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

Present:

Mr. Justice S. M. Saiful Islam

Civil Revision No. 5329 of 2002

IN THE MATTER OF:

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

And

IN THE MATTER OF:

Most. Jahida Khatun and others.

---- Petitioners.

-versus-

Md. Abdul Gani and others.

---- Opposite Parties.

Mr. Shasti Sarker, Senior Advocate with
Mrs. Lily Rani Saha, Advocate

---- For the Petitioners.

No one appears

--- For the Opposite Parties.

Heard On: 08.01.2026 and 13.01.2026.
Date of Judgment: 25.01.2026.

S. M. Saiful Islam, J.

Upon an application under section 115(1) of The Code of Civil Procedure 1908, this Rule was issued calling upon the opposite party No. 1 and 2 to show cause as to why the judgment and order dated 16.06.2002 passed by the Joint District Judge, 1st Court, Kushtia, in Miscellaneous Appeal No. 20 of 2000,

reversing the judgment and order dated 10.02.2000, passed by the Senior Assistant Judge, Kumarkhali, Kushtia in Miscellaneous Case No. 122 of 1983 and remanding the case for fresh trial should not be *set aside* and/ or such other or further order or orders passed as to this Court may deem fit and proper.

Facts relevant for the disposal of this Rule is that the predecessor of the petitioner Nos. 1(ka) - 1(chha) Taser Pramanik and petitioner No. 2 Hashem Ali Pramanik as the petitioners instituted Miscellaneous Case No. 122 of 1983 praying for pre-emption of .10 acre land under section 96 of the State Acquisition and Tenancy Act, 1950 in the Court of the learned Assistant Judge, Kumarkhali, Kushtia on 01.08.1978. Pre-emptor- petitioners case in short was that the petitioners were owner and possessor of .31 acre land in plot No. 73 appertaining to SA *Khatian* No. 676 of Hogla Mauja under the Police Station- Kumarkhali of Kushtia District. The case land measuring .10 acre of the same plot belonged to opposite party No. 3 under SA *Khatian* No. 549/4 and he had homestead over that land. That opposite party No. 3 transferred the case land collusively to opposite party No. 1 and 2 who were stranger purchasers. The petitioners came to know about that transfer on 01/06/1978. Thereafter, petitioners filed the Pre-emption Misc. Case on 01/08/1978 praying for pre-emption of that land as contiguous land owner.

Kabala (কবলা) purchaser- opposite party Nos. 1-2 jointly and vendor opposite party No. 3 separately contested the case by filing written objections. In that written objections they claimed that the Pre-emption Miscellaneous Case is barred by law of limitation, it is bad for defect of parties, the petitioners are not co-sharer or contiguous land owner in the case land and the case is not maintainable in its present form. They further contended

that opposite party No. 3, being in need of money, took loan of Taka 1000/- (One Thousand) from opposite party Nos. 1 and 2 and mortgaged the suit land to them and executed the registered deed dated 25/06/1977. On the same date, opposite party Nos. 1 and 2 executed an unregistered *Ekrarnama* (একরারনামা) by which they promised to give back the land to opposite party No. 3 on repayment of that loan money. Accordingly, on repayment of loan money by opposite party No. 3, opposite party Nos. 1 and 2 have executed and registered a return *Kabala* (কবলা) dated 23/09/1978. Disputed *Kabala* dated 25/06/1977 is not an out and out sale deed. In fact, it is deed with condition of re-conveyance. The case land is being owned and possessed by opposite party No. 3 all along. If the disputed land had been sold actually, then the value of the land would be 3,000/- (Three Thousand) taka. For these reasons, opposite party Nos. 1-3 prayed for dismissal of the Miscellaneous Case.

Learned Trial Court by the judgment and order dated 25/07/1989 dismissed the Miscellaneous Case holding that the case land had been re-conveyed to the original owner opposite party No. 3 and hence the petitioners cannot be allowed to pre-empt the land.

