

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

Present:

**Mr. Justice Muhammad Abdul Hafiz**

**CIVIL REVISION NO. 3638 OF 2014**

Khalilur Rahman  
being dead his legal heirs  
Md. Fazlur Rahman and others  
Plaintiffs-Respondents-Petitioners

Versus

Abdul Barik  
being dead his legal heirs  
Abdul Musabbir and others  
Defendants-Appellants-Opposite Parties

Mr. Md. Zakir Hossain, Advocate  
for the plaintiffs-respondents-petitioners

Mr. Tabarak Hussain, Senior Advocate  
for the defendant-appellant-opposite parties

**Judgment on 03.8.2022**

This Rule was issued calling upon the opposite parties to show cause as to why the impugned Judgment and Decree dated 16.07.2014 passed by the Special District Judge, Sylhet in Title Appeal No. 147 of 2011 allowing the appeal and thereby reversing the Judgment and Decree dated 23.02.2011 passed by the learned Senior Assistant Judge, Fenchugonj, Sylhet in Title Suit No. 14 of 2004 decreeing the suit should not set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioners as plaintiffs instituted Title Suit No. 210 of 1978 in the Court of Sadar Munsiff, 2<sup>nd</sup> Court, Sylhet for declaration of their title in the suit land. Thereafter the aforesaid Title Suit was transferred to the Court of Assistant Judge, Fenchuganj and was renumbered as Title Suit No. 14 of 2004.

The Case of the plaintiffs, in short, is that, Shuruj Ullah, the predecessor of the plaintiffs, was the owner of 76 decimals of land of suit Plot No. 319 appertaining to Khatian No. 69 and 111 under Gouripur Mouza within 36572/4 No. 'Mukut Roy' Taluk situated at Balagonj, Sylhet. Shuruj Ullah purchased 1 Kedar 2 Powa and 3 and a half Joshti land equivalent to around 48 decimals of land from one Amjad Ali by the Registered Deed No. 2294 of 1951 and 1 Kedar land equivalent to 30 decimals from Abdur Rouf by the Registered Deed No. 2061 of 1951 and had been possessing the land since then. During the last settlement survey 48 decimals of land was recorded in the name of Shuruj Ullah under Khatian No. 59 and the rest 28 decimals of the suit land was wrongly recorded in the names of Shuruj Ullah and Darasat Ullah jointly under Khatian No. 111, though Shuruj Ullah was in sole possession of the land and Darasat Ullah does not have any right, title and possession over the suit land. Hence the suit.

The defendants contested the suit by filing written statement alleging inter-alia that the original owner of the the suit land was Zaminder Roshomoy Chowdhury. Darasat Ullah, the predecessor of the defendants, took jote settlement of the said land and was in possession. After his death his legal heirs, defendants No.1-9 were in possession. Shuruj Ullah is the maternal uncle of Darasat Ullah and he used to look after the property of Darasat Ullah and he secretly and unlawfully managed to record half of the suit land in his name. In fact he has no title and possession over the suit land. The suit is therefore liable to be dismissed.

The suit was decreed and the defendants preferred Title Appeal No. 83 of 1984. The Appellate Court below found that the schedule described in the two title deeds of the plaintiffs has not been mentioned in the plaint and no local investigation was held to ascertain the suit land although those title deeds do not contain S. A. plot number. The Appellate Court also found that there are discrepancies between the depositions of the plaintiffs witnesses of the suit. That the Appellate Court below sent the suit on remand to the Trial Court with a direction to amend the plaint and to hold a local investigation in order to relay the suit land with the title deeds. After remand the plaint was amended and a local investigation was held in order to ascertain the suit land. The suit

(Title Suit No. 14 of 2004) was ultimately decreed by the learned Assistant Judge, Fenchugonj, Sylhet by his Judgment and Decree dated 23.02.2011 with one lac Taka cost upon the defendants and thereafter the defendants preferred appeal being Title Appeal No. 147 of 2011 before the Court of District Judge, Sylhet and the appeal was transferred before the Special Judge, Sylhet who allowed the appeal by his Judgment and Decree dated 16.7.2014 and hence the plaintiffs-respondents as petitioners moved this Court with the application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

During pendency of the Rule the plaintiff-petitioner Khalilur Rahman died and accordingly his heirs were substituted.

