

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No. 2264 of 2023**

Ramzan Ali

... Petitioner

-Versus-

Moulavi Mohammad Ferdaus and others

...Opposite-parties

Mr. Abdul Alim with

Mr. Md. Ashfakuzzoha, Advocates

...For the petitioner

Ms. Nusrat Jahan, Advocate

...For the opposite-party No. 1.

**Heard on 29.01.2024 and**

**judgment on 05<sup>th</sup> February, 2024.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioner calling upon the opposite parties to show cause as to why the impugned judgment and order dated 12.10.2022 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Cox's Bazar in Miscellaneous Appeal No. 20 of 2021 dismissing the appeal and thereby affirming the judgment and order dated 01.04.2021 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Cox's Bazar in Miscellaneous Case No. 01 of 2020 rejecting the application for temporary injunction should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The opposite-party No. 2, as plaintiff, filed Other Suit No. 402 of 2018 in the Court of Joint District Judge, 1<sup>st</sup> Court, Cox's Bazar against the present petitioner, as defendant No. 3 along with 29 others, as defendants, for a decree of declaration and partition in the following terms:

“ক) নালিশী ২(ক) নম্বর তপশীলোক্ত জমি লইয়া সম্পাদিত ও রেজিস্ট্রীকৃত গত ০৭/০৪/১৯৯৭ ইংরেজী তারিখের ৯০৭ নম্বর বায়নানামার পোষকে সম্পাদিত ও রেজিস্ট্রীকৃত গত ৩০/০৬/১৯৯৭ ইংরেজী তারিখের ১৬৮০ নম্বর কবলাভুক্ত ২ নম্বর তপশীলোক্ত জমিতে এই বাদীর খরিদা স্বত্ব অটুট সাব্যস্তের বিকল্পে উক্ত বায়নানামার পোষকে নালিশী ২(ক) নম্বর তপশীলোক্ত জমিতে ১ নম্বর বিবাদীর বিরুদ্ধে এই বাদীর বিরুদ্ধে দখলজনিত স্বত্ব সাব্যস্তের ডিক্রী দেওয়ার;

খ) নালিশী ২(ক) নম্বর তপশীলোক্ত জমি লইয়া বাদীর সাবেক দখল বজায় রাখিয়া বাদীর বরাবরে বিভাগের প্রাথমিক ডিক্রী দেওয়ার;

গ) বিজ্ঞ আদালত কর্তৃক প্রচারিত প্রাথমিক ডিক্রীর আলোকে বিবাদীগণ আপোষে বিভাগ করিয়া না দিলে, একজন সার্ভেজানা এডভোকেট কমিশনার নিয়োগ করতঃ বাদীর বরাবরে বিভাগের চূড়ান্ত ডিক্রী দেওয়ার;

ঘ) অত্র মামলার ২ নম্বর তপশীলোক্ত জমি লইয়া গত ০৭/০৪/১৯৯৭ ইংরেজী তারিখের ৯০৭ নম্বর বায়নানামার পোষকে সম্পাদিত ও রেজিস্ট্রীকৃত গত ৩০/০৬/১৯৯৭ ইংরেজী তারিখের ১৬৮০ নম্বর বিক্রয় কবলা দলিলের গ্রহীতার কলাম সংশোধন করতঃ নালিশী ২(ক) নম্বর তপশীলোক্ত জমির জন্য বাদীর নাম

অর্ন্তভুক্ত করিবার এবং দলিল সংশ্লিষ্ট বালাম সংশোধন করিবার জন্য  
২৩/২৪ নম্বর বিবাদীর বিরুদ্ধে ডিক্রী দেওয়ার;

ঙ) বিজ্ঞ আদালত কর্তৃক প্রচারিত রায় ডিক্রীর একখানা  
অনুলিপি ২৩/২৪ নম্বর বিবাদীর কার্যালয়ে প্রেরণ করতঃ তৎ অনুবলে  
নালিশী গত ৩০/০৬/১৯৯৭ ইংরেজী তারিখের ১৬৮০ নম্বর দলিল  
সংশ্লিষ্ট বালামে নোট লিপি করিবার জন্য ২৩/২৪ নম্বর বিবাদীগণের  
বিরুদ্ধে নির্দেশসূচক ডিক্রী দেওয়ার;

চ) বাদীর স্বত্ব দখলীয় নালিশী ২(ক) নম্বর তপশীলোক্ত  
জমি লইয়া ১ নম্বর বিবাদীর নামে সৃজিত নামজারী ও জমাভাগ  
১৮২৯ ও ৭০২৯ নম্বর খতিয়ান বে-আইনী, ফেরবী, যোগসাজসী,  
অকার্যকর, অবলবৎযোগ্য, উদ্দেশ্যমূলক ও হয়রানীমূলক মর্মে এবং  
তৎদ্বারা বাদী ও নালিশী জমি বাধ্য নহে মর্মে উচ্চারণের ডিক্রী  
দেওয়ার;