Against that judgment and order, the petitioners preferred Miscellaneous Appeal No. 74/89 before the Court of District Judge, Kushtia. That Appeal was heard by learned Subordinate Judge, Kushtia who by the judgment and order dated 20/10/1997, allowed the Appeal and sent back the case on remand to the Trial Court for fresh trial.

Learned Trial Court then by judgment and order dated 10/02/2000, allowed the Miscellaneous Case. Being aggrieved and dissatisfied from that judgment and order, opposite party Nos. 1-2 preferred Miscellaneous Appeal No. 20 of 2000 before

the Court of District Judge, Kushtia. That appeal was heard by the learned Joint District Judge, 1st Court, Kushtia who by the impugned judgment and order dated 16/06/2002, allowed the appeal and again sent back the case on remand for retrial. Being aggrieved from that judgment and order, petitioners filed this revisional application and obtained the Rule.

Mr. Shasti Sarker, the learned Senior Advocate, appearing on behalf of petitioners, submits that the learned Appellate Court failed to consider that the right of pre-emption accrues on transfer and vendee cannot defeat the right of pre-emption by taking the *plea* that the land has been re-conveyed to the vendor when he is still in possession. Such sham and colorable transaction will not stand in the way when the case of pre-emption is made out. Moreover, the re-conveyance deed was executed and registered during the pendency of the pre-emption case and thus it is hit by the doctrine of *lispendens*. Opposite parties did not state in their written objection that the petitioners are not contiguous land owner. In spite of that learned Appellate Court below held that the petitioners are not contiguous land owner. The case was filed on 01/08/1978 and long after 24 years, learned Appellate Court sent back the case on remand again which caused failure of justice. Moreover, previously the case was sent back on remand in Miscellaneous Appeal No. 74 of 1989 to give opportunity to the parties to adduce relevant evidence but the opposite parties failed take that opportunity. Giving the same opportunity again by the impugned judgment caused failure of justice. For these reasons, learned Advocate for the petitioners prayed for making the Rule absolute. In support of his contention he referred to the cases reported in 1984 BLD (AD) 219, 47 DLR (HC) 607, 39 DLR (AD) 78.

None appears on behalf of the pre-emptee- opposite parties at the time of hearing. But as the Rule is a long pending one, I think, justice would be better served, if the matter is disposed on merit.

Heard the learned Advocate for pre-emptor- petitioners. Perused the impugned judgment and order, revisional application and annexures therewith and the lower Court records.

On perusal of records, it appears that the petitioners instituted the Miscellaneous Case for pre-emption claiming themselves as contiguous land owner of the land transferred. Learned Appellate Court below has sent back the case on remand for fresh trial by the impugned judgment and order mainly on the two grounds; firstly, the petitioners have not filed the *Mouja Map* (মৌজা ম্যাপ) to prove that they are contiguous land owner and secondly, the opposite parties have not proved the unregistered *Ekrarnama* (একরারনামা) and the registered retransfer deed through competent witness. Learned Appellate Court has sent back the case on remand to give opportunity to the parties concerned to adduce evidence on those regards.

On perusal of the judgment of the Trial Court dated 10/02/2000, it appears that the Trial Court has elaborately discussed the issue regarding whether the petitioners are contiguous land owner or not. Findings of the learned Trial Court in this regard are as follow:

> "অত্র মোকদ্দমায় দরখাস্তকারীগণ দাবী করিয়াছেন যে তাহারা নালিশী জমির পাশ আইলা। পি ডব্লিউ- ১ হিসাবে তাদের সাক্ষী সাক্ষ্য দিয়া জবানবন্দীতে বলিয়াছেন যে নালিশী জমিতে তিনি পাশ আইল্যা। দরখাস্তকারীগণ নালিশী জমির পাশ আইলা উহা সুনির্দিষ্টভাবে অস্বীকার করে নাই। দরখাস্তকারীগণ নালিশী জমির পাশ আইলা উহা অস্বীকার করিয়া প্রতিপক্ষ হইতে পিডব্লিউ- ১ তাদের সাক্ষীকে জেরা করার সময় কোনো সাজেশন দেয় নাই। সুতরাং দরখাস্তকারীগণ নালিশী জমির পাশ আইলা উহা প্রতিপক্ষগণ স্বীকার করিয়া নিয়াছেন বলিয়া অনুমান করা যায়। উহা ছাড়াও বিজ্ঞ আপীল আদালত রায়ে উল্লেখ করিয়াছেন দরখাস্তকারীগণ নালিশী জমির

