

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

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 5342 of 2024

IN THE MATTER OF :

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

-And-

In the Matter of:

Md. Abdur Rob Howlader and others

... Defendant-Petitioners

-Versus-

Dita Majumder and others

...Plaintiff-Opposite Parties

Mr. S.M. Rezaul Karim, Advocate

... For the petitioners

Ms. Salina Akter, Advocate with

Mr. Uzzal Bhowmic, Advocate

Mr. Khandoker Firoz Ahmed, Advocate and

Ms. Farhana Abedin, Advocate

.... For the opposite party Nos.1-6

Judgment on: 29.07.2026

Md. Riaz Uddin Khan, J.-

At the instance of the added defendants Rule was issued asking the opposite parties to show cause as to why the judgment and decree dated 08.09.2024 (Decree signed on 12.09.2024) passed by the Special Judge (Senior District Judge), Patuakhali in Title Appeal No. 34 of 2023 dismissing the appeal and thereby affirming the *ex parte* judgment and decree dated 28.02.2023 (decree signed on 07.03.2024) passed by the Assistant Judge, Galachipa, Patuakhali in Title Suit No. 1128 of 2021 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 the Rule the operation of the *ex parte* judgment and decree dated 28.02.2023 passed by the Assistant Judge, Galachipa, Patuakhli in Title Suit No. 1128 of 2021 was stayed till disposal of the Rule. Subsequently by order dated 29.01.2025 the parties were directed to maintain *statusquo* in respect of possession and position of the suit property.

Facts in a nutshell for disposal of this Rule are that the plaintiff filed a suit being Title Suit no.124 of 2014 (renumbered as Title Suit no.1128 of 2021) for partition of the suit scheduled land claiming the suit land as successors of Nikunja Patni, who got the entire suit property. At one stage of the trial the present petitioners being informed filed an application for addition of parties as defendants which was allowed by the trial court. However, though the present petitioners were added as defendants but they neither filed any written statement nor contested the suit by adducing any evidence before the trial court and thereafter about 07 years the suit was listed for adjudication and ultimately the trial court decreed the suit *ex parte*. Being informed about the *ex parte* decree the present petitioners (added defendants) filed Title Appeal No. 34 of 2023 against the same before the learned District Judge, Patuakhali on the contention that the present petitioners could not file their written statement or adduce or produce any evidence before the trial court because of the betrayal of defendants 28 and 29 upon whom the petitioners trusted most. The S.A Khatian nos. 240 and 241 originally belonged to Nikunja Patni, Hinguli Bewa, Brojeswari and Manikya Mala in equal share. Thereafter, Hinguli Bewa,

Brojeswari and Manikya Mala sold their shares for their legal necessities by various registered deeds to the vendors and predecessors of the present petitioners and all the petitioners are in possession by virtue of their registered deeds. The appeal was ultimately heard and disposed of by the Special Judge (Senior District Judge), Patuakhali who by his impugned judgment and decree dated 08.09.2024 dismissed the appeal and thereby affirmed the *ex parte* decree passed by the trial court.

Being aggrieved by and dissatisfied with the said judgment and decree dated 08.09.2024 the petitioners field the instant civil revision before this Court and obtained the Rule and interim orders as stated at the very outset.

Mr. S.M. Rezaul Karim, the learned advocate appearing for the petitioners submits that he has filed an application for sending the instant case on remand to the trial court for adjudication afresh setting aside the *ex parte* decree as the present petitioners could not file their written statement or adduce or produce any witness or evidence before the trial court because of the betrayal of defendants 28 and 29 upon whom the petitioners trusted most who in collusion with the plaintiffs helped to obtained an *ex parte* decree. The petitioners even could not file written statement or produce evidence before the Appellate Court below because of the lack of proper legal advice. The petitioners being appellants submitted before the Appellate Court a memorandum of appeal describing their case that the S.A Khatian nos. 240 and 241 originally belonged to Nikunja Patni, Hinguli Bewa, Brojeswari and

Manikya Mala in equal shares. Thereafter, Hinguli Bewa, Brojeswari and Manikya Mala for their legal necessities sold their shares by various registered deeds from 1960 to 1982 to the vendors and predecessors of the present petitioners and all the petitioners are in possession by virtue of their registered deeds.

The learned advocate then submits that the story of the plaint case is very unusual and unlikely that entire suit property was devolved upon Nikunja Patni who was in fact the owner of only $\frac{1}{4}$ share of the suit property as recorded in the above mentioned two SA Khatian. The properties of other S.A. recorded tenants sold their entire property to the vendors and predecessors of the present petitioners but the court of appeal below without considering that aspect of the case by dismissing the appeal committed wrong and should have allowed the same sending the case on remand for a fresh trial. The learned advocate lastly submits that by invoking inherent power this Court should allow the application for sending the case back on remand to the trial court to secure ends of justice treating it as an exceptional case. In support of his contention he cited two decisions: the case of Abdul Aziz and others Vs. Sahajuddin Mollah and others, 48 DLR 164 and the case of Tripura Charan Choudhury and others Vs. Girish Ch. Choudhury reported in 7 DLR 466.

