

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO.5573 OF 2022.

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Md. Faruque and others
..... Plaintiff-Appellant-Petitioners

-Versus-

Abdul Kadir and others
..... Defendant-Respondent-Opposite parties.

Mr. Md. Saidul Alam Khan, Advocate
..... For the petitioners.

Mr. Prabir Halder, Advocate
.... For the opposite party Nos.1-6.

Mr. Mohammad Abdullah Al Masud, Advocate
.... For the opposite party Nos.7-20.

Heard and Judgment on: 18.01.2024.

On an application of the petitioner Md. Faruque and others under section 115 (1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party Nos.1-20 to show cause as to why the judgment and decree dated 04.10.2022 passed by the learned Joint District Judge, Narayanganj in Title Appeal No.80 of 2022 dismissing the appeal and thereby affirming the judgment and decree dated 13.02.2022 passed by the Senior Assistant Judge, Bondar, Narayanganj in Title Suit No.112 of

2021 dismissing the suit should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the predecessor of the petitioners as sole plaintiff filed Title Suit No.112 of 2021 before the Senior Assistant Judge, Bondar, Narayanganj for declaration of title of the schedule land and the R.S Khatian No.253 and 257 is illegal, erroneous and not binding upon the plaintiff.

The defendant Nos. 1-10 contested the suit by filing written statement denying all the materials assertion made in the plaint.

Thereafter, the trial Court framed 06 (six) issues for disposal of the suit.

At the trial the plaintiff side examined two witnesses as P.Ws and also adduced documents and defendant side also examined two witnesses as D.Ws and also adduced some documents to prove their respective cases.

The trial Court after hearing the parties and considering the evidence on record dismissed the suit by its judgment and decree dated 30.02.2022.

Against the said judgment and decree of the trial Court the plaintiff side preferred Title Appeal No.80 of 2022 before the learned District Judge, Narayanganj.

The learned District Judge, after hearing the parties and considering the evidence on record dismissing the appeal and thereby

affirming the judgment and decree of the trial Court by its judgment and decree dated 04.10.2022.

Being aggrieved by and dissatisfied with the impugned judgment and decree of the Courts below the plaintiff-appellant-petitioners filed this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the Rule.

Mr. Prabir Halder, the learned Advocate entered appear on behalf of the opposite party Nos.1-6 through vokalatanama to oppose the Rule and Mr. Mohammad Abdullah Al Masud also filed power on behalf of the opposite party Nos.7-10 and 12-20 through vokalatanama to oppose the Rule.

At the time of hearing of the revisional application the learned Advocate Mr. Md. Saidul Alam Khan, filed an application for amendment of the plaint under Order VI rule 17 read with Section 151 of the Code of Civil Procedure.

The learned Advocate submits that since the schedule property being the ejmailly property and without any prayer for partition the dispute cannot be resolved. The learned Advocate submits that in his application he stated the detail facts in the paragraph Nos.7-9 and submits that by the proposed amendment the nature and character of the suit has not been changed.

He further submits that the plaint can be amended at any time during the trial even in the appellate stage or even in the revisional stage

or and this matter has already been settled by our Apex Court and prayer is a *bonafide* prayer. He prays for disposal of the Rule with a direction to allow the application for amendment and to dispose of the suit treating the same as partition suit.

Mr. Prabir Halder, the learned Advocate appearing on behalf of the opposite parties and Mr. Mohammad Abdullah Al Masud appearing on behalf of the opposite party do not have raised any objection against the prayer of the learned Advocate of the petitioner.

I have heard the learned Advocate of both the sides, perused the impugned judgment of the Courts below and the papers and documents as available on the record.

It appears that the predecessor of the petitioners as plaintiff filed the suit praying for declaration of title along with a prayer that the record prepared in the name of the defendants is illegal, wrong and not binding upon them.

The trial Court after considering the evidence on record dismissed the suit taking view that as per C.S record both the parties were the owner of the suit land but the plaintiff failed to prove the amicable partition between the C.S recorded owner and thus dismissed the suit.

The appellate Court in its judgment opined to the effect: “সুতরাং দালিলিক ও মৌখিক সাক্ষ্য পর্যালোচনায় দেখা যাচ্ছে যে, বাদী ও বিবাদী উভয়পক্ষই নালিশী জমি খরিদ সূত্রে মালিক এবং তারা নালিশী জমি ভোগ করছেন দখল করছেন”। The Court also opined that the

plaintiff ought to have prayed for partition and thus the suit is not maintainable and accordingly dismissed the appeal.

I have also perused the evidence and the documents as available on the record. From where it is found that the plaintiff as well as defendants and are in possession but it could not be decided the title of the plaintiff without prayer for partition are the purchasers of the land and they both have valid documents in such a case it is my view that the appellate Court rightly found that without any prayer for partition the suit is not maintainable.

However, since at the hearing of this revisional application the plaintiff appellant-petitioners filed this application for amendment of the plaint under Order VI rule 17 read with section 151 of the Code of Civil Procedure stating the facts and also sought for partition as mentioned in paragraph No.10 of the application. The petitioners inserting the prayer for partition and claiming that the pleadings may be amended at any stage of the proceedings.

Considering the aforesaid facts and circumstance of the case and the application of the amendment, since, the petitioners filed this application for amendment of the plaint with a prayer for partition and the proposed amendment do not change the nature and character of the suit. Furthermore in partition suit the details specially the title, possession and other claim of the parties may be consider on the basis of the evidence on record. The learned Advocate of both the side submits

that it is better to send back the case on remand for fresh trial treating the same as partition suit.

It is my view that not only seeking amendment of the plaint with a prayer for partition even the plaintiff can withdraw the suit due to some formal defect to file the suit afresh as partition suit when his right and interest has been challenged. Furthermore, the right of partition is recurring and the suit may file when the right was affected and in such a case the limitation should be considered on the basis of evidence. In such a case there is no bar to allow the application.

It appears that the appellate Court found that both the side have right, title and possession of the suit land but since the suit land was not amicably partitioned between the predecessors of the parties and since the plaintiff did not seek prayer for partition thus took view that the suit is not maintainable without any prayer of partition.

However, it is better to send back the case to the trial Court for disposal of the suit afresh and then the trial Court should consider the aforesaid facts and the findings of this Court after disposal of the application dated 12.10.2023 filed by the petitioner and may dispose of the suit in accordance with law treating the same as partition suit.

The trial Court also should consider the evidence available on the record and also can allow the parties to adduce additional evidence or evidence if requires for disposal of the suit.

Considered the aforesaid facts and circumstances of the case and the discussions as made above, I find merit in the Rule.

In the result, the Rule is made absolute. The judgment and decree dated 04.10.2022 passed by the learned Joint District Judge, Narayanganj in Title Appeal No.80 of 2022 dismissing the appeal and thereby affirming the judgment and decree dated 13.02.2022 passed by the Senior Assistant Judge, Bondar, Narayanganj in Title Suit No.112 of 2021 are hereby set-aside.

The Title Suit No.112 of 2021 is sent back on remand to the trial Court.

The trial Court is directed to dispose of the application of the petitioners dated 12.10.2023 filed under Order VI rule 17 read with section 151 of the Code of Civil Procedure considering the observations as made above.

The trial Court is directed to dispose of the suit as early as possible preferably within 06 (six) months from the date of receipt of this order in accordance with law and the observations as made above.

The order of status-quo granted earlier by this Court should continue till disposal of the suit.

Send down the Lower Court's Records along with the application for amendment of plaint under Order VI Rule 17 read with section 151 of the Code of Civil Procedure dated 12.10.2023 at once.

B.O. Obayedur