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

Present:
Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.4154 of 2005.

In the matter of:

An application under section 115(1) of the Code of Civil Procedure.

And

Sreemoti Momota Rani (Mukul) and others

...Petitioners

-Versus-

Sreemati Narayani Kunda and others

...opposite parties

Mr. Md. Garib Newaj, Senior Advocate with Ms. Maksuda Akhter, Advocate

...For the petitioners

No one appears

...For the opposite parties

Heard & Judgment on 29.08.2024.

This rule was issued calling upon the opposite party Nos.1-6 to show cause as to why the judgment and decree dated 11.09.2005 and 18.09.2005 respectively passed in Partition Appeal NO.06 of 2005 by the learned District Judge, Joypurhat reversing the judgment and decree dated 27.11.2000 and 29.11.2000 respectively passed by Sub-ordinate Judge, 2nd Court, Joypurhat in Suit No.18 of 1999 partition should not be set aside and/or pass such

other order or orders as to this Court may seem fit and proper.

Facts in short are that petitioner as plaintiff instituted Title Suit No.18 of 1999 for partition seeking a separate saham for 92 decimal land. Above suit was contested by defendants No.1-6 by filing a joint written statement.

On conclusion of trial the learned Sub-ordinate Judge decreed above suit in part and granted the plaintiff a separate saham for 46 decimal land.

Being aggrieved by the above judgment and decree of the trial court above plaintiffs preferred Title Appeal No.07 of 2001 to the District Judge who dismissed the appeal and affirmed the judgment and decree of the trial court.

The plaintiffs submitted a petition for appointment of an Advocate Commissioner for partition of above land and make the preliminary decree final. Accordingly Advocate Hafizur Rahman was appointed as Advocate Commissioner who on conclusion of investigation submitted a report which was accepted by the the trial court on 06.03.2005 and a final decree was passed on the basis of above report.

Being aggrieved by above judgment and final decree of the trial court the defendants as appellants preferred Partition Appeal No.06 of 2005 to the District Judge, Joypurhat who allowed the appeal, set aside the Advocate Commissioners report and the final decree and directed for further investigation of the disputed land by a newly appointed Advocate Commissioner.

Being aggrieved by above judgment and decree of the learned District Judge the respondent as petitioner moved to this court and obtained this rule.

Mr. Md. Garib Newaj learned senior Advocate for the petitioners submits that it has been admitted by both the parties in their respective pleadings and evidence that on amicable partition plaintiffs are in possession in their 46 decimal land by constructing their dwelling house from the north side of the disputed plot and the defendants are in possession in the land of their share by constructing their dwelling house on the southern part of the disputed plot. The learned Judge of the court of appeal below clearly mentioned above position of possession in the impugned judgment. The learned Judge held that the dwelling house of the plaintiffs is situated in front of the paved road but the house of the defendants is behind the above road and the defendants has a genuine

grievance against above position and they wanted to change the location of their house and bring their house in front of the paved road.

The learned District Judge misconceived the principle of partition and most illegally held that the aspiration of the defendants to get closer to the road must be fulfilled and on basis of above erroneous perception of law and facts set aside the advocate Commissioners report and the final decree which is not tenable in law.

No one appears on behalf of the opposite parties at the time of hearing of this revision.

I have considered the submissions of the learned Advocate for the petitioner and carefully examined all materials on record including the report of the Advocate commissioner and the impugned judgment and decree passed by the learned District Judge.

As mentioned above the trial court decreed above partition suit on contest in part and granted separate saham for the plaintiffs for 46 decimal land.

The defendants did not seek separate saham in above suit and so no separate saham was granted to the defendants.

Above preliminary decree was accepted by the defendants and they did not prefer any appeal

against above judgment and decree of the trial court. The plaintiffs preferred an appeal against above judgment and decree of the trial court but the same was dismissed.

On the basis of an application submitted by the plaintiffs the learned Judge of the trial court appointed Mr. Hafijur Rahman as Advocate Commissioner for partition of the disputed land of plot No.151 who on conclusion of necessary investigation and measurement of the land of the disputed joma taking into consideration the existing possession and convenience and inconvenience of the parties submitted a report on 10.11.2004.

Defendants No.1-6 submitted an objection against above report stating that the Advocate Commissioner has given separate saham for 46 decimal land to the plaintiffs from the front side of the road but the defendants have been given their saham of 46 decimal land behind the above road.

It turns out from the impugned judgment and decree that the learned District Judge accepted above statement of the defendants as lawful aspiration although both the parties are in above peaceful possession for a very long period by

constructing their respective houses on the basis of amicable partition.

There is no allegation of technical or procedural defect or any other deficiency against the above Advocate Commission's report.

There is no allegation that the present possession of the plaintiffs was not acquired peacefully by amicable partition with the co-sharers. Nor there is any allegation that the plaintiff are in possession of land in excess to their share.

The objective of a partition suit is to effect division of the joint property among the co-sharers by meets and bounds on the basis of their respective share. While effecting a partition a court must not disturb the existing possession of the co-sharers provided the same does not exceed his lawful share in the ejmali property and above possession was on the basis of an amicable partition between the co-sharers. The partition of an ejmali property through court does not provide for change of location of amicable possession of co-sharers by demolishing house or cutting standing trees on the ground that the previous amicable possession is not presently suitable for a particular co-sharer.

In above view of the materials on record I find substance in this rule and hold that the learned District Judge committed serious illegality in allowing the appeal and setting aside the final decree passed by the trial court which is not tenable in law.

In the result, the rule is made absolute.

The judgment and decree dated 11.09.2005 and 18.09.2005 respectively passed in Partition Appeal NO.06 of 2005 by the learned District Judge, Joypurhat reversing the judgment and decree dated 27.11.2000 and 29.11.2000 respectively passed by Sub-ordinate Judge, 2nd Court, Joypurhat in Suit No.18 of 1999 is set aside and those of the trial court is upheld.

The ad-interim order passed at the time of issuance of the rule is hereby vacated.

Let the lower Court's record along with a copy of this judgment be transmitted down to the Court concerned at once.

Md. Kamrul Islam
A.B.O