Present:

Mr. Justice Farid Ahmed
&
Mr. Justice Muhammad Khurshid Alam Sarkar.

FIRST APPEAL NO. 30 OF 2014.

Zohra Begum and others ....Appellants.

-Versus-

Anisurzaman and others ....Respondents.

Mr. Md. Mahbub Ali with
Mr. Md. Ziaul Haque, Advocates,
...For the appellants.
Mr. Md. Abdul Halim Chaklader with
Mr. Shaikh Khairul Anam, Advocates,
... For the respondents.

Heard on 11.09.2014, 19.10.2014, 20.10.2014, 22.10.2014 and Judgment on 28.10.2014.

MUHAMMAD KHURSHID ALAM SARKAR, J:

This appeal, at the instance of the plaintiffs-appellants, has been preferred against the judgement and decree dated 01.12.2013 passed in Other Suit No. 145 of 2004 by the learned Joint District Judge, 2rd Court, Chittagong, rejecting the plaint under Section 151 of the Code of Civil Procedure, 1908.

Although the above cause title of this judgement inscribes the words "Appellants" and "Respondents", however, for ease of reference, we would be addressing the appellants hereinafter as 'the plaintiff' given that at the time of institution of the suit there

was a lone plaintiff and the present plaintiffs-appellants have been substituted as the heirs of the said single 'plaintiff' and, also, the respondents would be referred to hereinafter as 'the defendant' given that it is only defendant no. 1 who registered his appearance in the trial court and the plaint was rejected at his stance.

The factual matrix on which the suit is founded are that on 26.07.2004 one Mr. Abdul Barek, who is the predecessor of the appellants, as plaintiff, instituted Other Suit No. 145 of 2004 for a declaration of title to the suit land against the respondents stating, *inter alia*, that while he had been owning and possessing 21 decimals of land of PS Khatian No. $\frac{707}{738}$ of Mouza Rampur under the Police Station of Doublemooring of Chittagong, he sold out 9 decimals therefrom to the defendant vide two registered deeds being numbered 8810 and 8894 dated 22.07.1977 and 25.07.1977 respectively and 2 decimals of land to Mr. Habibur Rahman and, thereafter, continued to peacefully own and possess the rest 10 decimals of land. However, on 03.07.2004 when he visited the local land office to pay the rent for the said 10 decimals of land, he was informed that the lands were not recorded in his name in the BS Khatain and, under the circumstances, he collected a certified copy of the BS Khatian and found that 19 decimals of the

suit land had been recorded in the name of the defendant by transforming the PS Khatian's plots into newly-created plot nos. 1723, 1724 and 1725 under BS Khatian no. 53. Hence, the suit.

On 29.09.2005 the respondents filed written statement controverting the material allegations made in the plaint and having denied the claim of petitioner over the suit land prayed for dismissal of the suit. Thereafter, on 18.06.2013 the respondents filed an application under Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the CPC) to reject the plaint on the grounds of *res-judicata* stating, *inter alia*, that on 15.10.1996 the plaintiff Abdul Barek had appointed one Mr. Sabir Ahmed as his attorney vide deed no. 6068 and the said Sabir Ahmed on 23.01.1998 created a Waqf in favour of his 2 sons vide deed no. 549. On 04.11.2001 the said 2 sons of the said attorney-turned-wakif Mr. Sabir Ahmed, as "Mutawallis" of the said Wakf, filed Other Suit No. 150 of 2001 impleading the same set of present defendants for correction of B.S khatian no. 53 and, thereby, to record the suit land in the name of the Wakf but the concerned trial court dismissed the said suit vide its judgment and decree dated 25.07.2006 declaring that there was no title and possession of the claimed Wakf or Mutawallis in the said suit land and against the said judgment and decree no appeal was preferred.

It is alleged that in the middle of the year 2004, when the plaintiff Abdul Barek foresaw that the failure of the said Other Suit no. 150 of 2001 is imminent, he filed the present suit before completion of the trial of the said Other Suit No. 150 of 2001 as a trump card for harassing the respondents when the suit no. 150 of 2001 would be dismissed. It is alleged that the previous Other Suit No. 150 of 2001 was filed by Abdul Barek under the disguise of his attorney's sons and, thus, apart from the names of the plaintiffs being different there is no separate cause of action or any other distinction in these 2 suits. It is contended that since the previous suit and the present suit are relating to and arising out of the same property between the same parties with similar prayer, the present suit's plaint is liable to be rejected.