Per contra, Mr. Uzzal Bhowmic, the learned advocate appearing for the plaintiff-opposite parties submits that the present petitioners were added defendants upon their application for addition of parties but thereafter for long 07 (seven) years they did not bother to appear before the court or contest

the suit by filing written statement or adducing or producing any evidence. Though they filed appeal before the District Judge but even before the appellate court they neither filed application for filing written statement nor adduced any evidence before the appellate court. Hence, the appellate court rightly dismissed the appeal. The defendant-petitioners were very indolent in pursuing their cause and their story of co-defendants 28 and 29's "false activities" or collusion is a blatant afterthought, completely devoid of any factual basis and manufactured solely as a convenient excuse to cover up their own gross laches and negligence and that contention even was not proved before the court of appeal below.

Mr. Bhowmic then submits that it is a settled principle of law that the power of remand cannot be exercised to assist a party in filling up lacuna of their own or to condone gross laches without proper explanation. The petitioners willfully abstained for long seven years in the trial court and also failed to participate effectively in the appeal. The petitioners reference to certain registered deeds at this revisional stage is an impermissible attempt to introduce new evidence that was willfully withheld from the trial court as well as court of appeal below and those documents were never placed on record, never exhibited and never subjected to judicial scrutiny and as such cannot be entertained at the revisional stage to circumvent the finality of a concurrently decided matter. It is a settled position of law that evidence that was within the knowledge and custody of a party but not produced during the trial cannot form the basis

of a remand. The appellate court below passed a comprehensive, well-reasoned and legally sound judgment on thorough assessment of evidence on record who rightly found that the present petitioners' predecessors-in-interest held merely a restrictive 'life interest' and not absolute ownership. In support of his contention Mr. Bhowmic cited decisions: the case of Jagabandhu Sarker and others Vs. Jotish Chandra Sikder and others, 3 ADC 332 and Abdus Sobahan Vs. Anwar Rahim and others reported in 53 DLR (AD) 110.

Mr. Bowhmic lastly submits that revisional jurisdiction is limited to the examination of jurisdictional error or material irregularities such as misreading and non-consideration of evidence in the existing record but the petitioners are merely invoking the discretionary regular jurisdiction of this Court to undo the self-inflicted consequences of their own inaction, which is entirely outside the scope of revisional jurisdiction. Moreover, they are attempting to convert this revision Court into trial court by introducing 'new facts' for the first time before this Court which cannot be allowed and sitting in revisional jurisdiction this Court also should not interfere in the findings of the last court of facts, the court of appeal below.

I have heard the arguments advanced at the bar, perused the revision petition, counter affidavits along with all other applications including the application for remand. I have examined the plaint, depositions and exhibited documents. I have carefully examined the judgment passed by the trial court as well as the court of appeal below.

On examination of the judgment of the trial court it appears that the trial court decreed the suit *ex parte* after considering the documentary evidence on record and the oral evidence: the depositions of the plaintiffs' three witnesses, PW-1, son of plaintiff no.2, PW-2 a witness for possession and PW-3, a Union Parishad member who proved the genealogy of the plaintiffs. The trial court could not discuss the case of the added defendant-petitioners as on their behalf there was no pleadings and or evidence before the trial court. It further appears that the Appellate Court dismissed the appeal not only on the ground of disbelieving of the story of the added defendants of betrayal and collusion of defendants 28 and 29 but also the Appellate Court touched some merits of their case discussing the case of the added defendants as stated in their memorandum of appeal finding *inter alia* that the added defendant-appellants' predecessors-in-interest held merely a restrictive 'life interest' and not absolute ownership.

Now, the question before this Court is whether the present case deserved to be sent to the trial court on remand after setting aside the *ex parte* decree for retrial or trial afresh.

Section 107 of the Code of Civil Procedure empowers the Appellate Court, subject to such conditions and limitations as may be prescribed, amongst others, to remand a case. Section 107 confers the power of remand on the appellate court while the appellate court can exercise the power under the circumstances mentioned in Rule-23 and 25 of Order-XLI of the Code of Civil Procedure. This is the general

rule but the power of remand is not restricted to cases covered by Rule-23 & 25 and in any appropriate case not covered by these two Rules, the appellate court can exercise the power to remand a case in exercise of its inherent power under section 151 of the Code of Civil Procedure to secure the ends of justice. Under Rule-23, three conditions must be fulfilled before a remand order can be passed: (1) the suit has been disposed of by the trial court, (2) the disposal must be on a preliminary point, and (3) the appellate court reverses the decree of the trial court. Rule-25 is applicable only where the trial court has omitted to try an issue or to determine any question of fact. Under this Rule the appellate court is to frame specific issues and remand the case to the trial court for findings on those issues and not to remand the whole case. In some special circumstances both the Divisions of our Supreme Court allowed the exercise of inherent power in granting remand of appropriate case. In the case of Abdul Aziz and others Vs. Sahajuddin Mollah and others, 48 DLR 164; Tripura Charan Choudhury and others Vs. Girish Ch. Choudhury, 7 DLR 466; Abdur Rouf Vs. Serajul Islam, 7 DLR 26; Narayan Chandra Vs. Moksed Molla, 13 BLT (AD) 28 and the case of Jobeda Khatun Vs. Hamid Ali reported in 40 DLR (AD) 101, the inherent power of the court was exercised.

