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

**CIVIL REVISION NO. 2906 OF 2023**

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

AND

In the matter of:

Abu Afzal Md. Shafayet Ali and others

.... Petitioners

-Versus-

Md. Fazle Haider and others

....Opposite-parties

Mr. Probir Neogi, senior Advocate with
Mr. Tapos Bandhu Das, Advocates

... For the petitioners

Mr. Md. Mainul Islam with

Mr. Md. Faruk Hossein, Advocates

....For the opposite party nos. 1-5

**Heard on 04.03.2024 05.03.2024**

**and Judgment on 05.03.2024.**

**Present:**

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

**Md. Mozibur Rahman Miah, J:**

At the instance of the defendant nos. 1-11 in Title Suit No. 68 of 2021, this rule was issued calling upon the opposite-parties to show cause as to why the order dated 05.04.2023 passed by the Joint District Judge,

Court, No. 3, Dhaka in Title Suit No. 68 of 2021 rejecting the application filed Under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure filed by defendant nos. 1-11 should not be set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, this court also stayed the further proceedings of the said suit and also directed the parties to maintain status quo in respect of possession of the suit property.

The short facts leading to issuance of the instant rule are:

The present opposite party nos. 1-6 as plaintiffs filed the aforesaid title suit seeking following reliefs:

> *(a) To pass a decree in favour of the plaintiffs and against the defendants declaring that the plaintiffs have fourteen annas right title and interest in the Schedule (A) property.*
>
> *(b) To pass a decree of declaration in favour of the plaintiffs and against the defendants for cancellation the deed dated 30.05.1964 (more fully described in the (B) schedule) and it had never been acted upon and by that deed title had not been passed in favour of Enayet Ali and his heirs also;*
>
> *(c) To pass a decree declaring that (C) and (D) schedule R.S. Khatian No. 1037 comprising plot No. 2388 and Dhaka City Khatian No. 1265 comprising plot No. 2547 are wrong and not binding upon the plaintiffs.*

*(D) To pass a preliminary decree in favour of the plaintiffs giving them $\frac{14}{16}$ portion of land as their saham in the (A) Scheduled property.*

*(e) To pass a decree making the preliminary decree of the plaintiffs share $\frac{14}{16}$ of the (A) scheduled property and after appointing Survey knowing Advocate Commissioner declaring him to allot a compact share to the plaintiffs covering their shares $\frac{14}{16}$ in the Schedule (A) property.*

*(f) To pas final decree in accordance with the preliminary Decree and Advocate Commissioner's report.*

*(g) Any other relief or reliefs to which the plaintiffs are entitled in law and equity.*

After filing of the suit, the petitioners who are the defendant nos. 1-11 filed an application under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure for rejection of the plaint contending inter alia that, that on the self-same reliefs the plaintiffs had earlier filed a suit being Title Suit No. 59 of 2005 which went up to the Appellate Division and ultimately the suit was dismissed. However, the application was taken up for hearing by the learned judge of the trial court and vide impugned judgment and order rejected the same holding that, the grievance so have been made in the application for rejection of the plaint cannot be adjudicated without taking evidence of the parties to the suit. It is at that

stage the said defendant nos. 1-11 as petitioners came before this court and obtained the instant rule and interim order as has been stated herein above.

Mr Probir Neogi, the learned senior counsel along with Mr. Tapos Bandhu Das, the learned counsel appearing for the petitioners upon taking us to the revisional application at the very outset submits that, since earlier suit was filed by the self-same plaintiffs on the self same suit land with almost self same prayer like the prayers made in the instant suit so it turns out that, the ultimate result of the suit will be as clear as day light and therefore under the provision of section 151 of the Code of Civil Procedure this Hon'ble court has got every authority to reject the plaint *in limini* apart from exercising the authority so have been given under Order 7 Rule 11 clause (d) of the Code of Civil Procedure.

The learned counsel by referring to the prayer of both the suit that is, in Title Suit No. 59 of 2005 and that of the instant Title Suit No. 68 of 2021 also contends that, apart from prayer 'C' to the instant plaint all other prayers are same but since in prayer 'C' the plaintiffs have challenged the propriety of preparation of RS and city record which is the outcome of the judgment passed in earlier Title Suit No. 59 of 2005 and upheld by the Appellate Division so there would have no diverse result in the instant suit than that of the judgment and decree passed in earlier suit. When we pose a question to the learned counsel for the petitioners that, in earlier suit the plaintiffs had prayed for declaration to the effect that, the deed of gift dated 30.05.1964 is illegal and not binding upon the plaintiffs when in the present suit cancellation of the said deed was sought then how the relief in both the suit can be regarded as same, the learned counsel then contends that, since

the subsequent suit in particular, the prayer for cancellation of deed thereof has not been made within three years of getting knowledge of the deed in question filed under the provision of section 39 of the Specific Reliefs Act soon after earlier suit was dismissed on 30.09.2009 and as the plaintiffs have not filed the instant suit within three years after attaining major, so on that very two legal counts the prayer of cancellation of the deed of gift also cannot sustain.

The learned counsel further contends that, since there has been no assertion in the four corner of the plaint in both the suits that fraud has been practiced in transferring the suit property by the deed of gift by Md. Haider Ali in faovour of his full brother Md. Enayet Ali, the predecessor of the defendants-petitioners so there has been no reason to challenge the said deed of gift when the appellate court of earlier suit palpably found that, after getting the suit property through deed of gift, the predecessor of the defendants-petitioners got their name mutated in the khatian so there has been no occasion to challenge the said deed of gift either in the form of declaration or in the form of cancellation.

