summarily.

Communicate the order at once.

**(Justice Md. Badruzzaman)**