

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

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO. 1008 OF 2016.

IN THE MATTER OF:

An application under Section 115 (1) of the Code of
Civil Procedure, 1908.

- AND -

IN THE MATTER OF:

Humayun Kabir being dead his heirs:

1. Bilkis Begum and others

.... Petitioners.

-Versus-

Showkat Newaz and others.

..... Opposite parties.

Mr. Muhammad Rejaul Hussain Morshed, Advocate

.... For the petitioners.

Mr. Mohammad Osman, Advocate

.... For the opposite party No.1.

Heard on: 29.02.2024 and

Judgment on: 07.03.2024.

On an application of the petitioner Humayun Kabir being dead his heirs: (1) Bilkis Begum and others under section 115 (1) of the Code of Civil Procedure, 1908 the Rule was issued calling upon the opposite party Nos.1-3 to show cause as to why the impugned judgment and decree dated 19.01.2016 passed by the learned Special Judge and Jononirapatta Bighnakari Aparadh Daman Tribunal, Chattogram in

Other Class Appeal No.212 of 2009 allowing the appeal and thereby reversing the judgment and decree dated 25.11.2008 passed by the learned Senior Assistant Judge, 5th Court, Chattogram in Other Class Suit No.441 of 2002 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the plaintiff instituted Other Class Suit No.441 of 2002 in the Court of Senior Assistant Judge, 5th Court, Chattogram for permanent injunction under Section 54 of the Specific Relief Act, contending, *inter-alia*, that the defendant is the owner of the disputed property. The defendant entered into a contract with the Plaintiff. The conditions of which were, *inter alia*, that the rent of the property will be Tk.4,000/- (Four thousand) for the first year, and Tk. 4,500/- (four thousand and five hundred) for the next subsequent years, starting from the second year. The contract will be valid for 5(five) years i.e. from 01.05.1999 to 30.04.2004. At the expiry of the contract, the Plaintiff will leave the property to the defendant on condition that defendants will pay back the Plaintiff, the advance money and other development expenses and also the market value of the house at the time of leaving it which was to be constructed by the plaintiff. The parties will have the option of renewal of contract on the expiry of it by mutual understanding. The Plaintiff will pay rent to the defendant

within 15th days of each month and will be considered as defaulter if he fails to pay the rent for 3 consecutive months. All the gas, electricity, water lines, holding will be in the defendant's name who is responsible for paying holding taxes and 'Khazna'. The plaintiff will pay the electricity, water and gas bills and will provide copies of all bills to the defendant. The Plaintiff will have to build 'Kachcha' house after piling in the land which was null at the time of entering into the contract. All the money spent at that time by the Plaintiff will be considered as advance payment to the defendant and the defendant will be considered as the owner in all aspects. But the Plaintiff will rent the houses to the tenants and will be in charge of all kinds of dealings with them and will be bound to abide by the terms of the contract which will be the main facts for consideration in all Cases. The Plaintiff says that the contract signed by both the parties on 01.05.1999, was intended for a duration of 3 years, which contradicts the rent receipt of 06.12.1998 that stipulated a five-year contract. But the Plaintiff also says that the contract was renewed till April, 2004.

The defendant, having denied the renewal, subsequently issued an eviction notice to the tenants which did not contain his name and after that he sent another notice to the Plaintiff on 05.10.2002 stating that the terms of the contract has expired and demanding the return of the property, stating that the Plaintiff should return the property to the defendant.

On the same day, the defendant had filed a G.D. in the 'Panchlaish' Thana, accusing the plaintiff had threatened to initiate false legal proceedings against him. In fact the defendant himself threatened both the Plaintiff and the tenants of the same as a result some of the tenants left. And as such, the plaintiff notified the respectable persons of the locality and also filed a G.D. in Panchlaish thana. The defendant has caused hardship to the tenants by discontinuing the water supply and also filing complaints with the authorities of Bangladesh P.D.B. The Plaintiffs contend that the defendant is doing all these to avoid paying the Plaintiff Tk.8,00,000/- (eight lack), which was spent by the Plaintiff for the development of the property. According to the contract the defendant is bound to make the payment, otherwise the Plaintiff will not return the property to him. So, the Plaintiff prays that the defendant should be restrained permanently from evicting the Plaintiff unlawfully, going beyond the terms of the contract.

