

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Khairul Alam

Civil Revision No. 4099 of 2022.

Sachi Rani Dey another.

..... Petitioners.

-Versus-

Milon Kanti Dey Procash Mohajon and others.

..... Opposite parties.

Mr. Md. Abdun Nur, along with

Mr. Golam Samdani, Advocates.

..... For the petitioners.

Mr. Lokman Karim, Advocate

..... For the opposite parties.

Heard on: 25.06.2025 and

Judgment on: 02.07.2025.

This Rule was issued calling upon the opposite parties No. 1-3 to show cause as to why the judgment and order dated 08.12.2021 passed by the Additional District Judge, 5th Court, Chattagram in Civil Revision No. 60 of 2016 disallowing the same and thereby affirming the order dated 16.03.2016 passed by the learned Senior Assistant Judge, Hathazari, Chattagram in Other Class Suit No. 157 of 2011 allowing the application filed by the opposite parties under Order XXVI Rule 9 for local investigation should not set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

Relevant facts for disposal of the rule are that the present opposite parties No. 1-3 as plaintiffs instituted Other Class Suit No. 157 of 2011 in the Court of Senior Assistant Judge, Hathazari, Chattagram impleading the present petitioners and others as defendants seeking a declaration of title over the suit property. The plaintiffs have further prayed for a declaration that during the B.S. operation the suit property was erroneously excluded from recording. The plaintiffs have also sought a declaration that the mutation khatian prepared in the

name of the defendant No.1 is fraudulent, collusive and not binding upon the plaintiff. Since the defendants had been trying to dispossess the plaintiffs from the suit property, based on the said wrong recording, the plaintiffs were constrained to file the suit.

In the said suit, on 09.07.2015, the plaintiffs filed an application under Order XXVI Rule 9 of the Code of Civil Procedure (shortly, the Code) for issuing a commission to make a local investigation to ascertain whether a boundary wall and building fall within the suit plot or not. The predecessor of the present petitioners, as defendant No. 1, contested the application by filing a written objection denying the material allegations made in the application. The learned Senior Assistant Judge, Hathazari, Chattagram after hearing the said application by the order dated 16.03.2016 allowed the said application considering the ground of proper adjudication of the issue. Against the said order, the petitioners preferred Civil Revision No. 60 of 2016 in the Court of District Judge, Chattagram which was subsequently transferred to the Court of Additional District Judge, 5th Court, Chattagram for hearing who by the judgment and order dated 16.03.2016 dismissed the said Civil Revision and thereby affirmed the order passed by the trial Court.

Being aggrieved thereby the present petitioners moved before this Court and obtained the Rule and an order of stay.

Mr. Md. Abdun Nur, the learned Advocate appearing on behalf of the petitioners submits that the judicial function cannot be delegated to the commission. He further submits that decision on a material issue, as in the present case, can never be left to the commission which must be decided by the Court, but both the courts below without considering this settled principles of the law passed the impugned judgment and order and thereby committed an error of an important question of law resulting in an error in the decision occasioning failure of justice.

On the other hand, Mr. Lokman Karim, the learned Advocate appearing for the opposite parties supports the impugned order and submits that whether the boundary wall and the building fall within the suit plot or not can only be determined by local investigation and both the courts below after considering this legal aspect of the case rightly passed the impugned order.

Heard the learned Advocates, and perused the revisional application and other materials on record including the impugned judgment and order.

In the present case, an application for local investigation under Order XXVI rule 9 of the Code of Civil Procedure was filed to ascertain whether the boundary wall and the building fall within the suit plot or not. The application was allowed, and the first revisional court affirmed the said order.

Before entering into the issue, Order XXIV rule 9 of the Code is reproduced herein below:

“In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount or any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court within such time not exceeding three months as may be fixed by the Court”.

On a plain reading of the said provision it appears that to elucidate any matter in dispute, the Court may issue a commission for local investigation. The object of such investigation is to assist the Court by obtaining information with regard to the physical features of the property inspected which can only be had on the spot. It has been settled for the said commission that before the investigation the commission must issue notice to the parties. Any report without notice is not a report in the eye of the law. The commission report does not fall under section 35 of the Evidence Act and it can only be proved after examining the writer or witness. Using the word “may” makes the provision discretionary for the court. Under sub-rule 3 of rule 10 of Order XXVI of the Code, the Court may

issue a fresh commission; therefore, the question of res judicata does not arise at all.

While dealing with the issue, this Division in the case of Mahmud Ibne Abbas v. Momtaz Hossain, reported in 45 DLR 421, has decided that local investigation may be allowed to ascertain whether there is any house on the suit land or not.

In the above facts and circumstances of this case, I am of the view that both the Courts below after proper consideration of the facts and law passed the impugned judgment and order and do not find any reason to interfere with the same.

The learned Advocate for the petitioners failed to show that the courts below committed any error of an important question of law resulting in an erroneous decision occasioning failure of justice.

Accordingly, the Rule is discharged.

However, there is no order as to costs.

The order of stay granted earlier by this court is hereby recalled and vacated.

Let a copy of this judgment and order be communicated at once.

Kashem, B.O