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

CIVIL REVISION NO. 1199 OF 2017

IN THE MATTER OF:
An application under Section 115(1) of the Code of Civil Procedure.

-AND-

IN THE MATTER OF :
Mahfuzar Rahman
.. ... Petitioner

-Versus-

Moshiur Rahman and another
... Opposite parties

Mr. Meer Ahmed Shoaib, Advocate
……For the petitioner

No one appears
.....For opposite party No. 1.

Heard and Judgment on: 18.07.2019

Present:

Mr. Justice Md. Badruzzaman

On an application under section 115(1) of the Code of Civil Procedure, this rule was issued calling upon opposite party No. 1 to show cause as to why judgment and decree dated 06.09.2016 passed by the learned Joint District Judge, Nilphamari in Other Class Appeal No. 48 of 2014, disallowing the appeal and affirming those dated 11.09.2005 passed by the learned Senior Assistant Judge, Nilphamari Sadar, Nilphamari in Other Class Suit No. 57 of 2001, dismissing the suit for default, should not be set aside.

At the time of issuance of rule, this Court vide ad-interim order dated 10.04.2017 directed the parties to maintain status-quo in respect of possession and position of the suit land for a period of 1(one) year which was, subsequently, extended till disposal of the rule.

Short facts, relevant for the purpose of disposal of this rule, are that the petitioner as plaintiff instituted Other Class Suit No. 57 of 2001 against opposite party No.1 and another before the learned

Senior Assistant Judge, Nilphamari Sadar, Nilphamari seeking a declaration that the deed of exchange, being No. 3403 dated 15.04.2001, was collusive, ineffective, illegal and not binding upon the plaintiff. Opposite party No.1, as defendant, contested the said suit by filing written statement denying material averments in the plaint.

Eventually, the suit was fixed for peremptory hearing on 27.04.2005. On that date the plaintiff filed an application for adjournment, and the learned Judge of the trial Court allowed the said application with a cost of Tk. 200/-. On the next date i.e on 07.06.2005, the plaintiff again prayed for time without depositing the said cost and the trial Court vide order dated 07.06.2005, allowed the said application with another cost of Tk.200/- and fixed the next date on 26.07.2005 for peremptory hearing. On 26.07.2005 the plaintiff was examined as P.W.1 and, thereafter, another date was fixed and on that date the plaintiff failed to appear before the Court and took time. Thereafter, another date for further hearing was fixed on 11.09.2005. On that date also the plaintiff prayed for adjournment and trial Court, after perusing the records, came to the conclusion that in the meantime three adjournments were granted with costs but the plaintiff failed to pay the said costs and that there was no scope, under law, to adjourn the case and, accordingly, vide order dated 11.09.2005 dismissed the suit for default under sub-rule (4) of rule 1 of Order XVII of the Code of Civil Procedure [wrongly written in the order as section 7(4) of the Code of Civil Procedure (Third Amendment) Act, 2003].

Being aggrieved by the said judgment and decree dated 11.09.2005, the plaintiff preferred Other Class Appeal No. 48 of 2005 before the learned District Judge, Nilphamari which was, subsequently, renumbered as Other Class Appeal No. 48 of 2014. The said appeal was heard and disposed of by the learned Joint District Judge, Nilphamari and upon hearing both the parties and considering the materials on records, the appellate Court found no illegality in the

judgment passed by the trial Court and, accordingly, disallowed the appeal by the impugned judgment and decree dated 06.09.2016.

Being aggrieved by and dissatisfied with the said judgment and decree, the plaintiff has come up with this application under section 115(1) of the Code of Civil Procedure and obtained the aforementioned rule and order of status-quo.

Mr. Meer Ahmad Shoaib, learned Advocate appearing for the petitioner by taking me to the judgments of the courts below and other materials on record, submits that inadvertently the costs could not be deposited by the plaintiff which should be considered with a lenient view by the courts below and the plaintiff should have been given an opportunity to contest the said suit and as such both the courts below committed illegality. Learned Advocate further submits that the petitioner is now willing to pay some costs if the rule is disposed of directing the trial Court to dispose of the suit on merit.

No one appears to oppose the rule.

I have perused the revisional application, the judgments passed by the courts below, materials available on record and also considered the submissions as advanced by the learned Advocate for the petitioner. Before going into the merit of the case it would be beneficial to look into the relevant provisions of law regarding adjournments in a suit.

