

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 143 of 2023

Jahangir Alam Chowdhury being dead his  
heirs 1(a) Sahena Begum and others

.....Petitioners.

-Versus-

Momtaj Begum and others

.....Opposite parties.

Mr. Minhazul Hoque Chowdhury, Adv.

.....For the petitioners.

Mr. Sabel Nawaz, Advocate

.....For the opposite parties.

Heard and judgment on 9<sup>th</sup> August, 2023.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party No. 1-5 to show cause as to why the impugned judgment and decree dated 12.09.2022 passed by the Joint District Judge, 2<sup>nd</sup> Court, Feni in Title Appeal No. 01 of 2019 allowing the appeal and send back the case on remand after reversing the judgment of the trial court

dated 19.07.2018 passed by the Senior Assistant Judge, Dagganbhuiyan, Feni in Title Suit No.53 of 2010 decreeing the suit exparte should not be set aside.

Predecessors of the petitioner Nos. 1(a) to 1(g) and 2-7 as plaintiffs filed Title Suit No. 53 of 2010 before the Court of Senior Assistant Judge, Dagganbhuiyan, Feni for partition against the opposite parties.

Defendant Nos. 2-9 and 12 filed a written statement denying the plaint case but finally the suit was decreeing exparte by the judgment and decree dated 19.07.2018.

Challenging the said judgment and decree, defendant Nos. 2, 4-6 and 12 preferred Title Appeal No. 01 of 2019 before the Court of District Judge, Feni, which was heard on transfer by the Joint District Judge, 2<sup>nd</sup> Court, Feni. Who by the impugned judgment and decree dated 12.09.2022 allowed the appeal and after setting aside the judgment of the trial court send back the suit on remand to the trial court.

Challenging the said judgment and decree, plaintiff petitioner obtained the instant rule.

Mr. Minhazul Hoque Chowdhury, the learned advocate appearing for the petitioner drawing my attention to the lower court records as well as the impugned judgment submits that the District Judge has got the power to decide the matter under section 107 of the Code of Civil Procedure. In spite of that the suit was sent back on remand to the trial court and as such the impugned judgment is not sustainable in law and is liable to be set aside.

Mr. Sabel Nawaz, the learned advocate appearing for the opposite parties on the other hand although opposes the rule but found it difficult to support the impugned judgment.

In the instant rule main question to be decided whether the order of remand as been given by the appellate court is at all justifiable or not. This court vides judgment and order dated 29.05.2023 in Civil Revision No. 2957 of 1998 has settled the issue in the following manner:

“Section 107 of the Code of Civil Procedure enables the power of the appellate court to decide the appeal, wherein it has been provided that:

“107. (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them to trial;

(d) to take additional evidence or to require such evidence to be taken.”

Order 41 Rule 23 and 25 of the Code of Civil Procedure provided the procedure as and when and how the appellate court can send the matter for remand.

Under Order 41 Rule 23 of the Code of Civil Procedure provided that:

“23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what

issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.”

Under Order 41 Rule 25 of the Code of Civil Procedure provided that:

“25. Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required.

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefore.”

Appellate court definitely has got the power to send back the case on remand but under Order 41 Rule 23 and Rule 25 of the Code of Civil Procedure, a guideline has been framed as and when a suit can be sent on remand. Under Rule 23, if the judgment of the trial court is being reversed on a preliminary points, appellate court may send back the suit on remand directing to the trial court to decide the suit upon framing the issue. Under Order 41 Rule 25 of the Code of Civil Procedure, Appellate Court may send back the suit on remand, when he found the trial court has omitted to frame or try any issue, which are essential to determine the question on fact, which appears to the appellate court essential to the right decision of the suit on merits, then the suit can be sent back on remand with a direction to such court to take the additional evidence required and after proceeded the suit on the such issues, it

will be returned to the appellate court together with the findings thereon and the reasons therefore to decide the appeal on merit by the appellate court. In the instant case, the order of remand as been passed by the appellate court is not passed on following either of any of the guidelines as been mentioned above in the above two rules.

This is a suit for partition. The learned Judge while sending back the suit on remand has observed that:

“অত্র মূল দেওয়ানী মোকদ্দমাটি একতরফা সূত্রে নিষ্পত্তি হওয়ায় বিবাদীপক্ষ কর্তৃক বাদীপক্ষে উপস্থাপিত সাক্ষীগণকে জেরা করতে না পারায় এবং নিজেদের পক্ষে সাক্ষ্য প্রমাণ উপস্থাপন করতে না পারায় বিবাদীপক্ষকে বাদীপক্ষ কর্তৃক উপস্থাপিত সাক্ষীগণকে জেরা করার সুযোগ প্রদানের স্বার্থে এবং বিবাদীপক্ষকে নিজেদের মামলা প্রমাণের জন্য মামলায় সাক্ষ্য প্রমাণ উপস্থাপনের স্বার্থে মূল মামলাটি বিজ্ঞ বিচারিক আদালতে পুনঃবিচারে (Remand) প্রেরণ যুক্তিযুক্ত মর্মে প্রতীয়মান হয়।”

The points on which it was remanded can be decided by the appellate Court himself. Moreover an order of remand to fill up

the lacuna is not permissible under law. The impugned order thus appears to be passed illegally.

Considering all these aspect of this case, I am of the opinion that the impugned judgment and decree passed by the appellate court is not sustainable in law, which is liable to be set aside.

I find merits in this rule.

In the result, the rule is made absolute. The judgment and decree passed by the appellate court is hereby set aside and the appellate court is hereby directed to decide the appeal on merits by himself expeditiously as early as possible preferably within 6 (six) months after receiving of the judgment.

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

Send down the L.C.R along with the judgment to the courts below at once.