IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)
Present
Madam Justice Kashefa Hussain

Civil Revision No. 3446 of 2015

Khandaker Akhtaruzzaman and others
.....petitioners
-Versus-
Shorojit Kumar Basu and others
------- Opposite parties.
Mr. Mizanur Rahman, Advocate
------ For the petitioners
Mr. Tapos Bondhu Das with
Mr. Md. Sumon Ali, Advocates
------- For the Opposite Parties.

Heard on: 03.05.2023, 07.05.2023,
14.05.2023 and
Judgment on 21.05.2023

Rule was issued in the instant Civil Revisional application calling upon the opposite parties No. 1 to show cause as to why the impugned judgment and decree dated 21.10.2014 (decree signed on 27.10.2014) passed by the learned Additional District Judge, 1st Court, Kushtia passed in Title Appeal No. 50 of 2012 dismissing the suit with cost Tk. 25,000.00 (Twenty Five Thousand) only and affirming the judgment and order dated 31.07.2012 passed by the court of Sadar Assistant Judge, Kushtia in Title Suit No. 297 of 2010 rejecting the plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 should not should not be set aside and or pass such other order or further order or orders as to this court may seem fit and proper.

The instant petitioners as plaintiffs filed Title Suit No. 297 of 2010 in the court of Sadar Assistant Judge, Kushtia inter alia for declaration of title impleading the instant opposite parties as defendants in the suit. Subsequently the defendants in the suit filed an application for rejection of plaint under Order VII Rule 11 (D) of the Code of Civil Procedure. The trial court upon hearing both sides against the application of rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 allowed the application of the defendant and thereby rejected the plaint of the plaintiff by its judgment and decree dated 31.07.2012. Being aggrieved by the judgment and decree of rejection of plaint passed by the trial court the plaintiff in the suit as appellant in the appeal preferred Title Appeal No. 50 of 2012 which was heard by the Additional District Judge, 1st Court, Kushtia. The appellate court after hearing the parties dismissed the appeal by its judgment and decree dated 27.10.2014 and thereby upheld the judgment of the trial court. Being aggrieved by the judgment of the courts below the plaintiff in the suit being appellant in the appeal as petitioners filed a Civil Revisional application which is instantly before this court for disposal.

Learned Advocate Mr. Mizanur Rahman appeared on behalf of the petitioners while the learned Advocate Mr. S.M. Goshami appeared for the opposite parties.

Learned Advocate for the petitioners submits that both courts below upon properly examining the actual facts unjustly rejected the plaint in limine. Primarily on the principle of res-judicata he submits that the court's reliance on a suit being Title Suit No. 70 of 1986 and relying on the judgment and decree was an unjust reliance. He continues that it is an unjust reliance since it is not clear from the judgment of either court as to whether the courts scrutinized into the নথি of Title Suit No. 17 of 1986. He argues that it is also not clear as to whether the courts below actually examined of the judgment and decree passed in Title Suit No. 70 of 1986 followed by an execution Case No. 5 of 1992. He submits that it is a settled principle settled by this division and also by our Apex Court that Res-judicata is also a matter in fact and which can only be ascertained after proper examination into the relevant documents. He draws this Bench's attention to the judgment of the court and submits that from the judgment it is not clear as to whether the courts after properly sifting through the documents arrived upon its decision that the matter is already settled in a previous suit.

He submits that since it remains unclear as to whether the matter was already settled in a previous suit therefore rejection of plaint in the absence of certainty is unjust and unlawful. In support of his submissions the learned advocate for the petitioners cites two decisions in the case of Md. Mahbubul

Haque Vs. Md. A. Kader Munshi reported in 20 BLD (AD) (2000) page 82 and another in the case of Sreemati Pushpa Rani Das Vs. A.K.M. Habibur Rahman and ors reported in 13 BLD (AD) 1993 page- 217. He concludes his submissions upon assertion that therefore the judgment and decree of the courts below needs no interference and the Rule bears merit and ought to be made absolute for ends of justice.

