District: Cumilla

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 1159 of 2023

In the matter of :
Afia Khatun and others
… Petitioners
-Versus-
Amena Begum and others
…Opposite parties

Mr. Muhammad Rafiul Islam, Advocate
…For the petitioners

Mr. Prahlad Debnath, Advocate
…For the opposite party No. 1

Heard on: 14.11.2024 and 27.11.2024
Judgment on: 04.12.2024

Rule was issued on an application under section 115(1) of the Code of Civil Procedure calling upon the opposite parties to show cause as to why the judgment and order dated 30.01.2023 passed by the Additional District Judge, Forth Court, Cumilla in Civil Appeal No.130 of 2020 arising out of Title Suit No.99 of 2017, allowing the application to examine additional witnesses,

should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The present opposite party No.1 as plaintiff filed Title Suit No.99 of 2017 before the Assistant Judge, Borura, Cumilla for declaration of title in respect of the scheduled property to the plaint. On conclusion of hearing the suit was dismissed by judgment and decree dated 31.10.2019 on contest against the defendant Nos.1-3, 5, 8-10 holding that the plaintiff failed to prove her title, interest and possession in the suit land.

Having been aggrieved by the judgment and decree dated 31.10.2019 passed by the Assistant Judge, Borura, Cumilla in Title Suit No.99 of 2017, the plaintiff preferred Title Appeal No.130 of 2020 before the District Judge, Cumilla. The said appeal was transferred to the Court of Additional District Judge, Forth Court, Cumilla for hearing. On 30.01.2023, the plaintiff-appellant filed as well as 2(two) applications, one is under Order VI, rule 17 of the Code of Civil Procedure for amendment of plaint and another is for additional evidence to examine 2(two)

additional witnesses on behalf of the plaintiff-appellant. And 3rd party also filed an application under Order I, rule 10 of the Code of Civil Procedure to be added as respondents.

Learned Additional District Judge on the same day i.e. on 30.01.2023 took the applications for hearing and by her order allowed all the applications.

On being aggrieved by and dissatisfied with the order dated 30.01.2023, so far it relates to allowing the application to examine additional witnesses, the defendant-respondent preferred this civil revisional application and obtained the Rule.

Learned Advocate Mr. Muhammad Rafiul Islam appearing on behalf of the petitioner submits that the Court of appeal below committed an error of law in allowing the application for examining additional witnesses on behalf of the plaintiff-appellant failing to consider that the application is nothing but to provide an opportunity to fill up her lacuna. He next submits that Order XLI, rule 27 read with the rule 29 of the Code of Civil Procedure provides that learned Judge of appellate Court

concerned in allowing the application for additional evidence is to specify the reasons thereof and also is to specify the points to which the evidence is to be confined, limiting the scope of producing/advancing the evidence, but in the present case learned Judge of the appellate Court below failed to discharge the said mandatory obligation in allowing the application for examining additional witnesses and thereby committed error of law in an error in the decision occasioning failure of justice.

In support of the submission learned Advocate cited the case of Daulat Chandra Gope alias Mrityunjoy Gope and others Vs. Mosammat Monowara Begum and another reported in 16 BLD(AD) 251, wherein it was categorically held that in allowing an application under Order XLI, rule 27 of the Code of Civil Procedure the order of appellate Court below is must be a speaking one assigning the reason and specifying the scope of providing additional evidence. It was also held that it is the appellate Court who is to feel requirement of such additional evidences to arrive at a just decision and in view of above, he

prayed for making the rule absolute upon setting aside the impugned order, so far it relates to allowing the application for examining additional witnesses.

