

District: Lakshmipur

In the Supreme Court of Bangladesh

High Court Division
(Civil Revisional Jurisdiction)

Present

Mr. Justice Md. Zakir Hossain

Civil Revision No. 6272 of 2022

Salil Kumar Bongopadhyay and another
.....Plaintiff-Petitioners

-Versus-

Abdul Karim and others
.....Defendant-Opposite Parties

Mr. Md. Moniruzzaman, Advocate
..... For the petitioners

Mr. Khalilur Rahman with

Mr. Maqbul Ahmed, Advocate
..... For the opposite parties

Heard on:06.03.2024

Judgment on: 08.05.2024

At the instance of the petitioners, the Rule was issued by this Court with the following terms:

“Leave is granted.

Records of the case need not be called for.

Let a Rule be issued calling upon the opposite parties to show cause as to why the judgment and order dated 09.11.2022 passed by the learned District Judge, Lakshmipur in Civil Revision No. 25 of 2022 allowing the revision in part and affirming the judgment and order dated 26.09.2022 passed by the learned Joint District Judge, Second Court, Lakshmipur in Title Suit No. 18 of 2022 arising out of Title Suit No. 150 of 2019 allowing the application filed by the

defendant No. 28 for expunge the chief and cross-chief of DW, Ismail Khan shall not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.”

Facts leading to the issuance of the Rule are *inter alia* that the instant petitioner as plaintiffs instituted Title Suit No. 150 of 2019 which was later on, renumbered as Title Suit No. 18 of 2022. The defendants contested the suit by filing written statement denying the material allegations set out in the plaint. The defendant No. 28 being an added defendant contested the suit by filing separate written statement. After conclusion of the trial, the suit was fixed for hearing argument on 26.09.2022. On that date, the defendant No. 28 filed an application for expunging the evidence of DWs as it was not taken down in accordance with law. Upon hearing, on 26.09.2022, the learned Joint District Judge was pleased to withdraw the suit from the argument stage and again fixed for PH holding the view that all the witnesses of the plaintiffs and defendants may be examined afresh.

Impugning the judgment and order of the learned Joint District Judge, the plaintiff-petitioners preferred Civil Revision No. 25 of 2022 before the Court of the learned District Judge, Lakshmipur. Upon hearing, the learned District Judge was pleased to allow the Revisional Application with modification and directed the learned Joint District Judge for recording the evidence of the DW-2, DW-3 and DW-4. Impugning the judgment and order of the learned District Judge, the

petitioners moved this Court and obtained the leave, Rule and stay therewith.

Mr. Md. Moniruzzaman, the learned Advocate of the petitioners submits that the learned Joint District Judge, Second Court, Lakshmipur without considering the facts and circumstances of the case and legal position involved in this case most illegally allowed the petition for expunging the evidence of all the witnesses of the plaintiffs and the defendants who were earlier examined and cross-examined but the learned District Judge modified the order of the learned Joint District Judge without any legal basis rather he has flouted the well settled principle of law that once evidence recorded that cannot be expunged later on, therefore, the impugned judgment and order of the learned District Judge is liable to be struck down to secure the ends of justice.

Per contra, Mr. Khalilur Rahman, the learned Advocate along with Mr. Maqbul Ahmed for the opposite parties submits that the learned Joint District Judge, First Court, Lakshmipur did not record the evidence of the witnesses of the added defendant No. 28, therefore, the defendant No. 28 filed an application invoking Section 24 of the Code of Civil Procedure, in short 'the CPC' for withdrawing the aforesaid suit from the Court of the learned Joint District Judge, First Court, Lakshmipur and to transfer the same to any other competent court and accordingly, the learned District Judge was pleased to transfer the original suit to the Court of the learned Joint District Judge, Second Court, Lakshmipur; therefore, the learned Joint District Judge after considering the facts and

circumstances of the case expunged the evidence of the DWs and PWs and again the suit was fixed for peremptory hearing. He further submits that the learned District Judge by applying his judicial mind rightly held that the evidence of the DW-2, DW-3 and DW-4 shall be taken afresh or once again; therefore, there is no apparent reason to interfere with the decision of the learned District Judge. Hence the Rule is liable to be discharged to secure the ends of justice; otherwise, it will entail serious prejudice to the defendant-opposite parties.

