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

Present:

**Mr. Justice Muhammad Abdul Hafiz**

**Civil Revision No. 107 of 2020**

M/S Merlin Restaurant, represented by its proprietor late Syed Aurangzeb Bin Hossain being dead his heirs: namely 1(Ga). Syeda Farah Zeba and others
Defendants-Appellants- Petitioners

Versus

Sk. Hasibul Ahsan and another
Plaintiffs-Respondents-Opposite Parties

Mr. Mir Md. Joynal Abedin, Advocate
for the petitioners

Mr. Muhammad Tajul Islam, Advocate
for the opposite parties

**Judgment on: 19.7.2023**

This Rule was issued calling upon the opposite parties to show cause as to why the impugned Judgment and Decree dated 05.1.2020 passed by the learned Additional District Judge, 7th Court, Dhaka in Title Appeal No. 392 of 2011 dismissing the appeal and thereby affirming the Judgment and Decree dated 27.9.2011 passed by the learned Senior Assistant Judge, 1st Court, Dhaka in Title Suit No. 2800 of 2008 decreeing the suit should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The opposite party Nos. 1-2 as plaintiffs filed Title Suit No. 2800 of 2008 in the Court of 1st Assistant Judge, Dhaka for ejectment of the tenant.

The Case of the plaintiffs, in short, is that the defendant is a monthly ejectable tenant under the plaintiffs. The defendant paid rents up to March, 2006 against rent receipt. Since April 2006 the defendant has not been paying rents to the plaintiffs. In violation of the terms and conditions of the tenancy agreement the defendant has sublet a portion of the rented shop to one Abdul Latif and has also changed the nature and character of the shop without permission of the plaintiffs. The schedule shop is required by the plaintiffs for own use and they have served a notice dated 18.6.2006 under Section 106 of the Transfer of Property Act but the defendant is not vacating the shop, hence the suit.

The defendant contested the suit by filing written statement denying all the material allegations made in the plaint and contending inter alia that the defendant is a tenant under the plaintiffs. The plaintiffs rented the schedule premises to the defendant in the year of 1982 taking an advance amount of Tk. 5,00,000/-(Taka five lacs) from the defendant. The defendant with the permission of the plaintiffs made some extra construction at his own cost. For many times the said tenancy agreement was

renewed. The terms of the contract expired on 31.3.2006. The plaintiffs never gave monthly rent receipt to the defendants. In the month of January, 2006 the defendant proposed for renewal of the lease contract but the plaintiffs did not agree. The plaintiffs accepted the rent up to April, 2006. From May, 2006 the plaintiffs did not accept the monthly payment of rent from the defendant. The defendant under compulsion filed House Rent Case No. 17 of 2006 in the Assistant Judge, 4th Court and House Rent Controller, Dhaka and is regularly paying the monthly rent. The defendant is not a defaulter tenant and the suit shop is not required by the plaintiffs. The defendant did not sublet any portion to anyone. The suit is bad for defect of party and liable to be dismissed.

The learned Senior Assistant Judge, 1st Court, Dhaka dismissing the aforesaid suit by his Judgment and Decree dated 27.9.2011. Against the aforesaid Judgment and Decree the defendant as appellant preferred Title Appeal No. 392 of 2011 before the learned District Judge, Dhaka which was transferred to the learned Additional District Judge, 7th Court, Dhaka who dismissed the appeal and thereby affirming the Judgment and Decree dated 27.9.2011 passed by the Senior Assistant Judge, 1st Court, Dhaka and hence the defendants-appellants as petitioners

moved this application under Section 115(1) of Code of Civil Procedure before this Court and obtained this Rule.

