Bench:
Mr. Justice Bhishmadev Chakrabortty

Civil Revision No.3059 of 1995

Sona Baru Bibi being dead her heirs:
1(a) Md. Shahjahan and others
......petitioners
-Versus-
Moksed Ali being dead his heirs:
1(Ka) Md. Yousuf Ali Howlader and others
......opposite parties

Mr. Md. Mostafa with Mr. Mohammad Masud Parvez, Advocates
...... for the petitioners

No one appears for the opposite parties.

Judgment on 19.03.2024

At the instance of the defendants, this Rule was issued calling upon opposite parties 1(Ka) to 1(Cha) to show cause as to why the judgment and decree of the then Subordinate Judge, Court No.2, Jhalakathi passed on 19.04.1995 in Title Appeal No.84 of 1992 allowing the appeal and sending the suit on remand to the trial Court reversing the judgment and decree of the Assistant Judge, Nalchity, Jhalakathi passed on 27.05.1992 in Title Suit No.04 of 1989 dismissing the suit should not be set aside and/or such other or further order or orders passed to this Court may seem fit and proper.

The material facts for disposal of the Rule, in brief, are that opposite parties 1-5 herein as plaintiffs instituted the suit stating that the suit land measuring an area of 1.61 acres as detailed in the schedule to the plaint originally belonged to Elemuddin. He died

leaving behind his 2(two) cousins Hosenuddin and Abdul. Abdul died leaving Hakem Ali as sole heir. Subsequently, Hakem Ali died leaving behind 3 (three) daughters, Akubjan, Saburjan and Sona Baru. After the death of Hosenuddin the plaintiffs became his gradual heirs. On the death of Hakem Ali, Hosenuddin got 10 *annas* 13 *gondas*, 1 kara and 1 *karanti* equivalent to 1.07 acres shares. The plaintiffs are in possession of the aforesaid demarcated share. Defendant 1 disclosed on 01.09.1988 that she obtained a decree in respect of schedule-'Kha' land in Title Suit No.33 of 1981 and became its owner and hence the suit for declaration of title in respect of 'Ka' schedule land and for further declaration that the decree obtained in respect of 'Kha' schedule is collusive, fraudulent and not binding upon the plaintiffs.

Defendants 1 and 2 contested the suit denying the statements made in the plaint. They further stated that Elemuddin died leaving behind his only cousin Abdul who died leaving his son Hakem Ali. Subsequently, Hakem Ali died leaving behind his 3(three) daughters, defendants 1 and 2 and the other daughter Akubjan died during the life time of Hakem Ali. The heirs of Akubjan did not inherit the suit property. While the record of rights in respect of the suit land was erroneously prepared in the name of others, then defendant 1 as plaintiff instituted Title Suit No.30 of 1981 in the Court of Joint District Judge, Barishal and

obtained a decree and its consequence the record of right was corrected. The defendants are in absolute possession over the suit land. The plaintiffs have no title and possession in it and as such the suit would be dismissed.

The Assistant Judge framed 6(six) issues to adjudicate the matter in dispute. In the trial, both the parties examined 3 witnesses to support their respective cases. The plaintiffs produced no documents in support of their claim while the defendants produced exhibits-Ka-Ka(5) in support of their title and possession over the suit land. However, the Assistant Judge dismissed the suit holding that the plaintiffs failed to prove that they are the heirs of late Hosenuddin. The trial Court further found that the plaintiffs are not in possession of the suit land and as such the suit for mere declaration of title without any consequential relief is not maintainable.

Against the aforesaid judgment and decree the plaintiffs preferred appeal before the District Judge, Jhalakathi. The appeal was heard on transfer by the then Subordinate Judge, Court No.2, Jhalakathi. The transferee Court allowed the appeal, set aside the judgment and decree passed by the trial Court and sent the suit on remand to the trial Court for taking further evidence which prompted the defendant-petitioners to approach this Court with

this revisional application and the Rule was issued with an interim order of stay of further proceedings of the original suit.

Mr. Md. Mostafa, learned Advocate for the petitioner taking me through the judgments passed by the Courts below and other materials on record submits that the learned Assistant Judge on thorough discussion disbelieved the genealogy of the plaintiffs. In taking such decision the Assistant Judge assessed evidence of the plaintiffs. Learned Assistant Judge further found that the plaintiffs are not in possession of the suit land as such the suit in the present form is not maintainable. In appeal, the Joint District Judge without adverting the findings of the trial Court simply allowed the appeal, set aside the judgment and decree passed by the trial Court and sent the suit on remand for taking further evidence. The appellate Court ought to have delivered the judgment on the materials on record. It could not send the suit on remand to fill up the lacuna of the plaintiffs. The plaintiffs did not file any document before the trial Court to prove that they are the heirs of Elemuddin. The evidence led by them in support of their claim is not corroborative. Therefore, the Assistant Judge correctly dismissed the suit but the appellate Court committed error of law resulting in an error in such decision occasioning failure of justice in sending the suit on remand. He refers to the case of Akitullah and others vs. Zafala Begum and others, 54 DLR (AD) 74 and

Attor Mia and another vs. Mst. Mahmuda Khatun Chowdhury and others, 43 DLR (AD) 78 and finally submits that remand of a suit under Order 41 Rule 23 of the Code of Civil Procedure (the Code) is not a matter of course or to fill in the lacuna in any party's pleading. He adds that the appellate Court cannot send a case on remand to the trial Court for taking decision on the evidence on record without any direction to take additional evidence, when the Court itself was competent to decide the issue involved as the evidence on record was complete. In view of the *ratio* laid in the aforesaid cases, the Rule should be made absolute and the judgment and decree passed by the appellate Court should be set aside, Mr. Mostafa concludes.