Heard the submissions advanced by the learned Advocates of the petitioners and the opposite parties at length and perused the materials on record with due care and attention and seriousness as they deserve. The convoluted question of law embroiled in this case has meticulously been waded through.

The learned Joint District Judge in one breath held that there is no scope to expunge the evidence recorded earlier but in another breath, the learned Joint District Judge held that all the witnesses who were examined and cross-examined earlier may be recalled for fresh examination-in-chief and cross-examination. In this respect, the observation of the learned Joint District Judge may be read as follows:

“উপর্যুক্ত প্রেক্ষাপটে, আইনের সংশ্লিষ্ট বিধানসহ নথি, দরখাস্ত ও যাবতীয় প্রাসঙ্গিক দলিলাদি বিশদ পর্যালোচনা করা হল। সার্বিক পর্যালোচনায় আদালতের নিকট প্রতীয়মান হয় যে, মোকদ্দমার সকল পক্ষের প্রতি সমান সুযোগ প্রদানকরত: পুনরায় সকলপক্ষের সাক্ষীকে পুনঃতলব করে নতুন করে জবানবন্দী ও জেরা গ্রহণ করে তার ভিত্তিতে মোকদ্দমা নিষ্পত্তি করা হইলে তা কার্যবিধির ১৫১ ধারার বিধানের

আলোকে ন্যায়সঙ্গত ও যৌক্তিক হইবে। ইতোপূর্বে গৃহিত জবানবন্দী ও জেরার উত্তর *expunge* করার জন্য কোন আইনগত সুযোগ নেই মর্মে আদালতের নিকট প্রতীয়মান হয়। তদহেতুতে, বর্ণিত প্রার্থনার নিরিখে আনিত বিবাদীপক্ষের দরখাস্ত নামঞ্জুর করা হল। তথাপি, উক্তরূপ গৃহিত জবানবন্দী ও জেরার ভাষ্য নিয়ে প্রশ্ন উঠায়, পরিপূর্ণ ন্যায় বিচার নিশ্চিতকল্পে মোকদ্দমা নিষ্পত্তিতে সেসব সাক্ষ্য-পত্র বিবেচনা বহির্ভূত রাখা ১৫১ ধারার বিধানের আলোকে সঙ্গত ও ন্যায় বিচারের সমার্থক মর্মে আদালতের নিকট প্রতীয়মান হয়। তদহেতুতে, অত্র মোকদ্দমার সকল পক্ষের উপস্থাপিত সাক্ষীকে পুনঃতলব করার আদেশ দেয়া হল। পুনরায় সাক্ষীদের জবানবন্দী ও জেরা নতুন করে গ্রহণ করার সিদ্ধান্ত গ্রহণ করা হল। পর্যায়ক্রমে, বিধি মোতাবেক সাক্ষীদের জবানবন্দী ও জেরা গ্রহণ করা হইবে। ন্যায় বিচারে মোকদ্দমাটি যুক্তিতর্কের পর্যায়ে থেকে উত্তোলনক্রমে বাদীপক্ষের সাক্ষ্যগ্রহণের জন্যে P.H ধাপে আনয়ন করা হল। সংশ্লিষ্ট বিজ্ঞ কৌশলীদের জ্ঞাত করানো হোক। প: তা: ধার্য-১১.১০.২২ খ্রি.”

