4 SCOB [2015] AD 4

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A.H.M.Shamsuddin Chowdhury

CIVIL PETITION FOR LEAVE TO APPEAL NO.574 OF 2011 WITH CONTEMPT PETITION NO.13 OF 2011

(From the judgment and order dated the 14th day of December, 2010 passed by the High Court Division in First Appeal No.89 of 2007)

Md. Noor Hossain being dead his heirs: Halima Begum and others	:	. . . Petitioners (in both the cases)
-Versus-		
Mahbuba Sarwar and others	:	. . . Respondents (in both the cases)

For the Petitioners (in both the cases)	:	Mr. Khizir Ahmed, Advocate instructed by Syed Mahbubar Rahman, Advocate-on-Record
For Respondent No.1 (in CP.No.574 of '11)	:	Mr. Qamrul Hoque Siddique, Advocate instructed by Chowdhury Md. Zahangir, Advocate-on-Record
For Respondent Nos.2-5 (in CP.No.574 of '11)	:	None represented
For the Respondents (in Cont.P.No.13 of '11)	:	None represented
Date of Hearing	:	The 2nd day of February, 2015

Consequence of setting aside *ex-parte* decree:
The moment the *ex-parte* decree was set aside, the suit stood restored in its original position and the only legal consequence of such restoration was that the suit had to be proceeded with and disposed of in accordance with law. ...(Para 15)

Inherent power under section 151 of CPC cannot be exercised on assumptions and presumptions of facts:
Whether the statements made in the plaint are false or not, are purely questions of fact and are to be decided at the trial. In rejecting the plaint, the learned Judges invoked section 151 of the Code, but the inherent power under the section cannot be exercised on assumptions and presumptions of facts and or on suspicion. In other words, the truth or falsity of the statements made in the plaint cannot at all be a ground to reject a plaint either be it under Order VII, rule 11 or under section 151 of the Code. ...(Para 17)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed against the judgment and decree dated the 14th day of December, 2010 passed by a Division Bench of the High Court Division in First Appeal No.89 of 2007 allowing the appeal.

2. Facts essential for disposal of this petition are that the predecessor-in-interest of the petitioners as plaintiff filed Title Suit No.46 of 1991 in the Court of Subordinate Judge (now Joint District Judge), Narayangonj for specific performance of contract impleadng respondent Nos.1-3 herein as defendant Nos.1-3, RAJUK(formerly DIT) represented by its Chairman and its Deputy Director (Estates) as defendant Nos.4 and 5. The suit was decreed *ex-parte* on 05.11.1991 with the direction upon defendant Nos.1-3 to execute and register the kabala in respect of the suit land within 60(sixty) days failing which the plaintiff would get the kabala through Court. As the defendants did not execute the kabala as per the decree, the plaintiff levied Title Execution Case No.1 of 1992 and eventually, the kabala was executed and registered through Court. It further appears that the plaintiff (of Title Suit No.46 of 1991) also took possession of the suit land through Court vide the said execution case.

3. Respondent Nos.1-3 herein who were defendant Nos.1-3 in Title Suit No.46 of 1991 filed Title Suit No.146 of 2005 in the Court of Joint District Judge, 1st Court, Narayangonj for declaration that the *ex-parte* judgment dated 05.11.1991 and the decree dated 13.11.1991 passed in Title Suit No.46 of 1991 were illegal, collusive, inoperative and not binding upon them; for cancellation of the kabala dated 21.07.1992 being No.2386 executed and registered by the Subordinate Judge, Narayangonj in favour of the plaintiff in Title Execution Case No.1 of 1992 as shown in schedule-'Kha' to the plaint and also for recovery of khas possession of the land as described in schedule-'Ka' to the plaint. Eventually, the suit was renumbered as Title Suit No.1 of 2005(hereinafter referred to as the instant suit).

4. The main allegations made in the plaint of the instant suit were that plaintiff No.1 was not aware of filing the suit; the *ex-parte* decree passed therein, filing of Title Execution Case No.1 of 1992 and execution of the decree through the execution case before 06.04.2003. She came to know about the *ex-parte* decree, the registration of the kabala through Court in the said execution case on 07.04.2003. Plaintiff No.1 did not file any family suit being No.6 of 1985 for her appointment as guardian of plaintiff Nos.2 and 3. Plaintiff No.1 was not at the address at which the summons of the suit was sent, but defendant No.1 in collusion with the process server managed to obtain service returns and obtained the *ex-parte* decree by practising fraud upon the Court and also managed to execute and register the impugned kabala through Court in respect of the suit land. Plaintiff No.1 also denied the fact of entering into any contract with defendant No.1 to sell the suit land.

