

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 1953 of 2024

Md. Shahidul Islam Khandoker and
others

... Petitioners

-Versus-

Hajera Begum

...Opposite-party

Mr. Taposh Kumar Dutta with
Mr. Md. Touhid Rahman and
Ms. Bipasha Chakraborty, Advocates

...For the petitioners

Mr. M.M. Shafiullah, Advocate

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

Judgment on 16th January, 2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party to show cause as to why the impugned judgment and order dated 05.03.2024 passed by the learned Additional District Judge, Kurigram in Civil Revision No. 39 of 2022 rejecting the same and thereby affirming the judgment and order dated 20.07.2022 passed by the learned Senior Assistant Judge, Sadar, Kurigram in Other Suit No. 177 of 2020 allowing the application for mandatory 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, as plaintiff, instituted Other Suit No. 177 of 2020 in the Court of Senior Assistant Judge, Sadar, Kurigram against the present petitioners, as defendant, for a decree of permanent injunction. On the very day of filing suit the plaintiff prayed for temporary injunction by filing an application under Order 39 Rules 1 and 2 read with Section 151 of the Code of Civil Procedure. The trial court after hearing by its order dated 26.11.2020 issued notice to show cause to the defendants for 3(three) days as to why temporary injunction as prayed for shall not be granted and by an ad-interim order of injunction restrained the defendants from dispossessing the plaintiff from the suit land and interfering with the possession of the plaintiff. Notice to show cause and order of ad-interim injunction was duly served and received by the present petitioners and filed written objection against the application for temporary injunction on 24.01.2021. Thereafter, the plaintiff filed an application under Section 151 of the Code praying for dismantling and or removing the pucca wall and tin boundary by an order of mandatory injunction on the

allegation that the defendants after receipt of show cause and ad-interim order of injunction constructed boundary wall on 30.11.2020 violating the same and filed an application on 07.02.2021 praying for local inspection of the property by appointing an Advocate Commissioner.

The trial court allowed the application for commission and appointed one Mr. Md. Akhteruzzaman Advocate Commissioner to inspect the property who after holding inspection filed report on 06.10.2021. The defendants filed written objection against the application under Section 151 of the Code on 10.02.2021 denying the allegations brought against them by the plaintiff. The trial court heard the application for mandatory injunction and after hearing by its order dated 20.07.2022 allowed the application and directed the defendants to remove and or dismantle the boundary made of bricks and tin within 26.09.2022, failing which the plaintiff shall be entitled to remove the wall and boundary and in that case expenses shall be recovered from the defendants.

Being aggrieved by and dissatisfied with the judgment and order of the trial court, the defendants moved in revision before the

District Judge, Kurigram by filing Civil Revision No. 39 of 2022. Eventually, said revision was heard and disposed of by the Additional District Judge on transfer who after hearing by the impugned judgment and order dated 05.03.2024 rejected the same maintaining order passed by the trial court. At this juncture, the defendant-petitioners moved this Court by filing this application under Section 115(1) instead of filing application under Section 115(4) of the Code of Civil Procedure seeking leave to revision and obtained the present Rule without leave to revision and order of stay and status-quo.

Mr. Taposh Kumar Dutta with Mr. Md. Touhid Rahman, learned Advocates appearing for the petitioners at the very outset submits that as alleged by the plaintiffs in their application under Section 151 of the Code of Civil Procedure, the petitioners started construction on and from 23.11.2020 at 10 a.m. The order of ad-interim injunction was passed on 26.11.2020 and on that very day, in the afternoon, the defendants received notice to show cause and order of injunction. After receipt of the order of the court, the defendants stopped half done construction and did not proceed

further, as such, there is no question of violation of order of the court and removal of the structure already made before passing of the injunction order. He submits that the plaintiffs got the suit land inspected through court by appointing a learned Advocate Commissioner who in his report stated that there is existence of a boundary of the suit property made of bricks and tin. Nowhere in the application under Section 151 of the Code, the plaintiff claimed that she was in possession of the suit property and the defendants by violating order of injunction dispossessed the plaintiff or interfered with her possession. By the order of the court the defendants were restrained from dispossessing the plaintiff and interfering with her possession. The trial court as well as the revisional court failed to take into notice that the defendants were not restrained by any order from constructing any boundary wall or giving any boundary or tin fencing. Therefore, the order passed by the trial court and affirmed by the revisional court is palpably illegal and unwarranted as the act and conduct of the defendants, whatever done before granting injunction cannot come within the mischief of violation of interim order passed by the court.

