

Present

**Mr. Justice Mohammad Anwarul Haque
And
Mr. Justice Mohammad Ullah.**

Civil Revision No. 1270 of 2009

Mrs. Seemarna Azam, Wife of A.K.M.Safiul Azam,
House No.15 (2nd Floor), Road No.12, Sector-4,
Uttara Model Town, P.O.Uttara, District-Dhaka.
Through her constituted attorney Md.Nazrul Islam,
son of Late Ashraf Ullah of House No. 11/A,
Apt. No. A-103, Road No. 71, Gulshan-2.

.....Defendant-Petitioner.

-Versus-

Wonderland Holding Limited, 173 Elephant Road,
Thana-Dhanmondi, District-Dhaka and another.

.....Plaintiffs-Opposite Parties.

Mr. M. Amir-Ul-Islam, Senior Advocate with

Mr. Md. Taslim Uddin and

Mr. Md. Rafiqul Islam, Advocates.

..... For the Defendant-Petitioner.

Mr. Abdul Barek Chowdhury, Advocate

.....For the Opposite Party No.2.

**Hearing on 10.12.2012 and
Judgment on 12.12.12**

Mohammad Ullah, J.

On an application under section 115(1) of the Code of Civil Procedure this Rule, at the instance of the defendant petitioner was issued calling upon the plaintiffs-opposite parties to show cause as to why the order dated 02.02.2009 rejecting an application filed under order 7 Rule 11 of the Code of Civil Procedure, passed by the learned Joint District Judge, 7th Court, Dhaka should not be set aside and or such

other or further order or orders passed as to this Court may seem fit and proper.

By this Rule issuing order dated 20.4.2009 further proceeding of Title Suit No. 951 of 2008 pending in the 7th Court of Joint District Judge, Dhaka was stayed.

The facts relevant for disposal of the Rule are briefly stated below:

The opposite parties as plaintiffs instituted Title Suit No. 951 of 2008 against the petitioner and others for declaration that they are the owner of the flat measuring 2775 square feet along with undivided and undemercated share of 684 square feet land, fully described in the schedule of the plaint. The plaintiffs also prayed for another declaration that the registered deed No. 13723 dated 08.01.2005 is illegal, null and void and executed it by practicing fraud upon the court.

The petitioner as defendant entered appearance in the said suit and filed an application for rejection of plaint under order VII Rule 11 of the Code of Civil Procedure.

The case of the defendant petitioner is that the plaintiff opposite party as developer company, entered into an agreement for sale of the schedule flat in question with this petitioner and when the plaintiff opposite parties failed to comply with the terms and conditions of the agreement for sale, the petitioner, being instituted Title Suit No. 114 of 2002 before the 1st Court of Joint District Judge, Dhaka for specific performance of contract against the defendants- opposite parties and they contested the said suit by filing written statement and the suit was

decreed on contest on 10.2.2005 against the opposite parties. Then the petitioner got the deed No. 13723 dated 8.1.2005 registered and also got delivery of possession through court in Title Execution Case No.5 of 2005.

Then the opposite parties preferred First Appeal Tender No. 704 of 2006 against the said judgment and decree dated 10.2.2005 passed by the learned Joint District Judge, 1st Court, Dhaka before this Court with an application for condonation of delay of 553 days and the Rule was issued in Civil Rule No. 890(F) of 2006 and was discharged by an order dated 5.12.2007. Then the opposite parties moved before the Appellate Division by filing Civil Miscellaneous Petition No. 38 of 2008 against the said judgment and order dated 5.12.2007 passed by this Court. Ultimately the said Civil Miscellaneous Petition No. 38 of 2008 was dismissed for non compliance of the order of the Appellate Division dated 18.1.2009.

Mr. M. Amir-Ul-Islam, the learned Senior Advocate appearing with Mr. Md. Toslim Uddin and Mr. Md. Rafiqul Islam, the learned Advocates on behalf of the defendant petitioner submits that there is no cause of action for filing the suit against the defendant petitioner rather the suit was filed in order to frustrate the judgment and decree passed in Title Suit No.78 of 2004 against this opposite parties and the instant suit is an abuse of the process of the court.

Mr. Islam, the learned Advocate submits further that the suit is hit by section 42 of the Specific Relief Act as the plaintiffs-opposite parties

having no legal character or any right as to the property in question but the learned Joint District Judge without considering the provision of Order VII Rule 11 of the Code of Civil Procedure rejected such application of the petitioner.

Mr. Islam, the learned Advocate finally submits that the deed in question being No. 13723 dated 8.1.2005 was executed and registered through court in pursuance of the judgment and decree dated 10.2.2005 passed by the learned Joint District Judge, 1st Court, Dhaka and ultimately such decree was affirmed by the Appellate Division in the earlier suit so question of fraud as alleged upon the parties or the court does not at all arise and thus the Rule should be made absolute.

In support of his submission Mr. Islam, the learned Advocate for the petitioner has relied upon a decision of a case Rasheda Begum vs.- M.M.Nurussafa and others reported in 24 BLD(AD) 223.