The plaintiffs by filing written objection against the application filed under Section 151 of the CPC contended that the previous suit was filed for a different cause of action by the different persons and the judgement and decree of the previous suit is not enforceable against and binding upon the original plaintiff or present plaintiffs-appellants, who are the heirs of the original plaintiff late Abdul Barek.

Mr. Md. Mahbub Ali along with Mr. Md. Ziaul Haque, the learned Advocates, appeared for the appellants. Mr. Mahbub Ali submits that the trial court has misconstrued and misunderstood the provisions of Section 151 of the CPC inasmuch as Order 7 rule 11 is the relevant law for rejection of the plaint and it is a settled law of this land that the power of rejection of a plaint should be exercised by the court judiciously only where any of the factors as enumerated in the said provisions can be found. Mr. Ali posits with stentorian emphasis that in rejecting a plaint the trial court should not travel beyond the four corners of the plaint and since it is an admitted position that the previous suit was not filed in the name of the present plaintiffs or their predecessor Mr. Abdul Barek, the trial court ought to have disallowed the application for rejection of the plaint and, therefore, should have proceeded towards the full and final adjudication of the suit. Imbued with profound normative, Mr. Mahbub Ali further goes on to say that *res-judicata* is a mixed question of law and fact and the issue of *res-judicata* should be decided by taking evidence from the contending parties and, therefore, without taking proper evidence a plaint should not be rejected on the ground of *res-judicata*. By placing the written statements of the previous case being Other Suit no. 150 of 2001, Mr. Ali pinpoints to the fact that in the said

written statement, it was claimed that the suit land had been sold out by the defendant to one Hafez Ahmed and, now, in their written statements for the present suit no. 145 of 2004 they are claiming that they are in the possession of the same land. Mr. Mahbub Ali contends that the original plaintiff or the present plaintiffs never authorized the sons of his former attorney Mr. Sabir Ahmed to transfer the property to the Wakf or to file any suit and, in a bid to substantiate his above contentions as to having no knowledge about the previous case filed by the 2 sons of the plaintiff's attorney, he submits that the said power of attorney was cancelled by the plaintiff in the year 1998 and points out to the fact that the present suit has been filed in 2004 which is evidently before the date of pronouncement of the judgment and decree of the previous suit. Finally, he submits that the defendant appeared in the suit just after couple of months of institution of the suit and they ought to have filed application at that point of time inasmuch as the clues of rejection of the plaint should be sought from the plaint and, thereafter, although the defendant filed written statement on 29.09.2005, the defendant did not think of asking the court for rejecting the plaint, rather he squandered time by making repeated prayers to the court for adjournments on most of the dates fixed for preemptory hearing and, that is how, after 9 (nine)

years following institution of the suit, only on 18.06.2013 he came up with an application for rejection of the plaint instead of seeking full adjudication of the suit upon taking evidence. He emphatically submits before this Court that the claims of both the parties on the suit property should be examined through proper evidences and there should be a direction from this Court that the defeated party shall be slapped with costs. In support of his submissions the learned Advocate for the appellants cites a number of cases which are: Salauddin Khan & others Vs. Abdul Hai 63 DLR (AD) 138 (relevant Para 17), Mabubul Haque Vs. Md. A. Kadg Munshi 52 DLR (AD) 49 (relevant para 6), Sreemoti Pushpa Rani Das Vs. A.K.M Habibor Rahman 13 BLD (AD) 217 (relevant Para 4) Guiness Peat (Trading) Ltd Vs Fazlur Rahman 44 DLR (AD) 242 (relevant Para 9) and by making the aforesaid submissions the learned Advocate for the appellants prays for setting aside the impugned judgement and decree.

