In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 3134 of 2024

IN THE MATTER OF :
An application under section 115(1) of the Code of Civil Procedure

-And-

In the Matter of:
Mobarak Hossen

...Defendant-Petitioner

-Versus-

Mosammat Khairun Nesa Begum and others

...Plaintiff -Opposite Parties

Mr. Md. Khalilur Rahman, with
Mr. Md. Tanveer Rahman, Advocates

...for the petitioner

Mr. Mohammad Ziaul Hoque, with
Ms. Nusrat Jahan, Advocates

...for the Opposite Party Nos. 4, 5 & 7

Judgment on: 15.12.2025

Md. Riaz Uddin Khan, J-

At the instance of the defendant petitioner this Rule was issued asking the opposite party Nos.1-7 to show cause as to why the judgment and order dated 20.06.2024 passed by the Additional District Judge, 8th Court, Chattogram in Miscellaneous Appeal No. 161 of 2023 dismissing the appeal and thereby affirming the judgment and order dated 30.03.2023 passed by the Assistant Judge, Banskhali, Chattogram in Other Suit No. 103 of 1989 rejecting the application for injunction should not be set aside and/or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

At the time of issuance of Rule this Court was pleased to direct the parties to maintain status-quo in respect of possession and position of the Suit Land for a period of 6(six) months which was extended time to time.

Brief facts for disposal of this Rule are that the predecessor of the opposite parties Nos. 1 to 3 Shomsul Alam Chowdhury as plaintiff filed Other Class Suit No. 103 of 1989 for partition before the Court of Assistant Judge, Banskhali, Chattogram. The plaint case is that the land of suit scheduled No.1 was originally belonged to Nurunnobi, Obedul Malek, Bedar Bhakta, Morzia Khatun and Nozmunnessa and R.S khatian is rightly prepared in their names as per their share; Nurunnobi died leaving behind three sons namely Majej Ahmed, Mozaffor Ahmed and Delowar Hossen; Mozaffor Ahmed died leaving Mobasser Ahmed as his heir; Delowar Hossen died leaving only son Akbor Hossen; R.S recorded owner Obedul Malek died without issue thereby his share devolved to his brother Bedar Bhakta; Bedar Baktha died leaving defendants 3 to 6 as his heirs while Morzia Khatun died leaving two daughters namely Rahima Khatun and Halima Khatun (mother of the plaintiff); Rahima Khatun died leaving two sons Raisul Alam and Yunus Mia; Raisul Alam died leaving his son defendant No.7 and defendant nos.17-25; Yunus Mia died leaving his son defendant No.8; Nozmunnessa died leaving behind two sons Ahmed Sagir, Ahmed Nasir and three daughters Sakera Khatun, Zakera Khatun and Zahera Khatun; that Ahmed Sagir died leaving wife Nosima Khatun, son Ahmodul Haque and two daughters Zobeda Khatun and Nurunnisa (defendants 9-12); that Ahmed Nasir died leaving his two sons Zaker

Ahmed and Ashrof Ali (defendant nos.13 & 14) and only daughter Rizia Begum; Rizia Begum died leaving her son Abul Kashem (defendant no.15); Sakera Khatun died leaving her son Saifur Rahman who transferred his entire share to the plaintiff; that land measuring 59 decimals in R.S khatian No. 1428 in respect of R.S Plot No. 1764/1765/1766/1784/1786/1794 was prepared in the name of Rahima Khatun; Rahima Khatun transferred 15.50 decimals of land to the plaintiff on 14.01.1952 from the aforesaid four plots and the possession was handed over to the father of the plaintiff through oral agreement which was admitted in the deed no.932 dated 23.02.1957; thus the plaintiff resides over the said suit scheduled land as his homestead; meanwhile Rahima Khatun transferred some property to her son Raisul Alam through deed of gift dated 02.01.1952 which was registered on 23.09.1952; thereafter, from R.S Plot No. 1786 Raisul Alam transferred 15 decimals to Siddique Ahmed through a deed dated 07.11.1952 and Siddique Ahmed transferred said 15 decimals to the plaintiff through a deed dated 06.05.1958; thus the plaintiff got 30.50 decimals of land of schedule no.1; Rahima Khatun being owner of 22 decimals of schedule no.2 sold 10 decimals to the plaintiff by deed no.2828 dated 04.01.1951 registered on 03.06.1952; Saifur Rahman transferred 10 decimals from suit scheduled No.3 vide deed no.1964 dated 19.04.1969 to the plaintiff; Saifur Rahman transferred 5.50 decimals land of schedule no.4 to the plaintiff through deed dated 19.04.1969; from land of schedule no.5 Saifur sold 14 decimals to the plaintiff; from schedule 6 Sifur sold 5.50 decimals to the plaintiff; from schedule 7 saifur sold .38 decimals

