

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

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 2952 of 2014

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

M.A. Taher

... Defendant-Petitioner

Versus

Nabi Solaiman and others

... Plaintiff-Opposite Parties

Mr. Manzill Murshid, Advocate with

Mr. Sanjoy Mandal, Advocate

... For the Defendant-Petitioner

Mr. Md. Ashik-Al Jalil, Advocate

... For the Opposite Party no.21

Judgment on: 10.07.2025

Md. Riaz Uddin Khan, J:

Rule was issued under section 115(1) of the Code of Civil Procedure upon the Opposite Party Nos. 1-3 to show cause as to why the Order No. 16 dated 27.07.2014 passed by the Joint District Judge, 4th Court, Dhaka, in Title Suit No. 511 of 2012 should not be set aside and/or such other or further order or orders as to this Court may deem fit and appropriate.

At the time of issuance of the Rule the operation of the impugned judgment and order was stayed for a period of 06(six) months which was extended time to time and lastly on 04.01.2018 the period of stay was extended till disposal of the Rule.

By this application the petitioner who is the Defendant No. 8 of the original Suit challenged the impugned order by which the learned trial judge allowed two applications: one for Local Investigation filed under Rule 9 of Order 26 and another application for Amendment of Plaintiff filed under Rule 17 of Order 6 read with section 151 of Code of Civil Procedure.

Mr. Manzill Murshid, the learned advocate appearing for the Defendant-petitioner submits that the petitioner entered appearance and was contesting the Suit by filing written statement. The learned judge fixed 14.07.2014 for taking steps and next date was fixed on 07.08.2014 for S.D. and submission of written statements by the other Defendants. In the meantime, on 27.07.2014 the plaintiff-opposite party Nos. 1-3 filed two applications before the Trial Court without serving any copy upon the petitioner. The learned judge on the same date after hearing only the plaintiffs allowed both applications without affording any opportunity to the defendant-petitioner. The learned advocate then submits that the learned Joint District Judge on the very day of submission of those two applications by the plaintiff-opposite parties without serving any copies to the petitioner allowed the same by the impugned order.

He next submits that the petitioner was neither given any copies of the said applications nor was he given any opportunity of being heard on the said applications. Hence, the learned Joint District Judge has committed an error of law resulting in an error in the decision occasioning failure of justice in allowing the two applications of the plaintiff-opposite parties.

He further submits that the learned joint district judge did not apply his judicial mind in passing the

impugned order dated 27.07.14 thus committed an error of law in passing an order for forming a Local Investigation panel/committee comprising five persons: one advocate, three surveyors of different organizations and one Major Kazi Shakil Hossain, Project Officer, Hatir Jheel Area including Begun Bari Khal Project and as such the impugned order dated 27.07.14 passed by the court below is liable to be set aside.

He then submits that the learned Joint District Judge committed an error of law resulting in an error in the decision occasioning failure of justice in not considering that the suit property was enjoyed by the petitioner for a couple of years after it was purchased from legal owners and subsequently mutating his name and paying rent and other utility bills and the land of the plaintiffs and that of the petitioner was not in the same khatian and plots and not even in the same mouja as such the impugned order being passed by the learned court below without giving any opportunity to the petitioner to be heard is liable to be set aside.

The learned advocate finally submits that in the panel an army Major has been included who has no legal function in the matter of local investigation but there is every likelihood of influencing the other members of the panel and in that peculiar facts and circumstances of the case the impugned order should be set aside giving an opportunity to the petitioner to raise his objection before the Trial Court.

The plaintiff-opposite party Nos. 1-3 did not appear before this Court to oppose the Rule; however, added opposite party No. 21 appeared.

Mr. Md. Ashik-Al Jalil, learned advocate for the added opposite party No.21 candidly submits that before passing the impugned order the learned Judge should have given an opportunity to the petitioner to be heard. He however submits that since the proposed amendment of the plaint would not change the nature and character of the Suit the learned Judge did not commit any error of law by allowing the said application for amendment. He then submits that by allowing the application for Local Investigation the learned Judge also did not commit any wrong since some objections were raised by the Defendant regarding the possession of the Suit Land in his written statement in such situation for elucidating the Suit Land, order of Local Investigation was necessary. Hence, the Rule should be discharged.

We have heard the learned advocates for both the parties, perused the application along with annexures. It appears from the record that in an off-date both the applications were filed and no copies were served upon the petitioner though the copy of the application for Amendment was served upon the Defendant Nos. 1-3 only while the other application for Local Investigation was not served upon any parties. It further appears that the learned Judge on the very date of filing allowed both the applications without affording any opportunity to the petitioner and other Defendants to be heard. However, it appears from the impugned order that the learned Judge while allowing the application for Local Investigation formed a Panel/Committee and directed the committee to submit report to him within 3 weeks from date. The trial court allowed the application for local investigation under Rule 9 of Order XXVI of the Code of Civil Procedure.

Rule 9 of Order XXVI reads as under:

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount or any mesne profit or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court within such time not exceeding three months as may be fixed by the Court.:

Provided that the Court may, on the prayer of the commissioner and on sufficient cause being shown, extend the time.

From plain reading of the aforesaid rule it appears that commission has been used as singular number. It has not been expressly said that whether commission can be constituted comprising one or more than one person. To our view usually it should be of one person but in exceptional facts and circumstances commission can be constituted with more than one person. This rule 9 of Order XXVI has given the judge a wide discretion to decide whether investigation is necessary in the case but this discretion of the Court should not be exercised fancifully. The object of local investigation is to obtain evidence which from its very nature can only be obtained on the spot and to elucidate any point which is left doubtful on evidence taken before the court. No local commissioner can be appointed for recording evidence which can be taken in court. The court should not appoint a commissioner to report on a matter which only the court can decide on taking evidence. Where

the identity of the suit land is not challenged in the written statement, question of holding local investigation for identification of the suit land cannot arise. In other words, if the identification of the suit land is disputed in the written statement the order of holding local investigation is proper. In the present suit the identification of the suit land has been disputed in the written statement but the question is whether it is proper to allow such application for holding local investigation without affording any opportunity of being heard of the defendant and forming a panel/committee with 3 surveyors, one advocate and a serving Army Major who is the Project Officer, Hatir Jheel Area including Begun Bari Khal Project. The learned advocate for the petitioner raised objection regarding the inclusion of the said project officer apprehending doubt in submitting free and fair investigation report. We also do not find any function of the project officer in holding local investigation and as such there is no reason for inclusion of his name in the commission. The trial court formed a panel/committee asking the committee to submit report beyond the sanction of law. Moreover, it is not clear from the impugned order that who is the head of that panel/committee. The trial court has miserably failed to apply his judicial mind in passing the impugned order. There was no urgency for allowing the applications without giving any opportunity to the defendant-petitioner in an off-date. In that view of the matter and the reasons discuss above, the impugned order is liable to be set aside.

We find substance in the submissions of the learned advocate for the defendant-petitioner for which we are inclined to interfere with the impugned judgment and order.

In the result the Rule is made **absolute**.

The impugned order No. 16 dated 27.07.2014 passed by the Joint District Judge, 4th Court, Dhaka in Title Suit No. 511 of 2012 is hereby set aside and the trial court is directed to give an opportunity to the defendant no.8 to be heard fixing a specific date to that effect.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.