Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1587 OF 2021

Government of Bangladesh, represented by the Deputy Commissioner, Chattogram.

..... *Defendant-Petitioners.*

-VERSUS-

Mst. Safa Khatun died, leaving behind the legal heirs:

Mohammad Shah Alam and others

..... *Plaintiff-Opposite Parties.*

Ms. Ainun Naher, D.A.G with
Mr. A.K.M. Mukhter Hossain, A.A.G,
Mr. Md. Rejaul Islam, A.A.G,
Ms. Papia Sultana, A.A.G., and
Mr. Khan Mahfuzun Noor, A.A.G.

..... *For the Petitioners.*

Mr. Jyotirmoy Barua, Advocate with
Mr. Sk. Md. Jahangir Alam, Advocates

..... *For the Opposite Parties*

Heard on 19.05.2025, 13.07.2025, 20.07.2025, 04.11.2025, 20.10.2025, 21.10.2025 and 11.11.2025.

Judgment on 25.11.2025

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 02.06.2010 passed by the learned Additional District Judge, 5th Court, Chattogram in Other Class Appeal No.103 of 2009 dismissing the appeal and affirming the Judgment and decree

dated 27.01.2009 passed by the learned Senior Assistant Judge, 1st Court, Chattogram in Other Class Suit No.349 of 2008 decreeing the suit should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The facts in brief for disposal of the Rule are that the opposite party herein, as plaintiff, instituted Other Class Suit No. 349 of 2008 before the Senior Assistant Judge, 1st Court, Chattogram, for declaration of title, contending inter alia that the suit lands originally belong to Ashshini Kumar, Kamini Kumar, sons of Ram Gourn Chowdhury and Shirish Chandra Chowdhury, son of Mahan Chandra Chowdhury, and R.S Khatian was correctly prepared in their name. Ashshini Kumar died, leaving one son, Khetra Mohan, as his heir and successor; Kamini Kumar died, leaving one son, Narayan Kumar Chowdhury, as his heir and successor. Shirish Chandra Chowdhury died, leaving Shuvash Chandra Chowdhury as his heir and successor. Subsequently, on 09.11.1985, Ashshini Kumar, Narayan Kumar Chowdhury, and Shuvash Chandra Chowdhury appointed one Joynal Abedin as their attorney for the suit land, vide General Power Attorney No. 17195 dated 09.11.1985. Thereafter, Joynal Abedin, based on a Power of Attorney, sold the suit land, including other land, to the Plaintiff Safa Khatun, and the defendant No.1 Muhammad Islam,

by deed No. 1328 dated 03.05.1986, and handed over possession of the suit land. However, P.S Khatian of the suit land was wrongly recorded in the name of the Government; therefore, Miscellaneous Case No.69 of 1970 was filed before Senior Assistant Judge for the correction of P.S. Khatian, but in the meantime, B.S. Servay, having started the Misc Case, was abated. However, B.S. Khatian was also wrongly recorded in the name of the Government. The plaintiff became the owner of the entire suit land by virtue of a partition deed dated 03.02.1994. However, on 20.08.2005, the Plaintiff and defendant N0.1 came to know that the suit land was recorded in Khas Khatian No.1. Thus, the instant suit has been filed.

The defendants Nos. 2-4 contested the suit by filing a written statement on behalf of the Government, denying all material allegations against them, contending, inter alia, that the instant suit is barred by limitation, defective of parties, and not maintainable in the present form. The P.S and B.S khatians of the suit land have been published correctly as Khas Khatian No. 1, and the defendant has been peacefully owning and possessing the suit land, but the plaintiff has not taken any steps to correct the khatians. Moreover, the plaintiff did not raise any objection at the time the P.S. and B.S. Khatians were prepared. The plaintiff filed

the suit with an inadequate valuation of the suit land, only to grab the government property beyond the period of limitation.

The learned Senior Assistant Judge of the 1st Court, Chattogram, framed the necessary issues for the settlement of the dispute between the parties.

Subsequently, the learned Senior Assistant Judge of the 1st Court, Chattogram, by the Judgment and decree dated 27.01.2009, decreed the suit.