On the other hand learned advocate for the opposite party opposes the Rule and submits that the lower courts only after examining the নথি of the earlier Title Suit No. 70 of 1986 followed by execution case arrived upon its decision and therefore the judgment of the lower courts need no interference. Upon a query from this bench regarding the petitioner's contention that the courts below did not examine the নথি of the previous suit the learned advocate for the opposite party controverts such argument. He draws attention to the lower courts records and shows that the নথি of the earlier suit was in the L.C.R. and therefore the courts upon properly examining the নথি arrived upon its decision. He submits that therefore it is clear that both courts below upon concurrent findings came upon the conclusion that the matter was already decided in an earlier suit and therefore the case is barred by the principle of res judicata. In support of his submissions the learned advocate for the opposite parties cited a decision in the case of Abdul Jalil Vs Islamic Bank reported in 53 DLR (AD) (2001). Relying

on this decision he argued that it is well settled that the ultimate result of the suit is clear as day light and such a suit should be buried at its inception since continuing the same would be a fruitless litigation. He submits that in this matter it is clear that the title of the matter has already been decided in a previous suit therefore continuation of this suit would result in fruitless litigation. He concludes his submissions upon assertion that the Rule ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides, perused the application and materials on record including the judgments of the courts below. The relevant portion of the judgment of the trial court is produced below:

> "উভয় পক্ষের দরখাস্ত, আপত্তি ও কেস নথি পর্যালোচনা অন্তে প্রতীয়মান হয় যে, অত্র মোকদ্দমার নালিশি সম্পত্তি নিয়ে ইতোমধ্যে সাব-জজ আদালতে দায়েরকৃত ৭৫/৮৫ নং মোকদ্দমা দায়ের করতে মহামান্য হাইকোর্ট বিভাগ হতে বিজ্ঞ সাব-জজ আদালতের রায় ডিক্রি বহাল রাখেন। যে সমস্ত বিষয়াদি ইতোমধ্যে নিষ্পত্তি হয়ে গিয়াছে, সেটি নিয়ে পূনরায় ফলঞ্চীন মোকদ্দমা করায় কোন সুফল নেই।"

Upon examination of the judgment of the trial court it is not actually clear as to which নথি পর্যালোচনা he is referring to. It was the trial court's duty to specifically mention as to whether

the নথি he is referring is the নথি of the judgment and decree of the suit of 1986 being Title Suit No. 70 of 1986 which was followed by execution case. Since the court came upon its decision relying on a previous suit therefore it was absolutely necessary that the court should mention as to which নথি it is referring to.

Next I have perused the relevant portion of the judgment and decree of the appellate court. Upon perusal it is not actually clear as to whether the নথি was specifically examined by the Appellate Court either before arriving upon its decision.

Learned Advocate for the petitioner submitted that the নথি of the suit of 1986 was only produced in appeal and not in trial. The learned advocate for the opposite parties could not specifically deny such contention of the petitioner.

Therefore whether the নথি were at all before the trial court is also not clear. Furthermore it is also not clear whether the court below particularly the trial court actually examined the নথি and the judgment and decree of the original Title Suit No. 70 of 1986 followed by execution case.

In my considered view before rejecting a plaint it is the duty of the court to state upon certainty as to the ground of rejection which must be particularly determined. A party should not to be deprived in the absence of certainty in any finding which may be a ground for rejection of plaint.

It is also well settled that res judicata is a matter of fact and therefore ought to be heard on the factual merits. Moreover I have also relied on the decision cited by the learned advocate for the petitioner. The relevant portion of the 20 BLD (AD)is reproduced below:

> "Question of res judicata cannot be decided from a reading of the plaint and should be decided at the time of trial."

I have also relied on the principle of the judgment of 13 BLD(AD) which is reproduced below:

> "The plea of resjudicata is not available in rejecting a plaint under Order 7 Rule 11 of the C.P.C. This matter can only be decided on the trial and it cannot be decided from a reading of the plaint res judicata can be made an issue in the suit."

Relying on this judgment of our Apex Court the principle of which is binding on all, I am of the considered finding that it appears that no certainty was arrived at the courts regarding the issue of title being already settled in another suit previously. The courts ought to have examined the concerned নথি and specifically mentioned the details of the নথি before arriving at

their conclusion. Therefore I am of the considered view that the matter ought to be heard on the merits.

I find merit in this Rule.

In the result, the Rule is made Absolute and the impugned judgment and decree dated 21.10.2014 (decree signed on 27.10.2014) passed by the Additional District Judge, 1st Court, Kushtia in Title Appeal No. 50 of 2012 and the judgment and order dated 31.07.2012 passed by the Sadar Assistant Judge, Kushtia in Title Suit No. 297 of 2010 both are hereby set aside.

The order of stay granted earlier by this court is hereby recalled and vacated.

Send down the lower court's records at once.

Communicate the order at once.

Shokat (B.O)