In the case of Jobeda Khatun (supra) the appellants (women and minors being the heirs of the plaintiff's brothers) produced documents in support of their case in a dispute between co-sharers before the trial court and were marked exhibits, but could not adduce any witness for want of proper legal advice, the

Appellate Division found it an appropriate case for remand and ordered that the suit should be decided by taking into consideration the case of the appellants and permitting them to examine witnesses in support of their case and connecting documents already proved by them. In that case the apex Court observed: *“For whatever reason the appellants might have failed to examine any witness, want of proper legal advice it is said, in support of their case, Court should have intervened, either in appeal or in revision, having regard to the nature of the suit, to allow the appellants a turn for examining their witness for the purpose of complete adjudication between the co-sharers. Such intervention by the court will not only be a step in the interest of justice but the present trend in more progressive societies encourage more interventionist role by courts for resolution of disputes quickly and once for all.”*

On the other hand the case reported in 3 ADC 332 (supra) our Supreme Court, Appellate Division, held: *“The uniform view of the superior Courts is that an order of remand is not legally sustainable while the same tantamount to fresh trial of the subject matter of the suit upon allowing a party in the suit, who was negligent in bringing on record the materials which were relevant for adjudication of the subject matter of the suit or in other words to allow a party to fill up the lacuna. The order of remand is also not sustainable in law while same gives an opportunity to a party in the suit to make fresh attempt on the basis of the order of remand to establish his claim in respect of the subject matter of the suit which he earlier*

failed.” In the case reported in 53 DLR (AD) 110 (supra) it has been held: “.....from the perusal of the record it appears that the present petitioner took no step for giving additional evidence before the appellate Court and also has not taken any step for calling for the record of the earlier suit. What the appellate Court did was nothing but giving an opportunity to the defence to fill up lacuna which law has not permitted. No step was taken before the appellate Court by the present petitioner to adduce additional evidence or to call for the record of the earlier disposed of suit. There is nothing on record to show that there was collision in between the plaintiff and defence Advocate. In such situation the High Court Division rightly found that the suit could not be sent back on remand for filling up lacuna.”

In the light of the catena of decisions cited above it can safely be said that in an appropriate case the appellate or even revisional court can send the case back on remand if the court thinks that for ends of justice it is required. From the above cited decisions it is also clear when the parties had opportunity to place their case before the trial court for adjudication then without reasonable explanation the appellate court or revisional court should not give any opportunity to the indolent party, who for no reasonable cause, did not adduce or produce evidence which was relevant for the adjudication of the subject matter.

Now, in the present case it has already been noticed that the plaintiffs in the original suit did not make the present petitioners as parties. Never the

less, at one stage of the suit, the present petitioner Nos. 1-24, somehow, being informed filed application before the trial court for addition of parties as defendants which was allowed but for long more than six years they even did not file any written statement not to speak of adducing or producing any witness or evidence for which the trial court ultimately decreed the suit *ex parte*. However, they have filed appeal without resorting the provision of legal recourse as provided under Order-IX, Rule-13 of the Code of Civil Procedure for setting aside the *ex parte* decree but in the appellate court though they were present and argued before the court but did not try to submit any written statement or produce evidence in accordance with law in support of their case. Now before this Court they have filed copies of some registered deeds contending that their predecessors and/or vendors' predecessors purchased shares of 3 SA recorded owners out of 4 owners of the suit land. It is well settled that the court cannot help those who sleep over their rights. In other words, the law aids the vigilant, not those who sleep over their rights. (*vigilantibus et non dormientibus jura subveniunt*). This Latin maxim or principle expresses a basic rule of legal policy: rights and remedies are available only to those who diligently assert and protect them within prescribed time limits, not to those who ignore or delay enforcing them. In the present case after being informed the petitioners though were added as defendants but did not file written statement or produce any evidence for which the trial court passed the *ex parte* decree and even in the appellate court they did not take any

endeavour to give written statement or evidence. As a result, the present petitioners have failed to make out a case of remand as an exceptional case. In such circumstance sitting in a revisional jurisdiction this Court should not interfere in the judgment passed by the court of appeal below which is a comprehensive, well-reasoned and legally sound judgment on thorough assessment of evidence on record affirming the *ex parte* decree passed by the trial court.

In the facts and circumstance of the case and the position of law as discussed above, I find no merits in the instant rule and consequently I am not inclined to interfere with the impugned judgment and decree passed by the trial court.

In the result the Rule is **discharged**, however, without any order as to cost.

The interim orders of stay and statusquo passed earlier by this Court stand vacated.

All the applications are disposed of in the light of this judgment.

Send down the Lower Court Records along with a copy of this judgment at once.