5. The suit was contested by the predecessor-in-interest of the petitioners who was impleaded as defendant No.1(hereinafter referred to as the defendant) by filing written statement denying the material allegations made in the plaint contending, *inter alia*, that plaintiff No.1 with intent to transfer the suit property filed an application before the 4th Court of Munsif (now Assistant Judge) and Family Court, Narayangonj being Miscellaneous Case No.6 of 1985 for appointing her as guardian of plaintiff Nos.2 and 3 and she was appointed as guardian and then obtained permission to sell the suit property vide Permission Case No.5 of 1986. Plaintiff No.1 in person and on behalf of plaintiff Nos.2 and 3 agreed to sell the suit

property to the defendant for a consideration of taka 4,00,000(four lac) and received a sum of taka 10,000(ten thousand) against a written acknowledgement under her hand on 25.04.1985 for herself and on behalf of plaintiff Nos.2 and 3 as earnest money and thereafter, she received taka 20,000(twenty thousand) on 12.02.1989 and taka 500(five hundred) on 04.05.1989 and taka 10,000(ten thousand) on 05.07.1989 as additional earnest money against separate acknowledgement receipts. There was an understanding between the defendant and plaintiff No.1 that on obtaining permission of the Court to sell the suit property, she would execute and register a saf-kabala in favour of the defendant in respect of the suit land by taking the balance consideration from him. A legal notice was also published in the daily 'Banglar Bani' on 07.11.1989 through Mr. Kazi Ahmed Ali, Advocate, drawing attention of the interested persons, if any, relating to the suit property for communicating with the said learned Advocate with "requisite documents" in support of their claim, but none turned up. Thereafter, the defendant requested plaintiff No.1 time and again to receive the balance consideration money of taka 3,55,000⁄00 and execute and register the saf-kabala in his favour, but she did not pay any heed to the request and as such, a legal notice was served upon her by the defendant through his said learned Advocate under registered post with a copy to the Deputy Director (Estates), DIT, Dhaka. But the notice was returned unserved upon plaintiff No.1 with the endorsement "Refused" on 28.07.1990. In the above circumstances, the defendant was constrained to institute the suit (Title Suit No.46 of 1991) in the Court of Subordinate Judge, Narayangonj against the plaintiffs for specific performance of contract in respect of the suit property and the suit was decreed *ex-parte* on 13.11.1991. The summonses of the suit were served upon the defendants (of Title Suit No.46 of 1991) and accordingly, the suit was decreed *ex-parte* as per the procedure. No fraud was practised by the plaintiff of that suit (the defendant of the instant suit) in obtaining the decree for specific performance of contract; the decree passed in the suit was valid and binding upon the plaintiffs (of the instant suit). As the plaintiffs of the instant suit (the defendants of Title Suit No.46 of 1991) did not comply with the terms of the operative portion of the decree, the defendant levied Title Execution Case No.1 of 1992 in the Court of Subordinate Judge, Narayangonj for execution of the decree. The defendant deposited the balance consideration of taka 3,55,000⁄00 and then the saf-kabala being No.2386 was executed and registered in his favour on 19.07.1992 in respect of the suit property and the delivery of possession was made on 07.04.2003 with the help of police force in presence of a Magistrate and since then the defendant has been possessing the suit property. Shafiuddin Sarwar, brother-in-law of plaintiff No.1 instituted Title Suit No.106 of 1993 in the Court of Subordinate Judge, Narayangonj for setting aside the *ex-parte* decree of Title Suit No.46 of 1991 against the defendant impleading the plaintiffs and defendant Nos.2-4 and others as defendants, which was dismissed for default on 20.07.1999 at the stage of further hearing. The plaintiffs filed the instant suit on some false pleas and pretext, so the suit was liable to be dismissed.