Being aggrieved by and dissatisfied with the above Judgment and decree, the defendant-Government preferred Other Class Appeal No.103 of 2009 before the District Judge, Chattogram.

Eventually, the learned Additional District Judge of the 5th Court, Chattogram, dismissed the appeal by the Judgment and decree dated 02.06.2010.

Being aggrieved by and dissatisfied with the above Judgment and decree, the defendant-appellant-petitioner preferred the Civil Revision under section 115(1) of the Code of Civil Procedure and obtained the instant Rule.

Ms. Ainun Naher, the learned Deputy Attorney General appearing on behalf of the petitioner, submits that the appellate court below, as the last court of fact, did not at all consider the evidence on record; it simply affirmed the Judgment of the trial court below. Moreover, the Judgment of the Appellate Court is not

a judgment under Order XLI Rule 31 of the Code of Civil Procedure, as the appellate court below failed to evaluate the evidence on record. She then submits that both the court below failed to consider that the plaintiff is now taking a new device to grab public property, bringing a new case without her pleadings and as evidence on record; therefore, the suit is barred by Order VI, Rule 7 of the Code of Civil Procedure. She then submits that both the courts considered the advocate commissioner's report and found the plaintiff's possession of the suit land, although the learned advocate commissioner was not examined on oath by the court. So, the said report of the advocate commissioner is not acceptable in law under Order XXVI, Rule 12, of the Code of Civil Procedure; the documents, i.e., the deeds on which the plaintiff claimed ownership of the property, have not been properly marked as exhibits in accordance with the law. But both the courts failed to consider the same and decreed the suit as violative of the provisions of the law. The learned Deputy Attorney General also submits that the appellate court was unable to consider the factual aspects of the case and the principle of law in their true perspective. Moreover, the appellate court, it appears, without adverting to the findings of the trial court, affirmed the trial court's findings. Therefore, she is praying for absolute the Rule.

On the other hand, Mr. Jyotirmoy Barua, the learned advocate appearing on behalf of the plaintiff-opposite party, submits that the court of appeal, having considered all the material aspects as well as the law, affirmed the Judgment of the trial court; therefore, the submission raised by the learned Deputy Attorney General is not acceptable in the eyes of the law. He then submits that, since the appellate court affirmed the Judgment of the trial court as a judgment of affirmance, this court is not in a position to discuss the findings of the court of appeal under a revisional jurisdiction, save and except misreading of evidence or misconstruing the documents. Thus, he prays for the discharge of the Rule.

I have considered the submissions advanced by the learned advocate for both parties, perused the impugned Judgment and decree, the evidence, and the other materials on record. It appears that the opposite party herein, as plaintiff, instituted the instant suit for a declaration of title as the B.S Khatian was wrongly recorded in the Khas Khatian No. 1. On the contrary, the defendant claimed that the suit land has been correctly recorded in the name of the Government in P.S and B.S. Khatians as khash land in Khas Khatian No.1.

To prove the case, the plaintiff examined two witnesses and produced material evidence, which the defendant objected to as

exhibits. On the contrary, the defendants, to prove their case, examined one witness.

I have scrutinized each deposition and cross-examination of the witness, as well as the material evidence on record. It appears that the plaintiff's attorney, Md. Sirajul Islam was examined as P.W.-1 and stated that the suit lands originally belonged to Ashshini Kumar, Kamini Kumar, and Shirish Chandra Chowdhury. R.S. Khatian was correctly recorded in their names. Ashshini Kumar died, leaving one son, Khetra Mohan; Kamini Kumar died, leaving one son, Narayan Chandra; Shirish Chandra died, leaving one son, Shuvash Chandra. On 09.11.1985, Ashshini Kumar, Narayan Chandra, and Shuvash Chandra appointed one Joynal Abedin as their attorney for the suit land. Their attorney, Joynal Abedin, sold the suit land, including other land, to the Plaintiff, Safa Khatun, and her husband, the defendant No. 1, Muhammad Islam, by deed No. 1328, and handed over possession of the suit land. They possess the suit land through the plantation of various trees. Thereafter, the plaintiff and her husband partitioned the suit land. On 03.02.1994, she appointed her husband as her attorney upon creating an unregistered power of attorney. Her husband, i.e., defendant No. 1, on 20.08.2005, went to defendant No. 3 for mutation of the suit land, and then came to know that the suit

