

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice Muhammad Imman Ali
Mr. Justice Mirza Hussain Haider
Mr. Justice Abu Bakar Siddiquee

CIVIL APPEAL NO. 18 OF 2014

(From the judgement and order dated the 28th day of November, 2012 passed by the High Court Division in Summary Suit No.5 of 2012).

Islami Bank Bangladesh Ltd. ... Appellant

= Versus =

Bengal Techno Leather Ltd. ... Respondent

For the Appellant : Mr. Tanvir Parvez
Advocate, instructed by
Syed Mahbubar Rahman
Advocate-on-Record

For the Respondent : Mrs. Madhumalati Chowdhury Barua
Advocate-on-Record

Date of hearing : The 23rd day of February, 2021

Date of judgement : The 25th day of February, 2021

J U D G E M E N T

MUHAMMAD IMMAN ALI, J: This Civil Appeal, by leave, is directed against the judgement and order dated 28.11.2012 passed by a Single Bench of the High Court Division in Summary Suit No.5 of 2012 rejecting the petitioner's application under Order VII Rule 10 of the Code of Civil Procedure, 1908 (the Code) for return of plaint to file the same before the District Court.

The facts of the case, in short, are that the respondent herein as plaintiff filed Summary Suit No.5 of 2012 before the High Court Division seeking a

decree against the petitioner for Tk. 21,00,81,000.00 which is the proceeds of a negotiable instrument drawn in the respondent's favour.

The main contention of the defendant, appellant herein, is that the procedure under Order XXXVII of the Code allows the High Court Division and the District Court concurrent power to apply the said provisions in the said Order. However, section 15 of the Code has provided the jurisdiction whereby every suit shall be instituted in the Court of lowest grade competent to try it. Following this provision, this suit shall be filed before the District Court and the plaint is, therefore, liable to be returned for filing the same in the District Court. In support of the contention, reliance was placed on the decision in **Bengal Techno Leather Consult Ltd. Vs. Bangladesh, 2005 BCR 133.**

After hearing the parties and considering the evidence and materials on record the High Court Division rejected the prayer for return of plaint by the impugned order dated 28.11.2012. The defendant then filed Civil Petition for Leave to Appeal No.37 of 2013 and leave was granted to consider the following submissions of the learned Advocate appearing on behalf of the petitioners:

“1. That the High Court Division committed serious illegality in passing the order dated 28.11.2012 in Summary Suit No.5 of 2012 by way of assuming jurisdiction on the said suit purportedly under Order XXXVII of the Code of Civil Procedure (the Code) without considering that Order XXXVII, Rule 1 of the Code neither confers any jurisdiction upon any Court for entertaining any suit, nor creates any forum for entertaining any suit, rather it provides for a specialised procedure applicable to the High Court Division and

District Court and the said Order does not have any bearing on choosing forum for instituting a summary suit, which must be instituted in the proper forum having jurisdiction in normal course of action under prevailing law of the land inclusive of the Civil Courts Act, 1887 read with section 15 of the Code and any other special law conferring jurisdiction for instituting suits. Moreover, when the High Court Division does not have any first instance jurisdiction except especially conferred by any statute, it does not have any jurisdiction to entertain the said summary suit.

2. That the High Court Division committed serious error in entertaining the said Summary Suit No.5 of 2012 when under Article 101 of the Constitution, the High Court Division can exercise only such original, appellate and other jurisdictions and powers as conferred on it by the Constitution or other law. But neither any statute has conferred any jurisdiction upon the High Court Division to entertain a suit for recovery of money on Bill of Exchange or negotiable instrument, nor Order XXXVII of the Code confers any jurisdiction upon the High Court Division to entertain such suit, not to speak of conferring concurrent jurisdiction upon the High Court Division and District Court since the High Court Division does not have Ordinary Original Jurisdiction or Extra-Ordinary Jurisdiction to entertain any suit as a Court of first instance but only has Statutory Original Jurisdiction as conferred by a statute. Therefore, the order dated 28.11.2012 passed by the High Court Division assuming jurisdiction on the said summary suit is liable to be set aside and the said summary suit is liable to be rejected.

