

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 4067 OF 2010

IN THE MATTER OF:

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

(Against Decree)

-And-

IN THE MATTER OF:

Rafiqul Islam and others

--- Defendant-Respondent-Petitioners.

-Versus-

Md. Sakayet Hossain and others

--- Plaintiff-Appellant-Opposite Parties.

Mr. Syed Al Asafur Ali with

Mr. Mahmudur Rashid, Advocates

---For the Defendant-Respondent-Petitioners.

Mr. Humayun Kabir Sikder, Advocate

--- For the Plaintiff-Appellant- O.Ps.

Heard on: 09.08.2023, 10.08.2023,
20.08.2023, 22.08.2023, 27.08.2023,
28.08.2023, 12.11.2023, 15.01.2024,
17.01.2024 and 18.01.2024.

Judgment on: 21.01.2024.

At the instance of the present defendant-respondent-petitioner, Rafiqul Islam and others, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1-3 to show cause as to why the impugned judgment and decree dated 03.08.2010 passed by the learned Joint District Judge, Court No.

1, Sirajgonj in the Title Appeal No. 119 of 2005 allowing the appeal by reversing the judgment and decree dated 01.08.2005 passed by the learned Senior Assistant Judge, Kamarkhanda, Sirajgonj in the Title Suit No. 26 of 2002 dismissing the suit should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the opposite party Nos. 1-3 as the plaintiffs filed the Title Suit No. 26 of 2002 in the court of the learned Senior Assistant Judge, Kamarkhanda, Sirajgonj for declaration of title and removing the illegal construction thereof and also recovery of khas possession over the suit land described in the schedule of the plaint. The plaint also contains that one Umed Ali and 3 others were the owners of the suit land and possessions were ejmali (এজমালী). Umed Ali and his brothers and sisters amicably partitioned their land and Umed Ali got $22\frac{1}{2}$ decimals and Ahmed Ali got his $\frac{1}{2}$ share of the suit Khatian. Omed Ali died leaving behind 2 sons Azizul Huq, Akbar Ali and a daughter Hazera Khatun. Ahmed Ali died leaving behind 2 sons Tozammel Huq and Mojibor. Azizul Huq got $22\frac{1}{2}$ decimals by Ewaz Deed dated 23.02.1949. Hazera Khatun sold 8 decimals of

land to Shakhawat Hossain and Azizul Huque. Azizul Huq died leaving behind his wife Shakina and 3 sons who were the plaintiffs. Akbor Ali died leaving behind 2 sons Abdus Sattar and Abdul Maruf who sold 8 decimals of land to one Rafiqul Islam who subsequently sold 4 decimals to the plaintiffs Shakhawat Hossain and Jelhazuddin, as such, the plaintiffs acquired 16 decimals of land and possessed thereof. The name of the plaintiffs were recorded in the R. S. and S. A. Plot No. 930 out of the said 8 decimals of land and the plaintiffs were forcefully dispossessed by the defendant Nos. 1-5 on 30.11.2001, as such, the plaintiffs' entitlement were clouded.

The defendant Nos. 1-5 contested the suit by filing a joint written statement contending, *inter alia*, that one Omardi Sarker was the original owner of land measuring 828 decimals of the suit land who died leaving behind wife Jhumurjan, a son Umed Ali and a daughter Kulsumnessa became successors-in-interest and C. S. Khatian recorded in their names. Jhumurjan also died leaving behind son Umed Ali and daughter Kulsum (Kulsumunnessa) and the said Umed Ali died leaving behind 2 sons Azizul Huq and Akbar Ali and 3 daughters Rabeya, Surjan Khatun and Hazera Khatun. Ahmed Ali died leaving behind 2

sons Tozammel, Mojibur and 3 daughters Ayatan, Jamela and Dawla Khatun. Khulsum died leaving behind a daughter Maleka and 2 brothers sons Tozammel and Mojibur. Rabeya died leaving her husband Tasiruddin and brothers Azizul Huq, Akbar and sister Suraya Khatun and Surja Khatun died leaving behind her husband Safayat and brothers Azizul, Akbar and a sister Hazera. Azizul died leaving behind his 3 sons who are the plaintiff Nos. 1-3. The plaintiffs succeeded from Umed Ali and other purchasers. Accordingly, the plaintiffs got Sahams (সাহাম) of 6 decimals on the Southside of the suit plot and Abdus Sattar got Saham (সাহাম) of $4\frac{3}{4}$ decimals in the middle portion of land by way of amicable settlement and he sold the same to the defendant No. 1 by the deed dated 07.04.1996. Abdul Mannan (son of Akbar Ali) left the land measuring $3\frac{1}{4}$ decimals to defendant No. 1 by executing an exchange deed dated 19.02.1997. Thereafter, the plaintiff Nos. 1-3 filed the Preemption Miscellaneous Cases being Nos. 8 and 9 of 1996 and subsequently the said cases were disposed of by compromise. After compromising the said preemption cases, the defendant No. 1 transferred 4 decimals of land by a deed dated 28.08.1997.

