IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present
Madam Justice Kashefa Hussain

Civil Revision No. 173 of 2020

Mohammad Monirul Azim Rakib and another
.....petitioners
-Versus-
Abdul Karim Bepari and another
…… Opposite parties

Mr. Md. Khalilur Rahman, Advocate
…… For the petitioners
Mr. Sherder Abul Hossain, Advocate
…… For the Opposite Parties

Heard on: 14.01.20224, 15.01.2024 and
Judgment on 16.01.2024

Rule was issued calling upon the opposite parties to show cause as to why the order No. 72 dated 04.11.2019 and Order No. 73 dated 17.11.2019 passed by the learned Joint District Judge, 2nd Court, Narayangonj in Title Appeal No. 3 of 2011 rejecting the application for recalling the DW-1 for cross examination and application for additional evidence respectively should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The instant petitioner as plaintiff filed Title Suit No. 78 of 2007 before the court of learned Assistant Judge, 4th Court, Narayangonj for permanent injunction impleading the instant opposite party as defendant in the suit. The trial court upon hearing the parties adducing evidences, taking deposition and

framing issues etc. dismissed the suit by its judgment and decree dated 29.11.2010. Being aggrieved by the judgment and decree of dismissal passed by the trial court the plaintiff in the suit as appellant filed Title Appeal No. 3 of 2011 before the court of learned Joint District Judge, Narayangonj which was ultimately pending for hearing. During pendency of the appeal the plaintiff in the suit filed an application for amendment of plaint raising some disputed matter of facts. The appellate court by its order No. 17 dated 20.09.2012 allowed the application for amendment of plaint filed by the plaintiff. Along with prayer for amendment of plaint the plaintiff in the suit filed an application for recalling witnesses and for production of additional evidences which was allowed by the appellate court by the same order No. 17 dated 20.09.2012. Against which order the respondent in the appeal being defendants in the suit filed civil revision before this division being Civil Revision No. 3469 of 2012. The civil revision was heard by this division and which was discharged on 08.03.2018 during pendency of the civil revision. The plaintiff as appellant filed two applications for amendment of plaint on 30.06.2014 and 06.04.2014. The appellate court allowed all the applications by the order No. 56 dated 03.10.2018 and recorded examination in chief of the PW-3 in part and fixed for further hearing on 10.10.2018. Eventually it was closed by the Order No. 70 dated 09.10.2019 and fixed for witness dated 17.02.2019.

That after closing the plaintiffs witness, the appellants filed an application for recalling the DW-1 for cross examination for proving the case though the DW-1 did not depose in the appellate court which was rejected on 04.11.2019. The plaintiffs again filed two applications one for recalling the DW-1 for cross examination and also for additional evidences respectively. The appellate court after examining the application however rejected both the applications by Order No. 72 dated 04.11.2019 and Order No. 73 dated 17.11.2019. Against these orders of rejection passed by the appellate court the plaintiff in the suit being appellant in the appeal filed a civil revisional application which is presently before this court for disposal.

Learned Advocate Mr. Md. Khalilur Rahman appeared for the petitioner while Mr. Sarder Abul Hossain represented the opposite parties.

The learned Advocate Mr. Md. Khalilur Rahman for the petitioners submits that the appellate court below upon total misapplication of mind rejected the application for cross examination of DW-1 and upon further misapplication of mind rejected the application for additional evidences and therefore those orders are not sustainable. He submits that although the appellate court itself at the appellate stage allowed three applications for amendment of plaint filed by the plaintiffs

however upon totally misapplication of judicious mind the appellate court rejected the application for cross examination of the DW-1 and also rejected the application for additional evidences respectively. He argued that it is only logical to assume that an application of amendment of plaint is filed when the plaintiff intends to plead on some new facts which were not in the original plaint. He submits that it is evident that once an application of amendment on factual matters is allowed, such factual matters which were not raised before has to be evaluated upon producing evidences oral and documentary. He argues that however the court below took a contradictory position against its own order given that although the application of amendment of plaint was allowed but however the court inconsistently rejected the application for producing additional evidence and for cross examination of the DW-1. He submits that therefore by not allowing the application for recalling the DW-1 for cross examination and also by rejecting the application for additional evidence the appellate court committed a travesty of justice by diverting itself from its own position. He submits that consequently the order No. 72 dated 04.11.2019 and order No. 73 dated 17.11.2019 passed by the appellate court, being in total contradiction to its own conduct and is conflictive with the provisions of Code of Civil procedure and the law of evidence therefore such orders are not sustainable. He concludes his

submissions upon assertion that both the impugned orders passed by the appellate court ought to be set aside and the Rule bears merit and ought to be made absolute for ends for justice.

On the other hand learned Advocate Mr. Sarder Abul Hossain for the opposite parties opposes the Rule. He submits that the appellate court correctly rejected the application for recalling the witness of the DW-1 and also correctly rejected the application for producing additional evidences. In support of his argument he draws upon Order No. 56 dated 03.10.2018. He points out that from Order No. 56 dated 03.10.2018 it is clear that the recalling of witness has already been done and concluded following the provisions of Evidence Act, 1822 and under the Code of Civil Procedure pursuant to amendment of plaint. He argues that therefore once witnesses are closed there is no scope of recalling the witness under the provisions of the relevant laws. He contends that therefore in this case also once the witness is closed there is no scope to recall the witness of the DW-1 again.

Next he argues that moreover since the DW-1 did not give deposition in examination in chief in the appellate court therefore the question of cross examination cannot even arise. He persuades that following the provisions of Evidence Act, 1872 a cross examination only follows an examination in chief and cannot be done in an isolated manner. He contends that since

under the law of evidence a cross examination must follow examination in chief hence consequently no cross examination can be done in an isolated manner and would be in violation of the laws of the Evidence Act, 1872.

Regarding the issue of rejection of application for production of additional evidence he argues that since evidence has already been given by the parties and which is also clear from Order No. 56 dated 03.10.2018 therefore the court correctly disallowed the application for producing additional evidence also.

In support of his overall contentions he cites a decision of our Apex Court in the case of Maqbul Hossain & Ors. Vs Bangladesh Milk Producers reported in 1985 BLD (AD) page-112. From this judgment he attempts to argue that under the provisions of Order 18 Rule 17 of the Code of Civil Procedure, 1908 any application for recalling of witnesses whatsoever must be cautiously considered and it is only a discretionary power of the court and cannot be arbitrarily exercised. He submits that since it is a settled principle of our Apex Court therefore the appellate court correctly disallowed the application for additional evidences and cross examination of the DW-1 respectively since such discretionary power must be used with caution and not randomly. Relying on his arguments inter alia the AD decisions

cited by him, he argues that therefore the judgment of the court below need no interference with and the Rule bears no merit and ought to be discharged for ends of justice.

I have heard the learned Advocates from both sides, also perused the application and materials. The learned Advocate for the opposite party drew this bench's attention to a decision of our Apex Court reported in 1985 BLD (AD) page-112. He attempts to apply the principle of this decision with the case presently before this bench. I have examined the basic principle held in the Apex Court decision wherein our Apex Court upon adjudicating the matter reviewed and interpreted the provisions of Order 18 Rule 17 of the Code of Civil Procedure, 1908. Our Apex Court in 1985 BLD (AD) held that Order 18 Rule 17 of the Code is an enabling power which inter alia confers upon the court a power on the issue of recalling witness and production of additional evidences whatsoever and further confers the power to put such question as it thinks fit. The learned advocate for the opposite parties tried to argue that such being the settled principle of our Apex Court the principle is binding upon us. He further argued that therefore there is no scope for recalling the witness and/or produce additional evidences any more.

