

Present:

**Mr. Justice Sheikh Abdul Awal**

Civil Revision No. 558 of 2011

Md. Ansar Ali Morol being dead his legal heirs  
Most. Rezia Begum and others.

..... Defendant-petitioners.

Versus

Md. Tukuzzaman Morol and others.

..... Plaintiff-Opposite Parties.

Mr. Ahmed Nowshad Jamil, Advocate

.....For the Defendant-petitioners.

Mr. Sheikh Forhadul Haque, Advocate

.....For the Plaintiff-opposite parties.

**Heard and Judgment on 29.08.2024**

This Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 24.08.2010 (decree signed on 31.08.2010) passed by the learned Joint District Judge, 1<sup>st</sup> Court, Khulna in Title Appeal No. 30 of 2009 remanding the suit for fresh trial to the trial Court should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Material facts of the case, briefly, are that the present opposite party Nos. 1-3 as plaintiffs filed Title Suit No. 14 of 2003 in the Court of learned Assistant Judge, Paikgacha, Khulna impleading the petitioners as defendants for partition of the suit land as described in the schedule of the plaint.

The petitioners as defendant Nos.1 and 2-3 contested the suit by filing separate written statements denying all the material allegations made in the plaint contending, inter-alia, the plaintiffs filed case on false averments, the suit is not maintainable in its present form and manner, the suit is bad for defect of parties and as such, the suit is liable to be dismissed.

Ultimately, the said suit was dismissed on contest by judgment and decree dated 03.11.2008. Thereafter, the plaintiffs preferred Title Appeal No. 30 of 2009 before the learned District Judge, Khulna, which was subsequently transmitted to the Court of the learned Joint District Judge, 1<sup>st</sup> Court, Khulna for disposal, who after hearing the parties by the impugned judgment and order dated 24.08.2010 sent back the case on remand to the trial Court after setting-aside the judgment and decree of the trial Court dated 03.11.2008.

Being aggrieved by and dissatisfied with the aforesaid judgment and order dated 24.08.2010, the defendant-petitioners have come before this Court and obtained the present Rule.

Mr. Ahmed Nowshad Jamil, the learned Advocate appearing for the defendant-petitioners at the very outset referring the impugned judgment and order dated 24.08.2010 and other materials on record submits that the Court of appeal below without applying its judicial mind into the facts and circumstance of the case and law bearing on the subject most illegally remanded the suit to the trial Court after setting-aside the judgment and decree passed by the trial court below, which resulted in the failure of justice. He further submits that the Court of appeal below has shirked his responsibility in remanding the

case for retrial to the trial court instead of disposing the appeal inasmuch as the lower Appellate Court under section 107(1)(b) of the Code of Civil Procedure read with Order 41, Rule XXIII of the Code is equally empowered as like as trial Court to decide the case in taking evidence, if so required and thus, the impugned order of remand is liable to be set-aside.

Mr. Sheikh Forhad Hossain, the learned Advocate appearing for the defendant-opposite parties, on the other hand, opposes the Rule and supports the impugned judgment and order. He submits it is on record that the plaintiff side examined only one witness and due to wrong advise of their Advocate they could not adduce more than 1 witness and also could not exhibit all necessary papers in the suit and therefore to meet the ends of justice the Court of appeal below committed no wrong in remanding the suit to the trial Court below. The learned Advocate, however, admits that in the facts and circumstances of the case the Court of appeal below is equally empowered as like as trial Court to decide the case on taking evidence, if so required and thus, he will have no objection if a direction is given to the Court of appeal below to hear and dispose of the appeal on merit in taking evidence, if so required in accordance with law.

Having heard the learned Advocates for both the sides having gone through the judgments of 2 Courts below and other materials on record, the only question that calls for my consideration in this Rule is whether the court of appeal below committed any error in remanding the suit to the trial court.

On scrutiny of the record, it appears that the learned Joint District Judge, 1<sup>st</sup> Court, Khulna as appellate court after hearing the parties by the impugned judgment and order dated 24.08.2010 remanded the case to the trial Court after setting-aside the judgment and decree of the trial Court dated 03.11.2008 although the Court of appeal below observed that the suit is bad for defect of parties, barred by law of limitation, not maintainable without seeking any declaration.

In a case of this nature the Court of appeal below ought to have disposed of the case on merit in taking evidence, if so required as like as trial court. The lower Appellate Court under section 107(1)(b) of the Code of Civil Procedure read with Order 41, Rule XXIII of the Code is equally empowered as like as trial Court to decide the case on taking evidence, if so required. Therefore, in the facts and circumstances and in view of submission of the learned Advocates for both the parties, I am constrained to hold that the impugned judgment and order remanding the suit to the trial Court below does not deserve to be sustained. Besides, in this case both the parties have agreed that they have no objection if the case is sent back on open remand to the appellate Court by giving an opportunity to the parties to adduce fresh evidence in support of their respective cases.

In the facts and circumstances of the case as revealed from the materials on record and in view of the submissions of the learned Advocates for both the parties, I am of the view that in the interest of justice and to prevent failure of justice it is necessary that this case should be sent back to the Court of appeal below for

writing a proper judgment in accordance with law. In this connection the Court of appeal below is at liberty to allow the parties to adduce evidence both oral and documentary in support of their respective cases, if so required.

In the result, the Rule is made absolute. The judgment and decree dated 24.08.2010 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Khulna in Title Appeal No. 30 of 2009 remanding the suit is set aside and the suit is sent back to the Court of learned Joint District Judge, 1<sup>st</sup> Court, Khulna for disposal of the appeal afresh and both the parties will be at liberty to adduce fresh evidence in support of their respective cases and thereafter the learned Joint District Judge, 1<sup>st</sup> Court, Khulna shall dispose of the appeal on merit in accordance with law.

The order of stay granted by this court earlier is hereby vacated. In the facts and circumstances of the case there will be no order as to costs.

Let a copy of this judgment along with lower Courts' record be sent down at once.