On the other hand, Mr. Prahlad Debnath, learned Advocate for the plaintiff-appellant-opposite party submits that the Court of appeal below is quit competent to entertain an application for additional evidence under Order XLI, rule 27 read with section 107(i)(d) of the Code of Civil Procedure and it is the discretion of the appellate Court below to allow the application for additional evidence regarding any particular point in order to enable him to pronounce a proper judgment and for disposal of the suit effectively. He next submits that under rule 27 (1)(b) of Order XL of the Code, the Court of appeal below in an appropriate case may allow additional evidence for the ends of justice and to enable it to arrive at a just verdict. Under the provision of section 107, the appellate Court has the similar power that of the trial Court in taking evidence in an appropriate case. He further submits that through the application dated 30.01.2023, the appellant-opposite

party categorically assigned the reason for taking additional witness and although the Court of appeal below did not specify the reason in allowing the application, but in fact, it was being satisfied regarding the application filed by the appellant and thereby allowed the same. In support of the submission Mr. Debnath referred 2(two) judgments of the Apex Court, the case of AK Azad and another Vs. Mostafizur Rahman and another reported in 18 BLC(AD) 78 and the case of Harunur Rashid and others Vs. Yarun Nissa and others reported in 23 BLC(AD) 132 and in view of above, he prayed for discharging the Rule.

Heard learned Advocates for both the parties, perused the revisional application together with the annexures, supplementary affidavit and the counter affidavit, having gone through the cited judgments and the provision of law.

It appears that section 107(1)(d) of the Code of Civil Procedure provides that subject to the(such) conditions and limitations as may be prescribed, an appellate Court shall have power to take additional evidence or to require such evidences to

be taken; it is further provided under sub-section (2) of section 107 that the appellate Court shall have the same power and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on the Courts of original jurisdiction in respect of suits instituted therein.

Meaning thereby, the appellate Court shall have almost the same authority to take evidence within the meaning of additional evidence subject to the prescribed limitation under the First Schedule to the Code of Civil Procedure, in particular, under Order XLI, rule 27 to 29. Under rule 27, the scope of producing additional evidences having been specified and limited mainly on 2(two) reasons, the first one, if the trial Court has improperly refused to admit any evidence which ought to have been admitted by it or other one, where the appellate Court it self requires such evidence either to enable it self to pronounce just judgment or for any other substantial cause. At the same time, sub-rule (2) of rule 27 further provides that the appellate Court is to record the reason of allowing additional evidence and under rule 29, it is stipulated

that the appellate Court shall have to specify the point to which the additional evidence is to be confined and shall record on its proceedings, the point so specified. Under the case in hand, the plaintiff-appellant filed an application on 30.01.2023, purportedly under Order XLI, rule 27 read with section 107 of the Code of Civil Procedure for allowing the plaintiff-appellant to examine two additional witnesses namely, Md. Ali Akbor, son of Borhan Uddin and Abul Khair, son of Keramot Ali of Dalua under Police Station- Barura, District- Cumilla, on the stipulation that her engaged Advocate of the trial Court below failed to produce or examine any witness in support of the plaintiff's possession and as such, the aforesaid 2(two) witnesses who reside in the same locality of plaintiff may be allowed to depose in favour of the plaintiff- appellant to support her possession over the suit land. The Court of appeal below without assigning any reason or examining the contemplation of Order XLI, rules 27 and 29 read with section 107(1)(d) allowed the application. For ready reference the order No. 29 dated 30.01.2023 of the appellate Court below allowing the application is reproduced herein below:

> "আপীলেন্ট পক্ষ ফিরিস্তিযুক্তে একফর্দ কাগজাদি দাখিলপূবর্ক অপর এক দরখস্ত দ্বারা বর্ণিত কারনে মানীত সাক্ষীদের মান্য করার প্রার্থনা করিয়াছেন। আপত্তিসহ কপি জারি। শুনিলাম। দরখস্ত মঞ্জুর করা হইলো।"

The order of the appellate Court below did not show any reason, except referring the grounds taken in the application dated 30.01.2023. Wherein the only reason specified is that learned Advocate failed to produce any evidence in support of plaintiff's possession.

The application dated 30.01.2023 does not reveal any satisfactory reason or explanation for the failure of the plaintiff to examine them although the aforesaid 2(two) witnesses reside in the same locality.