3. That Order XXXVII of the Code does not create any forum for assuming jurisdiction over a suit, nor does it provide for any option to choose any forum, rather Order XXXVII provides for an option to choose the procedure, whether the suit in question to be disposed of by the Court having jurisdiction with the summary procedure laid down in Order XXXVII of the Code, if the said Order XXXVII applies to the forum in question, or in accordance with ordinary procedure and therefore, the High Court Division committed illegality in assuming jurisdiction on the said summary suit under a serious misconception of law that Order XXXVII created a forum and as such, the said order dated 28.11.2012 passed by the High Court Division in Summary Suit No.5 of 2012 is liable to be set aside.”

Mr. Tanvir Parvez, learned Advocate appearing on behalf of the appellant made submissions in line with the grounds upon which leave was granted. He also submitted that article 101 of the Constitution provides that jurisdiction of the High Court Division on the original side must be conferred on it by the Constitution or by any other law. He added that Order XXXVII of the Code does not confer jurisdiction but only provides the procedures to be followed in case of summary procedure for negotiable instruments. And those procedures shall be applicable only in the High Court Division and the District Court when any matter is brought before that Court. But filing of the suit must be in accordance with section 15 of the Code in the lowest level. In support of his contention, he has referred to the decision in the case of **Bengal Techno Consult Vs. The Registrar Supreme Court or Bangladesh, BCR (2005) High Court Division 133** where it was held that under the provisions of Order XXXVII of the Code suits are to be filed at the lowest level

competent to try it, although it was observed that both the High Court Division and the Court of District Judge have concurrent jurisdiction to entertain such suits.

Mrs. Madhumalati Chowdhury Barua, learned Advocate-on-Record appearing for the respondent made submissions in support of the impugned judgement and order of the High Court Division. She also submitted that the case reported in 2005 BCR 133 is distinguishable from the case in hand since that decision was passed under writ jurisdiction and the observation referred to by the defendant is nothing but on *obiter dicta*. She further submitted that it is abundantly clear that all these suits can be filed before the High Court Division as well as before the District Court and this has been made clear in the case of **Javed Traders and another Vs. Premier Soap Factory Ltd. and another, 44 DLR Page 490**. She submitted that the purpose of the summary procedure is to ensure expeditious disposal of suits upon bill of exchange or promissory note etc. and specific category of suits are being dealt with under Order XXXVII of the Code. She lastly submitted that the scheme of Order XXXVII is summary one and a departure from the procedure provided for ordinary suits (44 DLR 490). In the instant case there being no application filed within time mentioned in the summons as such High Court Division did not commit any error of law in rejecting the application for returning the plaint. On the other hand, if the application is allowed the jurisdiction of the High Court Division provided by Order XXXVII of the Code shall be taken away.

We have considered the submissions of the learned Advocates appearing for the parties concerned, perused the impugned judgement and order of the High Court Division and other connected papers on record.

At the outset we should point out that the body of a statute and the rules framed thereunder carry different status and significance. In the case of **Chandra Bhushan Misra Vs. Jayatri Devi, AIR 1969 All 142**, the Full Bench of the Allahabad High Court observed as follows:

“Now, what is of significance is that the sections of the Act, namely the "body of the Code", can be altered by legislation only. Legislation may be effected by Parliament or by a State Legislature. The sections cannot be altered or amended by the High Courts. In that sense the "body of the Code" consists of provisions which are fundamental and less easily amenable to amendment than the rules contained in the First Schedule. The sections enjoy a certain status and a related degree of permanency denied to the rules contained in the First Schedule which can be annulled, altered or added to by rules made by the High Courts under Section 122. The power to annul, modify or add to the rules contained in the First Schedule has been conferred upon the High Court for the purpose of answering local needs and adapting the First Schedule to effectively serve that purpose.”

The same section 122 of the Code of Civil Procedure being in force in our country allows our Supreme Court to ‘annul, alter or add to all or any of the rules in the First Schedule to the Code of Civil Procedure.’

