

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

**CIVIL REVISION NO. 2405 of 2020.**

**Mst. Oleda Begum and others.**

...Petitioners.

-Versus-

**Mst. Momena Khatun and others.**

....Opposite parties.

Mr. Md. Khalilur Rahman, Advocate

... for the petitioners

Mr. Hazi Mohammad Saifuddin and

Mr. Ehsanul Hoque, Advocates

... for the opposite party 1-5

**Heard on:18.10.2022, 01.11.2022 and 10.11.2022.**

**Judgment on: 13.11.2022.**

**Present:**

**Mr. Justice Md. Badruzzaman.**

This Rule was issued calling upon opposite party Nos. 1-5 to show cause as to why judgment and order dated 22.10.2020 passed in Civil Revision No. 48 of 2019 by learned District Judge, Jamalpur allowing the revision by setting aside an order dated 22.08.2019 passed by learned Assistant Judge, Dewangonj, Jamalpur in Other Class Suit No. 172 of 2011 rejecting an application under section 144 of the Code of Civil Procedure should not be set aside.

At the time of issuance of Rule this Court, vide *ad-interim* order dated 29.12.2020, stayed operation of the impugned order dated 22.10.2020 for a period of 6(six) months, which was subsequently, extended from time to time.

Relevant facts, for the purpose of disposal of this Rule, are that the petitioners as plaintiffs instituted Other Class Suit No. 232 of

2004 in the Court of Senior Assistant Judge, Dewangonj, Jamalpur against the opposite parties for declaration of title to and recovery of khas possession of .4050 acre suit land out of total .9250 acre land, as described in the schedule to the plaint.

Defendant opposite party Nos. 1-5 entered appearance in the suit and filed written statement on 20.09.2008 and thereafter, did not contest the suit and ultimately, the suit was decreed *ex parte* vide judgment and decree dated 22.10.2014.

Thereafter, the plaintiffs filed Execution Case No. 1 of 2015 before the trial Court and got possession of the suit land through Court on 31.03.2016 with the help of police forces. Then the defendant-opposite parties filed Other Class Appeal No. 10 of 2016 on 18.04.2016 in the Court of learned District Judge, Jamalpur who, admitted the appeal by condoning delay and thereafter, transferred the appeal to 1<sup>st</sup> Court of Joint District Judge, Jamalpur for disposal who, upon hearing both the parties, allowed the appeal vide judgment and order dated 10.09.2017 and sent the suit back on remand to the trial Court for fresh trial. Against said order of remand, the plaintiff petitioners preferred Civil Revision No. 12 of 2018 which was dismissed on contest on 18.04.2019.

After remand, defendant Nos. 1-5 filed an application on 14.05.2018 in the suit under section 144 of the Code of Civil Procedure praying for restoration of possession of the suit property against which the plaintiffs filed written objection on 21.05.2018. The trial Court, after hearing both parties, vide order dated 22.08.2019 rejected the application.

Being aggrieved by said order dated 22.08.2019 the defendants preferred Civil Revision No. 48 of 2019 before the learned

District Judge, Jamalpur who, upon hearing the parties, vide judgment dated 22.10.2020, allowed the revision by setting aside order dated 22.08.2019 passed by the trial Court and allowed the application filed under section 144 of the Code of Civil Procedure. Challenging the legality of said judgment dated 22.10.2020, the plaintiffs as petitioners have preferred this second revision under section 115 (4) of the Code of Civil Procedure and obtained Rule and order of stay, as stated above.

Opposite party Nos. 1-5 entered appearance by filing Vokatnama to contest the Rule.

Mr. Md . Khalilur Rahman, learned Advocate appearing for the petitioners by taking me to the revisional application impugned order, the order passed by the trial Court and other relevant documents submitted that in view of the provision under Rule 774 of the Civil Rules and Orders, the defendants should have filed Miscellaneous Case under section 144 of the Code of Civil Procedure instead of filing an application under section 144 of the Code of Civil Procedure in the suit for restitution of the suit property and as such, the application itself was not maintainable. By referring to section 2(2) of the Code of Civil Procedure learned Advocate submitted that any order passed in disposing an application under section 144 of the Code of Civil Procedure, is a decree and appealable and as such, the defendants should have filed miscellaneous appeal challenging the order of the trial Court instead of filing revision and as such, the civil revision was not maintainable. Learned Advocate further submitted that the revisional Court did not have jurisdiction to entertain the revision and as such, the impugned judgment is *quorum non judice*.

Learned Advocate next submitted that in view of the provisions under section 144 of the Code of Civil Procedure mere variation or reversal of a decree without reversing the findings of the trial Court is not enough to allow restitution under section 144 and that the appellate Court did not vary or reverse the judgment and decree of the trial Court but it gave an opportunity to the defendants to contest the suit on merit only on humanitarian ground because of the fact that the defendants, after filing written statements, could not contest the suit. Accordingly, in this case, the restitution cannot be granted. Learned Advocate finally submitted that the suit was decreed *ex parte* for the fault of the defendants for which they are not entitled to any benefit under the provisions of section 144 of the Code of Civil Procedure.