6. The trial Court by the judgment and decree dated 22.03.2006 dismissed the suit.

7. Against the judgment and decree of the trial Court, the plaintiffs preferred First Appeal No.89 of 2007 before the High Court Division and a Division Bench by the impugned judgment and decree allowed the appeal with a cost of taka 1,00,000˙00 (one lac) against the defendant, set aside the judgment and decree of the trial Court and decreed the suit. The High Court Division also set aside the *ex-parte* decree dated 05.11.1991 passed by the Subordinate Judge, Narayangonj in Title Suit No.46 of 1991 and declared the same as collusive, illegal, inoperative, void and not binding upon the plaintiffs. The High Court Division also declared the kabala dated 21.07.1992 being No.2386 executed and registered by the Subordinate Judge, Narayangonj in execution of the decree passed in Title Suit No.46 of 1991 vide Title

Execution Case No.1 of 1992 cancelled and at the same time rejected the plaint of Title Suit No.46 of 1991 as being frivolous, void, *ab-initio* and *"based upon concocted story of agreement and being barred by law"* and directed the defendant to hand over the vacant possession of the suit land to the plaintiffs within 60 (sixty) days failing which the possession would be delivered by the trial Court by evicting the defendant. The High Court Division also declared the proceedings of Title Execution Case No.1 of 1992 as void; hence this petition for leave to appeal.

8. Heard Mr. Khizir Ahmed, learned Advocate for the petitioners and Mr. Qamrul Hoque Siddique, learned Advocate who entered caveat on behalf of the respondents, perused the judgment and decree of the trial Court, the plaint, the evidence on record, the other materials on record and the impugned judgment and decree.

9. In the instant suit, the following prayers were made:

"(L) অত্রাদালতের দেঃ ৪৬/৯১ নং মোকদ্দমায় প্রচারিত বিগত ৫/১১/৯১ ইং তারিখের একতরফা রায় ও ১৩/১১/৯১ ইং তারিখের ডিক্রী বে-A¡Ce£, ®k¡Np¡S¢pL, a'La¡fZ, A®hd, অকার্যকর ও বাদীগন প্রতি প্রযোজ্য নহে মর্মে ঘোষনার ডিক্রী দিতে।

(M) দেঃ ৪৬/৯১ নং মোকদ্দমার রায় ও ডিক্রী হইতে উদ্ভুত ১/৯২ নং ডিক্রী জারী মোকদ্দমা অনুকুলে হাছিলকৃত ১নং বিবাদী বরাবরে সম্পাদিত ও রেজিষ্ট্রীকৃত আরজীর খ তপছিল h¢Za p¡h-Lhmi দলিল বাতিল ও ক্যানসেলেশন ক্রমে উহা সংশ্লিষ্ট সাব-রেজিষ্ট্রি অফিসের সংশ্লিষ্ট বালাম বহিতে নোট করার নিমিত্ত বোরকারীর আদেশ দিতে,

(N) আরজীর ক তপছিল বর্নিত সম্পত্তিতে বাদীগনের অনুকুলে মূল বিবাদীর প্রতিকূলে খাস দখল পাওয়ার ডিক্রী দিতে,

(O) মূল বিবাদীর বিরুদ্ধে ক্ষতিপূরন বাবদ ১০,০০,০০০/-(দশ লক্ষ) টাকা আদায়ের ডিক্রী দিতে এবং অত্র মোকদ্দমার উদ্ভবের সর্বশেষ দিন হইতে উক্ত ক্ষতিপূরণ এর টাকা আদায়ের দিন পর্যন্ত উক্ত টাকার উপর শতকরা ২০% হারে টাকা আদায়ের ডিক্রী দিতে,

(P) দেওয়ানী কার্যবিধি আইনের ২৪(৩) ধারার বিধান মতে মামলা খরচ এবং খরচের উপর শতকরা ৬% টাকা হারে মামলা খরচাসহ ডিক্রী দিতে,

Hhw

(Q) আইন ও ইকুইটি মতে আদালতের ন্যায় বিচারের বাদীগন অন্যান্য ফলপ্রস্ত কোন প্রতিকারের ভাজন হইলে তাহাও ডিক্রী দানে সুবিচার করিতে আজ্ঞা হয়।"

10. The trial Court considering the pleading of the parties framed the following issues:

"1z অত্রাকারে ও প্রকারে অত্র মোকদ্দমা চলিতে পারে না?

2z অত্র মোকদ্দমা তামাদিতে দুষ্ট ¢L e¡?

3z অত্র মোকদ্দমা পক্ষ দোষে দুষ্ট কিনা?