The Allahabad High Court then referred to the observation of Sir Lawrence Jenkins, C. J. in **Mani Mohan Mandal v. Ramtaran Mandal, AIR 1917 Cal 657**, as follows:

"The body of the Code is fundamental and is unalterable except by the Legislature; the rules are concerned with details and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised.”

Hence, it follows that jurisdiction is determined in accordance with the body of the Code of Civil Procedure. Order XXXVII of the Code of Civil Procedure relates to the summary procedure on negotiable instruments. Rule 1 of the said Order provides as follows:

“1. This order shall apply only to the High Court Division and to the District Court.”

Rule 2 of Order XXXVII provides that if the plaintiff desires to proceed to file a suit for bills of exchange, hundies or promissory notes under the summary provision, the plaint in such a suit may be presented in the form prescribed. But in the Order there is no specific or special form of plaint mentioned. However, rule 2 provides that the summons shall be in Form No.4 in Appendix B to the Code. Hence the plaintiff has the option to file the suit under the summary procedure or under the normal procedure for any ordinary suit.

The question before us is whether this provision gives concurrent jurisdiction to the High Court Division and to the District Court or merely relates to procedure for filing a suit concerning negotiable instruments, the question of jurisdiction being governed by section 15 of the Code.

We note that in the application filed by the defendant under Order VII, rule 10 of the Code for return of the plaint, the defendant, appellant herein, admitted that both the High Court Division and the District Judge have concurrent jurisdiction, but averred that section 15 of the Code provides that the suit is liable to be instituted before the lowest tier competent to try it, and that was the argument placed there. However, leave has been granted to consider whether Order XXXVII rule 1 at all confers any jurisdiction upon any court for entertaining such a suit. The succinct argument before us is that

Order XXXVII of the Code only provides for procedure to be followed in a case dealt with under the summary jurisdiction, and that jurisdiction is to be determined in accordance with section 15 of the Code.

The High Court Division assumed jurisdiction relying upon the decision in the case of **Javed Traders** cited above, observing with approval that, “The scheme of Or. XXXVII is summary one and a departure from the procedure provided for ordinary suit.” At the same time the High Court Division distinguished the case of **Bengal Techno Consult** cited above on the ground that the observation in that case made in Writ Petition No.577 of 2004 was mere *obiter dicta*.

Upon scrutiny, we find that the **Javed Traders** case was one where the suit under Order XXXVII was filed before the District Judge and no question of jurisdiction arose. The High Court Division in that case merely found that Order XXXVII provides a separate procedure to be followed in case of summary suits. This decision, therefore, does not support the view that the High Court Division and District Court have concurrent jurisdiction to entertain summary suits.

There is no dispute that Order XXXVII provides a set of procedures to be followed in the case of summary suits, but it does not specify where any such suit is to be filed. In the case of **Bengal Techno Consult**, cited above, the petitioner filed the plaint under Order XXXVII, rule 1 of the Code before the Registrar, Supreme Court of Bangladesh. On refusal by the Registrar to accept the plaint, the petitioner moved the High Court Division in writ jurisdiction. In disposing of the writ petition it was held that “both the High Court Division of the Supreme Court of Bangladesh and the Court of District

Judge have concurrent jurisdiction to entertain such suits but as per Civil Procedure Code the suits are to be filed at the lowest level.”

Since the issue involved in that case concerned the question of jurisdiction of the High Court Division and District Court to hear suits under the summary procedure provided by Order XXXVII of the Code, in the instant case the High Court Division erroneously discarded that decision merely because it was considered *obiter dicta*. There was no indication as to why the decision was considered to be *obiter dicta*. However, the question of concurrent jurisdiction will be discussed below.

