

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

CIVIL REFERENCE NO. 02 OF 1991

In the matter of:

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

AND

In the matter of:

Fakhrul Islam being dead his heirs 1(a) Majeda Khatun and others

.... Petitioners

-Versus-

Shamsul Huda Chowdhury being dead his heirs 1(a) Shafiqul Islam Chowdhury and others

...Opposite-parties

None appears

... For the petitioners

Mr. Abdul Momen Chowdhury, senior Advocate with
Mr. A.F.M. Hafizullah Bhuiyan, Advocate with
Mr. Md. Zakir Hossain Ripon, Advocate

....For the opposite party

Heard on 05.11.2024

and Judgment on 14.11.2024

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

The predecessor of the decree holder in Other Class Execution Case No. 39 of 1986 namely, Shamsul Huda Chowdhury as plaintiff originally filed a suit being Other Class Suit No. 213 of 1966 in the court of the then

Munsif, Cox's Bazar for declaration of title and recovery of khas possession in the suit land seeking following reliefs:

“(a) That the plaintiffs be given a decree for khas possession in the lands, houses etc, described in schedule “B” below by removing the unauthorized structure in schedule “c” below on the declaration of the plaintiffs title therein and against the defendants.

(b) That the cost of the suit be decreed in favour of the plaintiff and against the contesting defendant.

(c) That the defendant be directed to removed the unauthorized structure in schedule “C” at their own cost failing which the plaintiff be given the liberty to remove the same and to recover the cost thereof from the defendants.

(d) That the plaintiff be given such other relief of reliefs as he may be found entitled in the circumstances of the case.

(e) That the plaintiff be permitted to recover profits in a separate proceeding.

That suit was contested by the defendant nos. 1 and 2 and the same was ultimately dismissed on contest against them on 16.07.1969 and thereby a decree was drawn up on 22.07.1969 by the then learned Munsif, Cox's Bazar.

The plaintiff then preferred an appeal before the learned District Judge, Chittagong being Title Appeal No. 368 of 1969. The said appeal

was on transfer heard by the learned Subordinate Judge, 3rd court, Chittagong and after hearing the parties, the said appeal was allowed and the judgment and decree passed by the learned Munsif, Cox's Bazar was set aside though it was sent back on remand to the trial court for fresh trial directing the learned Munsif to give a chance to the plaintiff to get the land of schedule 'B' relayed on commission and after getting the report decide the suit in accordance with law.

After receiving the record on remand by the Munsif, the plaintiff was given chance for getting the suit land relayed on commission and thereby appointed a pleader commissioner for that purpose. Then the pleader commissioner upon giving notice to the parties to the suit, held local investigation and submitted his report on 02.09.1974 and the said report was accepted without any objection by the defendants. But ultimately the learned Munsif again dismissed the suit on 14.02.1978 and decree was drawn on 18.02.1978.

Challenging the said judgment and decree of dismissal, the plaintiffs (decree holders) then preferred an appeal being other class appeal no. 138 of 1978 before the learned District Judge, Cox's Bazar which was on transfer heard by the learned Subordinate judge, Cox's Bazar who thus allowed the appeal on contest on 31.05.1982 and set aside the judgment and decree passed by the learned Munsif, Cox's Bazar dated 14.02.1978 resulting in decreeing the suit.

The defendants of the suit then preferred a Civil Revision being Civil Revision No. 32(c) of 1982 before the High Court Division against the said judgment and decree and a Circuit Bench of the High Court Division,

Chittagong was pleased to uphold the judgment and decree passed by the learned Subordinate Judge by its judgment and order dated 22.06.1986 by discharging the rule.

The defendants of the suit then preferred an appeal before the Appellate Division being Civil Petition for Leave to Special Appeal No. 211 of 1986. The Appellate Division also dismissed the said appeal on 25.09.1986 and upheld the judgment and order passed by this court in the Civil Revision dated 22.06.1986. After traveling up to the Appellate Division, the plaintiffs as a decree holders then initiated an Execution Case being Other Class Execution Case No. 39 of 1986.

During the course of the execution case, the learned Munsif, Cox's Bazar on 15.12.1986 referred the matter before this court as of reference holding that

“ that this court being the execution court cannot go behind the decree. It can neither go for execution of the present decree which is admitted to be vague and unspecified on the one hand nor it can go for execution of the land as decide in the execution petition and in the writ of DP as per investigation report which is in fact not found in the decree the judgment debtor filed. That the learned Advocate for the decree holder could not show any specific provision of laws or rules is/are to be followed in this regard when a question of law arises ”.

Upon receiving the said reference, this court then registered it as Civil Reference No. 32 (C) of 1982 and it was accordingly placed before

the then Hon'ble Chief Justice and he vide order dated 21.08.1989 placed the matter to a regular Division Bench to hear and dispose of the same when it was registered as Civil Reference No. 2 of 1991. During pendency of the said reference, for the last 34 years both the original decree holders as well as the judgment debtor died for which the heirs of the deceased were duly substituted.

Mr. Abdul Momen Chowdhury, the learned senior counsel appearing for the decree holders at the very outset submits that, the reference referred by the then Munsif is totally misconceived and violative to Order 46 Rule 1 of the Code of Civil Procedure and therefore the Civil Reference is liable to be rejected.