land had been recorded in the Government's Khas Khatian No. 1. Thereafter, on 28.08.2005, he applied for a certified copy of the B.S. Khatian and on 30. 08.20905 finally came to know that the B.S. Khatian had been wrongly prepared in the Khas Khatian No. 1. The plaintiff also came to know that P.S Khatian of the suit land was recorded in the name of the Government. Thus, Miscellaneous Case No. 69 of 1970 was filed before the Senior Assistant Judge, but in the meantime, B.S. Servay, having started the Misc. case, was abated. As a result, B.S. Khatian was also wrongly recorded in the name of the Government. The plaintiff became the owner of the entire suit land by virtue of a partition deed dated 03.02.1994. However, the Plaintiff and defendant No.1 on 20.08.2005 came to know that the suit land was recorded in Khas Khatian No. 1.

P.W.-2 Md. Anwar Hossain deposed that the plaintiff possesses the suit land, built with tin shed houses, and a plantation of various trees thereon, and that he resides thereon by taking rent from one of the huts from the plaintiff. This witness also gave the specification of the suit land.

On the other hand, D.W. 1 Md. Enamul Haq, Deputy Assistant Land Officer, who deposed in line with the written statement.

Analyzing the evidence on record, it appears that the plaintiff claimed, in line with the plaint, that she possesses the suit land by the plantation of various trees. But the P.W. 2 deposed that the plaintiff possesses the suit land by erecting semi-paka huts, and this witness also lived thereon by taking rent from one of the huts from the plaintiff. Moreover, this witness gave details of the specifications of the suit land. Therefore, it appears that this witness's evidence is out of pleading. Further, if we peruse R. S., P. S., and B.S. Khatian, i.e., Exhibits -2-, it appears that the nature of all the suit plots is (i) two Hills, (ii) two Jungle, (iii) one Tila and (iv) a Fountain channel/cannel. On the contrary, the defendant claimed that it possesses the suit land, and the plaintiff filed the instant suit more than 60 years after the cause of action.

Considering the above, we are of the firm view that the plaintiff failed to prove her possession of the suit land, and, as such, a simple suit for a declaration of title without any prayer for consequential relief is not maintainable.

Further, it is a fact that neither from the averments made in the plaint do we find that the plaintiff claimed to possess the suit land by erecting huts/homes and renting the same to others. But the trial court, as well as the appellate court, considered the report of the Advocate Commissioner as well as evidence of P.W. 2,

found that the plaintiff possessed the suit land by erecting huts and a plantation of various trees,

Be that as it may, in the instant case, Rule 7 of Order VI of the Code of Civil Procedure is definitely a legal embargo in granting the relief as prayed for by the plaintiff. Despite the defendant failing to produce cogent, tangible evidence and being unable to prove their case, it is the incumbent duty upon the plaintiff to discharge her onus of proving her acquisition of title and possession. In the instant case, as we have already spelt out that Rule 7 of Order VI of the Code of Civil Procedure is a legal bar in granting the relief sought for in the instant suit inasmuch as "no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the parties pleading the same."

The provision of law is such that, firstly, the pleading of the plaintiff must contain those facts that have given the plaintiff the right to one or more rights of relief. The plaintiff must allege a cause of action describing a particular instance that substantive law entitles him to relief, or, in other words, he must allege facts showing the defendant's duty towards him. So, anything outside the pleadings is not part of the case. Therefore, the proof does not go outside the pleading. Rule 7 of the Order VI of the Code of Civil Procedure, therefore, does not allow the departure from the

pleadings, or in other words, any evidence at the trial which goes beyond the pleadings, would constitute a departure and a good ground of objection to the admissibility of that evidence. To overcome this situation with a view to securing the ends of justice, there is a provision for amendment of the pleadings under Rule 17 of Order VI of the Code of Civil Procedure. But here, in this case, the plaintiff failed to avail of that scope and did not avail of that opportunity; for the reason best known to her, she did not avail of that scope. In this regard, the case of Md. Hazrat Ali vs Joynal Abedin reported in 1986 BLD (AD) 45 in paragraph No. 17 held that:-