One other case that came to our notice during the hearing of the appeal was **Ansarul Hoque Vs. Agrani Bank, 50 DLR 263**. In that case the High Court Division hearing several applications, including one filed by **Bengal Techno Consult**, as summary suits, held that, “Section 15 of the Code of Civil Procedure obliges the plaintiff to choose the court of the lowest grade. Although the court of the higher grade is also competent to try the suit, the plaintiff cannot in view of section 15, compel the court to entertain the suit: that court may either entertain the suit and try it or require the plaintiff to obey section 15 and return the plaint.” Here the High Court Division appeared to give the option to that Division to either hear the suit or return the plaint. The result was that, in view of section 15 of the Code, all the plaints were returned by the High Court Division for presenting the same to the District Court. However, we feel constrained to respectfully differ with the view that the higher court has an option to entertain the suit or may refuse to entertain it. If, for argument’s sake, Order XXXVII of the Code provides the High Court Division with jurisdiction to hear the suit, then why would it exercise discretion not to hear it to the detriment of the plaintiff who has taken the

trouble to file it there? In our view Order XXXVII of the Code does not confer jurisdiction nor provides any discretion upon the court where the suit is filed to hear the suit or to decline to hear it. The Order does not indicate concurrent jurisdiction of the High Court Division and the District Court. The Order does not deal with jurisdiction at all.

There is yet another reported decision in the case of **Khan and Co Limited vs. National Bank Ltd., 3 BLC (1998) 51** where **Ansarul Hoque** had filed three out of the nine applications before the High Court Division under Order XXXVII of the Code. All the applications were rejected with a direction to return the complaints to the petitioners for presenting the same to the District Court.

It appears that in a similar vein **Ansarul Hoque** had filed Writ Petition No.5543 of 2000 to force Agrani Bank to pay money due against an FDR issued by that bank. The Rule was made absolute by the High Court Division. The matter came before this Division in Civil Appeal No.323 of 2002 [**Agrani Bank Vs. Ansarul Hoque and ors. 58 DLR (AD) 143**]. This Division held that the respondent No. 1 (the writ petitioner – Ansarul Hoque) had suppressed the fact that he already filed Summary Suit No.6 of 1996 before the District Judge, which was very much pending at the time of filing of the writ petition and that this suppression disentitled him from claiming any relief in writ jurisdiction as there could be conflicting decisions. It was observed that the High Court Division should not have entertained the dispute in question.

The case of **Lever Brothers Pakistan Ltd. Rock Court, Victoria Road, Karachi vs. Noor Ali Rahim, Pakistan Coconut Co. Abhoynagar, Jessore, 25 DLR 134** sheds some light on the issue before us. The issue in

that case was about place of filing the suit following summary procedure. The suit concerned a promissory note executed and delivered to the plaintiff at Dhaka and was made payable on demand to the plaintiff in Karachi which is the place of business of the plaintiff. The defendants carry on business in Jessore. The question that arose was whether the suit could be filed in Jessore. It was observed by the High Court (per A.M. Sayem J. as his Lordship was then) as follows:

“It will thus be evident that Order 37, which says nothing about the place of suing, provides by rule 7 that except to the extent specified in rules 1 to 6 the procedure in suits under this Order shall be the same as the procedure in suits instituted in the ordinary manner. There can be no logic therefore, in support of the proposition that clause (a) of sec. 20 which authorises trial of suits by courts within whose local jurisdiction the defendant resides or carries on business, would be inapplicable to suits under Order 37 of the Code.” The case was ultimately decided by reference to illustration (b) to section 20 of the Code and it was held that the suit could be filed in Jessore.

For ease of reference, we quote below section 20 illustration (b), which in fact refers to filing of a suit in respect of a promissory note and now with the amendment of place names reads as follows:

“(b) A resides at [Cox's Bazar], B at Dhaka and C at [Chittagong]. A, B and C being together at [Khulna], B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C [at Khulna], where the cause of action arose. He may also sue them at Dhaka, where B resides, or at [Chittagong], where C resides; but in each of these cases, if the non-

resident defendant objects, the suit cannot proceed without the leave of the Court.”

There can be no doubt that Order XXXVII provides special procedures to be followed in the case of trial of summary suits, which are different from the general procedures laid down for ordinary suits. It is the plaintiff’s choice whether to invoke the summary procedure. He may well choose to file his suit following the ordinary procedure of filing suits as provided by Order XXXVII, rule (2) of the Code. If he chooses to file the suit following the summary procedure under Order XXXVII of the Code, then the applicable procedure will be as set out in that Order. The procedure provided elsewhere in the Code will apply if not specifically mentioned in this Order (see rule 7 of Order XXXVII). But for the purpose of filing the suit, the place of filing will be governed by sections 15 to 24 of the Code.

