

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

**CIVIL REVISION NO. 2757 of 2021**

**Nurul Kabir**

...Petitioner

-Versus-

**Sodaha Ludhi Shikdarpara Jame Masjid  
and others**

....Opposite parties

Mr. Tushar Kanti Roy, Advocate

..... for the petitioner

Mr. Md. Faysal Hasan Arif, Advocate with

Mr. Mahfuz Bin Yousuf, Advocate

... for opposite party No. 1

**Heard on: 02.11.2022**

**Judgment on: 09.11.2022**

**Present:**

**Mr. Justice Md. Badruzzaman.**

This Rule was issued calling upon opposite party No.1 to show cause as to why judgment and order dated 13.01.2021 passed by learned Additional District Judge, 2<sup>nd</sup> Court, Chattogram in Civil Revision No. 156 of 2019 affirming an order dated 06.01.2019 passed by learned Senior Assistant Judge, Satkania, Chattogram in Other Suit No. 262 of 2016 rejecting an application under Order VII rule 11 of the Code of Civil Procedure for rejection of plaint should not be set aside.

At the time of issuance of Rule, this Court vide *ad-interim* order dated 06.12.2021 stayed further proceeding of Other Suit No. 262 of 2016 for a period of 6(six) months.

Facts, relevant for the purpose of disposal of this Rule, are that opposite party No.1 as plaintiff instituted Other Suit No. 262 of 2016 against the present petitioner and others in the Court of Senior Assistant Judge, Satkania, Chattogram praying for a decree of declaration of title to .40 acre suit land and another declaration that B.S Khatian Nos. 1398, 1399 and 2895 in respect of the suit land were wrongly prepared and published in the name of Md. Kamal Uddin and his mother Obeda Khatun instead of the plaintiff, declaration of heba deed executed by Md. Kamal Uddin in favour of defendant Nos. 3-7

dated 04.08.2009 being No. 1817 and the Mutation Khatian No. 3949 are illegal, void, without jurisdiction and for such misdeeds the title and possession of the plaintiff to the suit land have not been affected in any way.

Defendant No. 6 entered appearance in the suit and then filed an application under Order VII rule 11 of the Code of Civil Procedure for rejection of plaint against which the plaintiff filed written objection. The trial Court, upon hearing of both parties, vide order dated 06.01.2019 rejected the application fixing the next date for filing written statement.

Being aggrieved by said order dated 06.01.2019 defendant No. 6 preferred Civil Revision No. 156 of 2019 before the learned District Judge, Chattogram which was transferred to learned Additional District Judge, 2<sup>nd</sup> Court, Chattogram for disposal who, upon hearing both parties, disallowed the revision vide judgment and order dated 13.1.2021 by affirming the order passed by the trial Court.

Being aggrieved by said order dated 13.01.2021, defendant No. 6 has preferred this application under section 115(4) of the Code of Civil Procedure and obtained the Rule and order of stay, as stated above.

Plaintiff-opposite party No.1 has entered appearance by filing vokalatnama to contest the Rule.

Mr. Tushar Kanti Roy, learned Advocate appearing for the petitioner by taking me to the plaint, application for rejection of plaint and the orders passed by the Courts below submits that the suit is barred by the principle of *res judicata* and also barred under section 6A and 102 of the Waqfs Ordinance, 1962 inasmuch as that in view of provisions under section 6A(4) of the Waqfs Ordinance, 1962 the Administrator of Waqfs is empowered to take steps for correction of record-of-rights and the plaintiff, who is a stranger to the waqf estate, has no *locus standi* to institute the suit and as per the provisions under section 102 of the Ordinance 'Civil Court' has no jurisdiction to decide title in respect of waqf property and accordingly, the plaint should have been rejected by the trial Court. Learned Advocate submits that the revisional Court without considering the relevant provisions of law illegally disallowed the revision by affirming the order of the trial Court and as such, committed an error of law

resulting in an error in the decision occasioning failure of justice and accordingly, interference is called for by this Court.

