

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

Present:

Mr. Justice Kazi Md. Ejarul Haque Akondo

And

Mr. Justice Mohi Uddin Shamim

Civil Revision No. 2080 of 2021

IN THE MATTER OF

Kazi Firoz Rashid

.....Principal defendant No. 1
Petitioner

-Versus-

1. Syed Mahmoud Ali and another

.....Plaintiffs-Opposite parties

2. Mrs. Shafia Ali

.....Principal defendant No. 2
Opposite party

3. The Secretary, Ministry of Housing and Public Works, Government of the People's Republic of Bangladesh, Secretariat, Ramna, Dhaka and others

.....Proforma defendants-Opposite parties

Mr. Md. Oziullah, Senior Advocate with

Mr. Sheikh Muhammed Serajul Islam, Advocate

.....For the petitioner

Mr. Md. Sumon Ali, Advocate

.....For opposite party Nos. 1-2

Heard on 29.05.24, 30.06.24, 01.07.24 and judgment passed on 04.07.2024

Kazi Md. Ejarul Haque Akondo, J.

This Rule, under section 115(1) of the Code of Civil Procedure, 1908, was issued in the following terms-

“Record of the case need not be called for and let a Rule be issued calling upon opposite party Nos. 1 and 2 to show cause as to why the impugned order dated 04.02.2021 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Suit No. 109 of 2015 rejecting the application filed by principal defendant No. 1 i.e. the instant petitioner under Order 7 Rule 11(a)(d) read with section 151 of the Code of Civil Procedure, 1908 for rejection of the plaint should not be set aside and/or pass such other or further order or orders passed as to this Court may seem fit and proper.”

At the time of issuance of the Rule, all further proceedings of Title Suit No. 109 of 2015 were stayed for 6(six) months from the date, which was subsequently extended from time to time.

The present opposite party Nos. 1-2 as the plaintiffs filed the instant Title Suit No. 109 of 2015 in the Court of learned Joint District Judge, 3rd Court, Dhaka against the present petitioner and others as the defendants praying for (a) passing a decree declaring the plaintiffs’ 16 annas right, title, and interest in the scheduled property, (b) passing a decree declaring that the ex-parte judgment

and decree dated 20.11.2012 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Suit No. 253 of 2012 is fraudulent, illegal, collusive, in operative and void, (c) passing a decree declaring that the deed of agreement for sale executed on 09.08.1979 and registered on 16.08.1979 as deed No. 31154 in the office of the District Registrar allegedly executed by the plaintiffs and their mother Aliya Mohammad Ali is false, fraudulent, illegal, and void ab-initio, (d) passing a decree for khas possession of the scheduled property in favor of the plaintiffs against defendant Nos. 1 and 2, (e) delivering khas possession of the property in schedule in favor of the plaintiffs through the process of the Court, and (f) passing a decree for permanent injunction restraining defendant Nos. 1-2 from transferring the scheduled property in any form to anyone or from changing the nature and character of the same.

The principal defendant No. 1, that is to say, the present petitioner contested the suit by filing a written statement denying the material allegations made in the plaint contending, *inter alia*, that Mr. Mohammad Ali, a former Prime Minister of the then Pakistan, obtained the suit property by way of a deed of lease No.

5531 dated 05.11.1951 from the then C & B department. Mr. Mohammad Ali enjoyed the possession of the property by creating a one-storied building thereon. At the time of his death, Mr. Ali left behind two wives and their respective children. By dint of an agreement executed on 23.05.1967, the second wife, Begum Aleya Mohammad Ali, one son Syed Mahmud Ali and one daughter Syeda Mahmuda Ali (the son and daughter being out of the second wedlock) obtained the suit property. Having been in ownership, possession, and enjoyment, Begum Aleya Mohammad Ali, her son, and daughter entered into an agreement with this defendant for selling the property at a consideration of Taka 11,00,000/- through a written agreement executed on 09.08.1979 and registered on 16.08.1979 as deed No. 31154. It was a condition in the agreement that Begum Aleya and her children would obtain the necessary permission for sale from the Government. The possession of the suit property, however, was made over by Begum Aleya, her son, and daughter to defendant No. 1 in the presence of respectable persons on payment of Taka 5, 00,000/- (five lac). Thereafter, defendant No. 1 urged Begum Aleya and others to register the