The suit was contested by the defendant opposite party by filing written statement denying all the material assertions made in the plaint contending, *inter-alia*, that the suit is barred by limitation under Sections 42 and 56 of the Specific Relief Act, 1877 that the suit is not properly valued, the plaintiff has not come with a clean hand etc. The defendant denies all the statements of the Plaint except for the facts that the Plaintiff was to return the property in dispute to the

defendant at the expiry of the contract, the Plaintiff was to pay rent within the 15th days of every month. The holding, water, gas and electricity connection will be taken in the name of the defendant and he will pay the revenues and holding taxes but the bills of water, gas and electricity will be paid by the plaintiff of which he will provide the copies to the defendant. But the parties will be bound by the terms of contract and in all cases, the terms of the contract will be the main facts for consideration. The statement of the defendant is that, the contract was for 3 (three) years and according to which the monthly rent was Tk.5,000/- (five thousand) and the defendant took Tk.2,50,000/- (two lac and fifty thousand) as advance and the contract started from 01.05.1999 to 30.04.2002. The Plaintiff was to be considered a defaulter if he failed to pay rent for 2(two) consecutive months and accordingly, the Plaintiff is a defaulter and is not entitled to file this suit.

The defendant denies the existence of the rent receipt of 06.12.1998, the two receipts of 23.11.1998, the temporary tenancy agreement of 04.04.1999 and the receipt of Tk.1,00,000.00 (One lack) only bearing stamp No. Chha-798750, asserting that all the signatures of the defendant on these documents were forged.

The defendant also contends that the Plaintiffs obtained the water and electricity connections illegally by using forged deeds and through other unlawful ways and also that, these connections were

brought by the Plaintiff in the name of some persons other than the defendant and as such, the authorities of "WASA have disconnected the water supply many days before the filing of the suit. The Plaintiff has not provided any copy of the bills to the defendant according to the terms of the contract.

The defendant states that the Plaintiff is a defaulter as he has not paid any rent since May, 2002. The plaintiff has also received Tk.50,000/- (Fifty thousand) from the defendant for obtaining water, gas and electricity connections to the suit property. But with the help of his kin Belayet Hossain, who works at the office of the Deputy Commissioner and some dishonest employees of the WASA, the Plaintiff has done all the illegal activities. In fact, the defendant has been responsible for all the piling and construction of the houses' as well as renting them to the tenants, which the Plaintiff claims to have done. The Plaintiff has been involved in all sorts of anti-social activities and has vitiated the environment of the neighbourhood. He is an unwanted defaulter tenant and ought to leave the property to the defendant as the duration of the contract is over. So, the defendant prays for the suit to be dismissed with cost to the Plaintiff.

Thereafter, the trial Court framed the following three issues:

1. Is the suit maintainable in its present form ?
2. Has the Plaintiff any interest in the suit land ?
3. Is the Plaintiff entitled to get the decree as prayed for ?

At the time of trial the plaintiff adduced one witness namely, Jahanara Begum as P.W-1 on the basis of the power of attorney and also exhibited some documents as Exhibit-1-11 who was duly cross-examine by the defendant but the defendant adduced none.

The trial Court after consideration of the evidence on record decreed the suit by its judgment and decree dated 25.11.2008.

Against the said judgment and decree of the trial Court the defendant opposite party preferred Other Class Appeal No.212 of 2009 in the Court of learned District Judge, Chattogram.

The said appeal was heard by the Special Judge and Jononirapatta Bignakari Aporadh Daman Tribunal, Chattogram, who after hearing the parties and considering the law and facts, allowed the appeal and thereby setting-aside the impugned judgment and decree of the trial Court by its judgment and decree dated 19.01.2016.

