

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

Present:

Mr. Justice Md. Nazrul Islam Talukder

Civil Revision No.3653 of 2010

In the matter of:

An application under Section
115(2) of the Code of Civil
Procedure.

And

In the matter of:

Md. Meraj Miah

----**Plaintiff-appellant-petitioner.**

-Versus-

Mossammat Alufa Khatun and
others

---**Defendant-respondent-opposite parties.**

Mr. Mohiuddin Ahmed,
Advocate

---**For the Petitioner**

Mr. Abu Bakar Farhad, Advocate with
Mr. Syed Asgar Ali, Advocate and
Mr. Giasuddin Ahmed, Advocate

---**For the Defendant-respondent-opposite party No.**
01.

Heard and judgment on: 09.09.2021

Md. Nazrul Islam Talukder J:

On an application under Section 115(2) of the
Code of Civil Procedure, this Rule, at the instance of
the plaintiff-appellant-petitioner, was issued calling
upon the opposite parties to show cause as to why

the impugned judgment and decree dated 31.05.2010 (decree signed on 07.06.2010) passed by learned Joint District Judge, 1st Court, Habiganj in Title Appeal No.09 of 2007 affirming the impugned judgment and decree dated 27.08.2006 (decree signed on 07.09.2006) passed by learned Senior Assistant Judge, Lakhai, Habiganj in Title Suit No.09 of 2001, should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The facts of the plaintiff's suit relevant to disposal of the Rule, in nutshell, is that the plaintiff instituted the suit seeking declaration of title to the suit land described in the 1st schedule to the plaint as well as for a further declaration that the exparte decree passed in the Title Suit No.35 of 1995 is illegal, collusive, fraudulent and not binding upon the plaintiff. It is stated in the plaint that the suit land measuring .39 acre of land of plot Nos. 6395, 6412 and 6413 appertaining to Khatian Nos. 2416 and 2416/1 along with many other lands belonged

to one Luda Miah, the predecessor of the defendant Nos. 1-9 and Arjat Ali, the defendant No. 10. The S.A. Khatian No. 2416 was prepared accordingly. Thereafter, Luda Miah died leaving behind his one wife Kulsum alias Kulsuma, two sons Lakindar and Lukandar and a daughter Alufa Khatun. Lukhandar died leaving behind a wife Rejia Khatun and a daughter Nigara Khatun. The plaintiff got .13 acre of land in plot No. 6412 through exchange vide deed No. 1216 dated 15.09.1994 from the heirs of Lakinder. The plaintiff purchased .28 acre of land of plot Nos. 6412, 6413 and 6395 from the heirs of Lukander by virtue of a registered kabla deed No. 2518 dated 07.12.1995. After obtaining permission of the court, the defendant No. 8 sold out her share as well as the share of her daughter i.e. the defendant No. 9, to the plaintiff. The plaintiff erected two houses on the suit plot No. 6412 within the knowledge of the defendant No. 1 and has been living there with his family. The plaintiff mutated the suit land in his name under the mutation case

No. 496/94-95 and got the mutation khatian No. 2416/1. The plaintiff has been owning and possessing the suit property by paying rents to the Government. During R.S. operation, the attested khatian has also been prepared in the name of the plaintiff within the full knowledge of the defendants. The defendant No. 1, in collusion with other cunning defendants, managed to get an ex-parte decree in respect of 10.5 acres of land in the Title Suit No. 35/95. The plaintiff was a necessary party to that suit but he was not impleaded therein. It is also stated that Luda Miah alias Ekram Hossain being the owner and possessor of the suit land of Title Suit No. 35/95, during his lifetime, transferred the land of plot Nos. 6412 and 6413 to his two sons Lakindar and Lukandar by registered deed of gift and handed over possession of the same to them. As such, the daughter of Luda Miah is not entitled to get any share in plot Nos. 6412 and 6413 mentioned in Title Suit No. 35 of 1995. So the ex-parte decree is collusive, illegal, fraudulent and not

binding upon the plaintiff. The plaintiff came to know about the Title suit No.35 of 1995 on 01.04.2001. Hence, the suit.