property, but they kept on assuring him that the deed of sale would be registered after obtaining permission. After waiting for some time, defendant No. 1 in the middle of 1981 told the vendors that if the property was not registered, he would have to resort to legal action. Then the vendors requested him not to do so for the sake of their honor and prestige. Defendant No. 1, therefore, refrained from taking action. In this way, defendant No. 1 waited for about 33 years on the assurance of the vendors, but he being in possession of the property kept on paying all the rent, utility service charges, etc. in the name of the vendors. Lastly, being constrained defendant No. 1 as the plaintiff filed Title Suit No. 253 of 2012 before the learned Joint District Judge, 3rd Court, Dhaka praying for a decree of declaration of title by way of adverse possession, and the suit was decreed on 20.11.2012.

During trial defendant No. 1 filed an application under Order 7 Rule 11 (a) (d) read with section 151 of the Code of Civil Procedure, 1908 praying for rejection of the plaint for the reasons stated therein. Against which the plaintiffs filed a written objection. The learned Joint District Judge, 3rd Court, Dhaka after hearing the

application by impugned judgment and order dated 04.02.2021 rejected the application for rejection of the plaint. Being aggrieved by the same defendant No. 1 as the petitioner had preferred the instant civil revision before this Court.

Anyway, Mr. Md. Oziullah, the learned Senior Advocate appearing with Mr. Sheikh Muhammed Serajul Islam, Advocate on behalf of defendant No.1-petitioner very candidly went on to submit that if the plaintiffs were aggrieved by the judgment and decree dated 20.11.2012 passed in Title Suit No. 253 of 2012 by the learned Joint District Judge, 3rd Court, Dhaka they could have filed a miscellaneous case before the concerned court within the stipulated time of 30 days from the date of knowledge but they deliberately did not file such miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure, 1908 and as such, the instant suit is barred under Order 7 Rule 11 (a)(d) of the Code.

He further submits that the learned Court below failed to consider that the plaintiffs without resorting to the specific provision of law as has been enunciated in Order 9 Rule 13 of the Code filed the instant suit which is not tenable in the eye of the law.

He lastly submits that Title Suit No. 253 of 2012 was purely a suit for declaration of title by way of adverse possession, and the plaintiffs in para-26 of their plaint admitted the possession of the suit premises by defendant No. 1-petitioner as such, it is clear that the present petitioner has been possessing the suit property within the knowledge of the plaintiffs, as such the judgment and decree passed by the learned Joint District Judge, 3rd Court, Dhaka in the said suit are legal, lawful as well as binding upon the plaintiffs-opposite party Nos. 1 and 2.

To the contra, Mr. Md. Sumon Ali, the learned Advocate appearing for plaintiffs-opposite party Nos. 1 and 2 categorically submits that it is a settled principle of law that against an ex-parte decree, a judgment debtor(s) has either of threefold remedies namely, an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 or a regular appeal, or a separate suit where the scope of the suit is contemplated in section 44 of the Evidence Act, 1872 and as such, either of the said three remedies may be invoked at the option of the judgment debtor and consequently the Trial

Court committed no error of law in rejecting the application for rejection of the plaint.

He next submits that having regard to the fact that the present petitioner's sister-in-law Safia Asaf Ali through her constituted attorney Kazi Nizamuddin (brother of the present petitioner) having failed to implement her evil design to grab the suit land by filing Title Suit No. 78 of 1997 for specific performance of a contract, which was dismissed up to the Appellate Division, now in collusion with her full sister's husband Kazi Firoz Rashid (defendant No. 1), filed Title Suit No. 253 of 2012 and by practicing fraud managed to get the ex-parte decree without serving the summons upon the plaintiffs and as such, the plaintiffs filed the instant suit, which is maintainable.

