

Present:
Mr. Justice Soumendra Sarker

Civil Revision No. 121 of 2018

In the Matter of:

Javed Iqbal Khan

..... *Plaintiff -Petitioner.*

-Versus-

Haji Md. Bahauddin and others

.....*Defendant-Opposite parties.*

Mr. Abul Kalam Mainuddin, Advocate

----*For the petitioner*

Mr. S. R. M. Lutfor Rahman Akhand, Advocate with

Mr. S. M. Rafiqul Islam, Advocate

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

Heard on: 04.04.2019; 18.04.2019;10.07.2019; 11.07.2019 & 17.07.2019

Judgment on: 22.08.2019.

The Rule issued calling upon the Opposite party No. 1 to show cause as to why the judgment and order dated 19.11.2017 passed by the learned Additional District Judge, Court No. 08, Dhaka in Civil Revision No. 126 of 2017 reversing the judgment and order dated 11.05.2017 passed by the learned Senior Assistant Judge, Dohar, Dhaka in Title Suit No. 6715 of 2008 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 facts giving rise to the issuance of the Rule in a nutshell can be stated thus : The present petitioner as plaintiff instituted the original Title Suit No. 339 of 2007 in the 4th court of learned Assistant Judge, Dhaka against the defendant-opposite parties for Specific Performance of Contract. The suit was transferred subsequently to the court of Senior Assistant Judge, Dohar, Dhaka and renumbered as Title Suit No. 6715 of

2008. During pendency of that suit after service of summons-notice the defendant No. 14 on making his appearance filed an application for rejection of plaint under Order VII rule 11 along with section 151 of the Code of Civil Procedure contending *inter alia* that the plaintiff to the original suit on the basis of an agreement in the form of 'baynapatro' with the predecessor of the defendants No. 1-6 executed on 20.06.1972 and registered on 01.07.1972, after the expiry of 35 years of the deed of agreement has instituted the original suit for Specific Performance of Contract. It was further contended by the defendant No. 14 that the aforesaid deed of agreement is forged, created and not acted upon and there is a clear recital in paragraph No. 5 of that deed of agreement that on the date of registration, the possession would be delivered in favour of the plaintiff, but till today no possession was delivered and as such the alleged deed of agreement not yet effected. In paragraph No. 03 of that deed of agreement there was another condition that within 03 (three) months from the date of getting a registered lease deed in respect of the agreement from the Government, the executant of the agreement would execute and register the sub-kabala deed in favour of the plaintiff.

In the instant case the date of agreement deed is 20.06.1972 and despite, within the contents of this deed, there is a condition to the effect that the agreement shall be effected within 03 months, but after the laps of 35 years, the suit has been filed by the plaintiff and as such the suit is not maintainable as it is barred by law.

The learned trial court after hearing of the application for rejection of plaint by its order dated 11.05.2017 disallowed the application for rejection of plaint and being aggrieved the defendant-opposite party has preferred a revisional application under Section 115 (2) of the Code of Civil Procedure being Civil Revision No. 126 of 2017 in the court of the learned District Judge, Dhaka, which was transmitted to the 8th court of learned Additional District Judge, Dhaka for hearing and disposal and the learned 1st revisional court on hearing the civil revision by the impugned judgment and order dated 19.11.2017 allowed the civil revision and after setting aside the order of the trial court dated 11.05.2017, rejected the plaint.

Being aggrieved by and dissatisfied with the impugned judgment and order, the plaintiff-petitioner has preferred 2nd revision before this court under section 115 (4) of the Code of Civil Procedure and obtained the Rule with an interim order of stay.

During hearing of the Rule, Mr. Abul Kalam Mainuddin the learned Advocate appeared on behalf of the petitioner while Mr. S. R. M. Lutfur Rahman Akhand the learned Advocate appeared on behalf of the opposite party No. 1.

