

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashefa Hussain

Civil Revision No. 33 of 2017

Dipok Kumar mojumder

.....petitioner

-Versus-

Anup Kumar Mojumder and others

----- Opposite parties.

Mr. A.Z.M. Fariduzzaman, Advocate

----- For the petitioner

Mr. Md. Jalal Uddin, Advocate

----- For the Opposite Parties.

Heard on: 16.01.2024, 30.01.2024 and

Judgment on 05.02.2024

Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 17.11.2016 passed by the learned Additional District Judge, 2nd Court, Gazipur in Civil Appeal No. 151 of 2014 arising out of Civil Suit No. 434 of 2010 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 Civil Suit No. 434 of 2010 in the court of learned Senior Assistant Judge, 1st Court, Gazipur inter alia praying for cancellation of a partition deed impleading the instant opposite parties as defendants in the suit. Upon hearing the parties the trial court dismissed the suit by its judgment and decree dated 31.08.2014. Being aggrieved by the judgment and decree of dismissal passed by

the trial court the plaintiff filed an appeal which was pending in the court of Additional District Judge, 2nd Court, Gazipur. During pendency of the appeal the plaintiff in the suit being appellant in the appeal filed an application to call the page No. 124-126 of 106 number Balam of Balam Book No. 01 of 1990 from Joydebpur Sub-Registry Office Gazipur before the appellate court to pass an order. The appellate court upon hearing the parties however rejected the application filed by the plaintiff appellant by its judgment and Order No. 15 dated 17.11.2016 which is the impugned order in this civil revisional application. Being aggrieved by the order of the court below the plaintiff appellant as petitioner filed the instant civil revisional application which is before this bench for disposal.

Since the instant civil revision arises not out of any decree in the suit but out of an order of the appellate court order dated 17.11.2016 which is the impugned order, therefore there is no necessity to mention the facts on the merits of the case as stated by the parties.

Learned Advocate Mr. A.Z.M. Fariduzzaman appeared on behalf of the petitioners while the learned Advocate Mr. Md. Jalal Uddin appeared for the opposite parties.

Learned Advocate for the petitioners submits that the appellate court upon total disregard of the necessity of calling for the Nothi unjustly rejected the order and thereby caused

grave injustice to the plaintiff petitioner. He submits that the appellate court while passing the order of rejection did not even state its reason for not allowing the application. He asserts that the appellate court by not stating the reasons for passing the order did not comply with the provisions of Order 41 Rule 31 of the Code of Civil Procedure and therefore the impugned order is a nonspeaking order. He submits that the application for calling for the Nothi particularly Balam Book was filed under the provisions of Order 41 Rule 28 and 29 of the Code of Civil Procedure. He particularly draws upon Order 41 Rule 28 of the Code of Civil Procedure and submits that Order 41 Rule 28 particularly allows production of additional evidences in the appellate court. He submits that Order 41 Rule 28 provides that:

“Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.”

He submits that in this case the appellate court while arriving at its decision did not state the reasons for such a decision and which is in total violation of the provisions of the code. He next submits that the Balam Book is absolutely

necessary for proving the plaintiff's case and therefore needs to be produced in the concerned court. He concludes his submission upon assertion that the judgment of the appellate court be set aside 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 vehemently opposes the Rule. He submits that the appellate court did not commit any illegality in passing the order since the application was filed by the plaintiff is only a dilatory tactics to delay the proceedings. He makes some submissions on the factual aspects and submits that the issue was already settled by the trial court and calling for the Balam Book is not at all necessary and relevant at the appellate stage. He concludes his submissions upon assertion that the impugned order was correctly given by the appellate court and the Rule ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides, perused the application and particularly examined the impugned order. From the impugned order it appears that the appellate court while passing the order however did not cite its reason for passing such an order. My considered view is that whatsoever being the order passed by the appellate court, it ought to have given its reasons for passing the order. The application apparently was filed under Order 41 Rule 28 of the Code of

Civil Procedure and also Order 41 Rule 29 of the Code of Civil Procedure. Order 41 Rule 28 is reproduced below:

“Mode of taking additional evidence, Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the court from whose decree the appeal is preferred, or any other subordinate court, to take such evidence and to send it when taken to the Appellate Court.”

From perusal of Order 41 Rule 28 of the Code it appears that it is an application for producing additional evidences and if filed it is the appellate court's discretion to allow or disallow the production of the evidences whatsoever. However no discretion or power conferred upon any court can be arbitrarily exercised. While passing any order the court must cite its reason. When in an order a court does not cite the reason for allowing or disallowing the order whatsoever the case it manifests an arbitrary and unjust order. Such arbitrariness is not allowed particularly under the provisions of Order 41 Rule 31 of the Code of Civil Procedure. Order 41 Rule 31 (C) of the Code of Civil Procedure expressly calls for citing the reason for a decision taken by the appellate court. However as mentioned

above in this case the appellate court did not state its reason at all and gave a nonspeaking order.

The learned advocate for the opposite party argued that the Balam Book is not at all necessary since the particular issue was already decided in trial by the trial court wherein the trial court dismissed the suit. My considered view on this argument of the learned advocate for the opposite party is that the civil revision arises out of an impugned order against which Rule was issued. Therefore the records of the case are not before me. Consequently I am not in a position to examine or enter into such factual and disputed matters.

Therefore under the facts and circumstances of the case, I find merit in this Rule.

In the result, the Rule is made Absolute and the impugned judgment and order dated 17.11.2016 passed by the Additional District Judge, 2nd Court, Gazipur is hereby set aside.

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

Communicate the order at once.

Shokat (B.O)