(Underlines for emphasis)

The learned District Judge modified the order of the learned Joint District Judge holding the view that the evidence of the DW-2; Md. Ismail Khan, DW-3; Md. Farid Uddin and DW-4; Mohin Uddin (Contractor) may be recorded afresh since both the learned Advocates of the parties agreed to that effect. In this respect, the observation of the learned District Judge may be read as follows:

“এমতাবস্থায় বিজ্ঞ নিম্ন আদালত এর তর্কিত ২৬/০৯/২০২২ ইং তারিখের আদেশটি সংশোধনযোগ্য মর্মে অত্র রিভিশন আদালত কর্তৃক সিদ্ধান্ত গৃহীত হলো। বাদী ও ১-২৭ নং বিবাদীপক্ষে পরীক্ষিত সাক্ষী P.W-1 সুনীল কুমার বন্দোপাধ্যায়, P.W-2 আঃ ওদুদ, P.W-3 রুহুল আমিন ও D.W-1 আবদুল করিম এর সাক্ষ্য জেরা জবানবন্দির বক্তব্য বাতিল বা *Expunge* করার জন্য নিম্ন আদালতের আদেশটি রদ রহিতযোগ্য মর্মে সিদ্ধান্ত গৃহীত হলো। একই সঙ্গে ২৮ নং বিবাদীপক্ষের পরীক্ষিত সাক্ষী D.W-2 মোঃ ইসমাইল খান, D.W-3

ফরিদ উদ্দিন, D.W-4 মহি উদ্দিন কন্ট্রাকটর এর জেরা জবানবন্দির বক্তব্য বাতিলযোগ্য মর্মে সিদ্ধান্ত গৃহীত হলো। বিজ্ঞ নিম্ন আদালত'কে ২৮ নং বিবাদীপক্ষ গৃহীত সাক্ষী D.W-2 মোঃ ইসমাইল খান, D.W-3 ফরিদ উদ্দিন, D.W-4 মহি উদ্দিন কন্ট্রাকটর এর সাক্ষ্য নতুনভাবে গ্রহণ করার নির্দেশ প্রদান করা হল।”

It appears from the record that the petition for expunging the evidence of the witnesses of the parties (Annexure-C to the Revisional Application) is absolutely vague and indefinite. The application for expunging the evidence of the plaintiffs and the defendants invoking Section 151 of the CPC is a device to prolong the litigation filed with an ulterior motive. The learned District Judge with the stroke of a pen passed the impugned order that the evidence of the DW-2; Md. Ismail Khan, DW-3; Md. Farid Uddin and DW-4; Mohin Uddin (Contractor) shall be recorded afresh, which is absolutely illegal, unfounded and baseless. It is now well settled that once evidence recorded cannot be rejected. It appears from the record that the learned Judges of the Courts below committed gross illegality in passing the order of expunging the evidence which have been recorded earlier. They forgot the dictum of law that the consent of parties cannot *ipso facto* bind the court to pass any order which is repugnant to the law. Section 151 of the CPC in no way enables the Court to expunge the evidence recorded earlier, therefore, the impugned judgment and order of the learned District Judge is not sustainable in the eye of law. My penultimate decisions are as follows:

- (i) *The impugned order passed by the learned Joint District Judge and the learned District Judge is absolutely illegal.*

- (ii) *Once evidence recorded cannot be rejected invoking Section 151 of the CPC.*
- (iii) *It transpires from the record that both the Courts by gratuitous finding allowed the petition for expunging the evidence of DW-2, DW-3 & DW-4.*
- (iv) *If such a practice is allowed to continue, it will open the flood gate and as such, there will be no end of litigation.*
- (v) *In this case, the defendant No. 28 may recall the witness Nos. DW-2, DW-3 and DW-4 by filing a proper and appropriate application stating specific questions thereto and wherein the plaintiffs will get an ample opportunity to cross them.*
- (vi) *The expunging of evidence is not doable and feasible and it is foreign to our jurisprudence.*

With the above observation, the Rule is disposed of, however, without passing any order as to costs. The earlier order of stay, thus, stands recalled and vacated. The learned Joint District Judge, 2nd Court, Lakshmipur is directed to dispose of the original suit as per the observation made in the body of the judgment with utmost expedition preferably within 06(six) months from the date of receipt of the copy of the judgment.

Let a copy of the judgment be transmitted to the Courts below at once for taking necessary step.

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Md. Zakir Hossain, J