Procedure in regards adjournment of hearing in a suit is governed by Order XVII of the Code of Civil Procedure in particular under sub-rules (1) and (2) of rule 1. Before 2003, it was the discretionary power of the Court to adjourn hearing of a suit and the Court could adjourn the hearing of the suit *suo motu* without being applied for by any of the parties. For better understanding, the said provisions (before amendment) under Order XVII of the Code are quoted below:

> " 1. (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.
>
> (2) In every such case the Court shall fix a date for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:
>
> Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

It appears, under the aforesaid provisions of rule 1 of Order XVII of the Code of Civil Procedure, the Court had the discretionary power to grant adjournments on the prayer of either of the parties to a suit or without being applied for by any of the parties. As the granting of adjournment being discretionary, the superior court would not interfere with the exercise of such discretion, specially when adequate reasoning were given. Such type of adjournments would cause delay in disposing of a suit. Keeping the provisions under sub-rules (1) and (2) of rule 1 of Order XVII unchanged, the Parliament added sub-rules (3), (4) and (6) in rule 1 of Order XVII of the Code in 2003 by 'The Code of Civil Procedure (Third Amendment) Act, 2003 narrowing down the discretion of the court in regards granting adjournments of hearing in a suit. For ready reference, those new provisions are quoted below:

> "(3) Notwithstanding anything contained in sub-rules (1) and (2), the Court shall not grant more than six adjournments in a suit before peremptory hearing at the instance of either party to the suit, and any adjournment granted to a party beyond the aforesaid limit shall make such party liable to pay a cost of not less than two hundred taka and not more than one thousand taka to the other party, within time to be specified by it;

noncompliance with which, by the plaintiff shall render the suit liable to be dismissed and, by the defendant shall render the suit liable to be disposed of ex parte:

Provided that the Court shall not grant more than three adjournments to a party even with cost under this rule.

(4) Notwithstanding anything contained in the Code, the Court shall not grant any adjournment at the peremptory hearing stage and thereafter in a suit at the instance of either party to the suit:

Provided that if for ends of justice any adjournment is granted to a party under this sub-rule, the Court shall direct that party to pay a cost of not less than two hundred taka and not more than one thousand taka to the other party, within time to be specified by it, noncompliance with which, by the plaintiff shall render the suit liable to be dismissed and, by the defendant shall render the suit liable to be disposed of *ex parte*:

Provided further that the Court shall not grant more than three adjournments to a party even with cost under the above proviso.

(5) .....

(6) The Court shall not, of its own, order any adjournment under this rule without recording reasons therefor.

(7) .....

The aforesaid provisions under sub-rules (3) to (4) of rule 1 of Order XVII of the Code are clear and unambiguous which narrowed down the discretion of the Court in granting adjournments in a suit. The said two sub-rules have been introduced for preventing the litigants from taking unnecessary adjournments in a suit as well as for speedy disposal of suit. The amended provisions prescribe as to how many adjournments can be allowed in a suit. Under sub-rule (3), the Court is empowered to grant six adjournments before peremptory

hearing of a suit at the instance of either party to the suit but beyond the aforesaid limit, the Court is not empowered to grant adjournment without a cost of not less than two hundred taka and not more than one thousand taka and without specifying time. But the Court is prevented from granting more than three adjournments to a party even with costs as specified.

Provisions under sub-rule (4) of rule 1 of Order XVII of the Code is more strict about granting adjournment at peremptory hearing stage of a suit by inserting the words therein '*notwithstanding anything contained in the Code, the Court shall not grant any adjournment at the preemptory hearing stage and thereafter in a suit at the instance of either party to the suit'*.

Though the newly added sub-rule (4) prohibits any adjournment at the stage of peremptory hearing, but by adding the first proviso therein such restriction has been relaxed by empowering the Court to grant adjournment with a cost of not less than two hundred taka and not more than one thousand taka to the other party, within time to be specified by the Court and for ends of justice. If the plaintiff fails to comply with such order, the suit shall be dismissed and in case of defendant, the suit shall be disposed of ex-parte. But the second proviso to the said sub-rule (4) again restricted the power of the Court providing that the Court shall not grant more than three adjournments to a party even with cost under the first proviso.

Since, under sub-rules (3) and (4) of rule 1 of Order XVII of the Code, consequence against noncompliance of the Court's order allowing adjournment with cost has been provided therein in such a manner that for such noncompliance on the part of the plaintiff shall render the suit liable to be dismissed and on the part of the defendant shall render the suit liable to be disposed of *ex parte,* the said provisions should be construed as mandatory provisions of law and in that view of the matter the Court becomes powerless in exercising discretionary power. However, the said provisions vests discretionary

power upon the Court only as regards imposition of the quantum of cost within the range stipulated in sub-rules (3) and (4) and specification of time limit for depositing such cost.

On a combined reading of sub-rules (3) and (4) of rule 1 of Order XVII of the Code of Civil Procedure, it appears that the law in clear terms curtailed the power of the Court in granting adjournment prayers of the parties to the suit. If the Court, before or after peremptory hearing of a suit, allows adjournment to a party with costs with a direction to deposit the same within some specified time in exercising power under sub-rules (3) and (4) and the plaintiff fails to comply with such order, the Court shall have no option but to dismiss the suit and in case of defendant, dispose of the suit *ex-parte*.

