

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

**Civil Revision No. 5038 of 2023**

**In the matter of:**

Md. Kamal Mia  
...Petitioner.

**-Vs-**

Md. Abul Kashem and others.  
....Opposite parties.

**Present**  
Mr. Justice Mamnoon Rahman

Mr. Md. Mozammel Haque Bhuiyan, Adv.  
...For the petitioner.  
Mr. Md. Abdul Haque, Adv.  
...For the opposite parties.

Heard on: **13.01.2025**

**And**

Judgment on: **The 16<sup>th</sup> February, 2025**

**Mamnoon Rahman,J:**

In an application under section 115(1) of the Code of Civil Procedure, 1908 rule was issued calling upon the opposite party Nos. 9-16 and 18 to show cause as to why the impugned judgment and order dated 19.05.2022 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Mymensingh in Other Class Appeal No. 174 of 2018 rejecting the prayer for to produce the disputed deed No. 4560 dated 12.03.1967, 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 short facts relevant for the disposal of the instant rule, is that, the present petitioner as plaintiff instituted Other Class Suit No. 134 of 2014 in court of Assistant Judge, Nandail, Mymensingh impleading the opposite parties as defendants for declaration of title,

recovery of possession as well as for a further declaration that the deed in question is illegal, collusive, fraudulent and not binding upon the parties. After filing of the suit the defendant opposite parties entered appearance and filed written statement, however, they did not contest the suit ultimately. During trial the plaintiff adduced two witnesses and also adduced documentary evidences wherein the trial court proceeded exparte. The trial court ultimately vide judgment and decree dated 25.05.2018 dismissed the suit exparte. Being aggrieved by and dissatisfied with the aforesaid judgment and decree passed by the trial court the present petitioner as appellant preferred Other Class Appeal No. 174 of 2018 and the said appeal is pending for disposal before the lower appellate court. It transpires that during pendency of the appeal the appellant plaintiff petitioner pressed an application under Order 41 rule 27 of the Code of Civil Procedure, 1908 for production of additional evidence. However, the lower appellate court vide judgment and order dated 19.05.2022 rejected the application. Being aggrieved by and dissatisfied with the aforesaid judgment and order passed by the lower appellate court the petitioner moved before this court and obtained the present rule.

Mr. Md. Mozammel Haque Bhuiyan, the learned counsel appearing on behalf of the petitioner submits that the lower appellate court without applying its judicial mind and without considering the facts and circumstances, most illegally and in an arbitrary manner rejected the application under Order 41 rule 27 of the Code of Civil Procedure, 1908 thus the lower appellate court committed an error

which requires interference by this court. He submits that in the said application the plaintiff petitioner appellant prayed for a direction for production of a deed which is very much essential for proper adjudication of the real question in controversy. He further submits that the sole case as per the plaint and written statement filed by the defendants based upon the said deed which was admittedly done in the year 1971 and such production an expert opinion will facilitate the court to come to a clear finding and to resolve the real question in controversy. The learned Advocate referred the decisions reported in 36 DLR (AD) 220.

Mr. Md. Abdul Haque, the learned counsel appearing on behalf of the opposite parties vehemently opposes the rule. He submits that the lower appellate court on proper appreciation of the facts and circumstances and materials on record has rightly rejected the application thus the court below committed no error which requires interference by this court. The learned counsel submits that admittedly in the suit an ex parte decree was passed against the plaintiff and it is the duty of the plaintiff to prove his case as because in the present case in hand the respondent-defendants did not contest the suit. He submits that in the event that the defendants contested the suit the court cannot enforce first non-contesting defendants to produce any documents at any stage. The learned counsel prays for discharging the rule.

I have perused the impugned judgment and order, revisional application, ground taken thereon as well as necessary papers and documents annexed herewith, provisions of law as well as decisions as

referred to and heard the learned Advocates for the petitioner as well as opposite parties.

On perusal of the same, it transpires that admittedly the present petitioner as plaintiff instituted a suit impleading the opposite parties as defendants for declaration of title, recovery of possession and further declaration to the effect that the deed in question is illegal, void, collusive and not binding upon the parties. It clearly transpires that after filing of the suit though the defendants entered appearance by filing power and submitted a written statement but ultimately they did not contest the suit either way. It also transpires that the court below proceeded ex parte wherein the plaintiff adduced two documentary evidences and the trial court ultimately dismissed the suit ex parte against which the present petitioner preferred appeal and the same is now pending.

On meticulous perusal of the papers and documents, it transpires that during pendency of the appeal which is of the year 2018 the present petitioner pressed an application in the year 2022 under Order 41 rule 27 of the Code of Civil Procedure, 1908 for production of additional evidence. Order 41 rule 27 of the Code of Civil Procedure, 1908 empowered the appellate court to take additional evidence. As per the said provisions of law the lower appellate court has the ample power and jurisdiction like the trial court to take any additional evidence in anyway and to proceed. So, it transpires that the parties have the right to invoke the appellate court jurisdiction for production of additional evidence. In the present case in hand from the plaint

reading of the application under Order 41 rule 27 of the Code of Civil Procedure, 1908 as evident in Annexure-A-2 it transpires that the petitioner-plaintiff-appellant seeking a direction from the court of law upon the defendant-respondent-opposite parties for production of a deed in question. It has been mentioned earlier that in the suit the defendant-respondent-opposite parties did not contest though they filed written statement and in the event of non-contesting the said written statement has no value.

On meticulous perusal of the papers and documents, it further transpires that while rejecting the application though in a summary manner the lower appellate court came to a conclusion that in the original suit the defendants did not contest and as such the suit was decreed *ex parte* and in the event of the same the plaintiff who is to prove the case and no burden can be given upon the plaintiff. Admittedly, the decisions reported in 36DLR(AD) 220 the appellate court has the ample power and authority to take additional evidence and to proceed. But in the present case in hand it is crystal clear that the defendants since did not contest in the suit at all they cannot be enforced or directed to file any documents as because the suit was decreed *ex parte* and it is the duty of the plaintiff to prove his or her case. In such view of the manner I am of the view that the lower appellate court in the present case in hand committed no error in passing the impugned judgment and order. It also transpires that though the appeal is of the year 2018 but the appellant plaintiff pressing the

application after four years. All these counts I find no reason to interfere with the same.

Accordingly, the instant rule is discharged and the interim order passed by this court is hereby vacated. The impugned judgment and order passed by the lower appellate court is hereby affirmed and the lower appellate court is directed to hear and dispose of the appeal expeditiously, as possible, not later than 3(three) months from the date of receipt of the instant judgment without fail.

The office is directed to communicate the order to the concerned court below with a copy of the judgment, at once.

(Mamnoon Rahman,J:)

*Emdad.B.O.*