

IN THE SUPREME COURT OF BANGLADESH
 HIGH COURT DIVISION
 (CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.
And
Mr. Justice Sashanka Shekhar Sarkar

First Misc Appeal No. 80 of 2021.

With
Civil Rule No. 117 (F.M) of 2021

Md. Alamgir Hossain.

...Appellant.

-Versus-

Md. Mansur Ali and others

....Respondents.

Mr. Sharif Ahmed, Advocate

... For the appellant

Mr. Monsur Habib, Advocate

... For the respondent No. 1

Heard on: 15.01.2024, 21.01.2024.

Judgment on: 22.01.2024,

Md. Badruzzaman, J:

This Appeal is directed against an order dated 06.12.2020 passed by learned Joint District Judge, 1st Court, Rangpur in Other Class Suit No. 87 of 2020 allowing an application for appointment of Receiver filed by the plaintiff under rule 1 of Order XL of the Code of Civil Procedure.

Upon an application for stay this Court vide order dated 11.02.2021 issued Rule and stayed operation of the impugned order for a period of 06 (six) months and the Rule has registered as Civil Rule No. 117 (F.M) of 2021.

Since the miscellaneous appeal and civil rule are connected with each other those have been heard together and now are being disposed of by this common judgment.

Facts, relevant for the purpose of disposal of the appeal and civil rule, are that opposite party No. 1 as plaintiff instituted Other Class Suit No. 87 of 2020 in the 1st Court of Joint District Judge, Rangpur for a decree of declaration of title to and recovery of khas possession of .07 acre land as described in Schedule-Kha of the plaint contending, *inter alia*, that the plaintiff is the owner of the suit land by registered sale deed from which he was forcefully dispossessed by the defendants on 11.05.2020 and after taking possession, the defendants have erected a hut and is running tea business therein. Thereafter, the plaintiff filed an application for temporary injunction restraining the defendants from constructing pathway or changing the nature and character of the suit land. The petitioner as defendant No. 1 contested the application for injunction by filing written objection contending, *inter alia*, that he is owning and possessing the suit land by way of registered heba-bil-ewaj deed being No. 6495 dated 10.04.2011 and by way of inheritance and mutated his name in respect of the suit land and paying rents thereof and after erecting a tin shed hut therein rented the same as Motor Workshop in one part and installed a Tea Stall in another part and he is possessing the same by running business therein. There is a pathway of 8 feet wide beside the suit land and the defendant also prepared to install a container measuring 4 feet x 40 feet x 8 feet for reservation of live fish. The plaintiff has no title to or possession in the suit land and he is not entitled to injunction as prayed for. The Court below, after hearing the parties vide order dated 03.09.2020 rejected the application for temporary injunction having found no *prima facie* title to or possession in the suit land in favour of the plaintiff. The plaintiff did not challenge the order of the trial Court before any higher forum rather he filed an application for appointment of Receiver under Order

XL rule 1 of the Code of Civil Procedure contending that if a Receiver is not appointed the defendant would change the nature and character of the suit land and he would be benefited and law and order situation would be deteriorated. The defendant filed written objection against the application for appointment of Receiver contending that since the defendant is owning and possessing the suit land, there is no scope under law to appoint Receiver to deprive him of his enjoyment in the suit property.

The trial Court, upon hearing the parties, allowed the application for appointment of Receiver by order dated 06.12.2020 against which this appeal has preferred by defendant No. 1.

Plaintiff-respondent No. 1 has entered appearance by filing Voklatnama to contest the appeal and the Rule. He also filed counter-affidavit.

Mr. Sharif Ahmed, learned Advocate appearing for the appellant submits that under the provision of Order 40 rule 1 of the Code of Civil Procedure the Court may appoint a Receiver of any property when it appears to it to be just and convenient and for the protection of the property or prevention of any injury to the property and a Receiver cannot be appointed to deprive of possessor of the property but the trial Court without considering the above aspect of the matter appointed Receiver for extraneous reason not supported by any law. Learned Advocate further submits that since this is a suit for declaration of title and recovery of khas possession and the suit involved with landed properties there is no reason to appoint Receiver which amounts to taking away the right of the defendant from his enjoyment of the property. Learned Advocate further submits that the trial Court appointed the receiver mainly on the reason that there was an

apprehension that the property is under possibility to be wasted and damaged. Learned Advocate further submits that the same Court while rejecting the application for temporary injunction came to the conclusion that the plaintiff could not prove *prima facie* title to and possession in the suit land but the same Court while passing the impugned order came to erroneous finding that the defendant cannot be considered as a *de facto* possessor of the property.