Being aggrieved by and dissatisfied with the impugned judgment of the Appellate Court the plaintiff-petitioners filed this revisional application under Section 115(1) of the Code of Civil Procedure, 1908 and obtained the Rule.

Mr. Mohammad Osman, the learned Advocate enter appeared on behalf of the opposite party No.1 through vokalatanama to oppose the Rule.

Mr. Muhammad Rejaul Hussain Morshed, the learned Advocate appearing on behalf of the petitioners submits that admittedly the

defendant opposite party are the owner of the scheduled property and the plaintiff is the tenant of the defendant No.1. He submits that the defendant threatened him to dispossess and without following any specific procedure of law, issued notice upon the plaintiff thus the plaintiff was constrained to file the suit for not to evict him without due course of law and as such the trial Court after consideration of the evidence on record decreed the suit whereas the Appellate Court, without adequately addressing the each finding of the trial Court, passed the impugned judgment. He further submits that the plaintiff specifically mentioned that at the time of agreement the defendant had received Tk.1,00,000/- in advance and in such a case the plaintiff was not a defaulter but the Appellate Court, without properly considering the said facts, passed the impugned judgment.

He further submits that the plaintiff claims that since the defendant, after receiving the amounts, did not make any agreement or renew the contract whereas the defendant, after receiving the huge amounts of money, developed the land and also constructed semi-pacca ghar and established connections for water, electricity and gas line, indicating that the defendant should not be labeled as habitual defaulter.

Furthermore, the plaintiff's received of Tk.1,00,000/- was not merely an advance but an advance for rent as such the agreement though has not been renewed but the amount received by the

defendant should be accounted for in the payment of the monthly rent but the Appellate Court also did not consider the said facts and passed the impugned judgment. He further submits that since the plaintiff deposited the advance money for rent and though the trial Court as well as the Appellate Court took view that no agreement existed between the parties but the agreement should remain in effect till the adjustment of the said amount of Tk.1,00,000/- as rent and asserts that the Appellate Court failed to consider these facts and passed the impugned judgment. He further submits that the trial Court specifically mentioned that the defendant received the rent by putting his signature in the said rent receipt but at the time of trial, he denied his signature whereas he did not prove the same and the trial Court rightly found that the defendant had indeed signed the receipt for the amount (Exhibit-D) but the Appellate Court failed to consider the said vital facts of the case and erroneously took the view that it is the duty of the plaintiff to prove the same. He further submits that when the defendant asserts certain claims then it is the duty of the defendant to prove the same. Since the defendant claims that the signature present in the receipt does not belong to him, the burden of proof lies with the defendant, however the Appellate Court did not consider the said vital facts of the case and erroneously passed the impugned judgment.

He further submits that admittedly the defendant is the owner of the land and the plaintiff never claims the title but claims that the said agreement should be renewed and citing the deposit of funds and significant investments made in the property's development and the same should be adjusted and thus without any due course of law the defendant is not allowed to evict the plaintiff from the suit premises. In support of his argument the learned Advocate cited decision of the case of *Mokbul Hossain Khondker Vs. Jaheda Khatoon* reported in 47 DLR (HCD)-430, the case of *Dr. Suraiya Hossain Vs. Taherunnessa* reported in 41 DLR (HCD)-441, the case of *Md. Rafique and other Vs. Md. Siddique and others* reported in 22 DLR (AD)-56 and also decision of the Indian Court of the case of *Dasarathi Kumar Vs. Sarat Chandra Ghose and another* reported in 37 (CWN)-971. He prayed for making the Rule absolute.

On the contrary, Mr. Mohammad Osman, the learned Advocate appearing on behalf of the opposite party submits that admittedly the defendants are the owner of the suit premises and the agreement between the parties seized from October 2002 and since then the plaintiff did not pay any rent and thus he is a habitual defaulter. He further submits that the Appellate Court rightly took the said view that the agreement between the parties was seized from October 2002 and from then the plaintiff never paid any rent, thus he become a habitual defaulter.