to the plaintiff and the plaintiff got 1.34 decimals from his mother Halima Khatun; from schedule 8 Saifur sold 26 decimals to the plaintiff; from schedule 9 the plaintiff got 62.75 decimals from his mother Halima and Rahima sold 16 decimals to the plaintiff; then the plaintiff and his wife Sajia Begum purchased 126 decimals from heirs of RS recorded owners vide deed dated 25.03.1958; thus the plaintiff became the owner and possessor of in total 350.22 decimals from suit land; on several occasions the plaintiff demanded partition of the suit property to the defendants but they did not pay any heed and hence the suit.

The defendant Nos. 7/17-19 and 27-29 filed Joint written statements denying all material averments of the plaint. Further case of the written statements in a nut shell is that R.S. recorded owner Rahima Khatun transferred 59 decimals land to her son Raisul Alam through registered deed of gift No. 977 dated 29.03.1952 from RS Plot nos.1764, 1765,1784,1786 and 1794 under RS Khatian no.1428 and RS Plot nos.1785 and 1793 under RS Khatian no.1668 and the abovementioned defendant got the same from their father Raisul Alam; that the claim of the plaintiff in respect of deed No. 932, 933 and 934 respectively dated 23.02.1957 is false and fabricated and those deeds never executed by alleged executant, Rahima Khatun nor she has any right and title to execute such deeds after transferring the same to her son. Hence they prayed for dismissing the suit with cost.

Thereafter, defendant Nos.7/17-25 and defendant Nos. 26-29 filed separate written statements. However, on 14.03.2023 the defendants 7/17-25 filed an

application under Order-XXXIX Rule 1 and 2 read with section 151 of the Code of Civil Procedure with a prayer for temporary injunction against the plaintiff nos.1(ka) to 1(Ga) and also against defendants 26-29 so that they cannot transfer the property of scheduled no.2 measuring 22 decimals to any 3rd person or cannot change the nature of the property or cannot erect any kacha/pakka building/structure on the schedule property. The plaintiffs filed written objection against the aforesaid injunction application dated 14.03.2023. After hearing, the trial court was pleased to allow the application in modified form directing the parties to maintain status-quo restraining them from changing the nature of the land vide order No. 294 dated 19.03.2023 and then vide order no.295 dated 20.03.2023 issued writ of temporary injunction upon the defendant nos. 26 to 29. Thereafter the trial court on the prayer of the defendant nos.27/28 vide order no.296 dated 22.03.2023 was pleased to stay his earlier order no.294 dated 19.03.2023 to provide an opportunity to the defendants 26-29 to be heard on the matter by filing written objection and accordingly defendant nos.27-29 filed written objection on 27.03.2023 on the contention that on schedule no.2 property their dwelling houses are situated whereon they are now living and also filed an application for local inspection by appointing an advocate commissioner which was allowed vide order no.297 dated 27.03.2023. Thereafter, the learned advocate commissioner submitted his report with still photographs of the disputed property.

The learned judge of the trial court after hearing all the parties, considering the documents including the commissioner's report vide his order no.298 dated 30.03.2023 was pleased to reject the application for temporary injunction on the finding that the applicant failed to show exclusive possession over the suit property and on the other hand defendants 26-29 have prima facie case, the balance of convenience is in favour of the defendants 26-29 who can build structure on the land with their risk and peril.

Against the said order the defendant no.17, Mobarak Hossen, filed Miscellaneous Appeal No.161 of 2023 before the District Judge, Chattogram which was ultimately heard by the Additional District Judge, 8th Court who by his impugned judgment and order dated 20.06.2024 dismissed the same and thereby affirmed the order passed by the trial court on concurrent findings.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 20.06.2024 the defendant no.17 filed the instant revision before this Court and obtained the rule and interim order as stated at the very outset.

Mr. Md. Khalilur Rahman along with Mr. Md. Tanveer Rahman, the learned advocate appearing for the petitioner submits that in a partition suit the status of the Plaintiffs and Defendants are of the same. So, the Defendants are also entitled to ask for injunction. Every co-sharer is owner in the every inch of the total undivided property till legal partition is made thereof. Partition is always made on the basis of valuation of the share but not on the area of land, as such, none of the party can claim/pray a definite

partition of the area of land in his/their respective share. So, the Plaintiff is to pray his/or his predecessors' definite share in a suit for partition.

