IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL APPEAL NO.602 OF 2009

(From the judgment and order dated 02.08.2007 passed by the High Court Division in Civil Revision No.4949 of 2001)

Moslehuddin Ahmed ..... **Appellant**

=VERSUS=

Abdul Gafur being dead his heirs :1(a) Nuruzzaman (Rotan)and others ..... **Respondents**

For the appellant	**:Mr. Md. Abdul Wadud Bhuiyan, Senior Advocate with Mr. Mehedi Hasan Chowdhury, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record**
For the Respondent Nos.1(a)-1(g)	**:Mrs. Qumrunnessa, Advocate, instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record and Mr. Nurul Islam Bhuiyan, Advocate-on-Record**
For the respondent No.2	**:Not represented**
Date of hearing	**:The 8th June, 2022**
Judgment on	**:The 15th June, 2022**

J U D G M E N T

MD. NURUZZAMAN, J:

This Civil Appeal, by leave, has arisen out of the judgment and order dated 02.08.2007 passed by the High Court Division in Civil Revision No.4949 of 2001 making the Rule absolute and thereby setting aside the judgment and order dated 10.07.2001 passed by the Senior Assistant Judge, Chandina, Comilla in Decree Execution Case No.5 of 2000 dismissing the suit with a direction to the trial Court to proceed with the execution case in accordance with law and disposed of the same preferable within 3(three) months from the date of receipt of the judgment.

Facts leading to filing of this civil appeal, in short, are that the decree holder

respondent Abdul Gafur instituted Title Suit No.166 of 1967 in the 2nd Court of Munsif, Comilla against one Balaram Sarkar for specific performance of contract claiming that the defendant Balaram Sarkar entered into an agreement with him to transfer 56 decimals of land at a consideration of Tk.500/- on first Ashar, 1370 B.S. He paid Tk.48.75 to the said Balaram Sarkar for purchasing stamp paper; on 12.01.1964, he and Balaram Sarkar went to Chandina sub-Registrar Office, therein a kabala was written and the defendant Balaram Sarkar received the rest of the consideration money amounting to Tk.1500.00, Balaram Sarkar duly executed the kabala, but it was not present for registration on that date; he took immediate possession of the suit from Balaram

Sarkar; the defendant Balaram Sarkar avoided registration of kabala by instituting criminal case against him; that he obtained necessary permission to sue the defendant Balaram Sarkar since he was a member of minority community. Thereafter, he filed suit for specific performance of contract.

The defendant contested the case by filing written statement contending that he intended to execute a deed of usufructuary mortgage in favour of the plaintiff in respect of 16 decimals of land on receipt of Tk.200/- as loan from him, but the plaintiff in collusion with the deed writer got the kabala executed by him, being aware of the same he brought a criminal case against the plaintiff, he denied delivery of possession of the suit land in favour of the

plaintiff by him and claimed his own possession.

After hearing the parties the suit was decreed by the learned Munsif by his judgment and decree. As against the said judgment and decree Balaram Sarkar preferred Title Appeal no. 96 of 1973 in the Court of District Judge, Comilla, on transfer it was heard by the learned Sub-ordinate Judge, Second Court, Comilla, who by his judgment and decree dated 28.07.1973 set aside the decree passed by the trial Court. Against the said judgment and decree the plaintiff preferred Second Appeal No. 169 of 1974 before the High Court Division and by a judgment dated 02.09.1985 the High Court Division allowed the Second Appeal on setting aside the judgment and decree passed by

the learned Sub-ordinate judge and restored the judgment and decree passed by the Trial Court. During pendency of the said Second Appeal in the High Court Division on 02.09.1980 the opposite party No.1 of the revision (appellant herein) and his father Mohammad Ali Miah filed an application to substitute them as respondents in the Second Appeal claiming that they purchased the suit land from Balaram Sarkar, and on the same date Balaram Sarkar also made similar prayer by a separate application, accordingly the High Court Division by an order dated 4.11.1980 substituted the said two persons as respondents in place of Balaram Sarkar in the said Second Appeal.

The trial court in decreeing the suit directed the defendant Balaram to register the kabala within 30 days from the date of preparing the decree and in the Second Appeal the High Court Division gave similar direction to the substituted respondent/defendant in the following words;

> **"As the purchaser respondents have put themselves in the shoes of defendant Balaram, they are also directed to execute and register sale deed in favour of the plaintiff"**

Since the said Balaram Sarkar or the substituted defendants did not comply with the court's direction by executing and registering any kabala in his favour he filed Execution

Case no. 04 of 1990 for execution of the decree, the said execution case was dismissed for default on 06.06.1992.