4z দেওয়ানী ৪৬/৯১ নং মোকদ্দমার ৫/১১/৯১ ইং তারিখের রায় এবং ১৩/১১/৯১ ইং তারিখের HLalg¡ ¢Xœ£ a'L£ ¢Le¡?

5z বাদীপক্ষ প্রার্থীত মতে ১০,০০,০০০/- টাকার ক্ষতিপূরন পাইতে হকদার কি না?

6z B¢Sl M af¢pm h¢ea Lhm¡ c¢mm a'L£ J AL¡kLl£ ¢L e¡?

7z বাদীপক্ষ প্রার্থীত প্রতিকার ছাড়া কি কি প্রতিকার পাইতে পারে?

8z বাদীপক্ষ প্রার্থীত প্রতিকার পাইতে হকদার কিনা?"

11. The trial Court dismissed the suit answering issue No.2 in the affirmative, issue Nos.4 and 5 in the negative, i.e. against the plaintiffs; issue No.3 in the negative, i.e. in favour of the plaintiffs and issue Nos.6-8 in the negative, i.e. against the plaintiffs.

12. The High Court Division reframed the issues as under:

"(a) Whether the ex parte judgment and decree passed in Title Suit No.46 of 1991 was valid in law on account of non appointing any guardian *ad litem* as required under Order 32 Rule 3 of the Code of Civil Procedure?

(b) Whether the ex parte judgment and decree passed in Title Suit No.46 of 1991 was passed in normal course of business or hastely and abnormally?

(c) Whether the plaintiff No.1 was appointed as guardian of person and property for plaintiff Nos.2 and 3 and got a permission for transforming (sic, it would be transferring) the suit land as claimed by the defendant No.1?

(d) Whether the plaintiff No.1 was entitled to enter into any contract on behalf of minor daughters and that was enforceable in law?

(e) Whether the Title Suit No.1 of 2005 was barred by limitation as held by the trial court?

(f) Whether the defendant could produce any paper in Title Suit No.46 of 1991 or in the instant suit to prove the fact of existence of any agreement for transfer of the suit land by the plaintiff No.1 for herself and on behalf of her minor daughters and in absence of any such evidence what would be the consequence of Title Suit No.46 of 1991?

(g) Whether the judgment and decree passed in Title Suit No.46 of 1991 were enforceable in law?

(h) As per the submission made by Mr. Quayum, the learned Advocate for the defendant, whether the title Suit No.46 of 1991 is liable to be sent back on remand?

(i) Whether the plaintiffs are entitled to get relief as prayed for?

(j) What more relief the plaintiffs are entitled to get?"

13. From the issues framed by the High Court Division, it appears to us that the High Court Division travelled beyond the scope of the suit and it went even beyond the relief prayed by the plaintiffs in the suit. Be that as it may, of the 10(ten) issues: issues (h), (i) and (j) appear to us relevant to decide the questions involved in the instant suit. And we do not consider it at all necessary to discuss the propriety of the issues other than these issues (issues (h), (i) and (j)) decided by the High Court Division.

14. So far as issue (h) is concerned, the learned Judges refused to send the suit back to the trial Court on the view that *"(a) there was no existence of any contract as alleged by the defendant No.1 (b) The plaintiff No.1 being a defacto guardian had no authority to enter into any contract (c) If existence of any contract is accepted that is void and not enforceable in law as per decisions referred to above."*

15. In taking the above view, the learned Judges totally failed to consider that the moment the *ex-parte* decree was set aside, the suit stood restored in its original position and the only legal consequence of such restoration was that the suit had to be proceeded with and disposed of in accordance with law.

16. We also failed to understand how the questions as raised by the learned Judges quoted hereinbefore were relevant in deciding the question as to whether the *ex-parte* decree passed

in Title Suit No.46 of 1991 was liable to be set aside or not. Whether there was existence of any contract, whether plaintiff No.1 had any authority to enter into any contract and whether the contract, if any, would be "void and not enforceable in law" are the matters to be decided in Title Suit No.46 of 1991. In the context, it is necessary to state that in the suit, no relief was sought against the contract for the performance of which Title Suit No.46 of 1991 was filed.