He further submits that the plaintiffs came to learn that the address of the defendants (the present plaintiffs) in Title Suit No. 253 of 2012 was shown at Kamini Kutir, 5 Siddeswari, Police Station-Ramna, District- Dhaka, which was never the address of the present plaintiffs, rather, it was the address of Safia Asaf Ali (sister-

in-law of the present petitioner) and as such, the plaintiffs filed the instant suit, which is maintainable.

He also submits that it is a settled principle of law that a suit for setting aside an ex-parte decree can be filed on the ground of fraudulent suppression of summons, which is apparent in the instant suit.

He lastly submits that the Trial Court while rejecting the application for rejection of the plaint rightly held that the facts as asserted in the application filed under Order 7 Rule 11 of the Code cannot be decided without taking evidence.

Heard the learned Advocates of the contending parties and perused the materials on record. It appears that the present opposite party Nos. 1 and 2 as the plaintiffs filed the instant suit for a decree of declaration of title, recovery of khas possession, and also for a declaration that the ex-parte judgment and decree dated 20.11.2012 passed in Title Suit No.253 of 2012 by the learned Joint District Judge, 3rd Court, Dhaka is fraudulent, collusive, illegal, inoperative, and void along with other prayers. During the

pendency of the suit defendant No. 1 filed an application under Order 7 Rule 11(a)(d) read with section 151 of the Code of Civil Procedure, 1908 for rejection of the plaint. Against which the plaintiffs filed a written objection. After hearing the same the learned Trial Judge by impugned judgment and order dated 04.02.2021 rejected the application for rejection of the plaint on the contest.

At the time of the hearing, the main contention of the learned Advocate for defendant No.1-petitioner was that the plaintiffs could have filed a miscellaneous case before the court concerned within the stipulated time of 30 days from the date of knowledge about the ex-parte judgment and decree dated 20.11.2012 passed in Title Suit No.253 of 2012 but they deliberately did not file any such miscellaneous case under Order 9 Rule 13 of the Code and as such, the present suit is barred under Order 7 Rule 11 (a) (d) of the Code. However, it is a settled principle of law that against an ex-parte judgment and decree a judgment debtor has either of 03 fold remedies, i.e. (i) an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908, or (ii) a regular appeal under section 96

of the Code, or (iii) a separate independent suit on the ground of fraud. In the case at hand, in the plaint, the plaintiffs categorically stated that they or their mother as the defendants in Title Suit No.253 of 2012 never got any summons or show cause notice. The suit was filed on 27.08.2012 and within 02 months and 22 days, the suit was decreed on 20.11.2012 which was very unusual and extraordinary relief in the facts and circumstances of the case which demonstrates fraud and collusion. From the above averments of the plaint, it appears that defendant No.1-petitioner managed to obtain the impugned ex-parte judgment and decree on 20.11.2012 fraudulently beyond the knowledge of the plaintiffs without serving them any notice. In the premises, a separate suit for setting aside an ex-parte decree can be filed on the ground of fraudulent suppression of summons which is apparent in the instant suit. However, in case of rejection of the plaint, the court will take only the plaint and documents filed therewith into consideration and not what has been urged by the defendant in a petition or the written statement. In view of the above, the learned Trial Judge rightly rejected the application for rejection of the

plaint holding, amongst others, that the facts so asserted in the application filed under Order 7 Rule 11 of the Code for rejection of the plaint cannot be decided without taking evidence, and thereby committed no illegality to be interfered with.

Given the above, the submissions so made by the learned Advocate for the petitioner fall through. In the premises, we find substances in the submissions made by the learned Advocate for plaintiffs-opposite party Nos. 1 and 2. Accordingly, the Rule fails.

As a result, the Rule is discharged without cost.

Stay vacated.

The impugned judgment and order dated 04.02.2021 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Suit No. 109 of 2015 rejecting the application filed by defendant No. 1-petitioner under Order 7 Rule 11(a)(d) read with section 151 of the Code of Civil Procedure, 1908 for rejection of the plaint is hereby affirmed.

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

Mohi Uddin Shamim, J:

I agree.