With respect, we are inclined to disagree with the views of the High Court Division regarding concurrent jurisdiction of the High Court Division and District Court as mentioned in the decisions in the **Bengal Techno** and **Ansarul Hoque** cases cited above to the extent that Order XXXVII does not say anything about jurisdiction of any court to hear summary suits. The Order does not specify the place of filing of any suit following the summary procedure detailed therein. In this regard we may refer to Mahmudul Islam’s treatise “**The Code of Civil Procedure**” **Second Edition, Volume 2, page 1671**. In his comment on Order XXXVII, he states as follows: “*In a suit under this Order all the procedures described in the Code for the ordinary suits, unless inconsistent with the express provisions made in this Order, will*

apply. Or. XXXVII does not say anything about the place of suing. So the provisions of the Code regarding the place of suing will apply.”

We respectfully agree with the view expressed by Mr Mahmudul Islam regarding place of filing a suit under the summary procedure. Such view is fortified by the decision in the **Lever Brothers** case cited above.

The learned Advocate for the appellant additionally argued that article 101 of the Constitution circumscribes the matters which may be brought before the High Court Division namely, original, appellate, and other jurisdictions and powers as are conferred on it by the Constitution or any other law.

In this regard, we note that, apart from the Constitution itself, there are several statutes which provide for matters to be brought for trial directly before the High Court Division as a Court of first instance. In this category fall matters, for example under the Company Ain, 1994, Admiralty Court Ain, 2000, Trademark Ain 2009, the Patents and Designs Act 1911 and Divorce Act 1869. Suffice it to say that the law must specifically give jurisdiction to the High Court Division. Hence, we find substance in the submission of the learned Advocate for the appellant.

The question that springs to mind is, why the summary procedure under Order XXXVII has been made applicable to the High Court Division if it has not the jurisdiction to hear summary suits? The answer lies in history. In essence, the High Courts of British India would have original jurisdiction in civil matters only where the pecuniary ceiling is beyond the jurisdiction of the District Court. We must bear in mind that the Code of Civil Procedure was enacted in 1908. At that time, the existing High Courts had jurisdiction to try suits as courts of first instance where the value of the suit was above the

specified pecuniary limit. This is the case still in Pakistan where, unlike Bangladesh, the pecuniary jurisdiction of the District Court is limited. In the case of Bangladesh, the pecuniary jurisdiction of the Judge hearing original civil suits is unlimited, hence, there is no question of any civil suit being filed before the High Court Division, other than those required by statute to be filed there. To our knowledge, the only other civil matter that would come to the High Court Division for trial would be under the provision of article 110 of the Constitution and that is where the procedures of Order XXXVII would be applicable.

Coincidentally, it transpires from a decision reported in (1997) 17 BLD (AD) 143 - **Ansarul Haque Vs. Abdur Rahim and 4 others**, that the petitioner **Ansarul Haque** is the Managing Director of **Bengal Techno Consult**. He is the same Ansarul Hoque in the case of **Ansarul vs. Agrani Bank**. In the case of **Khan and Co Limited vs. National Bank Ltd.**, 3 BLC (1998) 51 the very same **Ansarul Hoque** had filed three out of the nine applications before the High Court Division under Order XXXVII of the Code. All the applications in the cases mentioned above were rejected with a direction to return the complaints to the petitioners for presenting the same before the District Court. It transpires that his several attempts to file summary suits before the High Court Division failed in 1997 in at least two cases moved before the High Court Division and again in 2005. Having filed a summary suit in 1996 before the District Court, he surreptitiously tried to get payment against the same FDR by filing a writ petition before the High Court Division in the year 2000. His complaint in a summary suit having been returned several times, in 1997 and again in 2005, the present is yet another attempt to file a summary suit before the High Court Division. Of course, there was also the

attempt in the year 2000 to totally bypass the summary suit that he had himself filed by enforcing payment through a surreptitious writ petition. Evidently the said **Ansarul Hoque**'s attempts to file summary suits before the High Court Division on several earlier occasions, despite his similar applications being refused several times, demonstrates that he is a vexatious litigant. Any future attempt in a similar manner by the present respondent shall be dealt with severely in accordance with law.