Evaluating his arguments on these issues, it is necessary to remind that there are some dissimilarities between the 1985BLD

(AD) with the present case. The case presently being dealt with challenge two impugned orders rejecting an application for additional evidences and another application for recalling of witness following an order allowing an application of amendment of plaint which was earlier allowed by the same court. However upon perusal it transpires that in the 1985 BLD (AD) case no such circumstances of allowing an application of amendment of plaint exist. Our Apex Court in the 1985 BLD(AD) case while evaluating and interpreting the intention of Order 18 Rule 17 of the Code of Civil Procedure was not dealing with any such circumstance of application for amendment of plaint. It may be further reminded that once an application for amendment of plaint is allowed such amendment also may give rise to some additional issues/points involving new facts. The factual matters stated in the amendment of plaint application and if such application of amendment is allowed, it is only logical to presume that such factual matters may lead to necessity for producing evidences afresh both oral and documentary for purpose of proper adjudication of the suit. Upon distinguishing the circumstances arising out of the 1985 BLD upon comparison with the present case, I am of the considered view that the facts and circumstances of 1985 BLD (AD) case and the case presently being adjudicated upon are different.

I am inclined to opine that following an order allowing an application for amendment of plaint under Order 6 Rule 17 of the Code of Civil Procedure, 1908 it confers upon the parties a legal right to produce evidence in support of their pleadings both oral and documentary.

The learned advocate for the opposite party persistently argued that although the DW-1 did not depose before the appellate court pursuant to the amendment of plaint but however the plaintiff petitioner prayed for cross examination of the DW-1 and which is not allowed under the provisions of the relevant law. The learned advocate for the opposite party argued that since the application for amendment of plaint was filed in the appellate court therefore one or any other of the defendants in the suit if he intended would have made his deposition in examination in chief. He argued that cross examination can only follow an examination in chief under the law of evidences.

Upon examination into the relevant laws, particularly the law of Evidence Act my view is that this particular argument of cross examination only following an examination in chief is procedurally correct. Moreover, the DW-1 did not appear as witness for examination in chief in the appellate court following the order arising out of the amendment of plaint. Cross examination in absence of examination in chief is not allowed

under the provisions of Evidence Act, 1872. The relevant provision under Section 137 of the Act is reproduced below:

> "Examination in Chief- The examination of witness by the party who calls him shall be called his examination in chief.
>
> Cross examination- the examination of a witness, by the adverse party shall be called his cross-examination.
>
> Re-examination- The examination of witness, subsequent to the cross examination by the party who called him, shall be called his re-examination."

It is clear upon perusal and interpretation of Section 137 of the Evidence Act, 1872 that cross examination shall only follow an examination in chief and the statutory law of evidence leaves no scope to depart from these provisions. Such being the position of the law, I am inclined to take the view that if a party does not take any steps to appear to give deposition by way of examination in chief or cross examination even after an amendment of plaint, such party, person, witness whatever his

legal status in the case may not be compelled to defend his case by appearing as a witness.

But it may be necessary to remind that in case of any defendant or any other witness does not appear for examination in chief to be followed by cross examination to defend the case, or to oppose the statement made in the plaint by way of original plaint or subsequent pleading or amendment of plaint, such refraining act or conduct he is doing at his own risk and peril.

It is only logical that any court evaluating the facts of a case by way of amended of plaint cannot compel any witness to appear or produce evidence to oppose the plaint or defend the case. Therefore I am of the considered view that I do not notice much infirmity in the appellate court's order in rejecting the application for recalling the witness for cross examination of the DW-1. As stated above if the DW-1 did not give his deposition pursuant to the amendment of plaint the defendants are taking such step at his/their own risk.

However regarding the rejection of application for producing additional evidences by Order 73 dated 17.11.2019, I am of the opinion that since an application for amendment of plaint was allowed the court ought to have allowed the application for additional evidence. It is only logical to presume that additional evidences may be necessary to support or oppose

an application for amendment of plaint which may give rise to new facts which did not constitute a part of the original plaint.

Under the foregoing discussions made above and under the facts and circumstances of the case I am inclined to dispose of the Rule with some observations and directions.

In the result, the Rule is disposed of with directions and observations. The Order No. 73 dated 17.11.2019 rejecting the application for production of additional evidence is hereby set aside. The appellate court is directed to allow the application for additional evidences filed by the plaintiff appellant. The Order No. 72 dated 04.11.2019 is upheld and the appellate court is hereby also directed to dispose of the suit relying on the above observations and findings. The appellate court is further directed to dispose of the matter as expeditiously as possible.

The order of stay granted earlier by this court is hereby recalled and vacated.

Communicate the order at once.

Shokat (B.O)