No one appears for opposite parties 1(Ka)-1(Cha), although the matter has been appearing in the list for a couple of days with the names of the learned Advocate for the opposite parties. The Rule is pending in this Court for last 29 years and as such it is taken up for disposal on merit hearing the learned Advocate for the petitioners only.

It is found that the appellate Court remanded the case to the trial Court on the findings-

> "বিজ্ঞ কৌসুলীগনের বক্তব্য কাগজাদী সাক্ষ্য প্রমাণ ও পারিপার্শিক অবস্থা পর্য্যালোচনার ভিত্তিতে এই সিদ্ধান্তে নেওয়া হয় যে, মোকদ্দমার আলোচিত বাদী ও বিবাদী গনের পূর্ববর্তী যথাক্রমে আবদুল ও হোচেন উদ্দিন রেকর্ডিয় মালিক এলেমদ্দিন আপন চাচাতো ভাই হিসাবে ওয়ারীশ বিদ্যমান ছিল কিনা উহা যথাযথ প্রমানের নিমিত্ত

মোকদ্দমাটির অধিকরত সাক্ষ্য প্রমান গ্রহণ আবশ্যক। ন্যায় বিচারের স্বার্থে বিতর্কিত বিষয়টি সম্পর্কে সুস্পষ্ট সিদ্ধান্ত নেওয়ার লক্ষ্যে দালিলীক ও মৌখিক সাক্ষ্য গ্রহনের ভিত্তিতে মোকদ্দমাটি নিস্পত্তি হওয়া সংগত বলিয়া মনে করি।

তর্কিত রায় পর্যালোচনায় দেখা যায় যে, বিজ্ঞ সহকারী জজ সাক্ষ্য প্রমানাদি সঠিক ভাবে মুল্যায়ন করিতে সমর্থ হন নাই। ফলে উহা রদ ও রহিত যোগ্য।”

An appellate Court may send a suit to the trial Court on remand if it comes within the purview of Order 41 Rule 23 of the Code. But here the suit has been remanded to the trial Court only for taking further evidence to secure the ends of justice which the law does not provide. If the materials before the appellate Court is found sufficient to deliver the judgment, it has to write the judgment considering the evidence and materials before it. The appellate Court sent the suit on remand without any application for taking additional evidence as provided under Order 41 Rule 27 of the Code. It cannot send the case on remand to the trial Court on the prayer of the learned Advocate to fill up lacuna of the plaintiffs, if any. The appellate Court ought to have written the judgment on the materials before it, but he did not do so. It did not send the suit on open remand giving the parties liberty to amend the pleadings and to lead evidence to that effect.

In view of the above position of fact and law, this is a fit case of remand to the appellate Court to direct it for writing judgment afresh on the materials before it and to dispose of the appeal on merit. But the fact remains that the original suit was instituted in 1989 and the Rule is pending before this Court for

last 29 years. In the case of Hussain Ahmed Chowdhury alias Ahmed Hossain Chowdhury vs. Md. Nurul Amin and others, 47 DLR (AD) 162 our Appellate Division disapproved in sending old cases on remand to the lower Court considering the harassment of the litigant public who has been conducting the case for years together. Therefore, considering the fact that the remand order was not according to law, I will consider meticulously whether the judgment and decree passed by the trial Court is sustainable in law and whether the Assistant Judge committed any error of law in dismissing the suit.

It transpires that the plaintiffs instituted the suit for declaration of title in respect of 'Ka' schedule land claiming themselves as gradual heirs of Hosenuddin with further prayer that the decree obtained by defendant 1 in title Suit No.33 of 1981 in respect of the suit land as described in schedule-'Kha' to the plaint is not binding upon them. In support of their claim, the plaintiffs did not produce any documentary evidence *vis-a-vis* the defendants produced rent receipt exhibits-Ka-Ka(5) to show payment of rent for the suit land which are evidence of possession. The evidence of the plaintiffs in support of their possession over the suit land is not corroborative on the contrary the defendants' evidence for the same purpose is corroborative and convincing. Therefore, the suit in the present form praying for declaration of

title with further prayer that the judgment and decree passed in Title Suit No.33 of 1988 in favour of the defendants are not binding upon them is not maintainable without any prayer for recovery of possession. The above findings and decision thereon of the Assistant Judge is correct. The findings of the Assistant Judge that the plaintiffs failed to prove that they are the heirs of Hosenuddin is also found correct on appraisal of the evidence of the plaintiffs' witnesses. The trial Court on correct assessment of evidence of PWs 1, 2 and 3 found that since the defendants are in possession of the suit land, the suit in the present form for declaration of title only without any prayer of consequential relief is not maintainable.

In view of the discussion made hereinabove, I find that the Court of appeal below in setting aside the judgment and decree passed by the trial Court and sending the suit on remand committed error of law and violated the provisions of Order 41 Rule 23 of the Code which is required to be interfered with by this Court in revision. Therefore, the submissions made by Mr. Mostafa merits consideration.

Accordingly, the Rule is made absolute. However, there will no order as to costs. The judgment and decree passed by the appellate Court is hereby set aside and those of the trial Court is restored. The suit in accordingly dismissed.

The order of stay stands vacated.

Communicate the judgment and send down the lower Courts' record, if any.