He further submits that the Appellate Court after proper evaluation of the evidence on record as well as the law took a view that the suit is not maintainable under Section 54 of the Specific Relief Act, 1877. The Specific Relief Act, 1877 can be involved when the agreement is in existence but admittedly there was no agreement between the parties in existence thus the suit is not maintainable, which is a right finding of the Appellate Court.

He further submits that the Appellate Court after consideration of the evidence on record found that the plaintiff is the habitual defaulter and illegal possessor and did not pay any rent from the date of filing of the suit that is 14 years and being habitual defaulter, he has no right to file any case for permanent injunction. He further submits that law clearly provides that the habitual defaulter should be evicted at anytime when he denied to pay the rent. In support of his argument the learned Advocate cited the decisions of the case of *Lutfor Rahman Mollah (Md) and another Vs. M. Safi-ul-Alam reported in 67 DLR (HCD)-319*.

He further submits that without filing any documents since the plaintiff is a habitual defaulter thus he file SSC Suit No.377 of 2010 for eviction of the plaintiff and in support of his view cited the decisions of the case of *Mustaque Hossain (Md) Vs. Md. Shajahan Miah and another reported in 57 DLR (AD)-60* and the case of *Mymensingh Arya*

Dharma Gnan Prodaini Sava Vs. Rabindra Narayan Paul reported in 56 DLR (HCD)-47. He prayed for discharging the Rule.

I have heard the learned Advocate of both the side, perused the impugned judgment of the Courts below, the evidence and the papers and documents as available on the record.

Admittedly the plaintiff entered into an agreement with the defendant from 01.05.1999 to 30.04.2002 that is for 03 years and the monthly rent was fixed for Tk.4000/- per month for the 1st year and then 4500/- per month for subsequent years and the plaintiff's further case is that the defendant received of Tk.1,00,000/- as advance. So, the plaintiff is not a habitual defaulter. He, after the agreement, developed the suit premises and constructed semi-pacca house and also installed electricity, gas and water line and regularly paid the dues to the concerned authority. The defendant gave assurance that the contract should be renewed till April, 2004 but subsequently, denying the said promise and the defendant sent a notice for eviction without containing his name and thereafter sent another notice to the plaintiff on 05.10.2002 stating that the terms of the contract has expired and the plaintiff should return the property to the defendant. Furthermore, on the same day, the defendant lodged a G.D in Panchlaish Police Station with some allegation against the plaintiff and the plaintiff also informed the same to the respectable persons of the locality and thus the defendant has created hardship to the tenant by

making allegation to the concern authority to terminate or disconnect the water supply and other services. The plaintiff claimed that thus he is constrained to file this suit and it also appears that the defendant also contested the suit but did not adduce any witnesses and the defendant's case is that the contract was for three years and the monthly rent was fixed for Tk.5000/- and he received Tk.2,50,000/- as advance and contract started from 01.05.1999 and was in force till 30.04.2002 and if the plaintiff failed to pay the rent for two consecutive months, the plaintiff became the defaulter and he is not entitled to continue the possession of the said premises. The defendant also denied the rent receipt dated 06.12.1998 and 23.11.1998 and agreement dated 04.04.1998 receiving Tk.1,00,000/- only on stamp No.Chha-798750 and also denied the signatures of the defendant in those documents. Defendant further claims that plaintiffs brought the water and electricity connections illegally by using forged deeds and through other unlawful ways and also claims that they received Tk.50,000/- from the defendant for the installment of the water, gas and electricity connections and as the plaintiff became a habitual defaulter, he issues a notice under Section 106 upon the plaintiff, which has hindered the plaintiff's right to enjoy the property. Thus the plaintiff illegally has filed the suit for permanent injunction.