Per contra, Mr. Abdul Halim Chaklader along with Mr. Shaikh Khairul Anam, the learned Advocates, appeared for the defendant. Mr. Chaklader at the very outset of his submissions places Orders 7 and rule 11(d) together with Section 11 of the CPC and proffers that the trial court having found the suit to be barred by law, namely Section 11 of the CPC, has rightly rejected

the plaint inasmuch as under Section 151 of the CPC the trial court is amply empowered to bury a frivolous or vexatious suit at any stage of the suit. In an endeavour to interpret the wordings engraved in Section 11 of the CPC, he submits that if the subject matter of a suit is same to the subject matter of the previous suit between the same parties, either directly or impliedly, the suit cannot be continued and the same should be buried without hesitation whenever the fact of re-litigating a disposed of matter is caught sight of by the court and there is no reason to wait for taking further evidence for adjudication of the suit. He canvasses that it is an admitted fact that the original plaintiff Abdul Barek, who is the predecessor of the present appellants, had appointed one Sabir Ahmed, who is the father of the plaintiffs of the previous suit no. 150 of 2001, as an attorney empowering him to deal with all the affairs relating to the suit land including selling or transferring of the suit land and, according to him, the said attorney upon transferring the suit land to the Wakf having appointed two Mutawallis and the above transfer of land in the name of the Wakf as well as appointments of Mutawallis were done with the full knowledge of Mr. Abdul Barek and, hence, it is to be taken that the previous suit no. 150 of 2001 was instituted by the original plaintiff Mr. Abdul Barek. Mr. Chkalader takes us

through the order sheets of the trial court and argues that though the written statement was filed by the defendant on 29.09.2005 disclosing therein the fact of the suit no. 150 of 2001 to have been under adjudication in the courts of same jurisdiction and also providing information therein as to the fact that the defendant is claiming to have purchased 9 decimals of land vide 2 registered Kabala Deeds of 1977 from Moqbul Ahmed from whom Abdul Barek's vendor, namely Monsur Ahmed, is also claiming to have inherited the same property, nevertheless, the original plaintiff or the substituted plaintiffs-appellants did not take required step to amend the plaint in time. He submits that although lately the plaintiffs amended the plaint but he did not state the date of death of Moqbul Ahmed and, in continuation to this submission, he canvassed that since before this Court the plaintiffs-appellants are now endeavoring to controvert the claim of the defendant as to buying the property from Moqbul Ahmed in 1977 by saying that Moqbul Ahmed had died sometime in the year, 1962, omission of the date of demise of Moqbul Ahmed in the plaint is sufficient ground for rejection of the plaint. In support of his submissions, he referred to the following three cases, namely, Hafizuddin Sarker Vs Bangladesh 42 DLR(AD) 57, ADC Vs MSA Anju Bibi & others 6 BLT(AD) 51 and Sirajul Islam Chowdhury Trawlers

Ltd Vs Sirajul Islam Chowdhury 20 BLD(HCD) 347. By making the aforesaid submissions the learned Advocate for the defendant-respondent prays for dismissing the appeal with costs.

We have heard the learned Advocates for both the sides, perused the papers and documents compiled in and appended to the Paper Books, including the Memo of Appeal with the grounds taken for preferring this appeal, and laws and decisions placed before us for consideration.

In dealing with the instant appeal matter, the task which has been devolved upon this Court is carrying out an examination as to the legality and propriety of the impugned 'order' (though the word 'decree' is employed in the averments of the instant memorandum of appeal). The reason behind treating it as an 'order' would be taken up for discussion at a later part of this judgement. For now, assuming that it is a 'decree', we need to look at the relevant provisions for rejection of plaint namely Order 7, rule 11 of the CPC which reads as follows:

> The plaint shall be rejected in the following cases:
> a) Where it does not disclose a cause of action.
> b) Where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so.
> c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the

Court to supply the requisite stamp-paper within a time to be fixed by the Court fails to do so,
d) Where the suit appears from the statement in the plaint to be barred by any law.

From the reading of the above provisions of law and side by side from the reading of the averments of the plaint we do not readily find any of the four factors in the plaint. So, let us look at the application for rejection of plaint. It is pertinent to note here that the application has been titled to be one under Section 151 of the CPC without referring to any of the provisions of (a) to (d) of Order 7, rule 11 of the CPC and even if we ignore the significance of mentioning the said provisions of the CPC in the cause title, we could not find any grounds to have taken to make the application fitted into the said provisions of (a) to (d) of Order 7, rule 11 of the CPC. However, from the submissions of Mr. Chaklader, we get an indication that *resjudicata* being a specific law, the application falls within the purview of rule 11(d) of Order 7 of the CPC. In this backdrop, let us see whether doctrine of *res-judicata* was appropriate to apply in the case at hand. Since it is the settled principle of law that *resjudicata* is a mixed question of law and fact, the same can be applied for rejection of plaint only on the face of the plaint if it is revealed that the suit is an attempt to re-agitate the issue which has already been adjudicated upon by the