Mr. Md. Zakir Hossain, learned Advocate for the plaintiffs-petitioners, submits that the Trial Court decreed the suit on 29.01.1984 against which the defendants as appellants filed appeal and the Appellate Court below remanded the original suit to decide the matter by holding an Advocate Commission. Thereafter, an Advocate Commissioner was appointed and he submitted report after conducting commission and the learned Assistant Judge after hearing the parties decreed the suit after accepting the report of Advocate Commissioner. The learned Advocate further submits that in the Judgment and decree learned Court observed that- “ বিজ্ঞ

এডভোকেট কমিশনার সরজমিনে তদন্ত করে বাদীপক্ষের দাখিলা ০২/৮/১৯৫১ ইং তাং এর রেজিঃ কবলাদয় প্রদর্শনী-১ এবং ১ক নালিশী ভূমি আকর্ষণ করে মর্মে প্রতিবেদন প্রদান করেছেন। বিবাদী পক্ষ তাকে জেরা করে এমন কোন বক্তব্য বের করতে পারেননি যাতে পদ্ধতিগত ও তথ্যগত এমন বিরাট গলদ আবিষ্কৃত হয়। বাদীপক্ষের উল্লেখিত দলিলদ্বয়ের সম্পর্কে বিবাদীপক্ষ কোন প্রশ্ন উত্থাপন করেননি।” from such finding it transpires that the plaintiffs petitioners succeeded to prove their case. He next submits that the Appellate Court below virtually rejected the report of Advocate Commissioner but there is no material illegality in the said report and the Appellate Court below found that “নালিশী দাগের ৭৬ শতক জমির মধ্যে ৪৮ শতক জমি ৫৯ নং খতিয়ানে বাদী রেসপনডেন্ট পক্ষে পূর্ববর্তী সুরজ উল্লার নামে যথারীতি রেকর্ড হইয়াছে বাকী ২৮ শতকের মধ্যে সুরজ উল্লার নামে অর্ধেক ও বিবাদীগণের পূর্ববর্তী দরাসত উল্লার নামে রেকর্ড হইয়াছে।” from such finding it is found that substantive portion of the suit land has been recorded in favour of the plaintiffs and the defendants admit the title of Rasmoy Chowdhury and in Exhibit-1 Ka the purchased deed of plaintiffs shows that the plaintiffs title derives from Rasmoy Chowdhury and by the Exhibit-1 and 1 Ka the plaintiffs title and possession is proved. The learned Advocate then submits that the Appellate Court below wrongly observed that neither party succeeded to prove their title which is wrong and since the plaintiffs have right, title and interest in the suit land and they have preferred this revision. Here, the important determining question

is that whether 2 deeds exhibit-1 and 1Ka attract the suit land for which it was ordered to conduct a survey Commission which was done but the Appellate Court below rejected the report of the Advocate Commissioner in passing the judgment and decree without any observation as to the consequences if there is no commission report to determine the title of the parties. The plaintiffs by adducing both oral and documentary evidence succeeded to prove their title and possession. The learned Appellate Court below being final Court of facts did not discuss the evidence of the parties; that P.W. 2 deposed that “নালিশী জায়গায় প্রথম সুরুজ মিয়াকে ঘর বানাইয়া দখল করতে দেখেছি। বর্তমানে বাদীগণ দখল করে । নালিশী জায়গা কখনও বিবাদীগণকে দখল করতে দেখি নাই।” In cross examination the defendant-opposite party did not put any suggestion denying those evidence as to possession. Similarly P.W. 3 also deposed in support of the possession of plaintiffs and in cross examination the defendants did not deny those evidence. P.W. 4 also gave corroborative evidence as to possession of the plaintiffs and the defendants also did not deny those evidence. P.W. 5 the son of Amzad Ullah deposed in support of the possession of the plaintiffs and the defendants did not deny the evidence of P.W. 5 by cross examination. Since the plaintiffs possession is proved there is no cause to record the name of predecessor of the defendants in the

suit land only in respect of 14 decimals without any basis. He lastly submits that it transpires that Judgment and decree of the Appellate Court below is not proper and lawful and he did not follow the provision of Order 41 rule 31 of the Code of Civil Procedure and the Rule has good merit and should be made absolute for the ends of justice.

Mr. Tabarak Hossain, learned Advocate for the defendants-opposite parties, submits that the original suit was sent on remand with a direction to hold a local investigation in order to ascertain the suit land since the suit land described in the plaint was unspecified. A local investigation was held and the Advocate Commissioner submitted a report and he deposed as P.W.4. In his cross examination he admitted the following discrepancies in his report. In the plaint the suit land has been described as a land under 'Mukut Roy' Taluk but in the investigation report he stated the land belonged to 'Ruproy' Taluk. That the recital and schedule of the plaintiffs deed contains the suit land to be the land appertaining to Taluk but the Advocate Commissioner did not relay the 'Thak' map of concerned 'Taluk' in order to ascertain as to whether the same attracts the suit land and did not consult the 'Wazibul Arj' which is very important and vital document and necessary to ascertain the suit land and as such, in fact did not relay the Taluk