The trial Court took the view that though the plaintiff has claimed that another agreement was executed, set to expire in 2004 but no such agreement had been exhibited and as the agreement was not renewed, the plaintiff was bound to vacate the suit premises. However, the Court took view that since it appears that the defendant received an advance which was marked as Exhibit-3 is to be paid by the defendants to the plaintiff on the expiry of the contract and on condition to that the plaintiff will leave the premises to the defendant in case of non-payment of rent for two consecutive months and from the Exhibit-4 it appears to the trial Court that the defendant took Tk.1,00,000/- as advance though the defendant denied his signature but did not take any step to prove the same. The trial Court also took view that the defendant though claimed that the plaintiff is a defaulter tenant, but failed to prove even the receipt of acceptance of rent till October, 2002, signed by the defendant. As such the plaintiff cannot be called a defaulter.

However, the Court took view that since the tenancy agreement had expired the plaintiff is bound to leave the suit premises condition to the fulfillment of the provision as described in clause No.11 of the agreement and the defendant has denied taking any money but failed to disprove the Exhibit-3, which containing his signature and thus the trial Court decreed the suit.

The Appellate Court after consideration of the facts and circumstances of the case took view that the agreement was in existence up to 30 April, 2002 and then the defendant proposed the plaintiff to handover the land to the defendant but the plaintiff did not handover the same even he did not pay the rent for consecutive two months, the Court also took view after considering the receipts (Exhibit-9 series) that as per provision of Section 103 the burden was on the plaintiff to prove that the defendants' signature on the receipt but the plaintiff did not adduce any witnesses.

The Appellate Court also took view that Jahanara Begum on the basis of power of attorney filed the suit and there is no provision in the agreement that allows the power of attorney holder to file a suit for permanent injunction. The Appellate Court also found that the plaintiff claims that he had paid rent up to September, 2002 which was contradicted by the fact that he had not paid rent for the last 14 years, as such, making him as a habitual defaulter. The Appellate Court also took view that as per provision of Section 54 of Specific Relief Act, the tenant has no right to bring a suit against the owner of the premises and as such the suit is also not maintainable. Thus the Appellate Court took view that since the agreement between the parties has expired and seized by the conduct of the plaintiff thus he cannot get any relief and accordingly allowed the appeal and setting-aside the judgment of the Courts below.

I have considered the provision of Section 54 of the Specific Relief Act, 1877, which is for perpetual injunction and perpetual injunction maybe granted to prevent the breach of an obligation existing in favour of the applicant.

Wherein the law clearly states that: When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the Court may grant a perpetual injunction in the following cases (namely):

(a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

If I consider the aforesaid provision (e), which states that where the injunction is necessary to prevent a multiplicity of judicial proceedings, then admittedly, the plaintiff is a tenant of the defendant No.1 and if any notice served upon him for non-payment of the rent as a defaulter then his appropriate course of action would be to file a suit under Premises Rent Control Act, 1991. But in the instant case it appears that the plaintiff, without invoking the said provision, filed the

suit for perpetual injunction under Section 54 of the Specific Relief Act, 1877. When the specific provision is available, without exhausting the said provision, the plaintiff is not permitted to travel beyond the said provision. However, in this case the Appellate Court, after consideration of the facts, found that the plaintiffs' suit under Section 54 is not maintainable. Furthermore, it appears that the plaintiff claimed that he was not a default and had invested significant amounts in developing the property, in question, including the installation of electricity, gas and water lines. However, the agreement does not contain any terms supporting this claim, and the defendant denied the same. While the plaintiff claimed that he had spent approximately Tk.8,00,000/- on the suit premises but the defendant claimed to have paid Tk.50,000/- to the plaintiff for the installation of the aforementioned utilities, but both the said facts have not been proved by either party. Although, according to the agreement (Exhibit-3) it is found that the defendant received an advance of Tk.1,00,000/-. We can go through the provisions referred in Section 10(a) and (b) of the Premises Rent Control Act, 1991:

“(a) claim, receive or invite offers or ask for payment of any premium, salami, fine or any other like sum in addition to the rent; or

(b) except with the previous written consent of the Controller, claim or receive the payment of any sum

exceeding one month's rent of such premises as rent in advance."

The provisions specifically indicate the prohibitions regarding the advance payment of rent as outlined in Section 23 of the Contract Act.