In the case of Mosharraf Hossain and others Vs. Ali Akbor Sarker and others reported in 1 BLC 283, the plaintiff-appellant of the case filed an application under Order XLI, rule 27 of the Code of Civil Procedure for taking additional evidence of one Md. Siddiqure Rahman, the attesting witness of Bainapatra along with the some documents as the said witness was at Singapur and away from the country at the relevant time of trial of the suit. The said

application was received with objection by the defendant-respondents and ultimately, after hearing learned Additional District Judge on 20.01.1993 allowed the application without assigning any reason what so ever. The said witness, Mr. Siddiqure Rahman was examined and also cross-examined (by the respondents on compulsion). Thereafter, the contested respondent Nos. 2 and 3 filed an application for cancellation of the additional evidence of the witness, Siddiqure Rahman, already recorded in Court, with the allegation that the plaintiff-appellant failed to produce the passport and other documents of Siddiqure Rahman to prove that at the relevant time of trial he was at Singapur and away from the country. After hearing learned Additional District Judge, Cumilla rejected the application. Challenging the aforesaid 2(two) orders, one is allowing the additional evidences and other one is rejection of application for cancellation or expunging the additional evidences recorded in Court, defendant-respondents filed a revisional application under section 115(1) of the Code of Civil Procedure before the High Court Division and a Division Bench of this Court by its judgment held that the order of the

Additional District Judge is not at all a speaking order and the same does not show that the Judge concerned at all applied his judicial mind and examined the requirement of additional evidence of the witness concerned in accordance with the provision of Order XLI rule 27 of the Code of Civil Procedure whether it was bonafide or not.

It was also found that on behalf of the plaintiff no attempt was made in the trial Court to produce or examine any attesting witness of Bainapatra and finally the Court found that the plaintiff-appellant-opposite party (in the said suit) at the appellate stage made an attempt to fill up and patch up the lacuna in his suit by filing the application for additional evidence at a belated stage and learned Additional District Judge without applying his mind arbitrarily and carelessly allowed the application without compliance of the requirement of the provision of Order XLI, rule 27 of the Code of Civil Procedure.

In the case of Sunil Krishna Banik and others Vs. Kailash Chandra Saha and others reported in 36 DLR(AD) 210. Their

Lordships of the Apex Court referring to a judgment of the Judicial Committee of the Privy Council (Parsotim -Vs- Lal Mohar reported in 58 I.A. 254) held that :

> *"It is only where the appellate Court "requires" it (i.e. finds it needful) that additional evidence can be admitted. It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent."*
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> ……
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> *"Wherever, the Court adopts this procedure it is bound by rule 27(2) to record its reasons for so doing and under r. 29 must specify the points to which the evidence is to be confined and record on its proceedings the point so specified."*
>
> …….

> *"The provision of section 107, sub-section 1(d) of the Civil Procedure Code as elucidated by Order XLI, rule 27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak part of his case and fill up omissions in the appellate Court."*

Under the case in hand, the plaintiff-appellant in his application claimed that due to mistake of her learned Advocate he could not examine any witness in support of her possession.

We have examined the judgment and order of the trial Court (Assistant Judge, Barura, Cumilla), wherein learned Assistant Judge categorically held that the plaintiff failed to prove her title, interest and possession over the scheduled land and thus, she is not entitled to get any remedy in the present suit.

It is not the case of the plaintiff-appellant-opposite party that with due diligence, she failed to examine the witness or produce necessary witness or evidence at the time of trial. Thus, in

view of the discussions made in above, she should not be allowed to fill up or patch up his weakness, i.e. the lacuna in the original suit before appellate Court by allowing the application under Order XLI, rule 27 of the Code of Civil Procedure.

In the premise above, this Court finds merit in the Rule.

Accordingly, the Rule is made absolute without any order as to cost.

The order dated 30.01.2023, so far it relates to allowing the application for additional evidence by examining 2(two) additional witnesses namely, Ali Akbor and Abul Khayer is hereby set aside.

The order of stay granted at the time of issuance of the Rule is hereby recalled.

Communicate the judgment and order at once.

Obaidul Hasan/B.O.