পাশ আইলা (contiguous land owner) উহা অস্বীকার করিয়া প্রতিপক্ষ Respondents কোন আপত্তি আপীলে উত্থাপন করে নাই বিধায় দরখাস্তকারীগণ পাশ আইলা থাকার বিষয় আপীলের রায়ে সিদ্ধান্ত গৃহীত হইয়াছে। উপরের আলোচনা মতে সিদ্ধান্ত হইল যে, দরখাস্তকারীগণ নালিশী জমির পাশ আইলা উহা দরখাস্তকারীগণ প্রমাণ করিতে সমর্থ হইয়াছে।"

Thus, it appears that the learned Trial Court with well founded reasons has decided that the petitioners are contiguous land owner. In the memo of appeal of Miscellaneous Appeal No. 20 of 2000, nothing has been mentioned regarding that the petitioners are not contiguous land owner. Opposite party No. 1 has deposed as OPW- 1 in the trial and in his examination-in-chief, he has not denied that the petitioners are contiguous land owner. PWs also were not cross-examined on the point that the petitioners are not contiguous land owner. In spite of that, the finding of the Appellate Court that the petitioners have not proved themselves as contiguous land owner by filing *Mouja Map* (মৌজা ম্যাপ) is erroneous and such finding arises from misreading and non-consideration of evidence.

Secondly, the claim of the opposite party that the *Kabala* (কবলা) dated 25/06/1977 is not an out and out sale deed and it is a deed with condition of re-conveyance is to be proved by themselves. Regarding this point, learned Trial Court in the judgment dated 10/02/2000 held, "অত্র মোকদ্দমায় ১-৩ নং প্রতিপক্ষগণ পক্ষে একরারনামা প্রমাণের জন্য কোনো সাক্ষীকে পরীক্ষা করে নাই। বিজ্ঞ আপীল আদালত প্রতিপক্ষগণকে তর্কিত একরারনামা দলিল প্রমাণের সুযোগ দিয়া অত্র মোকদ্দমা পুন:বিচারে প্রেরণ করেন কিন্তু অত্র মোকদ্দমা পুন:বিচারে আসার পরে একরারনামা প্রমাণের জন্য প্রতিপক্ষ কোনো সাক্ষীকে আদালতে উপস্থিত করে নাই। প্রতিপক্ষগণ বিজ্ঞ আপীল আদালতের রায়ের নির্দেশকে যথাযথভাবে পালন না করায় সিদ্ধান্ত হইল যে, ২৫/০৬/১৯৭৬ ইং তারিখের কবলা দলিল ফেরৎ কবালা দলিল ছিল উহা প্রতিপক্ষগণ আদালতে প্রমাণ করিতে পারে নাই।"