চ(১) অত্র মামলার ১-৫/৭-১৫/২৭-৩০ নম্বর বিবাদীগণ  
যাহাতে নালিশী তপশীলোক্ত চৌহদ্দিভুক্ত জমি ও ভবন হইতে এই  
বাদীকে বেদখল করিতে না পারে, স্থিত স্থাপনা ভাঙ্গিয়া ফেলিতে না  
পারে, শো-রুমে থাকা মালামাল লুট করিয়া লইয়া যাইতে না পারে  
তৎ মর্মে ১-৫/৭-১৭/২৭-৩০ নম্বর বিবাদীগণের বিরুদ্ধে চিরস্থায়ী  
নিষেধাজ্ঞার ডিক্রী দেওয়ার;"

The defendant Nos. 2-6, 8-15 and 27-30 appeared in suit and  
filed written statements. At one stage, defendant Nos. 2-5, 8-11, 13-  
15 and 27-30 filed an application of compromise before the trial  
court. The trial court upon hearing and recording evidence of present  
petitioner, as defendant No. 3 and the plaintiff decreed the suit on  
30.10.2019 on compromise in preliminary form. After passing  
preliminary decree the opposite party No. 1 who was defendant No.

1 in suit came to know about the compromise decree and filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree passed against him which was registered as Miscellaneous Case No. 01 of 2020 on the ground that no summon notices was served upon him and in his absence other defendants in connivance with the plaintiff got the suit compromised and obtained the preliminary decree, depriving the petitioner of his legal share in the property.

The petitioner, as defendant-opposite-party No. 3 appeared in the miscellaneous case and filed an application on 15.03.2021 praying for temporary injunction against the petitioner in miscellaneous case. The application was resisted by the petitioner filing written objection. The trial court after hearing by the impugned judgment and order dated 01.04.2021 rejected the application for injunction. Thereafter, the petitioner-opposite-party No. 3 filed Miscellaneous Appeal No. 20 of 2021 before the learned District Judge, Cox's Bazar against the order of the trial court. Learned District Judge transferred the appeal to the court of Additional District Judge, 1<sup>st</sup> Court, Cox's Bazar for hearing and disposal who

after hearing by the impugned judgment and order dated 12.10.2022 dismissed the appeal affirming the judgment and order of the trial court. At this juncture, the petitioner, moved this Court by filing this application under Section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of status-quo.

Mr. Abdul Alim with Mr. Md. Ashfakuzzoha, learned Advocates appearing for the petitioner submit that the contending parties in the litigation are full brothers, among them Efazullah filed the suit for a decree of partition along with other declaration. Since there is no conflict between the parties in respect of their entitlement to the property, the contesting defendants got the suit disposed of on compromise and the trial court decreed the suit in preliminary form making the compromise application part of the decree. He submits that after passing decree, the compromising parties as per their earlier possession enjoying the property, but the defendant No. 1 in suit came with an application for setting aside the decree on the ground of non service of summons where the summon was duly served upon him which was received by his full brother defendant No. 8. However, after filing miscellaneous case for setting aside the

compromise decree the petitioner threatened the present petitioner Ramzan Ali with dispossession. Consequently, he filed an application praying for injunction at least to maintain status-quo in respect of possession and position of the suit land till disposal of the miscellaneous case. The trial court as well as appellate court ought to have passed an order of status-quo considering the facts and circumstances of the case exercising inherent power as held by this division in the case of *Abu Mohammad Yousuf and others Vs. Mrs. Basiran Nessa and others* reported in *8 BLT (HCD) 307*. He argued that if an order of status-quo is passed in respect of the property neither the petitioner nor the opposite-party will be prejudiced as the status-quo only maintains possession of the parties as it is. Therefore, since an order of status-quo was passed at the time of issuance of the Rule that may be maintained till disposal of the miscellaneous case. He finally submits that maintaining the order of status-quo if the trial court is directed to dispose of the miscellaneous case within a shortest time the purpose will be served and justice will be done for the parties to the litigation.

Ms. Nusrat Jahan, learned Advocate appearing for the opposite-party No. 1 at the very outset submits that subject matter of

the miscellaneous case is a compromise decree obtained by the plaintiff in suit without service of summon upon the defendant No. 1. The question to be decided by the Court whether summon upon the defendant No. 1 was duly served and whether the decree passed ex parte against him for his negligence and there is no subject matter in miscellaneous case relating to property, as such, the court cannot pass an order relating to any matter which is not subject matter of the proceedings. She submits that the petitioner, as opposite-party No. 3 filed an application praying for injunction under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. Section 141 of the Code provides that the procedure provided in this Code in regard to suits shall be followed as it can be made applicable in all proceedings in any Court of civil jurisdiction, meaning thereby, provisions of the Code can be made applicable in all original matter in any Court of civil jurisdiction, but a miscellaneous case arising out of original suit filed under Order 9 Rule 13 of the Code praying for setting aside ex parte decree is not an original proceedings, like suits, as such, the application under Order 39 Rules 1 and 2 is not at all maintainable in the present case. The trial court as well as the appellate court rightly held that in a miscellaneous proceeding like

the present one, application seeking injunction under Order 39 Rules 1 and 2 is not maintainable as the subject matter in the case is not an immovable property but a matter relating to non service of summons. In support of such submissions she has referred to the case of *Almasuddin and another Vs. A. Wadud Khn and others* reported in **42 DLR 391**.