The learned advocate then submits that the person in possession of a definite portion of the area of land even covered more than his share can protect his possession of that area of land but cannot be allowed to change the nature and character of the said possessed land till legal partition is made. Generally a definite portion of land in possession of a co-sharer is to be given to the said co-sharer in his saham if it is covered by his entitled share. If the area of the land in possession is found as of less area than that of quantum area legally covered by his or their share then only injunction can be prayed in the court.

The learned advocate next submits that in the present case out of total 3.5022 acre property the Plaintiffs prayed a definite portion of 93.22 decimals land in their joint saham which is barred by the law of partition. On the other hand, the present petitioner, the Defendant No.17, Md. Mobarak Hossen and his other co-sharers jointly owned and possessed 22 decimals land described in the schedule No.2 and the said property also covered by their ¼ share; but the court misinterpreted the said injunction application stating that the petitioner and his camp followers co-sharers are praying injunction over the entire partiable property.

Mr. Rahman further submits that the present petitioner and his co-sharers' claimed total 1.54 acre property from the common predecessor Rahima Khatun claiming to have title over 1.54 acre property in the

year 1952. On the other hand, the Plaintiffs claimed to have acquired title in their claimed 93.22 decimal property from the selfsame person Rahima Khatun in the year, 1957. Section 48 of the Transfer of Property Act, 1882 stated that prior transfer will prevail over the subsequent transfer. So, the Plaintiffs have no prima-facie case in their favour in respect of at least said 1.54 acre property of the present Defendant No. 17, the petitioner.

Mr. Rahman lastly submits that the court below failed to consider the prayer made by the petitioner which has 2 parts: (i) for injunction upon the plaintiff and defendant Nos.26-29 so that they cannot transfer the scheduled property to any 3rd party and (ii) for injunction upon the defendant Nos.26-29 so that they cannot build or erect any building or structure on the suit property. According to him the court would either accept the injunction application or reject the same but in the order passed by the trial court it appears that the trial court rejected the application on the finding that the defendant Nos. 26-29 can continue to erect or build structure on the schedule land at their risk and peril.

Per-contra Mr. Mohammad Ziaul Hoque along with Ms. Nusrat Jahan, learned advocate appearing for the opposite party Nos.4, 5 & 7 submits that it is admitted position that both present petitioner and the present opposite parties claim property from their common vendor Rahima Khatun. It is also admitted that on the scheduled property there was structures and buildings on which both the parties are living which are situated in Banshkhali upazila urban area.

The learned advocate next submits that at one stage when the members of the family grown up it was necessary for them to build separate house for which the predecessor of the present petitioner went to the adjacent land where upon constructing dwelling house started living and meanwhile the dwelling house of the present opposite parties who are living in the old house over the time fell in a fragile condition for which there was a requirement to repair and construct anew and the trial court rightly passed the interim order on the finding that they can build structure at their own risk. The appellate court did not disturb this finding of facts that the houses were in a dilapidated condition which was required to be repaired and/or built anew. This Court should not interfere in the concurrent finding of facts sitting in revision.

Mr. Hoque lastly submits that it is now well settled that the development work cannot be stopped by way of injunction and it is also settled that usually a co-sharer cannot get injunction against another co-sharer unless there is any specific case. In support of his submissions the learned advocate for the opposite parties referred the decisions in Abul Kalam Engineer and another Vs Nasir Uddin Howlader and others, 54 DLR 515 which was upheld by the Appellate Division in the case of Nasir Uddin Howlader Vs Abul Kalam, 8 BLC (AD) 156; Azim Sarawar Bashar & others Vs Belayet Hossen & others, 24 BLC 41.

I have heard the arguments advanced at the bar, perused the application along with the documents annexed with the revision application. I have also

examined the judgment and orders passed by the courts below.

The present Suit for partition is filed in the year 1989 which is still pending for trial for examination of plaintiff's witness. However, at one stage of the suit the defendant No. 7/17-25 filed the instant application for temporary injunction against the plaintiff and defendant Nos. 26-29 so that they cannot sell the property to the 3rd party and defendant Nos. 26-29 cannot build or erect any building or house. It further appears from the record that there was an advocate commissioners report with photographs of the disputed houses which both the courts below taken into consideration and rejected the application for temporary injunction.

On careful examination of the order passed by the trial court it turns out that the trial court found that the defendant-applicant failed to show exclusive possession over the suit property and on the other hand defendants 26-29 have prima facie case, most of the houses of the suit land are 50/60 years old and as per commissioner's report with photographs it appeared that the houses of the defendants 26-29 are in fragile condition, hence the balance of convenience is in favour of the defendants 26-29 who can build structure on the land with their own risk and peril. The learned judge of the appellate court below concurred with the findings of the trial court and dismissed the appeal.