The learned counsel by refuting the submission so placed by the learned counsel with regard to the maintainability of earlier suit for not seeking any prayer for cancellation of the deed of gift and the observation and findings of the learned judge of the trial court contending that the Appellate Division had not disposed of the appeal on merit rather on the point of limitation which is why the plaintiffs have compelled to file the instant suit, the learned senior counsel then retorted that, since the prayer made for cancellation of the deed is also not maintainable and the

judgment of the Appellate Division can not be called in question about its correctness as the appeal was ended in dismissal resulting in dismissing the suit so the suit in its present form cannot continue and the learned judge of the trial court has clearly sidetracked those legal points even then all the legal submission was placed before him.. The learned counsel in this connection has placed his reliance in the decision reported in 53 DL R AD 12 and read paragraph no. 9 and 12 thereof and concludes that the *ratio* so have been settled in that decision is equally applicable in the facts and circumstances of the instant case and finally prays for making the rule absolute on setting aside the impugned judgment by rejecting the plaint.

On the contrary, Mr. Md. Mainul Islam along with Mr. Md. Faruk Hossein, the learned counsels appearing for the plaintiffs opposite party nos. 1-6 very robustly opposes the contention so taken by the learned counsel for the defendants-petitioners and submits that, since the learned judge of the trial court who disposed of Title Suit No. 59 of 2005 on the point of maintainability and even though it was upheld by the High Court Division as well as Appellate Division so only to cure the said defect, the instant suit was filed having no occasion to dismiss the same on an application filed under Order 7 Rule 11 of the Code of Civil Procedure.

The learned counsel on his second leg of submission also contends that, since the plaintiffs apart from declaration/ cancellation of the deed of gift also prayed for partition claiming 14 ana share out of 16 ana share in the suit property, and 2 ana shares they claimed to be entitled by their predecessor that is, their grandmother apart from other prayers so the trial court is bound to dispose of the suit even for partition. In that regard the

learned counsel has placed his reliance in the decision reported in 14 MLR HD 170 and placed before us paragraph no. 7 to that effect.

The learned counsel by referring to the provision of Order 14 Rule 2 of the Code of Civil Procedure also contends that, since the learned judge of the trial court while rejecting the application filed under Order 7 Rule 11 of the Code of Civil Procedure found that, since the principle of resjudicata is mixed question of law and facts so that very point should also be adjudicated by framing a separate issue but the said point of resjudicata as well as point of limitation cannot be any grounds for rejection of the plaint.

The learned counsel lastly contends that, since the suit so have been filed subsequently is to cure the defect made in the earlier suit as found by the trial court, so there has been no legal bar to proceed with the present suit with the prayers so have been made therein and finally prays for discharging the rule.

We have considered the submission so advanced by the learned counsel for the defendant petitioners and the plaintiffs opposite party nos. 1-6 at length. We have also meticulously gone through the plaint of Title Suit No. 68 of 2021 and that of Title Suit No. 59 of 2005 (erstwhile Title Suit No. 150 of 1986). We have also carefully gone through the prayers so sought in both the suits. On going through the prayer made in the earlier suit we find that the plaintiffs had challenged the propriety of the deed of gift dated 30.05.1964 in declaratory form apart from a prayer for partition. In the instant suit the plaintiffs have challenged the propriety of RS and city khatian stands in the name of the predecessor of the defendant nos. 1-11. It is admitted fact that the earlier suit was dismissed by the trial court

which was affirmed by the Appellate Division and so if on the self same reliefs the instant suit is allowed to continue it will be tantamount to give indulgence to the plaintiffs to harass the defendants indefinitely and there would have no end of the litigation among the self-same party. For that obvious reason the Appellate Division negated such ill practice which has been propounded in 53 DLR (AD) 120. And similar situation is there in the instant case as it is crystal clear that, the self same plaintiffs upon unsuccessful in getting relief in regard to the suit property up to the Appellate Division has filed the instant suit. It has been found by the learned judge of the trial court while dismissing Title Suit No. 59 of 2005 that the suit is not maintainable in a declatory form rather the suit should have been filed under section 39 of the Specific Reliefs Act by filing a suit for cancellation of the deed of gift dated 30.05.1964. However, in the forgoing paragraphs we came to a conclusion that, the prayer for cancellation of the deed is barred by limitation so even if on that prayer the suit is allowed to continue the plaintiffs will not get any relief eventually. Furthermore, though in the suit a prayer was inserted challenging the propriety of RS and city record but that very city survay is the outcome of acquiring title by the defendants from the deed of gift which has been executed and registered by the predecessor of the plaintiffs and it has been found by the High Court Division in First Appeal No. 40 of 2010 disposed of with First Appeal No. 44 of 2010 that upon getting the deed of gift, the recipients that is, the predecessor of the defendant nos. 1-11 got their name mutated in the khatian and paid rent. So, very perfectly the suit property has been recorded in the name of the predecessor of the defendants in the

latest khatians. So all the above factum led us to conclude that, the plaintiffs have been running after a fruitless litigation and in such a situation the law declared by our Appellate Division which has been reported in 53 DLR AD 12 is absolutely applicable in the facts and circumstances of the instant case. Though the learned counsel for the plaintiffs opposite parties submits that, the trial court is bound to adjudicate the suit at least on the prayer for partition but we don't find any reason in such submission because when the plaintiffs have found to have no right title and possession in the suit properties as found by the Appellate Division so no question can arises to dispose of the suit even for partition.

Regard being had to the above facts and circumstances we don't find any iota of substance in the impugned order which is liable to be set aside.

Accordingly, the rule is made absolute however without any order as to cost resulting in, the pliant of Title Suit No. 68 of 2021 is rejected consequently, the said suit is dismissed.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this order be communicated to the court concerned forthwith.

**Mohi Uddin Shamim, J:**

I agree.

Kawsar /A.B.O