In the instant case, it appears that the suit was fixed for peremptory hearing on 27.04.2005 and on that date on the prayer of the plaintiff, the learned Judge of the trial Court adjourned the hearing with a cost of Tk. 200/- fixing on 07.06.2005 for peremptory hearing and on that date the plaintiff prayed for time without depositing the said cost and the trial Court again adjourned the hearing with cost of Tk.200/- and fixed the next date on 26.07.2005 for peremptory hearing. On 26.07.2005, the plaintiff was examined as P.W.1 and thereafter, another date was fixed. The certified copies of the order dated 26.7.2005 and order of the next date have not been annexed to the revisional application. The learned Advocate for the petitioner could not also inform me as to what happened on that two dates. However, the next date was fixed on 11.09.2005 for further hearing. On that date the plaintiff prayed for adjournment and the trial Court, after perusing the records, dismissed the suit for default. The relevant finding of the trial Court is quoted below:

> " অদ্য মোকদ্দমাটি বাদীপক্ষের ২০০/- টাকা মুলতবী খরচা দাখিল সহ অবশিষ্ট চুড়ান্ড় শুনানীর জন্য দিন ধার্য্য আছে। বিবাদীপক্ষ হাজিরা দিয়াছেন। বাদীপক্ষ মুলতবী খরচার টাকা দাখিল না করিয়াই সত্যপাঠ যুক্ত এক দরখাস্ড় দাখিল করিয়া উহাতে বর্নিত কারনে শুনানীর জন্য সময়ের প্রার্থনা করেন। অপরপক্ষ ঘোরতর আপত্তিসহ অবগত আছেন। দাখিলী দরখাস্ড় ও মোকদ্দমার নথি পর্যবেক্ষন করিলাম

> এবং বিজ্ঞ আইনজীবীগনের বক্তব্য শ্রবন করিলাম। উক্ত পর্যবেক্ষনে দেখা যায় যে, বাদী পক্ষ মোকদ্দমার চুড়ান্ড় শুনানীর পর্যায়ে ইতোমধ্যেই খরচাসহ তিনবার মুলতবী প্রাপ্ত হইয়াছেন। তদুপরি বাদীপক্ষ মুলতবী খরচাও দাখিল করেন নাই। উপরোক্ত কারনে বাদীপক্ষের দরখাস্ড় নামঞ্জুর করা গেল এবং মুলতবী খরচার টাকা দাখিল না করায় মোকদ্দমাটি The Code of Civil Procedure (Third Amendment) Act, 2003 এর ৭(৪) ধারার বিধান অনুযায়ী খারিজ যোগ্য হইতেছে।"

On perusal of the aforesaid finding of the trial Court appears that at peremptory hearing stage of the suit the plaintiff-petitioner was allowed three adjournments with costs but the plaintiff did not deposit such costs and failed to comply with such order of the Court and accordingly, the trial Court came to the conclusion that there was no scope, under section 7(4) of 'The Code of Civil Procedure (Third Amendment) Act, 2003, to allow further adjournment to the plaintiff at that stage and, accordingly, dismissed the suit for default. It also appears that though the learned Judge of the trial Court on a misconception of law made wrong quotation of law in his judgment, but rightly dismissed the suit in view of the provisions under sub-rule (4) of rule 1 of Order XVII of the Code of Civil Procedure. Mere misquotation of law in an otherwise lawful order cannot make the order illegal.

It is settled principle that when a provision of law in a statute is amended by a subsequent-Amendment Act and such amended provision comes into force, the subsequent amended provision becomes part of the original statute. In view of the matter while quoting such amended provision in any order or judgment, the Court must quote the provision under original statute. In the instant case above amended provisions regarding adjournment in the Code of Civil Procedure was made in 2003, as stated above. The trial Court should have mentioned in the impugned order as 'sub-rule (4) of rule 1 of Order XVII of the Code of Civil Procedure' instead of "section 7(4) of The Code of Civil Procedure (Third Amendment) Act, 2003" by which the sub-rule (4) has been added in Order XVII under rule 1. It will not be out of context to say that such type of mistake is nothing

but a callousness on the part of the learned presiding Judge. It should be borne in mind that being a judicial officer, the learned Judge should have been cautious while making quotation of law in his judgment. If such types of mistakes are committed by a judicial officer of the lower judiciary, the public perception about the image of the concern Judge as well as the lower judiciary would be tarnished.

On perusal of the impugned judgment of the appellate Court, it appears that the appellate Court upon proper appreciation of factual and legal aspect of the case also found no illegality in the judgment of the trial Court and accordingly, arrived at correct decision for which no interference is called for by this Court.

In view of the above discussions, I find no merit in the rule.

In the result, the rule is discharged. The order of status-quo granted earlier is vacated.

Send down the LCR at once.

(Md. Badruzzaman J)