Mr. Mir Md. Joynal Abedin, learned Advocate for the defendants-petitioners, submits that the Trial Court clearly found that the defendant is not defaulter tenant and the plaintiffs failed to prove their bonafide requirement but the Trial Court as well as the Appellate Court below upon misreading of the evidence and materials on record most illegally decreed the Title Suit No. 2800 of 2008 and dismissed the Title Appeal No. 392 of 2011. He further submits that the Trial Court categorically found that the plaintiffs did not issue rent receipt to the defendant and that exhibit No. 4 filed by the plaintiffs was manufactured by them with malafide intention even then the Trial Court most illegally decreed the suit and the Appellate Court below being the last Court of fact miserably failed to discuss and consider about this vital evidence. He further submits that both the Courts below upon misreading of the evidence of D.W.-1 failed to consider that Abdul Latif is an employee of the defendant and the defendant did not give any sub-let of any portion of the schedule property to any person and he then submits that both the Courts below upon misreading of the evidence on record failed to consider that Abdul Latif is a monthly salary paid employee of the defendant and no portion of the

schedule property was rented by the defendant to Abdul Latif. He next submits that the Trial Court framed as many as 6(six) issues in deciding the Title Suit No.2800 of 2008 but the appellate Court below wrongly held that only 2(two) issues framed by the trial Court, moreover the trial Court did not frame the issue as "মকদ্দমাটি বর্তমান আকারে ও প্রকারে চলতে পারে কিনা?". So the appellate Court below being the last Court of fact hopelessly failed to apply his judicial mind in deciding the Title Appeal No.392 of 2011 and dismissed the appeal whimsically without properly considering the evidence and materials on record. He then submits that P.W. 2 Md. Mizanur Rahman did not corroborate the depositions of P.W. 1 rather contradicts the statement of the P.W 1. In his cross examination P.W. 2 stated that "নালিশী দোকানের ছাদ সংলগ্ন কাঠের পাটাতন ও বসার স্থান এখনও আছে" but there is no existence of such wooden floor in the schedule premises. The appellate Court below as the last Court of fact miserably failed to consider and discuss all the P.W.'s and D.W. properly and most erroneously dismissed the Title Appeal on the basis of surmises and conjectures and without any oral and documentary proof in support of the alleged sub-let by the defendant. He next submits that the petitioners are running a restaurant in the tenanted premises. As per provisions of Section 2(7) of the Bangladesh Labour Act, 2006 the petitioners business is

a factory (কারখানা). Factory has been as “কারখানা অর্থ এমন কোন ঘর-বাড়ী বা আঙ্গিনা যেখানে বৎসরে কোন দিন সাধারণতঃ পাঁচ জন বা ততোধিক শ্রমিক কর্মরত থাকেন এবং উহার যে কোন অংশে কোন উৎপাদন প্রক্রিয়া চালু থাকে, কিন্তু কোন খনি ইহার অন্তর্ভূক্ত হইবেনা” As per provisions of section 106 of the Transfer of Property Act, 1882 a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year which is terminable by the lessor by six months notice. So the notice for eviction of a factory must be 6(six) months prior notice which is the condition precedent and mandatory but in the instant case the landowner-opposite parties served a legal notice on 18.06.2006 giving only 1 (one) month and 12 (twelve) days time (Exhibit No.5). So the notice issued by the opposite parties is defective and as such the suit of the plaintiffs-opposite parties is not maintainable as per law. So the plaintiff-opposite parties are not entitled to get any decree as per law. Both the Courts below miserably failed to consider this vital aspect of the case and thus committed gross error of law which resulted in error in the decision occasioning failure of justice. He next submits that in order to evict a tenant notice under section 106 of the Transfer of Property Act, 1882 is a pre-condition and without serving a proper notice no suit for eviction is maintainable against the tenant. It will be clearly evident from Exhibit No.5 of the