court and to come to this conclusion there is no need of any further issue to be adjudged or no evidence is required, in the said type of exceptional cases if the courts are fully satisfied that the suit is nothing but a mere re-litigation of a previous suit, it is empowered to bury the suit as was done in the cases of Burmah Eastern Ltd Vs Burmah Eastern employees Union and others 18 DLR 709 and also in the case of Abdul Jalil Vs Islami Bank Bangladesh Ltd 53 DLR(AD) 12 and Rasheda Begum Vs Nurussafa 2004 BLD(AD) 223.

Therefore, let us go through the averments of the plaint in addition to the application for rejection of plaint to see whether there is any issue for adjudication by the court by taking evidence.

It appears from the plaint, written statement, application for rejection and its written objection that it is an admitted fact that Ator Ali was the owner of 21 decimals of land and, thereafter, following the demise of the said Ator Ali his legal heirs namely, 1(one) wife Jobeda Khatun, 2 (two) sons Moqbul Ahmed & Monsur Ahmed and 1(one) daughter Sofeya Khatun inherited the same and, accordingly, none of the side of this case assails the chain of title of the said 21 decimals of land upto this stage. It is the claim of the plaintiff that following the death of Jobeda Khatun, her above named three children became the owners of the

said 21 decimals of land and, thereafter, Moqbul Ahmed also died at an early age before getting married and, then, Monsur Ahmed, who is the vendor of the plaintiff, had inherited the portion belonging to his demised brother Mokbul Ahmed and the portions which were inherited by Sofeya from her father Ator Ali, mother Jobeda Khatun and brother Mokbul Ahmed also were purchased by Monsur Ahmed, the plaintiff's vendor. Thereafter, Monsur Ahmed sold out 9 decimals of land to the defendant and the 2 decimals to one Habibur Rahman and the rest 10 decimals were owning and possessing by Monsur Ahmed. On the contrary, the claim of the defendant is that he purchased the portions of both the brothers, which they had inherited from their father Ator Ali and mother Jobeda Khatun. Thereafter, the defendant having sold out 9 decimals of land, which he had bought from Mokbul Ahmed in the year 1977, to one Hafez Ahmed, currently possessing and enjoying the rest of the suit land. Thus, apparently there is a specific claim by the petitioner and counter claim by the defendant in the suit and for its proper resolution evidence is required for the following reason.

Firstly, while the plaintiff's claim on the suit land is based on the chain of title shown above, the defendant is showing a different chain of title in his written statement having contended

that he became the owner of the suit land by purchasing the entire share of the plaintiff and his brother, which they had inherited from their parents. It is noticeable that though the plaintiff is claiming to have inherited his brother's portion of land because of his brother's death in the year 1962, nowhere in the plaint or even in the amendment petition of the plaint the date of death of Mokbul Ahmed has been stated. Thus, the plaintiff is to overturn and nullify the defendant's aforesaid claim by establishing the date of demise of Moqbul Ahmed to be one which predates the execution of the deeds by Moqbul Ahmed to the defendant.

Therefore, the date of demise of Moqbul Ahmed appears to be a crucial issue in order to find out whether he expired after the year 1977 as it is vital for the defendant to corroborate his claims that he has purchased the land from Moqbul Ahmed and, in the same way, it is also important for the plaintiff to show that Moqbul Ahmed died before the date of execution of the claimed deeds in favour of the defendant in order to render the defendants claim false. Therefore, evidence is required to settle the dispute in particular, as to when Moqbul Ahmed died and, thus, it appears to us that the suit ought to have been disposed of through a full trial.

Secondly, the sons of the plaintiff's attorney were the plaintiffs of the previous suit no. 150 of 2001 but in the backdrop of the claim by the plaintiff of the present suit that he does not have any knowledge about the previous case, this fact warrants to be examined by the trial court and evidence should be taken from both the sides and all other concerned/interested parties such as the children of late Safeya Khatun etc. to verify whether they had sold their portion to Monsur Ahmed, Habibur Rahman to whom 2 decimals have been sold out by Monsur Ahmed and the said attorney's sons who, as the Mutawallis, had filed the Other Suit No. 150 of 2001 or their legal heirs or representatives and, further, the location as well as the possession of the entire quantum of 21 decimals of suit land, which was actually owned by Ator Ali, should also be determined by the trial court from the evidence of the above persons.

