

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.400 OF 2023

In the matter of:

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

And

Shokhiton Nesa and others

... Petitioners

-Versus-

Md. Hazrat Ali and others

... Opposite parties

Mr. Syed Altaf Hossain, Advocate

.... For the petitioners.

None appears

.... For the opposite parties.

Heard and Judgment on 05.11.2024.

This Rule was issued calling upon the opposite party Nos.1-16 to show cause as to why the judgment and decree dated 31.08.2022 passed by the learned Joint District Judge, 3rd Court, Sirajgonj in Partition Appeal No.98 of 2017 allowing the appeal sending the suit on remand reversing the judgment and decree dated 20.04.2017 passed by the learned Assistant Judge, Kmarkhond, Sirajgonj in Partition Suit No.49 of 2014 decreeing the suit on contest in preliminary form 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 the petitioner as plaintiff instituted above suit for partition seeking a separate saham for 4.361 decimal land on the basis of inheritance and purchase.

Defendant Nos.14-16 and 26-31 contested above suit by filing separate written statements. On conclusion of trial the learned Assistant Judge decreed the suit and granted the plaintiff separate saham for 434.6 decimal land, defendant No. 12-14 and 16 were granted separate saham for 27 decimal and defendant No.26-31 were granted separate saham for 49.671 decimal land.

Being aggrieved by and dissatisfied with above Judgment and decree of the trial Court defendant No.1-16 preferred Partition Appeal No.98 of 2017 to the District Judge, Sirajgonj which was heard by the learned Joint District Judge, 3rd Court who allowed the appeal, set aside the judgment and decree of the trial court and remanded the suit for re-trial.

Being aggrieved by and dissatisfied with above judgment and decree of the Court of appeal below respondents as petitioners moved to this court and obtained this Rule.

Mr. Syed Altaf Hossain, learned Advocate for the petitioners submits that the learned Judge of the Court of appeal below remanded the suit for re-trial on the ground that summon was not served upon the defendant No.33. But in fact above defendant No.33 entered appearance in above suit but subsequently abandoned his claim and withdrew his documents by submitting a petition on 05.03.2023. The learned Joint District Judge erroneously held that the heirs of deceased defendant No.41 Abdul Aziz did not receive any summon and the

address of defendant No.3 was erroneously shown in the plaint and no notice was served upon above defendant and after his demise his heirs were not substituted as defendants in the suit.

The learned Joint District Judge could substitute the heirs of any deceased defendant if it was found that the defendant died before receipt of summon or could pass an order service of summon upon any defendant and then after giving them an opportunity to submit their claim for saham could proceed to dispose of the appeal on merit. But the learned Joint District Judge insisted of disposing of the appeal on merit has most illegally set aside the lawful judgment and decree of the trial court on flimsy procedural grounds and remanded the suit for retrial which is not tenable in law.

No one appears on behalf of the opposite parties when the revision was taken up for hearing although the matter appeared in the list for hearing on several dates.

I have considered the submissions of the learned advocate for the petitioner and carefully examined all materials on record.

As mentioned above on conclusion of trial the learned Judge of the trial Court decreed the suit on contest and granted separate saham for the plaintiffs and contesting defendants.

It turns out from record that the learned Joint District Judge instead of disposing of the appeal on merit has unnecessarily concentrated on flimsy procedural aspects as to service of summons

and non substitution of the heirs of the defendants. It is well settled that a Court of appeal is also a Court of facts and in a suit for partition an Appellant Court has jurisdiction to allow amendment of pleading, addition of parties and record additional evidence and then pass a judgment on merit.

The learned Judge of the trial Court employed enough labour and time for writing a detailed judgment and allocating shares to both the plaintiffs and defendants. The learned Judge of the Court of appeal below set aside the judgment and decree of the trial court on curable procedural deficiencies. The learned Judge of the Court of appeal erroneously held that summon was not served properly upon defendant No.33 who in fact filed an application on 05.03.2023 seeking return of his submitted documents.

The learned Judge of Court of appeal below could substitute the heirs of deceased defendants if they were interested and dispose of the appeal on merit in accordance with law.

In above view of the facts and circumstance of the case and materials on record I find substance in this application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, this Rule is hereby made absolute.

The impugned judgment and decree dated 31.08.2024 passed by the learned joint District Judge, 3rd Court, Sirajgonj in Partition Appeal

No.98 of 2017 is set aside. The learned Joint District Judge, 3rd Court, Sirajgon is directed to dispose of the appeal on merit in accordance with law expeditiously preferably within a period of 6 (six) months from the date of receipt of this judgment.

However, there is no order as to cost.

Send down the lower Courts records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER