Present:-

Mr. Justice Mahmudul Hoque

And

Mr. Justice Khizir Ahmed Choudhury

Civil Revision No. 1036 of 2018

Rural Power Company Limited (RPCL), represented by its Managing Director, of House No.19, Road No.1/B, Sector-9, Uttara Model Town, Police Station-Uttara, District-Dhaka

... Petitioner

-Versus-

Lahmeyer International Pally Power Services Limited (LIPPS), represented by its Company Secretary, of House No.219, Lane No.2, Baridhara DOHS, Police Station-Vatara, District-Dhaka

...Opposite-party

Mr. A.K.M. Alamgir Parvez Bhuiyan, Advocate

…For the petitioner

Mr. Md. Sagir Hossain, Advocate

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

Judgment on 30th June, 2022.

Mahmudul Hoque, J:

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 29.11.2017 passed by the learned District Judge, Dhaka in Money Execution Case No.05 of 2009 restoring the case to its original file and number should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in brief are that, the opposite-party, as applicant, filed Money Execution Case No. 05 of 2009 on 30.09.2009 under Order 21 Rule 11 of the Code read with Section 45 of the Arbitration Act, 2001 in the Court of District Judge, Dhaka as decree-holder, against the opposite-party, as judgment-debtors, for enforcement of a foreign award passed by Singapore International Arbitration Centre in Arbitration Case No. 052 of 2005 and Arbitration Award No. 40 of 2006. Application for execution was admitted by the Court and notices issued upon the judgment-debtors. Finally, the Executing Court amongst other dates vide Order No. 47 dated 21.03.2017 fixed the case for return of notice. On the date fixed decree-holder filed hazira. The notices were not returned after service, but judgment-debtors entered into appearance by filing Vokalatnama, consequently, next date was fixed on 04.05.2017 for hearing of the case. On the date fixed for hearing the decree-holder did not take any step either by filing hazira or application for adjournment. When the case was taken up for hearing the decree-holder was found absent consequently, the Court below, by the impugned judgment and order dated 04.05.2017 dismissed the case for

default. Thereafter, the decree-holder filed an application on 11.05.2017 serving copy of the application upon the judgment-debtors, praying for restoration of the execution case. The application was opposed by the judgment-debtors by filing written objection on 29.11.2017. Learned District Judge after hearing both the parties by the impugned judgment and order dated 29.11.2017 allowed the application and restored the execution case awarding costs of Tk. 5,000/- (Taka five thousand) to be paid to the judgment-debtors.

Being aggrieved by and dissatisfied with the judgment and order of the learned District Judge, Dhaka the judgment-debtor-petitioner moved this Court by filing this revisional application and obtained the present Rule and order of stay.

Mr. A.K.M. Alamgir Parvez Bhuiyan, learned Advocate appearing for the petitioner submits that the execution case was filed by the decree-holder for enforcement of an award under provision of Order 21 Rule-11 of the Code of Civil Procedure. There is no provision in law to restore an execution proceeding dismissed for default, but the decree-holder can file fresh execution

case for enforcement of the decree subject to provision of Article 182 of the Limitation Act and section 48 of the Code of Civil Procedure. He further submits that though the application for restoration was filed within week after dismissal of the execution case, but the court has no power or jurisdiction to allow the application for restoration of the execution proceeding, as such, the order passed by the learned District Judge, Dhaka apparently suffers from lacking jurisdiction as well as contrary to the provisions of law.

Mr. Md. Sagir Hossain, learned Advocate appearing for the opposite-party submits that the execution case was fixed on 21.03.2017 for return of notices. On the date fixed the decree-holder filed hazira and the court noted that notice after service have not yet returned but order shows that the judgment-debtors entered into appearance on that date and the case was fixed for hearing on 04.05.2017, but in the cause list, it was posted mentioning service return which led the decree-holder to understand that the case was not ready for hearing, consequently, the decree-holder failed to take step on the date fixed for hearing, however, after coming to know

about order of dismissal, the decree-holder hurriedly filed the application for restoration of the case. The court below fixed the application for hearing on 29.11.2017 and on that date the judgment-debtors filed objection against the application. The court after hearing both the sides, restored the execution case awarding costs of Tk. 5000/-. He further submits that the court in restoring execution case committed no illegally or error of law as the court has inherent power to be exercised for the interest of justice, notwithstanding, the fact that the applicant had another remedy, accordingly, the court restored the execution case. He argued that because of restoration of the execution case by the court below the other party has not been prejudiced in any way rather they will get opportunity to get the case disposed of within a shortest possible time. In support of his such submissions he has referred to the case of ***Nemi Chand and other Vs. Umed Mal*** reported in ***1962 AIR Rajasthan 107.***

We have heard the learned Advocates of both the sides, have gone through the revision application, application in execution case, application for restoration of the execution case, objection

filed by the judgment-debtors and the impugned judgment and order.

The execution case arises out of an foreign award passed by the Singapore International Arbitration Centre. The award holder put the award in execution by filing Money Execution Case No.05 of 2009 on 30th September, 2009 before the court of District Judge, Dhaka.