The plaintiffs neither contested the miscellaneous appeal nor opposing the present rule. It appears, the dispute regarding the temporary injunction is mainly between the defendants 7/17-25, the successors of

Raisul Alam and defendants 26-29, the successors of Mohammad Younus. Admittedly both Raisul Alam and Younus are two sons of Rahima Khatun, SA recorded owner. It is further admitted position by these two contesting defendant parties that both parties got the property of the schedule no.2 from Rahima Khatun and those are not partitioned by metes and bounds. When admittedly both parties claim the property of shedule no.2 from common vendor, Rahima Khatun, which has not been partitioned there cannot be any injunction in a suit for partition upon one set of defendants on the prayer of another set of defendants on the ground of mere allegation that they are possessing more than their share.

It is now well settled that the development work of a co-sharer cannot be stopped by way of injunction on the prayer of another co-sharer particularly if it is in the urban area. The question of injunction against construction was considered in the case of Ali Ahmed Vs Rezia Begum and others reported in 1986 BLD 326 and rejecting the prayer for injunction their lordships of a Division Bench observed:

> *In our view, the nature and character of a suit land in urban areas may be allowed to be changed pending decision in partition suits by improvements but no change in the nature and character of the suit land which would diminish the value of the land or cause prejudice to the other co-sharers should be allowed. … … In the present-day scarcity of the accommodation in the urban areas a co-sharer should not be deprived of using the land in his possession by making*

> *constructions at his risk. If a co-sharer makes a construction in his possession on a land which is a subject matter in the suit for partition, he may do so at his risk and peril; if co-sharer chooses to make a construction at his own risk he should not be restrained from making constructions. If any portion of the constructed area falls in the saham of another co-sharer, the possession thereof shall be given to the allottee by demolition of the construction.*

Similar view was taken by another Division Bench in the case of Fahin Al Haque & another Vs Mohammad Abdul Aziz & others, 43 DLR 226 rejecting the prayer for injunction. In the case of Mofazzal Hossain reported in 3 BLC (AD) 78 the Supreme Court, Appellate Division upheld the decision of the Supreme Court, High Court Division rejecting prayer for injunction against construction in urban area considering the decision in Ali Ahmed case. The similar views were expressed in the case of Abul Kalam Engineer, 54 DLR 515 (supra) which was upheld by the apex Court, 8 BLC (AD) 156 (supra) and 24 BLC 41 (supra).

In the present case admittedly on the suit land and its adjacent, there are dwelling house of the parties. Both the courts below found that repair work and construction is needed to those hoses as those are in a dilapidated condition considering commissioner's report along with photographs. It is not clear whether the suit land is in urban area or not. Whatever may be the case, at the moment, the petitioner cannot be heard to say that if the opposite parties are allowed to

continue construction/repair of their dwelling house on their land, any of his rights would be violated, which could not be compensated by money. On the other hand, it cannot be said granting injunction or directing to maintain status-quo in respect of position to the construction has not caused a tremendous loss to the opposite parties. Because *a party in order to get interlocutory injunction must claim, inter alia, a legal right, and allege an injury which is not ordinarily reparable by monetary compensation as held in Serajuddin Vs Mizanur Rahman, 29 DLR(SC) 82.* The court must weigh one need against another and determine where the 'balance of convenience' lies. At the moment, the need of the present opposite parties is far greater than that of the present petitioner. In such view of the matter rejecting the application for injunction upon the opposite parties so that they cannot build or erect any structure or building/dwelling house on the scheduled land by the courts below is quite reasonable.

Regarding the other part of the injunction on selling the suit land to any 3rd party, it is suffice to say, it would be regulated by the doctrine of *lis pendens* as provided under section 52 of the Transfer of Property Act, 1882.

It is noticed that the present suit has been filed in the year 1989 and meanwhile more than 35 years elapsed and still the suit is in a preliminary stage. In such view of the matter, all the parties as well as the trial court should take endeavour to conclude the trial as early as possible, preferably within 6 (six) months without adjournment except dire necessity.

In the facts and circumstances of the case and the position of law as discussed above I am not inclined to interfere with the impugned judgment and orders passed by the courts below which suffer no error of law and the present rule has no merits.

In the result this Rule is **discharged** with cost.

The order of status-quo granted earlier by this court stands vacated.

Ziaul Karim
Bench Officer