We have also consulted the cause list off the High Court Division for 28.11.2012. We find from page 7 of the index for that date that Mr Justice Md. Rezaul Hasan would sit in courtroom number 26 and his list of cases for that date appear from page 247 onwards. The index shows that he would hear the following matters:

শুনানির জন্য আদিম অধিক্ষেত্রাধীন বিষয়; সাকসেশন আইন ১৯২৫ অনুযায়ী ইচ্ছাপত্র ও ইচ্ছাপত্র ব্যতিরেকে মৃত ব্যক্তির বিষয় বস্তুর অধিক্ষেত্র ; বিবাহ বিচ্ছেদ আইন ১৮৬৯ অনুযায়ী মোকদ্দমা ; ১৯১৩ ও ১৯৯৪ ইং সনের কোম্পানি আইন অনুযায়ী আবেদন পত্র এবং সহকারি জজ ব্যতীত অন্য বিচারকের ডিক্রি ও আদেশের বিরুদ্ধে অনূর্ধ্ব ৪,০০,০০০ টাকা মানের এবং সহকারি জজ এর মান নিরপেক্ষ ডিক্রি ও আদেশের বিরুদ্ধে রিভিশন মোকদ্দমা।

We note that Page 247 of the cause list contains the hearing list of Mr Justice Md. Rezaul Hasan for that date and his jurisdiction is given as follows:

বিচারপতি মো: রেজাউল হাসান

(২৬ নং বিচার কক্ষ)

যে প্রকার মামলা শুনানি হইবে : শুনানির জন্য আদিম অধিক্ষেত্রাধীন বিষয়; সাকসেশন আইন ১৯২৫ অনুযায়ী ইচ্ছাপত্র ও ইচ্ছাপত্র ব্যতিরেকে মৃত ব্যক্তির বিষয়বস্তুর অধিক্ষেত্র ; বিবাহ বিচ্ছেদ আইন ১৮৬৯ অনুযায়ী মোকদ্দমা ; ১৯৪০ ইং সনের ট্রেডমার্ক আইনের অধীন আবেদনপত্র ; ১৯১৩ ও ১৯৯৪ ইং সনের কোম্পানি আইন অনুযায়ী আবেদন পত্র ; ব্যাংক কোম্পানি আইন (১৯৯১ ইং সনের ১৪ নং আইন) অনুযায়ী আবেদনপত্র ; সালিশ আইন ২০০১ (২০০১ ইং সনের ১ নং আইন) অনুযায়ী আপিল ও আবেদনপত্র এবং সহকারি জজ ব্যতীত অন্য বিচারকের ডিক্রি ও আদেশের বিরুদ্ধে অনূর্ধ্ব ৪,০০,০০০ টাকা মানের এবং সহকারি জজ এর মান নিরপেক্ষ ডিক্রি ও আদেশের বিরুদ্ধে দেওয়ানী রিভিশন মোকদ্দমা এবং উপরে উল্লেখিত বিষয়াদি এসংক্রান্ত রোল ও আবেদন পত্র।

Thus, it appears that there was no jurisdiction given in that cause list for Mr. Justice Md. Rezaul Hasan to hear any summary suit. Hence, on this ground also it appears that the High Court Division acted without jurisdiction.

We note also that item No.1 of the list for Mr. Justice Md. Rezaul Hasan for that day is Summary Suit No.02/2012 for appearance of parties. The petitioner involved in that suit is none other than Ansarul Haque and the suit is against Manager, Agrani Bank. Be that as it may, the High Court Division did not have jurisdiction allocated to it to hear such summary suits.

In view of the above discussion, we find merit in the appeal, which is allowed, without, however, any order as to costs. The impugned order of the High Court Division is hereby set aside. The application for return of plaint is allowed. The plaintiff, if so advised, may file the suit before any court competent to hear the matter in accordance with law.

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