

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

CIVIL REVISION No. 1927 OF 2005.

Mst. Kamrun Nessa and others

...Petitioners.

-Versus-

Most. Meher Nigar and others

...Opposite parties.

Mr. Tapan Kumar Biswas, Advocate with

Mr. Md. Shahidul Islam, Advocate

... For the petitioners

Md. Shahjahan Chowdhury, Advocate with

Mr. Md. Hadiul Islam Mollick, Advocate

... For the opposite parties

Heard on: 28.04.2024.

Judgment on: 29.04.2024.

Md. Badruzzaman, J

This Rule was issued calling upon opposite parties No. 1-2 to show cause as to why order No. 54 dated 28.11.2004 passed in Title Suit No. 91 of 2001 by learned 5th Court of Joint District Judge, Dhaka should not be set aside.

At the time of issuance of Rule, the further proceeding of Title Execution Case No. 02 of 2005 now pending before the 5th Court of Joint District Judge, Dhaka was stayed for a period of 6 (six) months which was subsequently extended from time to time.

Facts, relevant for the purpose of disposal of this Rule, are that opposite party Nos. 1 and 2 instituted Title Suit No. 91 of 2001 against the petitioners and others for a decree of partition in 5th Court of Joint District Judge, Dhaka. The petitioners contested the suit by filing written statement. Both parties adduced evidence and

the trial Court decreed the suit in preliminary form allotting *saham* to the plaintiffs and dismissing the claim of the defendants by judgment and decree dated 22.04.2003. The defendant-petitioners did not challenge the preliminary judgment and decree of the trial Court.

To effect the preliminary judgment and decree Advocate Commissioner was appointed who submitted his report on 31.01.2004 against which the defendant-petitioners filed written objection. The Advocate Commissioner was examined by the plaintiffs and cross-examined by the defendant-petitioners and the trial Court upon hearing the parties and considering the materials on record by order dated 28.11.2004 accepted the report of the Advocate Commissioner and passed final decree and the decree was drawn up on 04.01.2005. Challenging said order dated 28.11.2004 the defendant-petitioners have preferred this revisional application under section 115(1) of the Code of Civil Procedure on 23.05.2005, and upon this application, the Rule was issued on 24.05.2005.

Plaintiff-opposite party Nos. 1-2 have entered appearance to contest the Rule. They have also filed an affidavit-in-opposition.

Mr. Tapan Kumar Biswas, learned Advocate appearing for the petitioners submits that the trial Court committed an error of law in accepting the Commissioner's Report without considering the written objection filed by the defendant-petitioners and illegally passed final decree and as such, interference is called for by this Court.

As against the above contention of the learned Advocate, Md. Shahjahan Chowdhury, learned Advocate appearing for the opposite parties submits that after accepting the Commissioner's Report as per sub-rule (3) of rule 14 of Order XXVI of the Code of Civil Procedure the trial Court passed the final decree and as such, this civil revision is not maintainable. Learned Advocate further submits

that since the defendants did not challenge the preliminary decree and since the trial Court did not allot any *saham* in favour of the defendants they cannot challenge the Commissioner's Report who has complied with the preliminary decree by allotting *saham* to the plaintiffs as per terms of the preliminary decree. In support of his contention learned Advocate has referred to the case of *Abu Bakar Siddique vs. Md. Khorshed Alam and others* 11 BLT 508.

We have heard the learned Advocates, perused the impugned order and other relevant documents available before us. It is not denial of the fact that the trial Court passed preliminary decree allotting *saham* to the plaintiffs and rejecting the claim of the defendants and without allotting any *saham* in favour of the defendants and the defendants did not challenge the preliminary decree before any higher forum. It appears that the Advocate Commissioner was appointed and after notifying all the parties he made survey and submitted his report on 31.01.2004. On perusal of the Commissioner's Report, it appears that the learned Advocate Commissioner allotted the *saham* to the plaintiffs in terms of the preliminary decree and kept rest suit land jointly in the *saham* of the defendants. Since the defendants did not challenge the preliminary decree questioning the allotment of the plaintiffs they are bound by the preliminary decree.

Moreover, the trial Court after accepting the Advocate Commissioner's Report made the preliminary decree final as per sub-rule (3) of rule 14 of Order XXVI of the Code of Civil Procedure and the trial Court also drawn up of the final decree. Thereafter, the defendants have challenged the order of the trial Court accepting the Commissioner's Report and making the preliminary decree final in

this revision without preferring an appeal challenging the final decree.

In the case of *Abu Bakar Siddique vs. Md. Khorshed Alam and others 11 BLT 508*, a Single Bench of this Court held that 'after accepting the commissioner's report making the preliminary decree final as per provision of sub-rule (3) of rule 14 of Order XXVI of the Code of Civil Procedure there is no scope to file a revisional application. We find no reason to disagree with the principle settled by the Single Bench.

Considering the relevant provisions of law as well as the materials on record, we are of the view that this revisional application is not maintainable.

In view of the above, this Rule is discharged, however, without any order as to costs.

The order of stay granted earlier is hereby vacated.

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)