The learned Advocate appearing on behalf of the petitioner submits that the learned 1st revisional court during passing the impugned judgment and order committed illegality, while the learned trial court in passing its order was justified in holding the view that the matter would be decided at the time of disposal of the suit as to whether the suit is

maintainable. The learned Advocate further submits that in paragraph No. 05 of the agreement it is stipulated that the vendor shall deliver physical possession to the purchaser before execution and registration of sale deed but the learned Additional District Judge, Dhaka wrongly held that the vendor Kazi Md. Firoz did not get any possession physically and as such he could not deliver possession in favour of the plaintiff. The learned Advocate also submits that the plaintiff is possessing the suit plot from the date of bainanama and as such he is entitled protection under Section 53A of the Transfer of Property Act but the learned Additional District Judge without realizing the facts erroneously held that the suit is not maintainable and it is barred by the provision laid down in Section 54 A of the Transfer of Property Act and Article 113 of the Limitation Act, although both the provisions of law are not applicable in the present suit inasmuch as in paragraph No. 03 of the agreement it has been mentioned that the executant will execute and register the sale deed in favour of the plaintiff within 03 months after getting registered lease deed from the Government. The learned Advocate lastly submits that the deed of agreement was on 20.06.1972 and it is the plaint case of the plaintiff that the fraudulent lease deed while obtained by the defendants, from the date of refusal to register the sale deed as per bainapatro, the plaintiff has filed the suit under Article 113 of the Limitation Act within 01 (one) year, but the learned 1st revisional court failed to appreciate the proposition of law. The learned

Advocate in support of his argument has referred a decision of this court reported in 14 BLC 367.

As against the aforesaid submission of the learned counsel for the petitioner, the learned Advocate appearing on behalf of the opposite party No. 1 controverting the argument advanced from the side of the learned counsel for the petitioner, submits that the learned 1st revisional court committed no wrong or illegality and the 2nd revision as it was filed from the side of the plaintiff-petitioner under section 115 (4) of the Code of Civil Procedure is not maintainable under the ambit of Section 2 (2) of the Code of Civil Procedure. The learned Advocate after referring some decisions of this court and our Apex Court submits that the order of rejection of plaint would be treated as a decree under section 2 (2) and 96 of the Code of Civil Procedure and within the meaning of the provision of sub-section (2) of section 2 of the Code of Civil Procedure, there is no scope to file any revision against the decree as per the provision laid down in Section 96 (1) of the Code of Civil Procedure. In the instant case although no formal decree has been drawn up, there lies no scope to hold such a view that the order of rejection of plaint is not a decree. In this context, the learned Advocate has referred a decision of our Apex court reported in 28 DLR (AD) 150. In the case of *Dacca Improvement Trust Vs. Waliullah and others* their Lordships held, in the case of an appeal against the order of rejecting a plaint drawing up of a formal decree not necessary as is provided in Civil Rules and orders. The learned Advocate lastly on referring 21 BLT 206; AIR 1998

Madhya Pradesh 148 & 11 BLD 318 submits that under the settle principle of law there is no scope to challenge a decree invoking the revisional jurisdiction and as such this civil Rule is liable to be discharged.

In order to appreciate the submission advanced from the sides of the learned counsels for the parties having gone through the certified copies of the plaint of Title Suit No. 6715 of 2008 (Annexure-A), the copy of deed of agreement dated 20.06.1972 which was registered on 01.07.1972 vide Annexure-D, the judgment and order passed by a Division Bench of this court in First Appeal No. 258 of 1993 vide Annexure-C, the certified copy of Civil Petition for Leave to Appeal No. 485 of 2013 [Annexure-C-(1)], the application for rejection of plaint (Annexure –E), the order of the trial court dated 11.05.2017 in Civil Suit No. 6715 of 2008, the impugned judgment and order dated 19.11.2017 and all other connected papers it transpires that the plaintiff to the original suit in order to get a sale deed by way of Specific performance of contract instituted the original suit and I find from the contents of the plaint that the plaintiff in his plaint has mentioned three dates of his cause of action. Firstly, on 20.06.1972, when the sale agreement was executed and secondly, on 20.08.1975, when the vendor died and thirdly, on 02.08.2007, when the defendants No. 1-6 obtained the lease deed from the Government in respect of the suit property. The fact remains that the suit has been instituted on 28.10.2007.

Consulting the relevant papers, I also find that the trial court despite did not allow the application for rejection of plaint, but the 1st revisional court by the impugned judgment and order rejected the plaint under the ambit of Order VII rule 11 of the Code of Civil Procedure. This Bench in the case of Ariz Khan vs. Government of the People's Republic of Bangladesh 38 BLD 234 held, in an appropriate case the plaint shall be rejected but in the case of rejection of plaint, the plaint alone and not the application of the defendant shall be the basis of rejection of plaint.