In the case of *Shamsuddin Ahmed Vs. Mohammad Hassan and others reported in 31 DLR (AD)-155*, it is found that the agreement to pay Tk.19,200/-, by way of advance rent, was undoubtedly a part of the consideration of the transaction as defined in Section 2(d) of the Contract Act. This contravenes the positive statutory mandate as provided in Section 10(b) of the Premises Rent Control Act, 1991.

Similar view has been taken in the case of *Md. Jashim Uddin and another Vs. Mst. Nurjahan Begum reported in 14 BLD (HCD)-528* wherein their lordship held that Section 10(b) of the Ordinance prohibits the acceptance of money by way of advance rent by the land lord. This also contravenes the positive statutory mandate as provided in Section 10(b) of the Ordinance and renders the agreement for lease void under Section 23 of the Contract Act. In view of the unenforceability of such an agreement the position is that the appellants are a monthly tenant who are liable to ejection if they make default in payment of rent. Even if the tenants become defaulters during the continuance of the suit then they should be

treated as defaulters and they will not be entitled to get the benefit under Section 18(5) of the Ordinance.

From the aforesaid decision it is clearly found that this type of advance payment is not permissible and hit by Section 10(b), furthermore in this decision Division Bench of this Court took view that even if the tenant not pay the rent during the pendency of the suit then he also became a defaulter. In the case of *M/s. Hossain Ahmed, represented by its proprietor Hossain Ahmed Vs. M/s. HD. Hossain and Brothers, represented by its proprietor Md. Delwar Hossain and others reported in 32 DLR (AD)-223*. Wherein our Apex Court took view that:

“Perpetual injunction is granted as provided under section 54. It lays down that an injunction may be granted to prevent the breach of an obligation in favour of the applicant, whether expressly or by implication, provided there exists no measure for ascertaining the actual damage or likely to be caused by threat of the defendants and where such invasion or threat is such that pecuniary compensation would not afford adequate relief.”

And in the case of *Jobayer Hossain and others Vs. Noor Hafez and another reported in 56 DLR (AD)-22* wherein our Apex Court took the view that: *The suit being a suit for permanent injunction in which the question of title may be gone in to incidentally but decision of title*

in a suit for permanent injunction not to have been the guiding principle. The Court cannot disentitle the plaintiff of a decree of a permanent injunction if he can prove possession and in that view the plaintiff could not be evicted with force if he continuous to be in possession unless in due process of law and could exercise his right of possession restrained everybody including the real owners.

This decision also cited by the learned Advocate of the defendant and from the aforesaid decisions it is clearly found that the real owner also not permitted to eject the tenant without due process of law. The learned Advocate of the petitioner cited the decision has already been mentioned earlier from where this principle also settled that without any due process of law the tenant should not be ejected.

I have considered the entire material facts of the case that the plaintiff filed this suit under Section 54 of the Specific Relief Act, 1877, however his appropriate remedy was laid within the provisions of Premises Rent Control Act, 1991.

In case of eviction if the tenant has given notice under Section 106 then the tenant has right to send the rent to the owner via postal service, and if the owner refuses, then he could seek recourse through the Rent Controller. But without going to apply the said provision he filed the present suit. However, the trial Court though decreed the suit but Appellate Court dismissed the suit, and allowed the appeal.

It also appears that in the meantime, time was passed and the defendant filed SCC Suit No.212 of 2009 for eviction. Without discussing anything more it is my view that it is better to direct the trial Court to consider the dispute the parties afresh, and also can consider whether the advance received by the defendant can be adjusted from the rent.

I have already discussed that the advance though illegal but it is the duty of the Court to adjust the rent from the said advance and if the plaintiffs rent control suit prevail then the owner can eject the tenant by due course of law.

Since the plaintiff, without filing the suit where his remedy was available, filed this suit it is my view that the Appellate Court rightly allowed the appeal and set-aside the impugned judgment of the trial Court. However, I have already discussed that the plaintiff should be evicted by due course of law.

In the result, the Rule is discharged without any order as to cost.

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

Sent down the lawyer Court records at once.