Thirdly, for the sake for argument if is held that out of 21 decimals of land, the defendant bought 18 decimals of land (9 decimals from Moqbul Ahmed and 9 decimals from Monsur Ahmed) still there remain a question as to who in fact owns the remaining 3 decimals of land. Again, another scenario to be considered is that if the title of the defendant on 18 decimal of land in the aforesaid manner is conceded by the plaintiff on top of

selling of two decimals of land to Habibur Rahman, even then declaration of title to the remaining 1 (one) decimal of land is left for adjudication in this suit. Thus, it is not possible to straightway claim that issue of re-litigation (*res-judicata*) can be found on the face of the plaint of this suit.

Apart from the above points in favour of proceeding with full trial, it is to be noticed that since the suit was filed in the year 2004 and the defendant registered his appearance in the suit within a couple of months, no step was taken by him assailing the plaint inasmuch as the court is to reject the plaint form the averments made in the plaint, not from the denials or counter claims made in the written statement and, as such, a defendant is not required to wait to file an application for rejection of plaint till submitting his written statement. However, it transpires that even the defendant is taken to be comparatively less negligent in filing the written statement as the same was filed within less than a year, he appears to be seriously negligent and careless in taking steps for rejection of the plaint in the light of the fact that though the suit was filed in the year 2004, he came up with the application only on 18.06.2013 for rejection of the plaint long after 9 (nine) years of institution of the suit. When a serious laches or failure in dealing with a suit as per the provisions of law by any litigant is found, he becomes

incompetent to agitate his rights under Section 151 of the CPC which is a discretionary power of the court and can be exercised in favour of those litigants who are diligent and clean in dealing with their litigation. In the case of Salauddin Vs. M.A. Hai 63 DLR (AD) 138 referred to by the learned Advocate for the plaintiff, when the suit was at the stage of pre-emptory hearing and the defendant filed application for rejection of the plaint under Section 151 of the CPC after 9 years, the Apex Court disapproved the said move by the defendant. In line with the dictum of the afore-referred case, we also observe that the defendant's application for rejection of the plaint after 9 years demonstrates his laches and negligence in the light of the fact that since the present suit was also at the stage of pre-emptory hearing the trial court instead of rejecting the plaint ought to have proceeded towards full and final adjudication of the suit on the basis of evidence.

We have minutely read the decisions referred to by the learned Advocate for the defendants and found that the facts of those cases are completely different from the facts of the case at hand as none of the cited cases' impugned order or decree is originated from any defendant's application for rejection of plaint. In one of the 2(two) Appellate Division cases, namely, Hafizuddin Sarkar Vs Bangladesh 42 DLR(AD) 57 referred to by the learned

Advocate for the defendant, the appeal was preferred in the High Court Division against the judgement and decree of a suit which was dismissed upon taking evidence, and in the other Appellate Division case of ADC Vs Mst Anju Bibi & others 6 BLT (AD) 51, the appeal was preferred in the High Court Division against a judgement and decree where upon going through the full trial process, the trial Court decreed the suit with the findings that the suit was not barred by principle of *resjudicata*. The third case referred to by the defendant side is the case of Sirajul Islam Chowdhury Trawlers Ltd. Vs Sirajul Islam Chowdhury 20 BLD 347 where the trial court had not passed any order on the application under Order 39 rule 1 of the CPC, rather had fixed a future date for hearing of the said application, and when the said non-action of the trial court was challenged in the High Court invoking revisional jurisdiction, then in course of adjudication of the issue of appropriateness as to granting temporary injunction by the High Court Division in the absence of any order from the lower court, it discussed the doctrine of *resjudicata*. Thus, the said dictum is also not relevant in this case.