Heard the learned Advocates of both the parties, have gone through the revisional application, plaint in Other Suit No. 402 of 2018, application for compromise, decree passed by the court, application under Order 9 Rule 13 of the Code of Civil Procedure, application for injunction, written objection thereto and the impugned judgment and order passed by both the courts below.

Facts as stated hereinbefore need not be repeated again. The question raised in this Rule is limited within a very narrow compus. Whether in a miscellaneous proceedings arising out of suit, like the present one filed under Order 9 Rule 13 of the Code praying for setting aside an ex parte compromise decree in preliminary form, any of the parties can file an application under any provisions of the



Code of Civil Procedure like an application for injunction under Order 39 Rules 1 and 2 is at all maintainable.

To appreciate the question raised, the provisions in Section 141 of the Code may be looked into which run thus:

*“141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction”*

Proceedings in Section 141 of the Code include original matter. Miscellaneous case under Order 9 Rule 13 of the Code is not a proceeding within the meaning of Section 141. In the instant case, the question is whether the defendant No.1-petitioner in miscellaneous case has any sufficient cause for his non appearance in suit or whether the summons duly served upon him.

Admittedly, Other Suit No. 402 of 2018 is a suit for partition of the property along with other declarations. Though the suit was decreed on compromise in preliminary form, it means that Other Suit No. 402 of 2018 is still pending until a final decree is drawn up and the property in question is the suit property as mentioned in the schedule to the plaint in Other Suit No. 402 of 2018. Present

petitioner is defendant No. 3 in original suit who compromised the suit with the plaintiff and obtained a decree on compromise. The property mentioned in the application for injunction is the subject matter of original suit which is admittedly a joint property having a share of defendant No. 1, meaning thereby, the petitioner in miscellaneous case is a co-sharer in the suit property which is situated within the City Corporation alongwith an underconstructed building. The present petitioner as one of the party to the compromise obtained a share in the suit property, but no share has been left out or allotted to the defendant No. 1. Moreover, the subject matter in miscellaneous case is not the property, but a question to be decided whether summon was served upon the defendant No. 1. The Court cannot pass any order beyond subject matter of the case, in particular, in respect of property mentioned in original suit.

It is true that the Court by exercising its inherent power pass an order for ensuring justice between the litigants, depending on the facts and circumstances of the case. In the present case, the property is ejmali property though a portion of the dependents partitioned the property on compromise leaving the defendant No. 1 in suit which is

now under challenge. The case referred by petitioner reported in **8 BLT (HCD) 307** is relating to ejectment of tenant wherein landlord got a decree for ejectment against the heirs of original tenant then the decree was put in execution, some of the heirs challenged the decree by filing application for setting aside the decree and during pendency of the miscellaneous case one of the heirs of original tenant started constructions on the property of which the plaintiff got a decree for ejectment. The Court considered the facts and circumstances of the case and observed that where the court passed a decree for eviction of the tenant, if the tenant is allowed to construct the structure on the suit property it will create obstruction in execution of the decree and passed the order of injunction till disposal of the miscellaneous case, but in the present suit, the situation is otherwise.

Apart from non maintainability of application under Order 39 Rules 1 and 2 in a miscellaneous case, this is a suit for partition among the plaintiff and major portion of the defendants got the suit decreed on compromise leaving defendant No. 1 who is a co-sharer as full brother of plaintiff. The present petitioner prayed for injunction on the basis of compromise decree and the share allotted

to him which is under challenge. In the event of allowing the case and setting aside the decree, the property whatever, fell in the present petitioner's share will not sustain. Therefore, the trial court as well as the appellate court rightly rejected the application not only on the ground of applicability of provisions of the Code of Civil Procedure Code in a miscellaneous case but also on merit finding that the petitioner has no prima facie case to prevent a co-sharer from joint enjoyment of the property by order of injunction. As such, I find that both the courts below rightly refused injunction in favour of the petitioner and finds no ground for interference by this Court.

Taking into consideration the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioner.

In the result, the Rule is discharged, however, without any order as to costs.

Order of *status-quo* granted at the time of issuance of the Rule stand vacated.

The trial court is hereby directed to dispose of the Miscellaneous Case No. 01 of 2020 expeditiously preferably within 02(two) months from the date of receipt of this judgment and order without fail.

Communicate a copy of the judgment to the Court concerned at once.

*Helal-ABO*