The decree holder again, for execution of the said decree, filed another application on 13.11.2000 being registered as Title Execution Case no. 05 of 2000 against the substituted defendants. After filing such application for execution the decree holder respondent herein filed 4 (four) applications (i) dated 04.04.2001 under section 14 of the Limitation Act, (ii) dated 04.04.2001 under section 5 of the Limitation Act, (iii) dated 17.04.2001 under section 48(2)(a) of the Code of Civil Procedure and (iv) dated 25.06.2001 under section 151 of the Code of Civil Procedure. In the aforesaid application made under section

48(2)(a) of the Code of Civil Procedure the decree holder respondent stated that as per the provision of section 48(2)(a) of Civil Procedure, he is entitled to proceed with the execution case which he filed with delay for a period of 5 years, 5 months,14 days which require to be condoned.

In another application made section 151 of the Code of Civil Procedure he made the similar prayer asking to invoke the inherent power of the court to execute the decree obtained by him.

In another application made under Section 5 of the Limitation Act he also made prayer for condonation of delay. The contentions of his another application made under section 14 are also similar.

One of the substituted debtors namely Moslehuddin Ahmed (the respondent No.1 in the High Court Division) filed a written objection in the execution proceeding denying the contention of the plaintiff /decree holder in his application for condonation of delay made under section 5 of the Limitation Act and stating that after obtaining the final decree on 02.09.1985 from the High Court Division the said decree was put into execution by filing execution 13.11.2000. The decree holder filed the subsequent execution case beyond the period of 12 years from the date of final disposal of the suit, as such the instant execution proceeding is not maintainable and the provision under section 5 of the Limitation Act is not applicable in the instant case as it

appears from the decisions of the Appellate Division reported in 36 DLR(AD) 5 and 16 BLD(AD) 73, hence the execution proceeding is liable to be dismissed.

All the aforesaid 4 (four) applications of the decree-holder as well as the aforesaid written objection of the judgment debtor were taken up together for hearing. After hearing by a judgment and order dated 10.7.2001 the learned Senior Assistant Judge rejected the applications filed by the plaintiff/decree holder and dismissed the execution proceeding as being barred by limitation with the finding that he came to know that Mr. Shahidul Islam the learned Advocate for the petitioner died in 1999 who could file the subsequent execution case within 3 years from the date of dismissal

of the first execution case. Moreover the application of the decree holder made under section 14 of the Limitation Act, reveals that the plaintiff could file another suit being Title Suit No. 35 of 1992 which is pending and he has been proceeding with that suit as such he was able to come to the court after dismissal of the first execution case, his contention in the application under section 48(2)(a) of the Code of Civil Procedure appears to be false.

Being aggrieved by the judgment and order the plaintiff-decree holder as petitioner moved the High Court Division in revision and obtained the rule. To oppose the rule a counter affidavit sworn on 22.03.2006 was filed by the opposite-party No.1 Moslehuddin Ahmed wherein

he reiterated his above mentioned written objection filed before the Senior Assistant Judge.

The High Court Division after hearing the parties in Civil Revision No. 4949 of 2001 by a judgment and order dated 02.08.2007 made the Rule absolute thereby setting aside the judgment and order dated 10.07.2001 passed by the Senior Assistant Judge, Chandina, Comilla in Execution Case No.5 of 2000.

The appellant, as petitioner filed civil petition for leave to appeal no. 514 of 2008 and after hearing the same obtained leave, which, gave, rise to the instant appeal.

Mr. Abdul Wadud Bhuiyan, the learned Senior Advocate appearing on behalf of the appellant has submitted that the law of

limitation provides period of time for filing of execution case in Article 182 of the Act as well as in Section 48 of the Code of Civil Procedure, the decree-holder, after obtaining the decree, did not file the first execution case within 3 years as per the provision of Article 182 of the Limitation Act. Moreso, the first execution case was dismissed for default, and even then, the decree-holder did not file the instant execution case within next 3 years from the date of dismissal of the first execution case, rather, he filed the same after expiry of 8 years 4 months from the date of dismissal of the first one. He has specifically pointed that the decree holder did not file the instant execution proceeding within 12 years from the date of decree in accordance with law,