As against the above submissions, Mr. Faysal Hasan Arif, learned Advocate appearing for opposite party No.1 submits that the question of *locus standi* as well as *res judicata* are mixed questions of law and fact which cannot be decided in disposing of an application under Order VII rule 11 of the Code of Civil Procedure and these issues can only be decided only upon taking evidence during trial. Learned Advocate further submits that admittedly, the suit property is waqf property but the previous *mutawalli* recorded the waqf property in his name along with his mother in the R.S Khatians instead of the name of waqf estate and thereafter, transferred the same without any permission from the Administrator to defendant Nos. 3-7 by way of declaration of heba deed and since the previous *mutawalli* and his son, the present *mutawalli*, did not protect the interest of the Waqf, the plaintiff filed the present suit for protection of the waqf property. By referring to the provisions under section 2(8) of the Waqfs Ordinance, learned Advocate submits that 'person interested in a waqf' includes a beneficiary and any person who has a right to worship or to perform any religious rite in a *mosque, idgah, imambarah, dargah, maqbara* or other religious institution etc, may file a suit to protect the waqf property when the *mutawalli* goes against the interest of the waqf estate.

Learned Advocate further submits that though section 6A of 'The Waqfs Ordinance' conferred power upon the Administrator of Waqfs to take immediate steps for correction of record-of-rights which has not recorded in the name of the waqf estate but, in the instant case, the Administrator did not take any steps to correct the record-of-rights. Learned Advocate further submits that in the instant suit not only the record-of-rights has been challenged but also the deed of declaration of heba which has been executed by the previous *mutawalli* transferring the waqf property to his relatives and mutation khatian have been challenged, the Administrator has no jurisdiction to decide whether the said deed or record-of rights were legal or whether by said deed the defendants have acquired any right, title and interest to the suit land by way of said declaration of heba deed and accordingly, the suit is not barred by law.

Learned Advocate finally submits that the provisions under section 102 of the Waqfs Ordinance provides that no decision or order of the Administrator can be questioned in any suit or other proceeding in Court except as otherwise expressly provided in the Ordinance but in the instant case, decision or order of the Administrator has not been challenged and accordingly, the revisional Court committed no illegality in refusing to reject the plaint by affirming the order of the trial Court and as such, interference is not call for by this Court.

I have heard the learned Advocates, perused the plaint, application filed under Order VII rule 11 of the Code of Civil Procedure and the orders passed by the Courts below as well as relevant provisions of law to come to a proper decision.

On perusal of the plaint, it appears that the suit has been filed by “ছদাহা লুধী সিকদার পাড়া জামে মসজিদ” represented by the Vice-President of the Committee of the *mosque*. In the averment of the plaint, the plaintiff stated that .40 acre suit land is waqf property out of which .30 acre was dedicated by Begumjan and others vide registered deed of waqf dated 17.06.1954 being No. 4345 in favour of the plaintiff *mosque* and handed over possession thereof in its favour and by said deed Danu Miah was appointed as first *mutawalli*. Thereafter, Syed Ahmed Mohuri transferred .10 acre suit land to the plaintiff vide waqf deed dated 23.11.61 being No. 5677 and Md. Kamal Hossain, the predecessor of defendant Nos. 3-7, was appointed as *mutawalli* of the waqf estate and in his tenure he recorded said .40 acre suit land in his name along with his mother instead of the name of the waqf estate i.e the plaintiff and thereafter, said *mutawalli* transferred the suit land in favour of his children (defendant Nos.3-7) by registered declaration of heba deed being No. 1817 dated 04.08.2009. It has also stated in the plaint that the defendants are now claiming title to the waqf property as their personal property and as such, the waqf estate filed the suit represented by the Vice-president of the *mosque* Committee praying for a decree of declarations, as stated above.