In contrast, the *ratio* of the four Appellate Division cases referred to by the learned Advocate for the plaintiff appears to be relevant and applicable in the instant case. In the case of Guiness

Peat (Trading) Ltd Vs Fazlur Rahman 44 DLR(AD) 242, the plaintiff instituted money suit for compensation against a company based in London on the ground that he did not receive the goods for which he had opened the LC and when an application for rejection of plaint was filed on the plea that no part of the cause of action arose within the jurisdiction of the trial court, the Apex Court at Para 9 made the following observation:

> The plea of implied bar should ordinarily be decided in evidence, unless the facts disclosed in the plaint clearly prove that the suit was not maintainable. Again, in considering an application for rejection of a plaint the specific provision under Order VII, rule 11 should ordinarily be followed. A resort to section 151 of the Code may be made in the interest of justice only in an exceptional case where the suit is foredoomed, and if it is allowed to be proceeded with it will amount to an abuse of the process of the Court.

In the case of Sreemati Pushpa Rani Das Vs AKM Habibur Rahman 13 BLD(AD) 217 it was held that:

> The plea of *resjudicata* is not available in rejecting a plaint under Order 7, rule 11 CPC. This matter can only be decided on the trial and it cannot be decided from a reading of the plaint. The maintainability of the suit on the ground of *res-judicata* can very well be framed as an issue in the suit.

In the case of Mahbubul Haque Vs Md A Kader Munshi 52 DLR (AD) 49, it was held that:

> Question of *resjudicata* raised in the application for rejecting the plaint is a mixed question of law and fact which needs thorough investigation on adequate

> evidence for arriving at a correct decision upon framing specific issues by the trial court.

Then, in the case of Salahuddin Vs MA Hai 63 DLR(AD) 138 it was held that:

> Provisions of Order 7 rule 11 are not exhaustive in the matter of rejection of plaint and in exceptional situations a plaint can be rejected under Section 151 of the CPC even if it does not come within the mischief of the rule, but such situation is absent in the instant case. It is also a fact that the application for dismissal of the suit was filed after about 9 (nine) years from the date of filing of the suit when the same was at the stage of peremptory hearing. The very filing of the application at such a belated stage particularly when the suit was fixed for peremptory hearing does not show bonafides on the part of defendants. The application was filed just to delay the disposal of the suit. In the above context, the learned joint District Judge while rejecting the application rightly observed that an issue as to the maintainability having already been framed, the same shall be decided along with other issues the learned District Judge rightly affirmed the said view of the learned Joint District Judge, but the learned Judges of the High Court Division totally failed to consider the above discussed factual and legal aspect of the case as well as observations of the courts below.

As a proponent of the above principles on rejection of plaint, which we have advocated in our other judgments on the issues of Order 7 rule 11 read with Section 151 of the CPC, we observe that the learned judge of the trial court failed to comprehend the scheme of Order 7 rule 11 and Section 151 of the

CPC as well as the *ratio* laid down in preponderance of case laws on the said provisions of the CPC.

It is our view that Civil Procedure Code being a procedural law simply aims at assisting the fair as well as prompt disposal of the trial or appeal or revision of a suit by the trial court or superior Courts, in other words, to help complete the trial of the suits conveniently. It is expected by the courts of this land that the courts would ensure the proper application of the provisions of the CPC with an aim to expeditious disposal of the cases keeping in view the consequence of passing any judgment and decree/order which may facilitate dragging the case for years. From the pattern and manner of dealing with the case at hand, this Court finds that the trial court took nearly 9 years within which time it could have completed taking evidences towards disposal of the case as it had all the relevant papers and documents in its hands to complete the trial and, therefore, at that point of time we do not find that it was a prudent decision for the trial court to reject the plaint instead of proceeding with the disposal of the suit on substantial issues so as to prevent the parties from protracting the disposal of the suit as a whole; meaning the adjudication of procedural/technical issues in tandem with the substantial issues. However, in a proper case, where the application is filed under Order 7 rule 11 of the CPC

but there appear difficulties to attract its provisions in toto and in the opinion of the courts there is a clear and unambiguous case of *res-subjudice*, *res-judicata* or an out and out false case upon tallying the identities of the parties to the suit, comparing the subject matter of the suit and scanning the cause of action of the suits, in that event, the courts are always at liberty to reject the plaint even at a belated stage having exercised their inherent powers under Section 151 of the CPC which may be found only in rare case, and, the same not being applicable to the present suit, accordingly, we find that the impugned judgement and decree passed by the learned trial court in the present appeal is erroneous and liable to be set aside.