The learned senior counsel further submits that, the learned Munsif has not stated a single word on what point this Hon'ble Court will give its opinion and decision and thereby the reference is untenable and the same is liable to be rejected. In addition to that, the learned counsel also submits that, since the decree was upheld by the apex court of this country and the defendants did not raise any objection with regard to the report submitted by the then pleader Commissioner on local investigation, so there has been no occasion to find schedule 'B' to the plaint is vague and unspecified that made him unable to execute the decree and therefore the assertion made in the reference by the learned Munsif cannot sustain in law.

The learned counsel by referring to the provision of Order 46 Rule 1 of the Code of Civil Procedure then submits that, only a reference can be made before this Hon'ble court if any question of law or usage having the force of law arises but in the reference nothing sort of those are there

which calls for any interference by this Hon'ble court and therefore the reference is liable to be rejected. However, in support of his submission the learned counsel has placed his reliance in the decision reported in 9 MLR (HC) 427.

The learned counsel has also referred another two decisions of Indian jurisdiction reported in AIR 1968 BOMBAY 439(V55 C 74) as well as AIR 1970 ANDHRA PRADESH 365 and by quoting the *ratio* settled in that decision, the learned counsel then submits that, under the provision of section 113 and Order 46 Rule 1 of the Code of Civil Procedure, it has been held in the said decision, “ *reference cannot be sought on hypothetical matter unless there is a pending case before the court which involves point of law determination of which is essential for the disposal of the case, so no question of reference can arise. Reference of hypothetical or imaginary questions or points likely to arise in cases that may be filed in future in view of the jurisdiction conferred on a court is wholly incompetent*”.

Relying on the decisions, the learned counsel finally prays for rejecting the reference enabling the execution court to execute the decree which has been pending since 1986.

Record shows, the judgment debtors did not represent the reference.

We have considered the submission so placed by the learned senior counsel for the decree holders of Other Class Execution Case No. 39 of 1986 vis-à-vis the plaint in the Other Class Suit No. 213 of 1966 and perused the reference under challenge as well as the documents so have been annexed with the application for rejection of the reference filed by the

decree-holders and the documents sent along with the reference by the court below.

However, we feel it expedient to reproduce the provision provided in Order 46 Rule 1 of the Code of Civil procedure for our ready reference which runs as under:

“Order XLVI

(1) Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court Division.”

On the face of the provision provided in Order 46 Rule 1 of the Code of Civil Procedure, we find that, the lower court can only refer any matter to this court seeking reference if any question of law or usage having the force of law arises. Now, if we go through the finding of the learned the then Munsif, we find that he found that schedule “B” to the execution case is vague and unspecified for which he became unable to execute the decree. But he did not take into consideration of the judgment passed by the Appellate Division. It is on the record, on two consecutive occasions, the

suit was dismissed by the then Munsif but the Munsif where the suit was sent back on remand however allowed the prayer of holding local investigation and the commissioner accordingly submitted his report which remained unchallenged by the defendants of the suit resulting in, the report has become valid in law and the same was tested even by the Appellate Division having no scope to raise any question with regard to vagueness of schedule 'B' property described in the plaint. On top of that, if we go through the provision laid down in Order 46 Rule 1 of the Code of Civil Procedure we clearly find that the reference can only be made by a lower court if any question of law or usage having the force of law arises but what the learned Munsif found compelling him to refer the matter is totally based on admitted fact as the defendants to the suit has not raised any objection against the investigation report filed by the Advocate commissioner. So executing court can under no circumstances say the report is vague. So the learned Munsif had no other option but to execute the decree in terms of the report submitted by the Advocate commissioner in respect of schedule 'B' property as the decree passed in favour of the decree-holders was upheld by the Appellate Division. Be that as it may, we find ample substance to the submission so placed by the learned senior counsel for the decree-holders here in the objector because, the observation so made by the Munsif bears no legal substance. However, during hearing, we asked for the commissioner's report so submitted by the Advocate commissioner when the learned senior counsel readily supplied photocopy of the same and on careful perusal, we find that the Advocate commissioner preformed all the legal formalities while holding local

investigation and filed report, Then again, on going through schedule 'B' to the execution case, which has also been annexed by the decree holder in the written objection as of annexure 'g' we find that, there appears no ambiguity in executing decree especially, in regard to schedule 'B' from where the plaintiff-decree holders alleged to have dispossessed by the defendants compelling him to sought recovery of khas possession and as the plaintiff-decree holders got the decree that was upheld up to the Appellate Division so the learned Munsif has got no other option but to execute the decree in line with the Advocate commissioner's report.

Regard being had to the above facts, circumstances and observation on legal point made herein above we don't find any iota of substance in the reference as it is not aligned with the provision of Order 46 Rule 1 of the Code of Civil Procedure

In the result, the reference is rejected however without any order as to costs.

The learned Assistant Judge, Cox's Bazar is hereby directed to execute the decree as expeditiously as possible preferably within a period of 3(three) months from the date of receipt of the copy of this order.

Let a copy of this order along with the lower court records be communicated to the learned Assistant Judge, Cox's Bazar forthwith.

Md. Bashir Ullah, J:

I agree.