

In the Supreme Court of Bangladesh
High Court Division
(Civil Appellate Jurisdiction)

First Appeal No. 34 of 2020

Md. Abu Hossain alias Robiul Hossain and
others

..... Appellants

Versus

Nobi Boksha being dead, his heirs-
Khoka Mia and others

..... Respondents

Mr. A.S.M. Khalequzzaman, Advocate

..... for the appellants

Mr. Md. Jahangir Alam, Advocate

..... for the respondents

Present:

Mr. Justice Gobinda Chandra Tagore

And

Mr. Justice Md. Aminul Islam

Heard on: 25.08.2024, 01.09.2024, and

Judged on: 05.09.2024.

Gobinda Chandra Tagore, J:

1. The appeal has been preferred against the judgment and decree dated 13.10.2019 (decree signed on 17.10.2019) passed by the learned Joint District Judge, 2nd Court, Gaibandha in Other Suit No.8 of 2018, rejecting the plaint under Order VII Rule 11(d) of the Code of Civil Procedure.
2. The appellants as plaintiffs instituted Other Suit No.8 of 2018 in the 2nd Court of learned Joint District Judge, Gaibandha for a declaration

that the judgment and decree dated 09.07.2007 (decree signed on 16.07.2007) passed in Other Suit No.88 of 1994 by the 2nd Court of learned Joint District Judge, Gaibandha, decreeing the suit in preliminary form from which Civil Revision No.3176 of 2009 arose and the Rule issued therein was made absolute by the judgment and decree dated 07.10.2012 upholding the judgment and preliminary decree of the Trial Court and the same was upheld by the Appellate Division in Civil Appeal No.110 of 2013 and Civil Review Petition No.153 of 2015 is void as per section 173(3) of the Bengal Tenancy Act, 1885 not binding upon the plaintiffs and thereby, the defendants have not acquired any right, title, and interest in the suit property.

3. Defendants Nos.1-16, 21-22, and 29-31 contested the suit by filing separate written statements. The defendants' common case is that the dispute over the same property between the same parties was disposed of earlier, even up to the review jurisdiction of the Appellate Division, and as such, the present suit on the same dispute between the same parties regarding the same suit property is not maintainable.

4. After submission of the written statement, defendant Nos.1-16 filed an application under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint contending, *inter alia*, that the dispute involved in the present suit was earlier disposed of up to the review jurisdiction of the Appellate Division between the same parties regarding the same suit property and as such, this Court has no jurisdiction to dispose of the same dispute further, and for the same reason the suit is also barred by *res judicata*. Upon hearing the said application for rejection of the plaint, the Trial Court by the impugned judgment and decree allowed the said application rejecting the plaint.
5. Against the impugned judgment and decree, the plaintiffs filed the instant First Appeal. During the hearing of the appeal, the plaintiff-appellants also filed an application for amendment of the plaint upon the addition of a party as well as inserting certain statements in the plaint. Accordingly, the application for amendment of the plaint has also been taken up for hearing along with the appeal.

6. Having placed the appeal and the application for amendment of the plaint, Mr. A.S.M. Khalequzzaman, learned Advocate for the appellants candidly submits that except the amendment of the plaint so far it relates to the addition of party, all the factual corrections were also raised in the earlier suit being Other Suit No.88 of 1994. However, those statements have been erroneously omitted from being inserted in the present suit. At the same time, the learned Advocate, in the alternative, submits that even if it is deemed that those were not raised, the same may be raised at this stage. To the query of this Court, the learned Advocate also candidly concedes that the question regarding section 173 of the Bengal Tenancy Act, 1885 was also raised, considered, and disposed of in the earlier suit but all the Courts failed to consider the provision of section 173(3) of the Bengal Tenancy Act as well as the provision of section 174 of the same Act and thereupon failure of justice occurred.
7. On the other hand, Mr. Md. Jahangir Alam, learned Advocate for the defendant-respondents submits that admittedly, regarding the dispute on the

suit property between the same parties, earlier Other Class Suit No.88 of 1994 was disposed of up to the review jurisdiction of the Hon'ble Appellate Division and as such, the same question or dispute cannot be reopened in any subsequent suit inasmuch as the same is barred by *res judicata* as stipulated under section 11 of the Code of Civil Procedure and hence, the plaint was rightly rejected and thus, there being no merit in the appeal as well as in the application for amendment of the plaint, the appeal is liable to be dismissed and the application is also liable to be rejected.