plaintiff-opposite parties dated 18.06.2006 and the reply of the said notice dated 20-7.2006 wherein the petitioners clearly stated that the notice served under section 106 of the Transfer of Property Act, 1882 is not inconformity of the law. He next submits that Labour Inspector (General) of the Department of Inspection for Factories and Establishments, Dhaka on 23.03.2023 filed BLA (Fouzdari) Case No.166 of 2023 against late mother of the petitioners Nrun Nahar and manager of the restaurant Md. Tuhin Khan under section 303 (uma) and 307 of the Bangladesh Labour Act, 2006 before the learned Second Labour Court, Dhaka Division, Dhaka which clearly proves that the petitioners business is a manufacturing business as such without giving 6 months notice as per law the suit of the plaintiff is not maintainable as such the judgment of both the Courts below are liable to be set aside. He then submits that in support their case the petitioners rely on the decisions reported in 46 DLR(AD) 121 (Abdul Aziz -VS- Abdul Mazid), 54 DLR(AD) 67 (Abdur Noor and others VS Mahmood Ali and others), 35 DLR(AD) 182 (Nur Banu VS Noor Mohammad and others), 29 DLR 214 (Mir Delwar Hossain VS Mirza Joynal Abedin Mokhtar). He lastly submits that the suit property is the only means of earning of the defendants and they are entirely dependant on the income of the restaurant business run on the

schedule property and they are regularly paying the monthly rent as per order of the House Rent Case No.17 of 2006 and the judgment and decree of both the Courts below are based on surmises and conjectures arising from misreading and non-consideration of the evidence on record thus judgment and decree of both the Courts below suffers from error of law which resulting in error in the decisions occasioning failure of justice.

Mr. Muhammad Tajul Islam, learned Advocate for the opposite parties, submits that both the Courts below passed a decree of ejectment on the ground that the tenant sub-lets the premises and the tenancy agreement no longer exists. It is not a question before the revisional court as to whether the tenant is a defaulter or the landlord got necessity of the premises for his own. He further submits that both the courts below decreed the suit in favour of the plaintiff on the ground that the defendant himself admitted that he sub-lets the premises to one Abdul Latif and the tenant himself does not operate his business rather he uses the premises through some other people. Question of sub-letting to Dastagir is not at all a question to be adjudicated upon by this Court. He next submits that the submission of the petitioner is also misconceived as both the Courts below concurrently found that the defendant sub-lets the premises to Abdul Latif which was admitted

by the defendant himself. Since both the courts below concurrently arrived at a decision on finding of a fact no illegality committed in decreeing the suit. He next submits that the submission of the petitioner is absolutely baseless and not tenable in the eye of law. The courts below did not commit any illegality in framing issues and passing their judgments. He next submits that the submission of the petitioner is misconceived as the fact taken in this submission was not at all a subject matter to be decided by this Court. He next submits that the submission of petitioner is misconceived and the petitioner failed to substantiate as to which exhibit was not considered by the courts below and what wrong was committed by such non consideration. He next submits that the submission of the petitioner is misconceived as it is not the question before the this Court whether the defendant is paying rent or not and whether the landlord got genuine necessity of the premises for his own purpose. It is the questions (1) whether the tenancy agreement is expired or not (2) whether the defendant sub-lets the premises and (3) whether notice for ejectment was served upon the tenant. All the issues have been properly dealt with by the courts below and no illegality committed by them. He next submits that the premises which was rented to the petitioner for the purpose of doing restaurant business and for using it for official purpose.

The restaurant can no way be treated as a manufacturing factory and this argument of the petitioner is absolutely funny. If a restaurant is taken as a “Manufacturing Factory” then every residential house should be treated as “Manufacturing Factory”. Mere cooking of food cannot be treated as Manufacturing. In this regard the opposite parties referring the definition of “Manufacturing” from the different dictionaries which has been appended with this written submission. He next submits that the argument of serving 6 months notice under section 106 of the Transfer of Property Act does not at all come to the present case as the 6 months notice is only require when there is no written contract but in the present case there is a written contract of tenancy between the landlord and the tenant from which it is evident that the tenancy was a monthly tenancy and it was not for Manufacturing purpose and as such the notice issued by the landlord for ejectment giving more than 15 days time is absolutely proper and sufficient notice for ejectment and as such no illegality committed with regard to service of notice under section 106 of the Transfer of Property Act. The tenancy agreement in question is out and out a monthly tenancy as the rent is to pay monthly. If the lease is for more than one year as the petitioner contended then the lease agreement must be registered under section 107 of the

Transfer of Property Act. Relevant portion of the law is reproduced as below verbatim:

> "107. Lease how made- A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument."