On the other hand, the defendant No. 1 contested the suit by filing written statement denying all the statements made in the plaint. The case of the defendant No. 1, in brief, is that Luda Miah i.e. the predecessor of the defendant Nos. 1-9 was the owner of the 1st scheduled land with other land by way of inheritance and was possessing the same. He died leaving behind a wife Kulsuma, a daughter Alufa Khatun and two sons namely Lakindar i.e. the predecessor of the defendant Nos. 3-7 and Lukandar i.e. the predecessor of the defendant Nos. 8 and 9. It is further stated that as an heir of Luda Miah, the defendant No. 1 has duly got a separate share measuring 10.5 decimals of land in Title Suit No. 35/95. The documents of the plaintiff are false and fabricated and those are not binding upon the defendant No. 1. The plaintiff was not a necessary party to Title Suit No. 35/95. The

plaintiff has brought the suit on a false statement with an ulterior motive to deprive the defendant No. 1 from her paternal property. Hence, the suit is liable to be dismissed with costs.

On perusal of the plaint and written statement, the learned Trial judge framed the following 05(five) issues for disposal of the suit-

- “1. Is the suit maintainable in it’s present form?
2. Has the plaintiff any title and possession over the suit land?
3. Is the plaintiff bound by the expartee decree passed in Title suit No.35 of 1995 dated 07/03/1996?
4. Is the plaintiff entitled to get a decree as prayed for?
5. Is the plaintiff entitled to any further relief? ”

During trial, the plaintiff to prove his case produced exhibit Nos. 1 to 3 and examined three

witnesses. On the other hand, the defendant No. 1 also examined three witnesses.

Upon hearing both the parties, the learned trial judge dismissed the suit against which the plaintiff filed Title Appeal No. 91/2003 before the District Judge, Habiganj. The learned judge of the Appellate court, after hearing the parties sent the suit on remand. At that stage, the plaint was amended on 17.10.2005 and the defendant No. 1 filed additional written statement on 24.01.2006. PW1 and DW1 were re-examined on 23.07.2006. The plaintiff produced the gift deed No. 5284 dated 07.08.1963 as exhibit No. 4. However, the learned Advocate for the plaintiff did not give proper legal advice to the plaintiff-petitioner for exhibiting and proving the registered sale deed No. 2518 dated 07.12.1995, exchange deed No. 1216 dated 15.09.1994 and other necessary documents although the same were produced and then kept with the record.

Again after remand, the learned trial judge framed the following issues:

- i) Whether the suit is maintainable in its present form and nature?
- ii) Whether the suit is barred by limitation?
- iii) Whether the suit is barred by defect of parties?
- iv) Whether the plaintiffs have title and possession over the suit property?
- v). Whether the plaintiffs are entitled to get decree as prayed for?

After hearing both the parties and on perusal of the evidence on record, the learned Assistant Judge, Lakhai, Habiganj dismissed Title Suit No. 09/2001.

On appeal, the judgment and decree of the trial Court was affirmed by the learned judge of the Appellate Court.

Being aggrieved by and dissatisfied with the impugned judgments and decrees, the plaintiff as petitioner preferred the above numbered revision before this and obtained Rule and Status quo vide order dated 26.08.2010.

At the very outset, Mr. Mohiuddin Ahmed, the learned Advocate appearing for the plaintiff-petitioner, submits that the petitioner is claiming the suit land on the basis of registered exchange deed being No. 1216 dated 15.09.1994 and registered sale deed being No. 2518 dated 07.12.1995 from the legal heirs of Luda Miah, the S.A. recorded owner as such the petitioner is a co-sharer in the suit holding; more so, during the last revised settlement operation, the attested Khatian was also prepared in the name of the petitioner and the petitioner has been in possession of the suit property by erecting two houses and has been living therein with his family; Moreover, DW 1 in cross-examination very clearly stated that “মেরাজ মিয়াকে

মামলার পক্ষ করি নাই। ----- এখানে মেরাজের ২ টা ঘর আছে।”; the learned trial judge also came to a positive finding to this effect; since the opposite party No. 1 inserted the suit property in the schedule to the plaint of Title Suit No. 35/95, the petitioner is a necessary party as co-sharer in the said suit and the opposite party ought to have impleaded the petitioner as the defendant in the suit; therefore, the ex-parte decree passed in Title Suit No. 35/95 is illegal, collusive and not binding upon the petitioner as such without considering the same, the learned judges of the courts below dismissed the suit and appeal causing serious miscarriage of justice.

He next submits that Luda Miah being the original owner of the suit property gifted the entire land of the suit plot Nos. 6412, 6413 measuring 3 Pous equivalent to .26 acre of land to his sons Lukandar and Lakindar vide registered gift deed being No. 5284 dated 07.08.1963 marked as exhibit No. 4 and delivered possession of the same in favour of them; the petitioner got the suit property by

registered deed of exchange and sale deed from the heirs of Lukandar and Lakindar; thereafter, the opposite party No. 1 being a daughter of Luda Miah had nothing to inherit from suit plot Nos. 6412 and 6413; in spite of that, these two plots were included in Title Suit No. 35/95 and the opposite party No. 1 had been allotted saham in the aforesaid plots; however, the learned judges of both the courts below failed to consider the gift deed marked as exhibit 4 as such the impugned judgments and decrees passed by the learned judges of the courts below are based on non-reading and non-consideration of the documents on record.