So, it is clear from the findings of the Trial Court that the opposite party, having opportunity to prove that the disputed *Kabla* (কবলা) was not an out and out sale deed, did not try to prove it at the time of trial. In such circumstances, giving them further opportunity to prove it by sending back the case on remand is neither logical nor legal. The opposite party claims that opposite party Nos. 1 and 2 have re-conveyed the case land to the original owner opposite party No. 3 by registered deed of re-conveyance dated 23/09/1978. But it may be noticed here that when the pre-emption case was allowed by the Trial Court on 10/02/2000, opposite party Nos. 1 and 2 filed the Miscellaneous Appeal No. 20 of 2000 against that judgment and order. If the opposite party Nos. 1 and 2 actually had retransferred the land on 23/09/1978 to opposite party No. 3, then they had no reason to file the Miscellaneous Appeal No. 20 of 2000 on 21/05/2000 as they were divested of right, title interest in the case land by the retransfer deed as they claimed. If, they had retransferred the land on 23/09/1978 to opposite party No. 3, then naturally the Miscellaneous Appeal No. 20 of 2000 would have been filed by the opposite party No. 3. But opposite party No. 3 did not prefer any appeal against that judgment. Thus, their conduct proves that the agreement of re-conveyance and the deed of re-conveyance dated 23/09/1978 are all sham transaction for the purpose of defeating the right of pre-emption and the case land actually is being possessed by the opposite party Nos. 1 and 2 and that's why they have filed the Miscellaneous Appeal No. 20 of 2000 to protect their interest. As the disputed deed dated 25/06/1977 does not disclose anything regarding the condition of re-conveyance and as the opposite party, after getting ample chance, has not proved the *Ekrarnama* (একরারনামা) and deed re-conveyance by competent witness, learned Trial Court has rightly held that the

Kabla (কবলা) dated 25/06/1976 is an out and out sale deed and the deed of re-conveyance dated 23/09/1978 is a colourable transaction which will not be a clog to the right of pre-emption.

According to the provisions of Order 41 Rule 23, Appellate Court can remand the case only when the Trial Court has disposed of the case on a preliminary point. Provisions of that Rule may be read as follow:

> "Rule 23. Remand of the case by Appellate Court: Where the Court from whose decree an Appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, …….".

Thus, it is clear from that provision that where the Trial Court disposed of a case on clear findings on all issues, the remand order should not be passed by the Appellate Court with direction to allow a party to prove some documents. In the case of *Abu Syeed -Vs- Mujibur Rahman* [51 DLR 289], it was decided that a remand order cannot be passed to enable a party to adduce fresh evidence which he failed to do during hearing with numerous adjournments. In the case of *Haran Chandra -Vs- Ejhar Molla* [36 DLR 41], it was held that a remand order cannot be passed to give fresh opportunity to defeated litigant who has lost in a full and fair trial and has nothing to complain of, except the results of his own latches or misconduct. It has been held by our Apex Court in series of cases that remand order cannot be passed to give an opportunity to a party to fill up the *lacuna* of his case [53 DLR (AD) 110, 54 DLR (AD) 74, 1996 BLD (AD) 166]. Thus, in view of the provisions of our statutory law and case laws mentioned above, order of remand in the impugned judgment seems to inappropriate, unlawful, unreasonable and inadmissible.

It is well settled principle of law that a revisional Court may exercise its power when there is an error of law resulting in an error which occasioned failure of justice. Error of law also includes misreading and non consideration of material evidence. Learned Appellate Court by the impugned judgment and order remanded the case for the second time and the case was then already pending for twenty four years. The grounds upon which the case was remanded were neither legal nor logical as discussed earlier. Impugned judgment of the Appellate Court is based on misreading and non consideration of relevant laws, material evidence on record as well as the case record. In the instant case the Appellate Court manifestly erred in law resulting an error in the decision which occasioned failure of justice. I think, this is a proper case which calls for interference by this Court under section 115(1) of the Code of Civil Procedure, 1908.

Considering the facts and circumstances, I find merit in the Rule. So, the Rule deserves to be absolute.

In the result, the Rule is made absolute without any order as to costs.

The impugned judgment and order dated 16/06/2002, passed by the learned Joint District Judge, 1st Court, Kushtia in Miscellaneous Appeal No. 20 of 2000, is hereby *set aside* and those dated 10/02/2000 passed by the learned Senior Assistant Judge, Kumarkhali, Kushtia in Miscellaneous Case No. 122 of 1983 is hereby upheld and confirmed.

Concerned section of this Court is hereby directed to send down the lower Courts Records along with this judgment and order to the concerned Courts below immediately.