In support of his submission learned Advocate has referred to the cases of Ramesh Chandra vs. Binayak, reported in AIR 1962 (Orissa) 11; Mst. Naeema Begum vs. Iqbal Ali Khan and others, reported in 1999 CLC 1432 and the case of the Secretary, Ministry of public Works vs. Momtaz Begum, reported in 10 MLR (AD) 23.

As against the above submissions, Mr. Hazi Mohammad Saifuddin Ahmed, learned Advocate appearing for the defendant opposite parties submitted that since the *ex parte* decree has been set aside by the appellate Court the same is to be considered as varied and reversed and accordingly, the defendants are entitled to restoration of possession of the suit property under section 144 of the Code of Civil Procedure. Learned Advocate further submitted that though the application was not registered as of miscellaneous case but for such error the defendants should not be deprived of their legal right as has been provided in section 144 of the Code of Civil

Procedure. Learned Advocate finally submitted that considering the above aspect of the matter the revisional Court rightly passed the judgment and as such, no interference is called for by this Court.

In support of his contention, learned Advocate has referred to the case of Shahna Hossain vs. AKM Asaduzzaman reported in 47 DLR(AD) 155.

I have heard the learned Advocates, perused the application, impugned judgment of the revisional Court, the order passed by the trial Court and other documents as has been annexed with this application.

It appears that, after disposal of the appeal by the appellate Court sending the suit back on remand by setting aside the *ex parte* judgment and decree the defendants filed an application in the suit under section 144 of the Code of Civil Procedure for restoration of possession of the suit property.

Rule 774 of Chapter 34 of Part I of the Civil Rules and Orders (the CRO) provides list of Miscellaneous Judicial cases filed under the Civil Procedure Code. Sub-rule (a)(5) of the Rule 774 of the CRO includes section 144 of the Code of Civil Procedure in the category of Miscellaneous Judicial Cases. On perusal of Rule 774 it appears that an application under section 144 of the Code of Civil Procedure is to be registered as Miscellaneous Case.

Admittedly, the defendants did not file Miscellaneous Case under section 144 of the Code Civil Procedure but only filed an application under section 144 in the suit and as such, I am of the view that the application was not maintainable.

On the other hand, section 2(2) of the Code of Civil Procedure defines 'decree' which includes an order under section 144 Code of

Civil Procedure which means that any order passed under section 144 of the Code of Civil Procedure would be a decree and appealable.

Since any order passed under section 144 of the CPC is a decree and appealable, the Civil Revision which was filed against rejection of the application under section 144, was not maintainable. Accordingly, the impugned judgment and order passed by the revisional Court is without jurisdiction and quorum *non judice*.

In the case of Abdul Hamid vs. Abdul Jabbar, reported in 34 DLR (AD) 208 = 2 BLD (AD) 172 the Appellate Division defined restitution as follows:

“Restitution simply means restoration of something to a person from which it was taken away earlier under an erroneous judgment of a Court. Question of restitution arises when the erroneous judgment of the Court is varied, reversed or set aside. Section 144 of the Code which provides for restitution says that restitution there under is available when a decree is varied or reversed.

The underlying principle of restitution is that when a person is deprived of some right or property by an erroneous judgment, order or decree, then in the event of the reversal of that judgment, order or decree, he may become entitled to restitution of his right or property and that it is the duty of the Court to see that the ends of justice be met.”

From the above view of the appellate Division, it is clear that a party is entitled to restitution under section 144 of the Code of Civil Procedure only when he has been deprived of some right or property by an erroneous judgment, order or decree. If the higher Court comes to the conclusion that the trial Court by an erroneous judgment or order decreed the suit and thereafter, reverse the said judgment only then question of restitution will arise.

In the instant case, from the judgment of appellate Court, it appears that the appellate Court did not touch upon the merit of *ex-parte* judgment and decree of the trial Court but considered that the defendant, after filing written statement, could not appear before the trial Court and contest the suit and only on humanitarian it gave the defendants an opportunity to contest the suit. Appellate Court, while passing such order, did not come to the conclusion that the *ex-parte* judgment and decree were erroneously passed by the trial Court. Accordingly, I am of the view that section 144 of the Code of Civil Procedure is not available for the defendants and they are not entitled to restitution of the suit property. But the Court of revision, upon gross misconception of law, illegally allowed restitution by the impugned judgment. Accordingly, interference is called for by this Court.

In that view of that matter I find merit in this Rule.

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

The order of stay granted earlier is hereby vacated.

The impugned judgment is set aside.

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

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