and, as such, it is hopelessly time barred, hence, not maintainable. The learned Senior Assistant Judge, in accordance with law, correctly dismissed the execution case which occasioned no failure of justice in view of the law laid down in the cases reported in 36 DLR (AD)5 and 16 BLD (AD) 73. The High Court Division erred in law in not following the decisions of apex Division as referred to above. He has further submitted that the High Court Division erred in law in applying sub-section 2(a) of section 48 of the Code of Civil Procedure, maintaining the execution case, even after, expiry of 12 years although execution proceeding not having been kept alive by filing successive application within 3 years from the date of the last proceeding application as

required by Article 182 of the Limitation Act. So, the instant application cannot be filed after 12 years as the first execution case was barred by time. The trial Court having found that the decree-holder was not prevented from executing the decree as described the story in the application for condonation but the High Court Division without appreciating the provisions of sub-section 2(a) of Section 48 of the Code of Civil Procedure (in short, the Code) in its true perspective of the case upon misinterpreting the provisions made applicable in this case. He has finally submitted that the High Court Division erred in law in holding that the decree-holder was prevented to file execution case within time which removed the bar of limitation to proceed with the execution

of the decree, and as such, the impugned judgment and order of the High Court Division is liable to be set aside.

Per contra, Mrs. Qumrunnessa, the learned Advocate-on-Record appearing on behalf of the respondent Nos.1(a) - 1(g) has submitted that the High Court Division as revisional Court did not commit any legal error, hence, rightly made the Rule absolute. Therefore, she prays for dismissal of the appeal. She has further submitted that the High Court Division considering the provisions of sub section (2)(a) of section 48 of the Code of Civil Procedure opined that the decree holder satisfactorily was able to assign the reason of delay in filing the execution case, as such, make the rule absolute setting aside the

impugned order of the execution Court which does not call for interference by this Division. The learned Advocate-on-Record in a same breath next submitted that the objection raised by the purchaser defendant is beyond the provisions of law. She has pointed that after omitting of section 47 of the Code, in execution of decree, none can raise the objection regarding executing the decree which was affirmed upto the Apex Court. She has very candidly apprised the Court that the precedents referred by the Senior Counsel for the appellants are not applicable for the present case because those decisions were pronounced before the omitting of the section 47 of the Code. She has finally approached that this Division to apply article 104 of the

Constitution to do complete justice for the respondents.

We have heard the learned senior Advocate and the learned Advocate-on-Record for the respective parties. Perused the impugned judgment and order of the High Court Division and other connected materials available on record.

The High Court Division found that the judgment debtor was prevented by filing criminal cases one after another, practicing fraud in the name of compromise, those pretexts were not considered lawfully of the executing court, although the plaintiff-petitioner was able to assign legal cause according to sub-section 2(a) of Section 48 of the Code. It was further observed by the High Court Division

that the plaintiff-petitioner never cause to show the death of his learned Advocate but the executing Court had brought such extraneous matter in rejecting the application which occasioned failure of justice, further view of the learned Judge of the High court Division is that the justice demands the decree obtained by the petitioner being contested up to the apex Court of the country should to be executed, since the said decree of specific performance of Contract has mostly been performed accept registration moreover after transfer of the suit land to the decree holed by the original owner Balaram Sarkar as it proved in the title suit there is no scope to claim or establish the subsequent purchase by the opposite parties from the said Balaram Sarkar. However in the

prevailing circumstances I hold the view that the execution of the decree cannot be restrained. Reading the two decision mentioned above I find that those are not applicable in the instant case. In both the decisions it appears that the judgment debtor raised abjection by filing application under Section 47 of the Code of Civil Procedure on such objecting raised by judgment debtor respective Miscellaneous case well initiated after formal disposal of the respective case the fate of the execution proceedings were decided. But in the instant case there was no scope to initiate any such miscellaneous case since Section 47 of the Code of Civil Procedure had already been repealed by Ordinance No.48 of 1983. After such repeal of Section 47 I find no scope to

entertain any objection as raised by the judgment debtor in the instant case. My such view got support from the decision of a Division Bench of this Division in the case of Tripura Modern Bank Ltd. Vs. Sunil Kumar Rajgharia and others reported in 11 B.L.D (H.C) 479.

It is, however, not denied, rather, admitted fact that at the time of filing the Execution Case No.5 of 2000 on 13-11-2000, the decree holder filed four applications two for condonation of delay under section 5 and 14 of the Limitation Act, amongst other two applications one under section 48(2)(a) and another under section 151 of the Code. The Executing Court at the time of hearing of the applications heard the respective Advocates and

rejected the same by its judgment and order dated 10-07-2001. The High Court Division, however, upon hearing both the parties was pleased to allow the application under section 48(2)(a) of the Code by the impugned judgment and order.