Now-a-days, the learned Advocates of the lower courts very often tend to approach the trial courts with an application for rejection of the plaint invoking Section 151 of the CPC when they find difficulties to fit their cases within the purview of Order 7 rule 11 of the CPC. In order to resist the above propensity of the learned Advocates, the learned judges of the lower courts must be well conversant with the scheme of incorporation of the above two provisions in the CPC and should be wary and skeptical in allowing the said application. Unless the learned judges find the cases to be fully fit and proper for rejection of the plaint, they

should insist upon the learned lawyers to assist the court in disposal of the cases through trial. Both the learned judges and lawyers should know that it was not within the contemplation of the Legislature that the provisions of rejection of plaint they inscribed in the CPC would be frequently and indiscriminately used for dismissal of suit inasmuch as the Legislature purposefully used the words 'plaint', thus, not 'suit', and 'rejection', as opposed to the perception of 'dismissal' and the Part/Chapter of the CPC they have chosen to have incorporated the said provision is under the heading of PLAINT, which primarily deals with the ins and outs of a plaint of a suit. Also, following rejection of plaint since Order 7, rule 13 allows to present a fresh plaint in respect of the same cause of action, it distinguishes the consequence of a rejection of a plaint from dismissal of a suit. The reason behind ushering the above discussion is that bulk of the learned Advocates perceive the provision of rejection of plaint to be the final ending of a suit. They should not make the application using the word 'rejection', rather they should employ the words 'application for dismissal of the suit' if that is what they intend, and, of course, they should not invoke the provisions under Order 7, rule 11 of the CPC. Therefore, the issue of rejection of plaint should be dealt with by the courts at an early stage of a suit given

that out of four factors or ingredients for rejection of plaint (as enshrined in Order 7 rule 11 of the CPC) 2 ingredients (b & c) are usually being dealt with just after the presentation of the suit, for the remaining two factors (a & d) the courts may at best take one or two diary date/s to look at the contents/averments of the plaint to satisfy itself to see as to whether (a) it discloses any causes of action and (d) whether the suit is barred by any law. It is crucial to note here that whether the suit is barred by law must be traced from the statements of the plaint and, thus, all these factors primarily may be dealt with by the court on its own motion and if due to the oversight of the court none of the four factors are caught sight of by the courts and, later on, the defendant brings any of the factor to the attention of the court, it may reject the plaint, even if the suit may have reached the last part of the trial. However, whenever the defendant comes up with an application for rejection of plaint based on grounds beyond the letters of Order 7, rule 11, the courts must be skeptical and delve deep into the points raised by the defendant in order to assess as to whether exercising of the discretionary powers under Section 151 of the CPC could at all be justified and for this the lower courts must take into consideration the dictum propounded by the Apex Courts on the issue of exercising the powers under Section 151 of the

CPC in dealing with the matters of rejection of plaint and, in doing so, the courts must not forget to tally the facts of the case with judicial precedent of Apex Courts on this point.

We, hereinbefore, purposefully used the word 'order' in addressing the impugned judgement and decree of this appeal as we opine that the impugned 'order' does not hold the status of a 'decree' as defined in Section 2(2) of the CPC inasmuch as in order to qualify the order as a 'decree', the same must be an order allowing an application under Order 7, rule 11 of the CPC or under Order 7, rule 11 read with Section 151 of the CPC. But when an application is made solely invoking the provisions under Section 151 of the CPC without resorting to the provisions enshrined in Order 7, rule 11, it cannot be treated or termed as an application for rejection of plaint inasmuch as when the Legislature has incorporated a specific provision for rejection of plaint, entertainment of an independent application solely on the provisions of Section 151 of the CPC would render the provisions under Order 7, rule 11 nugatory and making any provision nugatory, without declaring it unconstitutional, is beyond the power of the courts. In the case of Shilpa Bank Vs Bangladesh Hotels Ltd 38 DLR (AD) 70, it was held that the inherent power under Section 151 of the CPC cannot be exercised in disregard of

the established principles and norms of law. In the case of Rezaul Hoque Vs Afizullah 42 DLR (AD) 74, it was held that where the matter is governed by specific provision of law power under Section 151 of the CPC cannot be exercised. In the case of Hazrat Ali Vs Jaynul Abedin 1986 BLD(AD) 45, it was held that the inherent power cannot be exercised to evade or circumvent a positive prohibition laid down by a statute. In the case of Padam Vs UP AIR 1961 SC 218, it was held that powers saved by Section 151 of the CPC are not powers over substantive rights possessed by a litigant. The same dictum was propounded in the cases of Shirali Vs Mahadev 27 DLR 232, Pubali Bank Vs Mazid & Co. 54 DLR and Shafiqul Haq Vs Mina Begum 54 DLR 481.

