

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

CIVIL REVISION NO. 6660 OF 2023

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Reliance Insurance Limited represented by its Chief Executive Officer, Shanta Western Tower (Level-5), 186 Tejgaon Industrial Area, Tejgaon-Gulshan Link Road, Dhaka-1208.

.... Petitioner

-Versus-

1. Phoneix Finance and Investments Limited represented by its Principal Officer (F & A), Mohammad Mizanur Rahman, Ayub Trade Center (2nd Floor), 1269/B Sk. Mujib Road, Agrabad, Commercial Area, Chattogram and others

....Opposite-parties

Mr. Ehsan A Siddiq with

Mr. Syed Mohammad Raihan Uddin and

Mr. Mohammad K. Shahnewaz, Advocates

... For the petitioner

Heard and Judgment on 09.01.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J:

At the instance of the defendant no. 1 in Money Suit No. 01 of 2016, this rule was issued calling upon the opposite-party nos. 1 and 2 to show cause as to why the order no. 89 dated 30.10.2023 passed by the learned Joint District Judge, Environment Court, Chattogram in the said suit should not be set aside and why the evidence of P.W-1 should not be excluded from the record of the Money Suit No. 01 of 2016 and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, all further proceedings of the suit was stayed for a period of 1(one) month when this court directed to serve the notice of the rule through special messenger. From the office note, we find that, the notice of the rule has duly been served upon the opposite-parties.

The salient facts leading to issuance of the rule are:

The present opposite-party nos. 1 and 2 as plaintiffs filed the aforesaid suit seeking following reliefs:

“(a) A decree be passed against the defendant Nos. 1-3 for a sum of Tk. 10,00,40,645.58 together with interest at the rate of 21% per day in accordance with the insurance rule from the date of loss till recovery;

(b) Cost of the suit be decreed against the defendant nos. 1-3;

(c) Any other relief or reliefs as the Ld. Court deems fit and proper be awarded to the plaintiff.”

In the said suit, the present petitioner who is the defendant no. 1 along with two others entered appearance by filing written statement denying all the material averments so made in the plaint and eventually prays for dismissing the suit.

At the trial, the plaintiffs adduced 1(one) witness who completed recording examination-in-chief. After completion of examination-in-chief, the next date was fixed for cross-examining the said witness by defendants. Then on two consecutive occasions, the said P.W-1 was cross-examined and then the suit was adjourned for cross-examining that P.W-1. As on repeated occasions, the plaintiffs failed to produce that P.W-1 for cross-examination by the defendants, the learned Judge of the trial court then imposed taka 1,000/- as cost and finally vide order being no. 86 dated 16.05.2023, the cross-examination of the plaintiff was declared closed and it was fixed on 26.06.2023 for recording testimony of the defendant's witnesses. At this, the defendants on 30.10.2023 filed an application to exclude the evidence of that P.W-1 reasoning that, the evidence of the P.W-1 is not admissible because after the examination-in-chief is completed as the P.W-1 failed to make himself available, the defendant side could not cross-examine the said witness to check the veracity of the deposition given in the examination-in-chief and hence, the said chief cannot be admissible as evidence.

However, against that very application, the plaintiffs did not file written objection and the learned Judge of the trial court vide impugned order dated 30.10.2023 that is, on the very date of filing application rejected the same vide impugned order holding that, since the defendants got the opportunity to cross-examine the plaintiff's witness so there has been no scope to exclude the examination-in-chief from the evidence of the P.W-1.

It is at that stage, the defendant no. 1 as petitioner came before this court and obtained the instant rule and order of stay.

Mr. Ehsan A Siddiq, the learned counsel appearing for the petitioner upon taking us to the revisional application and all the documents appended therewith at the very outset contends that, since the witness of the plaintiffs could not be cross-examined by the defendants so the validity of the documents so have been produced and exhibited could not be examined and therefore, the said evidence made by the plaintiffs as P.W-1 through examination-in-chief will remain as evidence for the plaintiffs which remains unchallenged at the instance of the defendants.

The learned counsel further contends that, though on several occasions, the plaintiff witness remained absent and on the failure of producing the P.W-1 even the learned Judge of the trial court imposed cost and on the following day of imposing fine, the learned Judge himself found that the cost had not been deposited so the learned Judge of the trial court has got no other option but to dismiss the suit under order XVII, rule 2(3) of the Code of Civil Procedure yet the learned Judge proceeded with the suit which cannot be sustained in law.

The learned counsel next contends that, if the evidence given by the P.W-1 remains in place as of evidence of the plaintiffs and the said P.W-1 could not be cross-examined in that case, the defendant will not take his defence that has been asserted in the written statement.

However, in support of his such submission, the learned counsel for the petitioner has relied upon a host of decisions. On going through those decisions, we find that, though there has been no specific provision for excluding the evidence for want of cross-examining of the witness but it has been settled in those cited decisions that no evidence is admissible against a party unless and until, it is given opportunity to cross-examine the said witness.

As we have found earlier that in spite of serving notice through special messenger upon the opposite-parties who are the plaintiffs in the suit but they did not bother to turn up to oppose the rule. However, we have also very meticulously gone through the documents including the plaint, written statement, application as well as the orders so passed by the learned Judge of the trial court prior to passing the impugned order.

Only point to be adjudicated in disposing of the instant rule is, whether the examination-in-chief so given by the P.W-1 can be regarded as any evidence in absence of cross-examining that witness. Though there has been no straight jacket rule either in the Code of Civil Procedure or in the Evidence Act in that respect but we find from the authorities so cited by the learned counsel for the petitioner that, in absence of cross-examination, the chief given by the plaintiff's witness will be excluded but in those decisions, it has been settled, such kinds of evidence which

ended in only examination-in-chief has not been taken as any evidence meaning not to take into account of the examination-in-chief as evidence. We find substance to those authorities vis-à-vis the submission so placed by the learned counsel for the petitioner basing on that. So in absence of cross-examination, mere examination-in-chief cannot be admitted as evidence when the defendants cannot get any opportunity to test the veracity of such testimony as well as the documents so have been produced and exhibited by the plaintiff-witness, In essence, the evidence ended in chief has got no evidentiary value at all.

Regard being had to the above facts and circumstances, we find merit in this rule which is liable to be made absolute.

Accordingly, the rule is made absolute however without any order as to cost.

The deposition (examination-in-chief) so given by the P. W-1 is hereby excluded.

However, the plaintiffs are at liberty to adduce any other witnesses if so desires if not then the defendants can proceed with their own witness.

At any rate, the order of stay granted at the time of issuance of the rule stands recalled and vacated.

However, the learned Joint District Judge, Environment Court, Chattogram is hereby directed to dispose of the Money Suit No. 01 of 2016 as expeditiously as possible preferably within a period of 3(three) months from the date of receipt of the copy of this judgment taking into account of the above observation.

Let a copy of the judgment be communicated to the learned Joint District Judge, Environment Court, Chattogram forthwith.

Mohi Uddin Shamim, J:

I agree.