8. We have perused the records of the appeal as well as the application for amendment of the plaint and heard the learned Advocates from both sides.
9. It appears from the prayer portion of the plaint of the present Other Suit No.8 of 2018 and that of Other Class Suit No.88 of 1994 that regarding the same property between the same parties, earlier Other Class Suit No.88 of 1994 was instituted for partition of the same suit property. After trial, the suit was decreed in preliminary form by the judgment and decree dated 09.07.2007 (decree signed on 16.07.2007). Against

the judgment and decree of the Trial Court, the defendants therein, who are the plaintiffs in the present suit preferred Other Appeal No.99 of 2007 in the Court of the learned District Judge, Gaibandha. The appeal was transferred to the Court of learned Additional District Judge, Gaibandha for its disposal. The Court of Appeal below after hearing both the parties by the judgment and decree dated 26.11.2008 allowed the appeal and thereby, reversed the judgment and preliminary decree of the Trial Court and the suit was dismissed. Against the judgment and decree of the Court of Appeal below, the plaintiff-respondents therein filed Civil Revision No.3176 in 2009 in this Court and the Rule issued therein was made absolute by the judgment and decree dated 07.10.2012 and thereupon the Partition Suit was decreed in preliminary form. Against the judgment and decree passed in the Civil Revision, the defendant-appellant-opposite parties preferred Civil Appeal No.110 of 2013 in the Hon'ble Appellate Division. The Appellate Division upon hearing the appeal by the judgment and order dated 16.04.2015 dismissed the appeal. Thereafter, the appellants

therein filed Civil Review Petition No.153 of 2015. The Hon'ble Appellate Division by the judgment and order dated 23.03.2017 dismissed the Review Petition, and thereupon the judgment and order passed in the Civil Appeal as well as the judgment and decree passed in the Civil Revision stood upheld. Thereafter, the said appellant filed the present suit as plaintiffs.

10. It appears from the prayer portion of the plaint of the present suit that the earlier judgment and decree which was upheld by the Appellate Division has been claimed to be void as per section 173(3) of the Bengal Tenancy Act, 1885. Thus, the plaintiffs have prayed for correction of the earlier judgment and decree. It further appears that they have not challenged the earlier judgment and decree as void on the ground that the summons in the said suit being Other Suit No.88 of 1994 was not served upon any of the defendants who are the plaintiffs in the present suit. There is no dispute that the earlier suit was filed regarding the same suit property between the same parties and the same was finally disposed of up to the review jurisdiction of the Appellate Division. Therefore, neither this Court

nor any Court subordinate to it has any jurisdiction to raise any question as to right or wrong about the judgment of the Appellate Division as the same is absolutely out of the jurisdiction of this Court and any Court subordinate to this Court. Since the earlier suit was filed regarding the same suit property between the same parties and those very disputes were finally decided/settled up to the Appellate Division, the same question, without any hesitation, cannot be raised further in any subsequent suit as per section 11 of the Code of Civil Procedure.

- 11.** Moreover, it further appears from the application for amendment of the plaint that the statement sought to be inserted in the present plaint are related to the facts took place before the filing of the earlier Other Suit No.88 of 1994. Therefore, some of the questions on those facts were raised in the earlier suit and some were not. However, Explanation IV of Section 11 of the Code of Civil Procedure stipulates that any matter which might and ought to have been made the ground of defence or attack in such former suit shall be deemed to have been a matter

directly and substantially in issue in such suit. Therefore, any matter which might and ought to have been raised or made ground in the earlier suit cannot be raised or made any ground in any subsequent suit as per Explanation IV of Section 11 of the Code of Civil Procedure. Accordingly, we also do not find any merit in the application for amendment of the plaint. Moreover, since the suit itself is not maintainable under the law, the amendment thereto also cannot be allowed. In such facts and circumstances, we do not find any merit in the appeal as well as in the application for amendment of the plaint.

- 12.** It also transpires that the present learned Advocate for the appellants namely, Mr. A.S.M. Khalequzzaman was also the learned Advocate in the earlier Civil Appeal as well as the Civil Review Petition in the Appellate Division and he candidly submits that as per his advice, the present suit has been filed. Unfortunately, an experienced lawyer like Mr. A.S.M. Khalequzzaman should not advise filing such a suit involving the question which has already been finally disposed of by the Appellate Division. Further, since the same question was raised in the earlier

suit regarding the same suit property between the same parties, the present suit is nothing but a test suit or the same has been filed with a *mala fide* intention only to harass the decree-holder defendant.

13. Accordingly, we find that filing of such a suit like the present one should be discouraged and accordingly, it is a fit case for imposition of cost.
14. Hence, the appeal is dismissed and the application for amendment of the plaint is rejected with a cost of Taka 20,000/- (twenty thousand).
15. At this stage, Mr. A.S.M. Khalequzzaman, learned Advocate for the appellants submits that the cost may be reduced upon considering the financial condition of the appellants. For humanitarian grounds, we are inclined to reduce the cost to Taka 10,000/- (ten thousand).
16. Send down the records of the Court below immediately.

Md. Aminul Islam, J:

I agree.