Now the question is, if, the executing Court found that the execution case is barred by law of limitation and in the other applications reasons have been offered therein were not satisfactory and untenable that is the decree holder could not proved the facts of fraud or force as per provisions of section 48(2)(a) of the Code, such applications can be rejected after elaborate discussions.

The Executing Court in rejecting such applications opined that the decree holder filed the decree execution Case No.4 of 1990 which was dismissed on 06/06/1992 for want of steps. On 13/11/2000, 2nd decree execution case being Case No.05 of 2000 was filed, which was admittedly delayed by 8 years and 4 months. The decree holder took the pretext to condone the delay in an application under section 48(2)(a) of the Code. The Executing Court found that decree holder had filed another suit being other Suit No.35 of 1992 and proceeded well ahead without any hindrance for the same time. Furthermore, some criminal cases were not at the period of limitation but later like G.R.

Case No.32 of 1998, non G.R. Case No.33 of 1998 and C.R. Case were out of period of limitation, however, execution case was dismissed on 06/06/1992, hence, the Court disbelieved the aforementioned pretexts to allow the aforementioned applications.

Thus, such discussions according to us are legal and lawful to its true perspective. We observed that High Court Division without discarding the findings based on strong inferences reversed the order of the Executing Court.

On perusal of the impugned order of the learned Senior Assistant Judge it is found that his order is sound on point of law as well as

fact and it is a speaking order. The executing court found the execution application dated 13.11.2000 was hopelessly barred by limitation under the concerned legal scheme enshrined in the section 48 of the code of civil procedure, 1908 read with article 182 of the Limitation Act, 1908 which were further affirmed by the Apex Court in the cases reported in 36 DLR (AD) 5 and 16 BLD (AD) 73. We found the findings of the Executing Court as factual and rational. On appreciation and sifting of facts Executing Court disbelieved the decree holder's version of case as claimed that fraud or force, which prevented the execution of the decree at some

time within twelve years immediately before the date of the application.

However, the contentions advanced by the learned Advocate-on-Record for the respondents, referring repealed section 47 that no objection can be raised by the judgment debtor or title claimer through the judgment debtor, if, such arguments are accepted in toto, then the execution proceeding if suffer from any legal impediment like the present case, the executing Court would not be able to look into that impediment either factual or lawful in disposing the execution case.

We are, therefore, further, of the view that the executing Court itself can look into if it is found in a execution proceedings that such execution proceedings are not maintainable

due to any factual and legal impediment. Therefore, such arguments are devoid of merit.

We have anxiously thought as regard the application of Article 104 of the Constitution, as prayed by the learned Advocate for the respondents, nevertheless, we are unable to apply this article because of legal impediment as it appears in this matter. We have already viewed that the decree holder in filing both the execution cases admittedly were delayed due to his own fault. Therefore, other side appellant has accrued a valuable right in accordance with law due to fault and latches of the decree holder the predecessors of the respondent No.1(a)-1(g) in not executing the decree in time according to law. However, the plea taken by the decree holder according to us

unsuccessful. Therefore, our considered view is that in violation of the specific provision of law, one side cannot get the complete justice depriving the other side from his valuable right obtained under the law.

Concerning the execution proceedings this Division observed in the case of Bangladesh Jatiya Samabaya Bank Ltd. vs. Sangbad Daily Paper and others reported in 36 DLR(AD) (1984) 5 as follows:

> **"It is well settled that 12 years is to be counted from terminus quo mentioned in clauses (a) and (b) of section 48(1). Although the period of 12 years has been fixed which has been termed as an "outside period" the decree must be kept alive under the**