Thus, for rejection of plaint the provisions of Section 151 may be resorted to as supplemental to Order 7, rule 11; but it is not to be supplanted by the said specific provision in that the provision of Section 151 of the CPC is capable of playing a role only in helping rescue the defendant who, in wishing to attack the plaint under the provisions of Order 7 rule 11 of the CPC, struggles in trying to fit his grounds within the four corners of the said provisions, or in other words, the said provisions do not appear to be adequately helpful for him as the case does not come,

literally and strictly, within the scope of Order 7, rule 11 of the CPC.

In this case the application was made solely invoking the provisions of Section 151 of the CPC without making any reference to the provisions of Order 7 rule 11 of the CPC, nor raising any grounds which relate to or attract the said provisions and, thus, the application should not have been treated as an application for rejection of the plaint. Therefore, the impugned order being not a 'decree' was not an appealable order under Order XLIII, rule 1 of the CPC and, accordingly, on this technical count as well, the present appeal fails.

As a result, the appeal is allowed. The impugned judgement and decree dated 01.12.2013 is set aside and the learned trial court is directed to kick off the trial from the stage from where the plaint was rejected, and if it finds appropriate, to proceed with the adjudication of the suit upon framing issues as to whether the suit is barred by *res-judicata* and also whether the suit is maintainable in its present form or whether the suit should have been instituted for partition. The trial court is further directed to complete the disposal of the trial as expeditiously as possible with a definite order of compensation under Section 35A(1) of the CPC in

addition to slapping the usual litigation costs under Section 35(1) of the CPC read with rule 164 of the CRO against the defeated party. However, following adjudication of the instant suit as a suit for partition, should it emerge that none of the parties have, in fact, any interest in the suit land, then in that event, both the parties should be harshly penalized for wasting the court's time and abuse of process.

The parties are directed to maintain status-quo in respect of their positions and possession of the suit land till disposal of the suit by the learned trial court.

Before parting with the judgement we wish to say that, as the Judges of the High Court Division, we should not confine ourselves to performing the duties of disposing of the impugned orders or decrees in course of exercising the power under the writ, appellate or revisional jurisdiction but it is also our task to monitor and superintend the skill and quality of the learned judges of the sub-ordinate judiciary so that they do not indulge themselves in repeated errors in passing the judgements and orders/decrees causing proliferation in the number of appeals to the High Court Divisions which is overwhelmingly overburdened with a huge backlog of cases. More so, following overturning the lower courts

'orders', the lower courts again require to deal with the said cases for a second time. Therefore, we are inclined to make some directions under Article 109 of the Constitution upon the learned judges of the lower courts vested in conducting the trials of civil suits in an effort to ease their tasks in dealing with the matters of rejection of plaint.

The Judicial Administration Training Institute (JATI) should undertake a training course in order to facilitate the trial court judges to be acquainted with the guidelines enunciated in the Apex Court cases on the issue of rejection of plaint in the backdrop of the fact that the High Court Division is encountering a high volume of appeals arising from the orders of rejection of plaints (which hold the status of decree as per Section 2(2) of the CPC) which are mostly found unworthy of rejection and, consequently, the invaluable working hours of both the lower courts and the High Court Divisions are being wasted to deal with a case twice in a situation when the Bangladesh judiciary is receiving criticism for not being able to reduce the backlog of cases piled up both in the lower and higher judiciary.

Let a copy of this judgment be communicated to the learned DG of JATI for his perusal and necessary action in compliance

with the observations made in the penultimate para of this judgment.

Also, the Register of the Supreme Court is directed to disseminate a copy of this judgement to each of the 64 learned District Judges for their information so that, in line with the observations made hereinbefore in this judgement, they may pass necessary instructions onto their respective junior colleagues (who are vested with the duties of conducting civil trials) for their compliance.

FARID AHMED, J.

I agree.