As per averments of the plaint, the father of defendant No. 6, who was previous *mutawalli* recorded the waqf property in his name along with his mother instead of the name of waqf estate and also transferred the suit land by declaration of heba deed dated 04.08.2009 to defendant Nos. 3-7. This averment of the plaint is not

denied by defendant No. 6 who is also claiming that he is the present *mutawalli* of the waqf estate.

Under Order VII rule 11 of the Code of Civil Procedure the plaint shall be rejected in the following cases:

- (a) where it does not disclose a cause of action,
- (b) where the relief claimed is undervalued and the plaintiff, on required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so,
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so,
- (d) where the suit appears from the statement in the plaint to be barred by any law,

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not exceed twenty-one days.

It is not the case of the defendant that the plaint does not disclose cause of action or the relief claimed is undervalued or the plaint is written upon paper insufficiently stamped and the plaintiff failed to supply requisite stamp-paper as per direction of the Court. The defendant has sought for rejection of the plaint mainly on the ground that the suit is barred by law in that the plaintiff has no *locus standi* to file the suit and the suit is barred by the principle of *res judicata* and under sections 6A (4) and 102 of the Waqfs Ordinance, 1962.

It is settled principle of law that question of *res judicata* is a mixed question of law and fact which cannot be decided upon an application filed under Order VII rule 11 of the Code of Civil Procedure but the same can only be decided at the time of trial upon taking evidence. On the face of it, the suit has filed by the waqf estate and the plaint has signed by Janu Mia claiming to be empowered by the *mosque* Committee representing the waqf estate for protection of the interest of the waqf. On the other hand, defendant No. 6, Nurul Kabir is claiming to be the present *mutawalli* of the waqf estate and he is

legally authorized to represent the waqf estate. But both parties are admitting that the suit property is waqf property belonging to the *mosque*. Though defendant No. 6 is claiming himself as *mutawalli* but he did not come forward to file the suit for protection of the interest of the waqf estate.

Now question arises whether the waqf estate itself can file a suit for protection of its own interest and if answer is positive, who will represent the waqf estate?

Sub-section (1) of section 6A of the Waqf Ordinance, 1962 provides that '*any immovable property belonging to any waqf estate shall be recorded in the record-of-rights in the name of the waqf and shall be represented by the designation of mutawalli, Receiver or Administrator, as the case may be.*'

Sub-section (4) of section 6A of the Ordinance also provides that '*if any immovable property belonging to any waqf estate is not recorded in accordance with the provisions of this section, the Administrator shall take immediate steps for correction of the record-of-rights.*'

In the instant case, admittedly, the record-of-rights of the suit property was not recorded in the name of waqf estate but the same has been recorded in the name of previous *mutawalli* and his mother. Accordingly, the Administrator of Waqfs should have taken immediate steps for correction of record-of-rights under sub-section (4) of section 6A of the Waqfs Ordinance. By filing supplementary affidavit learned Advocate for the petitioner submits that the Administrator of Waqfs by order dated 30.03.2015 (Annexure- C-1) directed the petitioner (*mutawalli*) to take steps for correction of record-of-rights in the name of waqf estate. But, it appears that the petitioner (defendant No. 6) for unknown reasons, did not take any steps in view of the order passed by the Administrator of Waqfs dated 30.03.2015 as yet.

Section 56 (1) of the Waqfs Ordinance makes a clear bar of transfer of waqf property by way of sale, gift, mortgage or exchange by the *mutawalli* without the previous sanction of the Administrator. Sub-section (4) of section 56 also provides that '*where a mutawalli transfers a waqf property in contravention of sub-section (1) and afterwards himself becomes the owner of the property, the mutawalli shall, on the direction of the Administrator, reconvey the property to the waqf.*' Sub-section (5) of section 56 also provides that '*any transfer*

*made in contravention of the provisions of sub-section (1) shall be deemed to be an act of malfeasance and breach of trust for the purpose of sub-section (1) of section 32.* Section 32 of the Ordinance provides provision of removal of *mutawalli* on the allegation of breach of trust, mismanagement, malfeasance or of any act of the *mutawalli* causing loss of the waqf property.