Limitation Act and Article 182 requires the first application for execution to be made within 3 years of the decree and each successive application to be made within three years of the final order passed on the last application. In Pingle Venkata Rama Reddy Vs. Kakaria Buchanna & others. AIR. 1963 Andhra Pradesh F.B. page I it was held that section 48 deals with the maximum limit of the time for execution. This includes the "out side period" after which no execution could be granted. It was considered that section deals with the maximum limit of time for execution and no application would be

entertained after this period, notwithstanding that the last application was filed within three years of the final order made on the previous application as required by article 182 of the Limitation Act. It was further noticed that the section requires the decree-holder to be diligent in realising the fruits of the decree. Even if successive applications are filed within three years of each order, it will not avail the decree-holder if the last one is not put in within the period - specified in section 48. It was considered that the judgment debtor is under no obligation to establish that

the earlier petition was out of time. It is enough for him to show that the execution proceeding which was the subject matter of enquiry is hit by section 48 C.P.C. In Lalji Raja and Sons Vs. Firm Hansraj Nathuram, A.I.R. 1971 (S.C) 974 the Supreme Court of India considered that section 48(1) of the Code indicated that the period is a period of limitation not a bar as was a judicial opinion at one time. The opinion that has now crystalised is that section 48 is controlled by the provision of the Limitation Act. In India by Limitation Act, 1963 section 48 of the Code is deleted and its place has now been taken by

Article 136 of the Limitation Act, 1963. In this view the contention of Dr. Kamal Hossain that the execution proceeding is hit by Article 182 of the Limitation Act has considerable force.

This view has been expressed in 27 D.L.R. Dac. 72 Md. Abdur Rahim and others vs. Sree Sree Gredhari Jeo where it was observed:

> **Both prescribe the period of limitation for the execution of the decree. The Civil Procedure Code fixes the longest period, whereas the Limitation Act the earliest period to take the first step in execution and the**

subsequent steps known as steps-in-aid.

It was further observed:

An application for execution has therefore to satisfy first Article 182 of the Limitation Act the earliest period prescribed and then also section 48 of the Code which prescribed the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail.

This is a correct approach and it is interesting to note that the learned Judges commented that these two provisions though

expressed in different language "create anomaly" "The removal of the anomaly is the function of the Parliament and not the court". Precisely for this reason, in India section 48 has been deleted by the Limitation Act, 1963 and the period of limitation is now governed by Article 136 instead of the previous article 182."

The same view was reiterated by the Appellate Division in the case of Assistant Custodian, Enemy Property (Vested and Non-Resident) (L and B) and ADC(Revenue), Pabna vs. Md. Abdul Halim Mia reported in 1996 16 BLD (AD) 73 as follows:

"In support of his submission that the last Execution Case was barred by Section 48 C.P.C. Mr. Moksudur Rahman has relied upon some decisions all of which are not relevant. This Court has, however, already pronounced itself on this point in the case of Bangladesh Jatiya Samabaya Bank Ltd. Vs. The Sangbad, Daily Paper and others. BCR 1983, (AD) 418. The said decision was given on consideration of the cases of Md. Abdur Rahim and others Vs. Sree Sree Gredhari Jeo, 27 DLR (Dhaka) 72, Pingle Venkata Rama Reddy Vs. Kakaria Buchanna and others, AIR 1963 Andhra Pradesh (FB)1 and Lalji Raja and Sons Vs. Firm Hansraj

Nthuram, AIR 1971 (SC) 974. This Court approved of the approach of the then Dhaka High Court in the afore-cited cases in 27 DLR (Dhaka) 72 and affirmed that both Section 48 C.P.C. and Article 182(2) of the First Schedule to the Limitation Act provide the period of limitation for the execution of a decree. The Civil Procedure Code fixes the longest period whereas the Limitation Act fixes the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid. This Court also affirmed further view of then Dhaka High Court that an application for execution has

therefore to satisfy first Article 182 of the Limitation Act being the earliest period prescribed and then also Section 48 C.P.C. which prescribes the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail."

Though the above mentioned principles were enunciated through the procedures of miscellaneous case which rightly mentioned by the single Judge of the High Court Division. Therefore, according to learned Advocate-on-Record, those precedents are not applicable in the present case because the miscellaneous cases were arose out under section 47 of the Code which now not in existence as repealed

amending the Code. The contentions of the learned Advocate-on-Record cannot be sustained because the principle enunciated by this Division not according to the provisions of section 47 of the Code, though miscellaneous cases were filed on the procedure under section 4 of the Code, rather, it was enunciated regulating the provisions of the Limitation Act and section 48(2)(b)of the Code. So, it is squarely applicable in the present case.

As a result, we find merit in the submissions of the learned Counsel for the appellants and the reasons elaborated above we find that the impugned judgment and order of the High Court Division do call for interference.

In the result, the Civil Appeal is allowed without any order as to cost. The judgment and order of the High Court Division is set aside and the order of the learned Senior Assistant Judge is hereby restored.

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The 15th June, 2022
Hamid/B.R/*Words 4,479 *