Therefore, transferred 4 decimals of land to the plaintiff Nos. 1-3 by the sale deed No. 1836. The defendant No. 1 thereby got 4 decimals and constructed his house in the East portion of the possession. The said Azizul Huq's name was recorded in the S. A. Record of Right and Akbar Ali and Hazera Khatun recorded 20 decimals of land in their names in S. A. Record of right instead of their shares 17 decimals by managing which was wrong.

Upon receipt of the said case the learned Senior Assistant Judge, Kamarkhanda, Sirajgonj obtained both oral and documentary evidence in support of the respective cases of the plaintiffs and defendants. After the conclusion of the hearing, the learned trial court dismissed the suit on 01.08.2005. Being aggrieved the plaintiffs preferred the Title Appeal No. 119 of 2005 in the court of the learned District Judge, Sirajgonj which was heard by the learned Joint District Judge, Court No. 1, Sirajgonj who after hearing the parties allowed the appeal thereby reversing the judgment of the learned trial court by his judgment and decree dated 03.08.2010. Being aggrieved the defendant-respondent-petitioners filed this revisional application

under section 115(1) of the Code of Civil Procedure and obtained the Rule thereupon.

Mr. Syed Al Asafur Ali, the learned Advocate, appearing along with the learned Advocate, Mr. Mahmudur Rahman on behalf of the petitioners, submits that both plaintiffs and defendants possess suit property as ejmali (এজমালী) by making homestead and thereafter defendants acquired 08 decimals of land through 2 Ewaz deeds and plaintiffs challenged those deeds in Preemption Miscellaneous Case Nos. 8 and 9 of 1996 that those Miscellaneous Cases ended in compromise and defendant No. 1 out of said 8 decimals land returned to plaintiffs 4 decimals land by deed No. 1836 and defendant possessed rest 4 decimals as own homestead. But the learned court of appeal below failed to appreciate this material aspect in the judgment, thus, it committed an error of law resulting in an error in the decision occasioning a failure of justice.

The learned Advocate further submits that the learned trial court on perusal of evidence on record both oral and documentary of the parties legally dismissed the suit but the learned lower appellate court as a final court of facts failed to reverse the findings of the learned trial court, thus, came to a

wrongful decision and committed an error of law, thus, the Rule is liable to be discharged.

The Rule has been opposed by the present plaintiff-opposite parties.

Mr. Humayun Kabir Sikder, the learned Advocate, appearing for the opposite parties submits that the learned trial court failed to apply his judicial mind as to the fact described in the plaint regarding the location of the suit land, thereby, came to a wrongful conclusion by dismissing the suit, whereas, the learned appellate court below came to a lawful conclusion to allow the appeal preferred by the plaintiff-opposite parties but the present petitioners obtained the present Rule by misleading the court, as such, the Rule is liable to be discharged.

The learned Advocate further submits that the present petitioners filed the Preemption Case Nos. 08 and 09 of 1996 which were settled by the parties out of court by way of compromise. Accordingly, the plaintiff-opposite parties sold 4 decimals of land situated on the Southern side of the total suit land measuring 4.75 acres to the plaintiff-opposite parties but the learned trial court failed to consider the disputed land measuring 4 decimals, thus, came to an erroneous decision to dismiss the

suit. However, the learned appellate court below properly determined the location of the suit land, as such, allowed the appeal by reversing the judgment of the learned trial court, as such, the present Rule is liable to be discharged.

Considering the above submissions of the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree passed by the learned appellate court below and also perusing the materials available in the lower court records, it appears to this court that the present opposite parties as the plaintiffs, Md. Sakayet Hossain and others filed the Title Suit No. 26 of 2002 for declaration of title and removal of the construction and recovery of khas possession upon the suit land measuring 4 decimals out of the total land as described in the schedule “Kha” land measuring 4 decimals in the following terms:

“এস/এ খং-৪৬, আর/এস খং-৭, সা-বক দাগ নং-৫৪৮, হাল
দাগ নং- ৯৩০, জমির পরিমাণ ৩৯ শতক কাত পশ্চিম ছাহা-মর ২০
শতক কাত ১৬ শতক যাহা দক্ষিণ দিক হইতে উত্তর দিক একটা

পশ্চিমাংশ-শর বাদীগণের ছাহাম এবং উত্তরাংশ হই-ত ০৪ শতক ১ নং
বিবাদীর ছাহাম।”

The present petitioners as the defendants contended that the said description of the schedule “Kha” of the plaint and submitted that the description of the suit land measuring 4 decimals which has not yet been partitioned among the parties, as such, this kind of dispute will continue as the parties have not partitioned.