As against the above contention, Mr. Monsur Habib, learned Advocate appearing for respondent No. 1 submits that appointment of Receiver is a discretionary power of the Court and if the Court is satisfied that a Receiver should be appointed it may pass order appointing Receiver. Learned Advocate further submits that since it was presumed that unless Receiver is appointed law and order would be deteriorated the trial Court committed no illegality in appointing the Receiver. Learned Advocate further submits that if Receiver is not appointed there is possibility that the plaintiff would be physically assaulted by the defendants.

We have heard the learned Advocates and perused the record of the case. Admittedly, the plaintiff-respondent filed the suit for declaration of title to and recovery of khas possession of the suit land. It has been stated in the plaint that the defendant is enjoying the suit land by installing Tea Stall therein. On the other hand, it appears that while disposing of the application for temporary injunction, the trial Court found no *prima facie* title to and possession of the plaintiff in the suit land and accordingly, rejected the application for temporary injunction. The plaintiff sought for injunction restraining the defendants from changing the nature and character of the suit and after refusal of the prayer for temporary injunction the plaintiff did not go to higher forum

rather, he filed the application for appointment of Receiver so that the nature and character of the suit property cannot be changed.

Now question arises whether keeping the defendants in possession of the suit property a Receiver could be appointed.

Rule 1 of Order XL of the Code of Civil Procedure deals with appointment of Receiver in respect of disputed property which provides that the Court may appoint Receiver when it appears to the Court to be just and convenient. It is settled principle of law that a Receiver should not be appointed in suppression of a *bona fide* possessor of the property in the controversy, unless there is some substantial ground for interference. The power conferred by the Code of Civil Procedure to appoint a Receiver is not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a Receiver, that it can do no harm to appoint one. The words “just and convenient” in Order XL, rule 1 of the Code mean that the Court should appoint a Receiver for the protection of property or the prevention of injury according to legal principles and not that the Court can make such appointment because it thinks convenient to do so. The law confer no arbitrary and non-regulated discretion on the Court. Where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases and irreparable wrong. These principles have been summarized by the Appellate Division of the Supreme Court of Bangladesh in Kamiruddin and others vs. Md. Mokshed Ali Biswas and others 48 DLR (AD) 14 wherein it has observed as follows;

“Under the provision of Order XL rule 1 of the Code of Civil Procedure the Court may appoint a receiver of any

property when it appears to it to be just and convenient. The Court may think it just and convenient when it is necessary for the protection of the property or prevention of any injury to the property but not simply when it thinks to do so. It is no doubt a discretionary power of the Court as to when a receiver may be appointed in respect of any property but the discretion must be exercised judiciously according to judicial principle and not capriciously. The applicant for appointment of receiver of any property must show a *prima facie* case and good chance of his success and so no order for appointment of receiver should be passed to deprive a *de facto* possessor of the property. Sub-rule (2) of Rule 1 of Order XL of the Code of Civil Procedure does not authorize the Court to remove from the possession of property any person to whom any property to the suit has not a present right so to remove."

There is no gainsaying of the fact that the defendant is in possession of the suit property and he is enjoying the same by running business therein. But the trial Court while passing the impugned order came to conclusion that the defendants cannot be considered as a *de-facto* possessor of the property which is a wrong finding apparent on the face of the record. In the facts and circumstances of the case the Court should have come to the conclusion that question of protection of the property or prevention of any injury to the property did not arise because of the fact that the suit property is a landed property which is under possession of the defendant wherein he is running business and that the property is not a perishable one so that it can be damaged unless the Receiver is appointed.

In the facts and circumstances of the case the order of appointment of Receiver of the property in the suit by the trial Court cannot be considered to be an order passed in proper exercise of discretion and as such, it is liable to be set aside.

In that view of the matter we find merit in this appeal.

In the result, the appeal is allowed, however, without any order as to costs.

The impugned order dated 06.12.2020 is hereby set aside.

The order of stay granted earlier is vacated.

Consequently, Civil Rule No. 117 (F.M) of 2021 is disposed of.

The trial Court is directed to proceed with suit in accordance with law.

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)