He argued that the defendants, as plaintiff, earlier filed Partition Suit No. 162 of 2020 for the self same property praying for saham. Present opposite-party is defendant in suit. In the event of proving her title in the property she will get relief and saham in the partition suit. Admittedly, the defendants are co-sharers in the suit property, as such, a suit for simple injunction against other co-sharers is not maintainable. Both the courts below utterly failed to appreciate the provisions of law as well as facts and circumstances of the present case, as such, committed an error of law in the decision occasioning failure of justice.

Mr. M.M. Shafiullah, learned Advocate appearing for the opposite-party No.1 submits that the plaintiff admittedly, got an order of ad-interim injunction in the present suit on 26.11.2020 against the defendants not to dispossess the plaintiff and interfere with the peaceful possession. After service of notices and order of injunction they by engaging huge labourer hurriedly constructed a pucca wall violating order of injunction which is supported by report of the Advocate Commissioner. The trial court as well as the revisional court rightly observed and found that the defendants

knowing about filing of the suit and order of injunction constructed the wall with a view to frustrate the relief in suit of the plaintiff, as such, committed no illegality and error in directing the defendants to dismantle and or remove the construction and restored the suit property in its original position.

Heard the learned Advocates of both the sides, have gone through the revisional application under Section 115(1) of the Code of Civil Procedure, plaint in suit, application for temporary injunction, written objection thereto, application under Section 151 of the Code praying for mandatory injunction, application for local inspection and report thereto submitted by Advocate Commissioner, written objection against the application under Section 151 of the Code of Civil Procedure and the impugned judgment and order of both the courts below.

The plaintiff filed the suit for a decree of simple injunction against the defendants. On the very day of filing suit she prayed for temporary injunction against the defendants by filing an application under Order 39 Rules 1 and 2 read with Section 151 of the Code. The trial court after hearing issued notice to show cause for 3(three)

days and passed an interim order directing the defendants not to disturb with the possession of the plaintiff and dispossess the plaintiff from the suit land.

Admittedly, notice to show cause and order of injunction was duly served upon the defendants on the very day of passing interim order. The defendants entered into appearance and filed written objection against the application for injunction, wherein, the defendants stated that the suit property specifically bounded by a boundary made of bricks and some portion with tin fencing and also stated that they started construction of pucca wall by replacing tin boundary and constructed upto 45 feet length, 4'-5' feet height. After receipt of the order they stopped further construction and till today the wall whatever, constructed remains as it was. The plaintiff in the application under Section 151 of the Code of Civil Procedure claimed that the defendants entered into the suit land on 23.11.2020 at 10 a.m. and started construction thereon, engaging huge labourers after the order of injunction passed on 26.11.2020. The defendants claimed that they constructed the wall in question before filing of the suit and existence of said wall admitted by both

the parties as well as established by inspection report, but the court below did not even utter a single sentence when and how and at what time the wall was constructed either violating the order of injunction or before filing of the suit.

From the impugned judgment and order of both the courts below I find that nothing has been stated by both the courts below about age of the wall or any photograph of the suit property evidencing construction of such wall, on such and such date. Mere statement made by the plaintiff in her application filed without affording both the courts below passed the order directing the defendants to dismantle the wall constructed. Unless it is determined or proved that the defendants constructed the wall during subsistence of the order of injunction and violating the same. No order in the form of injunction was passed by the court restraining the defendants not to construct wall or to make any construction, either boundary wall or house, but it was passed restraining the defendants not to dispossess the plaintiff or interfere with peaceful possession. Curiously enough, in the application under Section 151 of the Code the plaintiff did not claim that she

was in possession of the property and on any day the defendants forcibly dispossessed her and constructed wall. Moreover, admittedly, a partition suit being No. 162 of 2020 is now pending between the parties. Present plaintiff in suit as defendants can claim saham in that suit and in the event of sustaining her claim she will get saham and possession through court along with the structure standing thereon. Therefore, for construction of a wall by the defendants in suit no right, title and interest of the present plaintiff has been frustrated as she has ample scope to get her saham in partition suit. In the absence of any conclusive evidence of violation of order of injunction and construction of the wall by the defendants, order passed by both the courts below directing the defendants to remove the wall is not at all justifiable in law.

In view of the above, this Court finds that both the courts below committed illegality and serious error in law in the decision occasioning failure of justice. Hence, the order is liable to be set aside.

Taking into consideration the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioners calling for interference by this Court.

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

The impugned orders passed by both the courts below are hereby *set aside*.

The order of *stay* and *status-quo* granted at the time of issuance of the Rule stands vacated.

The trial court is hereby directed to dispose of the suit within shortest possible time giving top most priority. Both the parties are directed to take step for hearing partition suit and the instant suit analogously or simultaneously to avoid conflicting decision of the court.

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