In view of the above description of the land both the parties were given a conflicting location of the suit land but the plaintiffs filed the suit when the present petitioners as the defendants constructed a tin-shed house upon the ছাহাম obtained by the plaintiff-opposite parties by way of the compromise of the preemption cases.

The admitted position between the parties is that there is no partition among the parties pursuant to the land described in the plaint and as the property is still an এজমালী property.

I, therefore, consider that both the parties must partition the land purchased from the এজমালী property and the learned

courts below were confused, thus, passed the conflicting judgments.

The learned trial court came to a conclusion to dismiss the suit upon the following findings:

...“বাদীপক্ষ নালিশী (গ) তফসিল বর্ণিত ভূমি-ত স্বত্ব সাব্যস্ত খাস দখলের ডিক্রী প্রার্থনা করিয়াছেন কিন্তু নালিশী (গ) তফসিল বর্ণিত ভূমি-ত বাদীগ-ণর নিরংকুশ ও একক স্বত্ব নাই। ১-৫ নং বিবাদী নালিশী (গ) তফসিল বর্ণিত ভূমি হই-ত বাদীগণ-ক জোরপূর্বক ও বে-আইনীভা-ব বেদখল ক-র নাই। এমতাবস্থায়, অত্র মোকদ্দমা বর্তমানে আকা-র রক্ষণীয় ন-হ। বাদীপক্ষ প্রার্থিত প্রতিকার পাই-ত পা-র না।”...

However, the learned appellate court below allowed the appeal by reversing the judgment and decree passed by the learned trial court on the basis of the following findings:

...“অথচ বাদীপক্ষ তাহা-দর দাবীর সমর্থ-ন সকল দালিলিক প্রমাণ আদাল-ত উস্থাপন করিয়াছেন। বিজ্ঞ নিম্ন আদালত এই বিষয়ে বিস্তারিত আ-লাচনা না করিয়া ভ্রমাত্মক সিদ্ধান্ত গ্রহণ করিয়া-ছেন বলিয়া অত্র আদালত মনে করেন। বিবাদীপক্ষ নালিশী দা-গর পশ্চিমাংশ-র ২০ শত-কর কা-ত দক্ষিণাংশ-র পূর্ব-দক্ষিণ হই-ত $3\frac{1}{8}$ শতক জমি এওয়াজ করিয়াছি-লন ম-র্ম দাবী করিয়া-ছেন। কিন্তু বিবাদীপ-ক্ষর দাখিলী এওয়াজ দলিল দৃ-ষ্ট দেখা যায় যে, বাদী-দর দাবীকৃত অংশ-র জমি হই-ত তাহারা উক্ত জমি বাবদ এওয়াজ করিয়াছেন। উক্ত এওয়াজ দলি-ল বিবাদী-দর শরীক বাদী-দর কোন প্রকার সহ-স্বাক্ষর নাই।”...

In view of the above conflicting decisions, I consider that the learned trial court committed an error of law by stating that the plaintiffs are not in absolute possession of the suit land, therefore, came to a wrongful conclusion. Whereas, the learned appellate court below passed the impugned judgment and decree on the basis that the plaintiffs could prove their case as to the possession of the suit land by locating and determining the possession of the suit land. I, therefore, consider that the learned appellate court below came to a lawful conclusion allowing the appeal by reversing the judgment of the learned trial court. I am, therefore, not inclined to interfere upon the impugned judgment and decree passed by the learned appellate court below.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 03.08.2010 passed by the learned Joint District Judge, Court No. 1, Sirajgonj in the Title Appeal No. 119 of 2005 allowing the appeal thereby reversing the judgment and decree dated 01.08.2005 passed by the learned Senior Assistant Judge, Kamarkhanda, Sirajgonj is hereby upheld and confirmed.

The judgment and decree dated 01.08.2005 passed by the learned Senior Assistant Judge, Kamarkhanda, Sirajgonj in the Title Suit No. 26 of 2002 dismissing the suit is hereby *set aside*.

The interim order passed by this court at the time of issuance of the Rule staying the operation of the impugned judgment and decree of the court of appeal below for a period of 6 (six) months and subsequently the same was extended from time to time are hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower court records along with a copy of this judgment and order to the learned courts below immediately.