No court can be supposed to have inherent power to disregard the express provisions of law, whenever they exist, whether in the Code or any other statutes or rules made thereunder, and at the same time, one should be careful not to come within the mischief of law. After all, the aim of law is not that short as not to reach a recalcitrant party.

Their lordships, in the case of Golzar Ali Pramanik vs Saburjan Bewa, being dead, her heirs, Md. Yakub Ali Khan reported in 6 BLC (AD)41 in paragraph 8 held that:-

There may be thousands of defects in the documents of the defence as well as their case but that does not entitle, the plaintiff

to get a decree. The plaintiff is to prove his case irrespective of the defence version of the case.

Further, notable that the learned judge of the trial court as well as the appellate court failed to consider that the Advocate Commissioner's report is not admissible as evidence, but if the Advocate Commissioner deposes on oath before the court, then the report of the Advocate Commissioner is admissible as evidence as per the proviso so enumerated in rule 2 of Order XXVI of the Code of Civil Procedure. This view gets support in the case of Abdus Sattar (Md) and others -Vs- Lalon Mazar Sharif and Seba Sadan Committee and others reported in 56 DLR (AD) (2004) 180, wherein their lordship of the Appellate Division observed that:-

> "It appears that the appellate court relied upon inadmissible evidence, namely, report of the Advocate Commissioner, since the Advocate Commissioner was not examined by the parties. It is to be mentioned here that the report itself of the Advocate Commissioner is not evidence, but if the Advocate Commissioner deposes on oath before the court, then the same is evidence."

In the instant case, it appears that the trial court, as well as the appellate court, relied upon inadmissible evidence, namely, the report of the Advocate Commissioner, because the Advocate Commissioner who prepared and submitted the report was not examined on oath before the court came to a finding that the

plaintiff possesses the suit land by erecting huts. Therefore, the courts below's findings regarding the plaintiff's possession of the suit land are not tenable in law.

Be that as it may, it is the cardinal principle of law that if a document was not marked as an exhibit in accordance with the law but taken into evidence, and based on such evidence, no decree can be passed. This view gets support in the case of Atul Gomes and others Vs. Julian Rozario and others reported in 6 MLR (AD) (2001) 46, wherein their Lordship of the Appellate Division observed that:-

> "It appears from the perusal of the Judgment of the High Court Division that, on consideration of the evidence adduced during the appellate stage, the High Court Division found that the original documents which were produced before the appellate court have not been properly taken into evidence. The persons competent to prove the documents were not examined. So, according to the High Court Division, mere filing of the original documents is not sufficient to give a decree in favour of the plaintiffs. These documents must be proved in accordance with the law, which the plaintiffs failed to discharge. The learned advocate appearing for

> the petitioners tried to convince us that the High Court Division was wrong in not accepting the evidence adduced in support of the plaintiffs' claim. It appears from the Judgment of the High Court Division that, on consideration of the evidence, it found that the documents were not properly marked exhibits and taken into evidence, and on such evidence no decree can be passed. We have heard the learned advocate appearing for the petitioners who failed to point out any legal infirmity in the Judgment of the High Court Division, which may call for our interference."

In the instant case, both parties adduced evidence before the trial court to prove their cases. The plaintiff failed to produce his original power of attorney No. 17195 dated 09/11/1998, save and except a certified copy of the alleged power of attorney by which Ashshini Kumar, Narayan Kumar Chowdhury, and Shuvash Chandra Chowdhury appointed one Joynal Abedin as their attorney for the suit land, being General Power Attorney No. 17195 dated 09.11.1985. Thereafter, Joynal Abedin, acting under a Power of Attorney, sold the suit land to the Plaintiff, Safa Khatun, and the defendant No. 1, Muhammad Islam, by deed No. 1328 dated 03.05.1986, which has not been marked as an Exhibit in accordance with law. Moreover, the plaintiff also failed to

produce the original Deed No. 1328 dated 03.01.1986, except for a certified copy of the said deed by which the plaintiff and her husband, defendant No. 1, purchased the suit land, which has not been exhibited in accordance with the law.