It appears that the previous *mutawalli* transferred the waqf property in favour of his children (defendant Nos. 3-6) which has been challenged in the suit. Admittedly, no sanction was obtained before the transfer of the suit property by the previous *mutawalli*. As per section 56(3) of the Ordinance, such transfer shall be declared void, if the Administrator applies to the Civil Court in this behalf. No such action has been taken by the Administrator nor he proceeded against the previous *mutawalli* under section 32 of the Ordinance. On the other hand, though the Administrator vide order dated 30.3.2015 directed defendant No.6 to take steps to prepare record-of-rights in the name of the waqf estate but he did not comply with the said order and the Administrator did not take any action against defendant No.6 for non-compliance of his order dated 30.3.2015.

Procedure as to when the Administrator may institute a suit or proceeding in his own name in a Court to protect the interest of a waqf property has been provided in section 83 of the Ordinance which reads as follows:

“83. If there is no *mutawalli* or the *mutawalli* refuses or neglects to act in the matter, within a reasonable time, the Administrator may, in his own name, institute a suit or proceeding in a Court against a stranger to the waqf or any other person-

- (a) for the establishment of right, title and interest in a waqf property, or
- (b) for confirmation of possession in a waqf property, or
- (c) for the recovery of any waqf property wrongfully possessed, alienated or leased, or
- (d) .....
- (e) .....
- (f) For any other relief in the interest of a waqf he may consider necessary.”

The provisions under section 83 clearly suggest that in the event of refusal or negligence on the part of the *mutawalli* in the matter, the Administrator of Waqfs is empowered to institute a suit or proceeding in a Court in his own name against a stranger to the waqf or any other person to protect the right, title and interest of a waqf property. In other words, the Administrator has no authority to pass a decree against such person like a civil Court declaring right, title and interest of a waqf property, or confirmation of possession of a waqf property, or of recovery of possession of any waqf property wrongfully possessed, alienated or leased.

The Waqfs Ordinance, 1962 has defined ‘**a person interested in the waqf,**’ in section 2(8) as follows:

“person interested in a waqf” includes a beneficiary and any person who has a right to worship or to perform any religious rite in a *mosque, idgah, imambarah, dargah, maqbara* etc or other religious institution and establishment connected with the waqf or to participate in any religious or charitable institutions under the waqf.

There is no provision in the Waqfs Ordinance, 1962 prohibiting ‘**a person interested in the waqf,**’ as defined in section 2(8) of the Ordinance, or ‘**the waqf estate itself,**’ as the case may be, to establish the right, title and interest of the waqf by filing a suit or proceeding in a Court in the event of failure on the part of the Administrator of Waqfs or *mutrawalli* in taking necessary steps under sections 6A, 56 or 83 of the Ordinance to protect the interest of the waqf.

Accordingly, I am of the view that, being a person interested in the waqf, the Vice-president of the *mosque* Committee has *locus standi* to institute the suit representing the waqf estate for protection of its interest.

On the other hand, section 102 of the Waqfs Ordinance provides that ‘*except as otherwise expressly provided in this Ordinance, no decision or order of Administrator shall be questioned in any suit or other proceeding in any Court*’. In the instant case, it appears that, the plaintiff did not challenge any such order or decision of the Administrator.

In that view of the matter and given the facts and circumstances of the present case, the present suit is not barred under any provision



of the Waqfs Ordinance. Accordingly, the plaint cannot be rejected on the ground that the suit is barred by law. As such, the Court of revision committed no illegality in dismissing the revision by affirming the order of the trial Court, rejecting the application for rejection of the plaint.

In that view of the matter I find no merit in this Rule.

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

The order of stay granted earlier is hereby vacated.

The trial Court is directed to proceed with the suit and conclude the trial expeditiously.

**(Md. Badruzzaman, J)**