On the other hand, Mr. Abdul Barek Chowdhury, the learned Advocate appearing on behalf of the plaintiff-opposite party No. 2 submits that whether the suit is maintainable or not would be decided only after taking evidence during the course of trial as such the impugned rejection order of the trial court should not be interfered with at this earliest stage.

Mr. Barek Chowdhury, the learned Advocate submits further that the deed in question was executed without prior permission of the Rajuk and without required payment of the transfer fees of the Rajuk and as such the deed is null and void.

But at one stage of the hearing Mr. Chowdhury, the learned Advocate candidly concedes that over the schedule flat in question the opposite parties were defeated up to the Appellate Division in a suit for specific performance of contract filed by the plaintiff-petitioner and thus there is hardly any scope to proceed with the present suit upon the self same matter against the petitioner.

We have heard the learned Advocates for both the parties, perused the impugned judgment and order, and gone through the referred decision wherefrom it transpires that the plaintiff opposite parties were defeated up to the Appellate Division in a suit for specific performance of contract filed by the petitioner over the schedule flat in question and the petitioner got registered deed and delivery of possession of the schedule flat through court.

The plaintiff opposites parties stated in the plaint that:

“উল্লেখ্য তর্কিত ৮/১/০৫ তারিখের ১৩৭২৩ নং দলিল রেজিস্ট্রির পূর্বে বা রেজিস্ট্রিকালে রাজউক এর বিক্রয়/হস্তান্তর পত্র অনুমোদন ও হস্তান্তর ফি জমা না দিয়া রেজিস্ট্রি করার কারনে বে-আইনী কাজ করা হইয়াছে সে কারনে তর্কিত দলিলটি বে-আইনী, তথ্যকী, ভয়েড দলিল হইতেছে।

নালিশের কারণ: বিবাদীপক্ষ তার নামীয় তর্কিত গত ইং ৮/১/০৫ তারিখে ১৩৭২৩ নং সাফ কাবালা দলিলের দ্বারা উৎসাহিত হইয়া বাদী পক্ষের নিরংকুশ স্বত্ব দখলীয় তপছিল বর্নিত সম্পত্তি ও তদউপরস্থ নালিশী এ্যাপার্টমেন্টের স্বত্ব দাবী করিয়া বেদখলের হুমকীর সময় বিকাল ইং ১২/২/২০০৮ ইং ১৪/২/২০০৮ ইং তারিখে বিবাদীপক্ষের বিরুদ্ধে বাদী পক্ষের অত্র নালিশের কারণ উদ্ভব হইয়াছে।”

It appears from the Annexure- E (a memo issued from Rajuk) that the defendant petitioner has paid the required transfer fees to the Rajuk about schedule flat in question. So the submission of the learned Advocate for the plaintiff opposite party about nonpayment of transfer

fees of the Rajuk has got no substance. As such the suit does not disclose cause of action as required under order VII Rule 11 (a) of the Code of Civil Procedure.

On perusal of the plaint it is the duty of the court to examine in order to ascertain whether any cause of action has been disclosed in the suit. But the trial court without considering the provision under order VII Rule 11 (a) of the Code rejected the application of the petitioner and thereby committed an error of law resulting in an error in the impugned decision occasioning failure of justice.

The decision in the case of Rasheda Begum vs. M.M Nurussafa and others reported in 24 BLD (AD) 223 as referred to by Mr. Islam, the learned Advocate, the Appellate Division held that:

“rejection of plaint is not confined to the provision of Order 7 Rule 11 of the Code of Civil Procedure. In an appropriate case while the proceeding itself is an abuse of the process of the court, the court having recourse of section 151 will be competent to reject the plaint.”

When the plaintiff opposite parties contested the earlier suit for specific performance of contract filed by the defendant petitioner and this petitioner got contesting decree thereof and also got registered deed as well as possession of the schedule flat in question through court and in such a situation the subsequent suit initiated by the plaintiffs opposite parties against the defendant-petitioner over the self same flat in question seeking declaration that the deed is null and void should not be allowed to continue being an abuse of the process of the court.

Moreover when the ultimate result of the suit is as clear as day light, such a suit should be buried at its inception. So that no further time is consumed in fruitless litigation.

For the discussion made above, we are constrained to hold that the court below committed an error of law resulting in an error occasioning failure of justice in passing the impugned order rejecting the application filed by the defendant petitioner under order VII Rule 11 of the Code of Civil Procedure.

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

The judgment and order dated 2.2.2009 passed by the learned Joint District Judge, 7th Court, Dhaka in Title Suit No. 951 of 2008 is hereby set aside and consequently the application for rejection of plaint filed by the petitioner is allowed and thus the plaint of Title Suit No. 951 of 2008 of the Court of Joint District Judge, 7th Court, Dhaka is rejected under Order 7 Rule 11 (a) of the Code of Civil Procedure.

Send copy of this judgment to the learned Joint District Judge, 7th Court, Dhaka.

Mohammad Anwarul Haque, J.

I agree.