and he did not show the lands of two title deeds separately in the report. Mr. Tabarak Hossain then submits that since the two title deeds, on the basis of which plaintiffs claim their title, do not contain any plot or khatian number and for this reason it was incumbent upon the plaintiffs to prove that the land described in the deeds is the land of Khatian Nos. 59 and 111. For this reason the report of the local investigation is the vital document in this regard. In Sylhet region the land of a 'Taluk' is determined by two documents, namely, 'Wazibul Aarj' and 'Thak' map; however in the instant case the plaintiffs did not supply and so the Advocate Commissioner neither relayed the 'Thak' map nor did he see the 'Wazibul Aarj'. Hence, the Advocate Commissioner failed to ascertain the suit land and submitted a defective report. As such the Appellate Court below rightly held that the investigation report was not a proper one and does not deserve any consideration in the eye of law. He further submits that it has been argued by the plaintiffs-petitioners that for failure of the Advocate Commissioner the suit should not fail; rather defect can be cured by obtaining a fresh investigation report which means that the prayer for remand of the suit to the Trial Court has been made to fill up the lacuna. It is also settled law that remand should not be made for giving opportunity to a party to fill up lacuna. One should not be allowed



to cover up his laches. In this regard he referred decisions reported in 2 MLR (AD) 12 and 51 DLR 289. He next submits that during deposition before the trial Court the P.W.1 mentioned that earlier a Title Suit No. 88 of 1989 for permanent injunction was filed between the parties of the instant suit and the possession of the plaintiffs was confirmed in that suit. This fact is a new fact and the plaintiffs' witness admit that they did not mention about this fact in the plaint of the present suit. It is a settled principle of law as contained in Order VI rule 7 of the Code of Civil Procedure that no fact out of the pleadings shall be considered as evidence. This Court in many cases decided that no new fact can be adduced in evidence which is not described in the pleadings. Moreover, the earlier suit was regarding Plot No. 312 whereas the present suit is regarding Plot No. 319 and as such the suit land being different is not applicable to the present suit. Therefore there is no scope to consider the new fact and the Trial Court committed an error of law. In this regard he has referred the decisions reported in 38 DLR 39, 44 DLR 69. He then submits that in support of their title the plaintiffs produced two title deeds Exhibit 1 and 1Ka which were executed on the same day i.e. on 02.08.1951. It appears from the record that in Deed No. 2061 the name of the father of Shuruj Ullah is written as late Furkan Ullah and in Deed No. 2294 the

father's name has been written as late Hurmat Ullah. The Advocate Commissioner failed to notice this discrepancy at the time of local investigation. This vital discrepancy suggests that the alleged title deeds of the plaintiffs are nothing but product of forgery and collusion. He further submits that it is a settled principle of law that a plaintiff has to prove his own case and cannot rely on the weakness of a defendant. In the instant case the plaintiffs filed the suit for declaration of title on the basis of two title deeds. Those title deeds do not contain any specific plot or khatian number and the Advocate Commissioner failed to ascertain the suit land to be the land of those two deeds. In the plaint the type of the suit land is written as 'Amon' but in those title deeds the type of land is written as 'homestead' and the plaintiffs witnesses also stated the suit land as homestead type of land. That out of five P.W.s only two could state the boundary of the suit land. The suit land is under Khatian Nos. 59 and 111 but in the plaint it has been written as 69 and 111. Therefore the suit land remains unspecified and the plaintiffs cannot get any relief. In this regard he referred a decision reported in 39 DLR(AD) 237. He lastly submits that all the defendants witnesses corroborated each other regarding the possession of the defendants on the suit land and it is also evident from the khatian that the defendants are in possession since 14

decimals of land has been recorded in the name of their predecessor. Mr. Hussain lastly submits that considering all the submissions made hereinbefore it transpires that the Appellate Court did not commit any error of law nor has made any misreading or non-reading of evidence on record.

Heard the learned Advocates for both the parties and perused the record.

The petitioners as plaintiffs filed the instant suit for declaration of their title in the suit land on the basis of two title deeds Exhibit- 1 and 1Ka which were executed on the same day i.e. on 02.8.1951. It appears from the record in Deed No. 2061 the name of the father of Shuruj Ullah (the predecessor of the plaintiff) is written as late Furkan Ullah and in Deed No. 2294 the father's name has been written as late Hurmat Ullah. The vital discrepancy has not been explained by the plaintiffs. Moreso, the aforesaid title deeds do not contain any specific plot or Khatian number and the Advocate Commissioner failed to ascertain the suit land to be the land of those two deeds. The suit land is under Khatian Nos. 59 and 111 but in the plaint it has been written as 69 and 111. Therefore, the suit land remains unspecified and the plaintiffs cannot get any relief and remand should not be made for giving opportunity to a party to fill up lacuna.

Considering the facts and circumstances of the case, I find no substance in the Rule.

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

The impugned Judgment and Decree dated 16.07.2014 passed by the Special District Judge, Sylhet in Title Appeal No. 147 of 2011 dismissing the appeal and thereby reversing the Judgment and Decree dated 23.02.2011 passed by the learned Senior Assistant Judge, Fenchugonj, Sylhet in Title Suit No. 14 of 2004 is hereby upheld and confirmed.

Send down the lower Courts record with a copy of this Judgment to the Courts below at once.