17. The learned Judges made another fundamental mistake in rejecting the plaint of Title Suit No.46 of 1991 on the finding that *"defendant No.1 instituted Title Suit No.46 of 1991 upon 100% false statements and without having a valid agreement, consequently the Title Suit No.46 of 1991 was liable to dismissed. We are of the view that Title Suit No.46 of 1991 was not liable to be decreed and that suit was barred by law and the plaint was liable to be rejected"*, though the learned Judges themselves found that *"upon eventual success in the appeal, the Title Suit No.46 of 1991 although are liable to be restored to its file and number."* It is also necessary to keep on record that though the learned Judges found Title Suit No.46 of 1991 barred by law, they did not point out or mention under what provision of law it was barred. We ourselves have tried to lay our hand on any provisions of the Statute to see whether the suit (Title Suit No.46 of 1991) was barred by law, but we failed. When Title Suit No.46 of 1991 was decreed *ex-parte* and the instant suit was filed for setting aside the said *ex-parte* decree, the question of rejection of the plaint of the suit did not arise at all. More so, when the defendants of the suit (Title Suit No.46 of 1991) did not get any chance to file written statement (as the suit was heard *ex-parte*) stating their own case, how it could be said that the suit was filed upon 100% false statements and such a finding is absolutely based on wild assumptions and presumptions. And no plaint can be rejected on the assumptions or presumptions that the facts stated in the plaint are false. Whether the statements made in the plaint are false or not, are purely questions of fact and are to be decided at the trial. In rejecting the plaint, the learned Judges invoked section 151 of the Code, but the inherent power under the section cannot be exercised on assumptions and presumptions of facts and or on suspicion. In other words, the truth or falsity of the statements made in the plaint cannot at all be a ground to reject a plaint either be it under Order VII, rule 11 or under section 151 of the Code. And if that legal proposition of the High Court Division is accepted, it will create havoc in the dispensation of justice delivery system in civil litigations. We conclude that in the facts and circumstances of the case, the learned Judges erred in law in deciding the issue in the negative. Therefore, that portion of the order of the High Court Division cannot be sustained.

18. Be that as it may, considering the evidence and the other materials on record, it appears to us that the *ex-parte* decree passed in Title Suit No.46 of 1991 cannot be sustained and the High Court Division rightly set aside the same. Consequently, the kabala executed and registered by the Court in favour of the defendant being kabala No.2386 dated 21.07.1992 in Title Execution Case No.1 of 1992 pursuant to the said *ex-parte* decree cannot also be maintained and the High Court Division rightly cancelled the same. Since the *ex-parte* decree is set aside and the defendant got delivery of possession of the suit land in execution of the *ex-parte* decree, he cannot get the benefit of the *ex-parte* decree and therefore, he cannot be allowed to enjoy the fruit of the decree continuing his possession therein and the plaintiffs must be restored back with their possession of the suit property. Therefore, the decree of the High Court Division directing the defendant to deliver possession of the suit property is to be maintained and the findings and the decisions of the learned Judges in respect of issues (i) and (j) appear to us correct subject to the findings and the observations made hereinbefore.

19. For the discussions made above, the judgment and decree of the High Court Division cannot be maintained in its entirety and it needs modification. Since we have heard the learned Counsel of both the parties and from the institution of the suit (Title Suit No.46 of 1991), 14(fourteen) years have elapsed, we are of the view that justice would be best served if the petition is disposed of finally without giving leave. Accordingly, the petition is disposed in the following terms:

> The impugned judgment and decree of the High Court Division so far as it relates to setting aside the *ex-parte* decree passed by the learned Subordinate Judge, Narayangonj in Title Suit No.46 of 1991 and cancelling the kabala dated 21.07.1992 being No.2386 executed and registered by the same Court in Title Execution Case No.1 of 1992 is maintained. The order rejecting the plaint is set aside. Title Suit No.46 of 1991 of the Court of Subordinate Judge, Narayangonj (now Joint District Judge) is restored to its file and number and shall proceed and be disposed of in accordance with law. The direction of the High Court Division upon defendant No.1 (now it will be the petitioners herein, being the heirs of the deceased defendant) to hand over the vacant possession of the suit land in favour of the plaintiffs is maintained. The direction of the High Court Division to allow defendant No.1(now it will be the petitioners herein) to withdraw taka 3,55,000˙00 deposited by him in Title Execution Case No.1 of 1992 is maintained. The awarding of cost of taka 1,00,000˙00 against defendant No.1 is set aside.

20. The judgment and decree of the High Court Division stands modified in the above terms.

21. Contempt Petition No.13 of 2011 is disposed of accordingly.