In the instant case, I have come across that in the plaint the plaintiff to the original suit alleged that the executant of the deed of agreement Kazi Md. Firoj after the execution and registration of the deed of agreement on 20.06.1972 & 01.07.1972 respectively, without execution and registration of the sale deed, died on 20.08.1975 and it is contended by the plaintiff-petitioner in his plaint that after the death of executant on 20.08.1975, the defendants No. 1-6 obtained the lease deed from the Government collusively. I also notice from the plain reading of the deed of agreement that within the deed of agreement there is a recital in the following way in paragraph No. 03 : “ That immediately after the Government of East Pakistan execute and register the lease deed in favour of the VENDOR in respect of the scheduled property, the VENDOR shall notify the PURCHASER and the PURCHASER shall pay the balance consideration money of (indistinct) to the VENDOR and the VENDOR shall execute and register the deed of transfer in

respect of the schedule property in favour of the PURCHASER within 3 (three) months from the date of the aforesaid notification after obtaining necessary clearance certificate and permission. ”

Here in this case, admittedly the Government has entered into a registered lease deed with the defendants No. 1-6 in respect of the suit property on 02.08.2007. It is further noticed from the connected papers that the executant of the deed of agreement Kazi Md. Firoj died issueless and after his death in a Succession Case No. 572 of 1983 the defendants No. 1-6 from the court of learned the then Subordinate Judge, 3rd Court, Dhaka obtained a succession certificate on 25.07.1983. Thereafter, the defendants No. 1-6 from the concerned Ministry of the Government on 02.08.2007 obtained a registered lease deed No. 7157 and the possession was delivered to the lease holder by the government. Subsequently, the defendants mutated their names and paying rents, holdings tax, gas and electricity bills etc. The defendant No. 14 after getting permission from the Government obtained his title document, the sub kabala dated 18.11.2014 which was duly registered.

Under the terms and conditions of the deed of agreement of the plaintiff it is obvious to note that after the lease deed of the Government the sub kabala deed should have been executed and registered within three months but admittedly, no sub kabala deed in respect of the suit property was executed and registered in favour of the plaintiff. It is to be remembered that a suit for Specific Performance of Contract shall have to be filed under Article 113 of the Limitation Act, 1908 which is one

year from the date, fixed for the performance. In this case, apparently after a long lapse of 35 years on 28.10.2007 the original suit was instituted. In this regard, the relevant law as provided in section 54 A of the Transfer of Property Act, 1882 contemplates, a contract for sale of any immovable property can be made only by an instrument in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof. In a contract for sale of any immovable property, a time, to be effective from the date of registration, shall be mentioned for execution and registration of the instrument of sale, and if no time is mentioned, six months shall be deemed to be the time.

On meticulous consideration of the plaint of the plaintiff-petitioner and on perusal of the relevant papers it is apparent from the face of the papers that the plaintiff to the suit have no definite cause of action and practically in the suit there is a lack of cause of action which is a substantive defect in the law of rejection of plaint as provided in Order VII rule 11(a) of the Code of Civil Procedure, and secondly; the suit as instituted is hopelessly time barred under Article 113 of the Limitation Act, 1908.

With regard to maintainability of the suit and invoking the revisional jurisdiction of this court, I have the reason to inclined such a view that it is clearly provided in Section 96 (1) of the Code of Civil Procedure (Act No. V of 1908) that the appeal shall lie against decree not the civil revision. The section 96 runs as follows:

“ (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties. ”

[Ref. AIR 1998 Madhya Pradesh 148; 28 DLR (AD) 150; 69 DLR 355]

Having regard to the facts, circumstances and the discussions referred to above, I am constrained to hold such a view that the Rule has got no substance to succeed.

In the result, the Rule is discharged without any order as to costs. The judgment and order dated 19.11.2017 passed by the learned Additional District Judge, 8th Court, Dhaka in Civil Revision No. 126 of 2017 reversing the judgment and order dated 11.05.2017 passed by the learned Senior Assistant Judge, Dohar, Dhaka in Title Suit No. 6715 of 2008 is hereby affirmed.

The order of stay granted earlier at the time of issuance of the Rule stands vacated.

Communicate the judgment and order at once.