Notably, Section 67 of the Evidence Act, 1872, provides as to the manner of proof of certain documents. Unless a document is proved in accordance with law, such a document cannot be admitted into evidence forming the basis of a decree. Mere filing of a document is not sufficient to satisfy the requirement of law. But the learned judge of the trial court below, considering the alleged certified copy of the power of attorney, Exhibit 4, and the alleged deed of transfer, marked as Exhibit 5, as evidence, erroneously decreed in favor of the plaintiff. On the contrary, the appellate court below, being the last court of facts, did not at all consider the same in accordance with the law and affirmed the decree of the trial court below; thus, it committed an error of law, resulting in an error in the decision, occasioning a failure of justice.

Further, it appears that the court of appeal below, being the last court of facts, did not assess the evidence on record at all, as required under Order XLI Rule 31 of the Code of Civil Procedure, 1908. Under the said provision, the court of appeal below, while disposing of an appeal, is mandatorily required to frame the points for determination, record its decision thereon, and state the

reasons for such decision. The object of the Rule is to ensure that the appellate court is to apply the judicial mind to deal with the specific findings of the trial court. This view gets support in the case of Jahanara Begum vs. Md. Aminul Islam Chowdhury, and others reported in 8BLC (AD)77, wherein it was observed that:-

> "The lower appellate court, being the final court of fact, will have to discuss and reassess the evidence on record independently while either reversing or affirming the findings of the trial court."

Considering the above facts, circumstances, and the other materials on record, it appears the Judgment of the appellate court below is not a judgment as per Order XLI Rule 31 of the Code of Civil Procedure. Moreover, both the courts failed to consider the evidence on record and, in an erroneous view, misconstrued the oral and documentary evidence, which led to the decree in the suit.

Notably, it is the cardinal principle of law that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case. This principle has been reaffirmed in the case of Moksed Ali Mondol -Vs- Abdus Samad Mondol, reported in 9 BLC (AD) 221, wherein it was held that:

> The plaintiff is to prove his case, and he must not rely on the weakness or defects of the defendant's case.

Similarly, in the case of Md. Naimuddin Sarder-Vs- Md. Abdul Kalam Biswas and another reported in 39 DLR (AD) 237, and Bangladesh -Vs- Israil Ali and others reported in 1981 BLD (AD) 371. In the aforesaid two cases, their Lordships of the Appellate Division observed that:-

> The plaintiff, in order to succeed, must establish his own case, and the weakness of the defendant's case is no ground for passing a decree in favour of the plaintiff.

In the present case, the plaintiff has failed to meet the burden of proof imposed by law, as none of the witnesses presented by the plaintiff has substantiated the claims.

Considering the above facts and circumstances, it appears that the learned Judge of the court of Appellate, in affirming the decision of the trial court, failed to evaluate the evidence on record properly. Instead of conducting a thorough examination, the Appellate Court merely upheld the trial court's Judgment. This approach does not constitute a judgment in accordance with the provisions of Order XLI, Rule 31 of the Code of Civil Procedure. Therefore, we find merit in the Rule.

Resultantly, the Rule is made absolutely without any order as to costs.

The impugned Judgment and decree dated 02.06.2010 passed by the learned Additional District Judge, 5th Court, Chattogram, in Other Class Appeal No. 103 of 2009 disallowed the appeal is hereby set aside. And the Judgment and decree dated 27.01.2009 passed by the learned Senior Assistant Judge, 1st Court, Chattogram in Other Class Suit No. 349 of 2008 is hereby set aside.

Communicate the Judgment and send down the Lower Court Records at once.

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(Md. Salim, J).

Rakib(ABO)