He next submits that the argument of serving 6 months notice under section 106 of the Transfer of Property Act does not at all come to the present case as the 6 months notice is only required when there is no written contract but in the present case there is a written contract of tenancy between the landlord and the tenant from which it is evident that the tenancy was a monthly tenancy and it was not for Manufacturing purpose and as such the notice issued by the landlord for ejectment giving more than 15 days time is absolutely a proper notice for ejectment and as such no illegality committed with regard to service of notice under section 106 of the Transfer of Property Act. And "the notice of ejectment was served upon the tenant on 18.06.2006 and the suit for ejectment was filed in the year 2008 i.e. after one and half year later of service of the notice of ejectment. For the arguments act if it is taken as true that 06 months notice is required- even then the said time had been given to the tenant too as he was given one and

half years time to vacate the premises and as such the argument placed by the petitioner is not at all tenable in the eye of law." He next submits that it is simply impossible to take the argument as prudent that filing of a criminal petition against a dead person in the Labour Court proves that a restaurant is a "manufacturing factory". That huge cost should be imposed upon the petitioner for making such frivolous argument before this Court. He lastly submits that the submission of the petitioner is also frivolous and funny as he has been illegally possessing a premises of the opposite party (plaintiff) since 2006 despite having no tenancy agreement with the landlord and as per the last tenancy agreement he was supposed to vacate the premises in 2006. That the petitioner has been paying only Tk. 20,000/- per month as rent for the premises which is situated in the heart of the Dhaka City and amounting to area 1256 sq feet. On the other hand he has been enjoying rent of taka more than 2,00,000/- from their sub-tenants every month by illegally occupying the premises. Now he is arguing on humanitarian ground that it is his only source of income. The petitioner completely forgot that he has been illegally occupying a premises of the landlord since 2006 and the said landlord is also a human being and he got human rights too.

Heard the learned Advocates for both the parties and perused the record.

This is a suit for ejectment of the tenant. The terms of tenancy agreement expired on 31.3.2006. But the defendant did not vacate the suit shop and thus the notice under Section 106 of the Transfer of property Act was served on 18.6.2006 by the plaintiffs and the suit was filed in the year 2008 i.e. more than one and half year later. The tenancy agreement between the parties is to the effect that no sub-letting was to be permitted but it is fact that sub-letting was done. In this respect the defendant witness stated "মার্লিন রেস্তোরার এক অংশে লাগোয়া পান দোকান আমার কর্মচারী আঃ লতিফ চালান। আঃ লতিফের নিকট হইতে আমি আনুমানিক ২-৩ হাজার টাকা লাভ পাই।" which supports the plaintiff's case. Therefore, the defendants-tenants have lost their right and are liable to be ejected.

Considering the facts and circumstances of the Case, I find no substance in this Rule, rather I find substance in the submissions of the learned Advocate for the plaintiffs-opposite parties.

**Accordingly, the Rule is discharged.**

The impugned Judgment and Decree dated 05.1.2020 passed by the learned Additional District Judge, 7th Court, Dhaka in Title

Appeal No. 392 of 2011 dismissing the appeal and thereby affirming the Judgment and Decree dated 27.9.2011 passed by the learned Senior Assistant Judge, 1st Court, Dhaka in Title Suit No. 2800 of 2008 is hereby up-held.

The order of stay granted earlier by this Court is hereby vacated.

Send down the lower Courts record with a copy of the Judgment to the Courts below at once.

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