He then submits that prior to disposal of the appeal, the learned judge of the Appellate Court below did not consider the application of the plaintiff-petitioner filed under Order 41 Rule 27 of the Code of Civil Procedure for taking additional evidence.

He candidly submits that the plaintiff-petitioner filed all the documents in support of his

title and possession in respect of the suit property and deposed categorically in his deposition that “২৫২৮ নং দলিলের মূলকপি দাখিল করেছি। এই দলিলের তারিখ ০৭/০২/৯৫ ইং, ১২১৬/৯৪ নং দলিলের সহি মোহরী নকল দাখিল করেছি। ২৪১৬নং খতিয়ানের কপি (নামজারী) যাহা রাজস্ব অফিসার কর্তৃক সত্যায়িত দাখিল করেছি। বর্তমান জরিপের ডিপি খতিয়ান নং- ১৫৫৭ এর সহি মোহরী দাখিল করেছি। ২৪১৬ খতিয়ানের মূলকপি দাখিল করেছি। এই সেই মূলকপি। ইহা প্রদ: ১। ডিসিআর প্রদ: ২। খাজনা আদায়ের রশিদ ২ খানা প্রদ: ৩ সিরিজ।”; The mode of proving of documentary evidence is a question of law and a litigant public like the petitioner does not know by whom and in what manner a document should be formally proved; the learned Advocate for the plaintiff-petitioner did not provide proper legal advice to the petitioner to take proper steps for proving formally the aforesaid registered sale deed and deed of exchange in accordance with law; the learned Advocate for the plaintiff did not take any step in this regard even after sending back the suit on remand; the petitioner had no negligence or laches on his part in

his regard; rather, it was a gross negligence and laches of the learned Advocate for the plaintiff; the learned judges of the courts below did not consider the facts that all the documents of the plaintiff with regard to title and possession of suit land were produced and kept with the record but those were not properly exhibited due to the negligence, laches and want of proper legal advice of the learned Advocate for the plaintiff and for the negligence and want of proper legal advice of the learned Advocate for the plaintiff petitioner, the plaintiff-petitioner should not suffer for the wrongs committed by the learned Advocate for the plaintiff petitioner; but the learned judges of the courts below without considering the same dismissed the suit and appeal and thus have committed serious miscarriage of justice.

No one appears on behalf of the defendant-opposite parties to contest the Rule when the Rule is taken up for hearing.

I have gone through the revisional application, examined and perused the judgments and decrees passed by the learned Judges of the Courts below and the evidence available on record. On perusal of the revisional application and other materials/evidence on record, it is evident that the petitioner being plaintiff instituted a suit for declaration of title to the land mentioned in the schedule to the plaint. In order to prove the title over the suit land, the learned trial judge recorded evidence of 3 witnesses of the plaintiff and also recorded evidence of 3 witnesses of the defendants.

The pertinent question raised by the learned Advocate for the plaintiff petitioner is that the plaintiff in order to prove his title over the suit land produced original registered sale deed being No.2528 dated 07.02.1995 and the certified copy of the sale deed No.1216/94 dated 15.09.1994 before the trial Court but those were not marked as exhibits for want of proper legal advice of the learned Advocate for the plaintiff-petitioner during

trial of the suit as a result of which neither the learned judge of the trial court nor the learned Judge of the appellate court took the same into consideration.

It is apparent from the record that the PW1 categorically deposed before the trial court as under:

“২৫২৮ নং দলিলের মূলকপি দাখিল করেছি। এই দলিলের তারিখ ০৭/০২/৯৫ ইং, ১২১৬/৯৪ নং দলিলের সহি মোহরী নকল দাখিল করেছি। ২৪১৬নং খতিয়ানের কপি (নামজারী) যাহা রাজস্ব অফিসার কর্তৃক সত্যায়িত দাখিল করেছি। বর্তমান জরিপের ডিপি খতিয়ান নং- ১৫৫৭ এর সহি মোহরী দাখিল করেছি। ২৪১৬ খতিয়ানের মূলকপি দাখিল করেছি। এই সেই মূলকপি। ইহা প্রদ: ১। ডিসিআর প্রদ: ২। খাজনা আদায়ের রশিদ ২ খানা প্রদ: ৩ সিরিজ।”

The learned trial judge in his judgment has observed as under:-

“On perusal of the record, it is seen that plaintiff did not submit any scrap of original paper or documentary evidence in support of his claim nor examine any witness to prove his claim. It is seen

that a certified copy of the said exchange deed has been kept on the record but the plaintiff did not take any step to prove the document properly.”