From perusal of order sheets (Annexure-B series to the application), it appears that the case was fixed for taking steps on the part of the decree-holder and return of notices on 47 dates and it took more than 8(eight) years time. Order sheets show that the decree-holder on all dates before dismissal of the execution case took steps either by filing hazira or by putting requisites for service of notices upon judgment-debtors. In usual course the case was fixed on 21.03.2017 for return of notices. On that date decree-holder filed hazira and the court noted that notices not returned after service, but the judgment debtors entered into appearance by filing vokalatnama. Because of appearance of the judgment-debtors on 21.03.2017 the court below fixed on 04.05.2017 for hearing of

the case, but on that date the decree-holder took no step either by filing hazira or seeking any adjournment consequently, the court below dismissed the case for default. Thereafter, on 11.05.2017 decree-holder filed an application for restoration of the execution case, copy of which was received by the judgment debtors on 22.11.2017. The learned District Judge fixed on 29.11.2017 for hearing the application. On the date fixed the judgment debtors filed written objection against the application for restoration. The Court after hearing both the sides allowed the application and restored the execution case in its original file and number on condition of payment of costs of Tk.5,000/- (Taka five thousand) to be paid the judgment-debtors.

Now, the question is whether the court can restore an execution case dismissed for default under any provision of law. It is true that there is no provision for restoration of an execution case dismissed for default in the Code of Civil Procedure, in particular, under Order 21. It is well settled that after dismissal of an execution case the decree-holder can file a fresh execution case subject to the provisions of section 48 of the Code and Article 182 of the

Limitation Act. In the present case, the decree-holder did not take recourse to such provisions of law but filed an application simply praying for restoration of the execution case in its original file and number and the court below allowed the same.

It is to be looked into whether by allowing an application for restoration of the execution case the court below has committed any illegality or error in the decision occasioning failure of justice. The petitioner contended that the execution court has no jurisdiction to restore the execution case in the exercise of its inherent power under Section 151 of the Code of Civil Procedure. The Civil Procedure Code admittedly contains no express provisions for restoration of the execution case dismissed in default or for re-hearing of the execution matters heard *ex parte*.

From the impugned order, it appears that the Court below did not specify the precise provision under which the execution case was restored as well as the application filed by the decree-holder also mentioned no provisions of law. In the absence of mentioning any provision of law in the application as well as dismissal of the execution case and restoration of the same it can be construed that

the impugned judgment and order was passed by the execution court under its inherent power under Section 151 of the Code of Civil Procedure. In pursuing the case the decree-holder was not so vigilant, but from order sheets it appears that they took steps on all the dates fixed, except on the date of dismissal of the execution case and there was no gross negligence on the part of the decree-holder. The court below in passing the impugned order though did not discuss or decide the applicability of Section-151 of the Code to the restoration of execution applications dismissed for default and has not assigned any reason for restoration of the case but the judgment-debtors could not satisfy the court how the order of restoration prejudiced them from getting justice, rather they will have all the weapons in their armoury available to wreck out the execution case on any point of law, as held by the Appellate Division in the case of ***Bangladesh Jatiya Samabaya Bank (Shimabadha) vs. Shafiqur Rahman and another*** in Civil Appeal No. 39 of 1980, arising out of Civil Rule No. 309 of 1969 (Ref: 53 DLR 78, wrongly quoted as Civil Revision No. 309 of 1967 and Civil Appeal No. 30 of 1980).

It is now well settled that the courts have wide discretionary power and they have to be exercised according to the exigencies of the particular cases. In the present case, we find that on 21.03.2017, in the daily cause list of the court below, subsequent date was posted on 04.05.2017 for service return inadvertently instead of hearing which is mistake of the court and for correction of its own mistake the execution court exercised its power under Section 151 of the Code for securing justice and for speedy disposal of the execution case and by the order of the execution court no injustice has been done to the judgment-debtors.

Apart from this there is another aspect to be mentioned that the award in Arbitration Case was passed on 02.10.2006, Money Execution Case No. 05 of 2009 was filed on 30.09.2009 i.e. within 3 (three) years, the execution case was dismissed for default on 04.05.2017, the application for restoration was filed on 11.05.2017 within a week and within 12 years from the date of award/decree dated 02.10.2006, therefore, the proceeding is not barred both by special provisions of section 48 of the Code of Civil Procedure and general provisions of Article 182 of the Limitation Act.

Had the court below rejected the application on the ground of maintainability, the decree-holder could have filed a fresh execution case within 10 months from the order or 12 years from the decree, but because of restoration of the case by the court below, in one hand, the decree-holder had no necessity and or scope to file a fresh execution case and on the other hand, because of elapse of 12 years by this time, the decree-holder has lost such opportunity to file a fresh execution case within the said period from the date of dismissal of the present case under section 48 of the Code of Civil Procedure, moreover, by filing an application for restoration of the case instead of filing a fresh execution case it appears that they did not adopt indirect method to achieve the goal to avoid other legal consequences of the case.

Had the decree-holder filed fresh execution case instead of filing this application it might have taken more time for the process of service of notices upon the judgment-debtors again. For speedy disposal of the proceeding by filing an application for restoration and allowing the same in exercise of inherent power of the court, in our view, has caused no injustice to the judgment debtors,

moreover, it is not a case of inherent lack of jurisdiction but at best it can be said to be a case of an inappropriate decision restoring the case. This by itself does not justify interference by this Court in the exercise of revisional jurisdiction at this stage in the facts and circumstances of the case. Mere restoration of an execution case by exercising inherent power of the executing court has not occasioned any injustice to the judgment-debtors, hence, we do not find any reason for interfering with the order passed. This is an exception to the principle of generality and shall not be applicable in every cases, like the present one, unless the dismissal of the execution case was caused by the mistake of the court or because of any strenuous circumstance arises beyond the control of the decree-holder subject to the provisions of Section 48 of the Code and Article 182 of the Limitation Act.

In view of the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioner.

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

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

The court is hereby directed to dispose of the case within shortest possible time.

Communicate a copy of the judgment to the Court concerned at once.

Khizir Ahmed Choudhury, J:

I agree.