The learned judge of the Appellate Court has observed in his judgment as follows:-

“On perusal of the documents submitted by the plaintiff, it is found that the plaintiff filed the said original deed which is kept on the record, but it is neither exhibited nor has the execution of the deed been proved by the testimony of the competent persons properly.”

As per submission of the learned Advocate for the petitioner, the plaintiff in order to prove his title over the suit land produced original registered sale deed being No.2528 dated 07.02.1995 and the certified copy of the sale deed No.1216/94 dated 15.09.1994 before the trial Court but those were not marked as exhibits for want of proper legal advice of the learned Advocate for the plaintiff-petitioner during trial of the suit as a result of which neither the learned judge of the trial court nor the learned

Judge of the appellate court took the same into consideration and for this reason, both the learned judges of the courts below committed an error of law resulting in an error in the decision occasioning failure of justice.

From the above evidence, it is clear that the plaintiff produced the original deeds of title before the trial court to prove his title over the suit land but since those documents were not marked as exhibits, those were not taken into consideration by none of the learned judges of the courts below.

It is now well settled that for the laches, negligence and want of proper legal advice of the learned advocate for the plaintiff to prove the deeds of title, the plaintiff as litigant public cannot suffer for the wrongs which were committed by the learned Advocate for the plaintiff.

In the decision taken in the case of Jobeda Khatun and others Vs. Md. Hamid Ali being dead his heirs Taherun Nessa and others, reported in 40DLR(AD)(1988)101, it was held as under:-

“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.”

In paragraph No. 07 of the aforesaid decision, it was laid down as under:-

“Leave was obtained upon submitting that on their own findings the learned judges of the High Court Division ought to have remanded the suit in the interest of justice and further that once the documents have been admitted without objection in a suit for partition where each co-sharer is a plaintiff, the appellants should have been given an

opportunity to lead oral evidence in support of their case and connecting the documents already on record with the said case even though the appellants failed to examine any witness initially at the trial.”

In the case of Chittagong Cotton Mills V. Amar Krishna, reported in AIR1936 Cal 195, it was decided that:-

“Where the appellants (women and minors being heirs of the plaintiff’s brothers) produced documents in support of their case in a dispute between co-sharers, but could not put any witness in the box for want of proper legal advice, the Appellate Division found it a proper 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 the documents already filed”.

Similar view has been expressed in the decision taken in the case of Mohammad Hossain V. Monwara Begum, reported in 2BLC(AD)124.

On consideration of above materials on record, the submissions made by the learned Advocate for the petitioner and the propositions of law, I am of the view that the ends of justice will be best served if the impugned judgments and decrees passed by the learned judges of the Courts below are set aside and the suit is sent on remand to the trial Court for exhibiting, proving and examining the witnesses if required to prove deed No.2528 dated 07.02.1995 and the certified copy of the deed No.1216/1994 and others documents already produced by the plaintiff which are kept with the record, giving an opportunity to the defendants to cross examine in this regard if so advised.

Having considered all the facts and circumstances of the case, the submissions advanced by the learned Advocate for the petitioner and the propositions of law cited and discussed

above, I find merit in this Rule and accordingly, I am inclined to make the absolute.

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

In consequence thereof, the impugned judgment and decree dated 31.05.2010 (decree signed on 07.06.2010) passed by learned Joint District Judge, 1st Court, Habiganj, in Title Appeal No.09 of 2007 affirming the impugned judgment and decree dated 27.08.2006 (decree signed on 07.09.2006) passed by learned Senior Assistant Judge, Lakhai, Habiganj in Title Suit No.09 of 2001 are set aside and the suit is sent on remand to the trial Court for exhibiting, proving and examining the witnesses if required to prove deed No.2528 dated 07.02.1995 and the certified copy of the deed No.1216/1994 and other documents already produced by the plaintiff which are kept with the record giving an opportunity to the defendants to cross-examine the witnesses if any in this regard if so advised.

The parties of the suit are directed to maintain status quo in respect of possession and position of the suit land till disposal of the suit.

The learned trial judge is directed to dispose of the suit as early as possible preferably within 04 (four) months from the date of receipt of this judgment and order following the observations and directions given above by this Court.

Let the lower court's record along with a copy of this judgment and order be sent down to the learned judge of the concerned court below at once.

Md. Nazrul Islam Talukder, J: