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

CIVIL REVISION NO. 4112 OF 2023

In the matter of:
An application under Section 115(1) of the Code of Civil Procedure.

AND

In the matter of:

Penticgem International Limited

.... Petitioner

-Versus-

Unites Knitwear Limited and others.

....Opposite-parties

Mr. Probir Neogi, senior Advocate with
Mr. Md. Manzur Al Matin and
Mr. Muntasir Mahmud Rahman, Advocates

... For the petitioner

Mr. Sikder Mahmudur Razi, with

Md. Zahirul Islam, Advocates

....For the opposite party no. 1

Heard on 09.01.2024

and Judgment on 10.01.2024

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. 125 of 2019, this rule was issued calling upon the opposite-party no. 1 (plaintiff in the suit) to show cause as to why the judgment and order dated 04.01.2023 passed by the learned Joint District Judge, 1st court, Dhaka in the said suit

rejecting the application filed under Order VII Rule 11 read with section 151 of the Code of Civil Procedure should not be set aside set aside 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, further proceedings of the said money suit was stayed for a period of 06(six) months.

The salient facts leading to issuance of the instant rule are:

The present opposite party no. 1 as plaintiff filed the aforesaid money suit claiming an amount of taka 397,608,470.65 against the present petitioner and the opposite party nos. 2-4 as defendant nos. 1-4 in the suit seeking following reliefs:

> ***(a)*** *Pass a decree against the defendants and in favour of the plaintiff to pay BDT 397,608,470.65 (Taka thirty nine crore seventy six lac eight thousand four hundred and seventy point six five) only as on 30.06.2019;*
>
> ***(b)*** *Pass a decree for interest calculable at rate 14% till the date of the decree in favour of the plaintiff and against the defendants;*
>
> ***(c)*** *Pass a decree of interest payable at 14% upon the decreetal amount calculated from the date of the decree till the date of realisation of the same;*
>
> ***(d)*** *Pass an award of costs of the suit against the defendants and in favour of the plaintiff;*

(e) *Pass further order or orders as your Honour deems fit and proper.*

In order to contest the suit, the present petitioner as defendant no. 1 on 13.01.2022 filed written statement denying all the material averment so made in the plaint and finally prayed for dismissing the same. Soon after filing of the written statement, the self same defendant on 19.09.2022 filed an application Under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure for rejecting the plaint stating *inter alia* that, there has been no cause of auction in the suit and the same was filed for causing undue harassment to the defendant and from the plaint it appears that, the suit is barred under the provision of section 73 of the Contract Act as well as Limitation Act. However, against that application filed for rejection of the plaint, the plaintiff opposite party no. 1 also filed written objection denying all the material averment so made in the application contending that, the defendant brought the said application on some vague, ambiguous and unspecific grounds only to harass the plaintiff opposite-party. However, the said application was taken up for hearing by the learned judge of the trial court and vide impugned order dated 04.01.2023 rejected the same holding that, there has been a cause of action as claiming the money a legal notice was issued by the plaintiff opposite party on 24.07.2019 when the defendant replied that notice on 21.09.2019 and as the suit was filed 04.11.2019, it cannot be said to be barred by limitation as the suit was filed within the period of 3 years from the date of arising cause of auction. It is at that stage, the defendant no. 1 as petitioner came before this court and obtained instant rule and order of stay.

Mr. Probir Neogi, the learned senior counsel along with Mr. Md. Manzur Al Matin, and Mr. Muntasir Mahmud Rahman, the learned counsels appearing for the defendant-petitioner upon taking us to the impugned judgment and order at the very onset submits that, since under Article 115 of schedule no. 1 to the Limitation Act there has been clear provision outlining the time limit for filing a suit for compensation in the form of money suit and it has clearly been asserted in the plaint that the contract between the defendant no. 1-petitioner and the plaintiff was terminated on 15.10.2015 and the suit was filed on 04.11.2019 so as per that provision, the suit is barred by law that is, limitation having no scope to proceed with the suit but the learned judge of the trial court has very erroneously rejected the application.

The learned counsel by referring to the provision embodied in Order 7 Rule 11 in particular clause (d) thereof, then submits that, the point of limitation as well as the cause of action has to be gathered from the description made in the plaint and since there has been no statement asserting that soon after the termination of the contract dated 15.10.2015 the plaintiff had made any correspondence save for alleged email dated 16.06.2016 (thought it has not been mentioned in the plaint) so there is no scope to reckon the limitation from the alleged email in filing the suit.

The learned counsel by referring to the statement provided in paragraph no. 14 of the plaint also contends that, though in that paragraph the plaintiff alleged that, soon after terminating the contract the plaintiff had made several communications with the defendant but those statements are all evasive one devoid of creating any cause of action in filing the suit

and to run limitation apart from the date of breaking the contract herein terminating the contract and therefore the suit is clearly barred by limitation within the meaning of Article 115 of the Limitation Act. When we pose a question to the learned senior counsel with regard to the settled proposition to the effect that, the point of limitation is a mixed question of law and facts and cannot be any point for attracting clause (d) of Order 7 Rule 11 of the Code of Civil Procedure as the said point of limitation may be formulated as one of the issues in the suit, the learned counsel then retorted that, since it is admitted position which has also been asserted by the plaintiff that, on 15.10.2015 the contract between the parties was terminated and in Article 115 of the limitation Act there has been clear assertion that, the limitation for filing a suit for realization of money will run from breaking of a contract nor from any date of knowledge or from any other circumstances, so it clearly comes within the purview of clause (d) of Order 7 Rule 11 of the Code of Civil Procedure yet the learned judge has neither discussed nor observed that very legal proposition in the impugned judgment and therefore the impugned order is liable to be set aside. Insofar as it relates to the point of limitation in filing the instant revisional application which was filed out of time by 123 days and by refuting the assertion made in the counter-affidavit by the opposite party no. 1 allegedly asserting that in condoning the said quantum of delay separate application has to be filed by the petitioner, it has been argued with reference to the decision reported in 51 DLR AD 253 that, in condoning that short span of delay there has been no necessity to file a separate application since in paragraph no. 15A of the revisional

application the reason for delay has clearly been explained which is well founded in condoning the delay and the above decision is squarely applicable in the facts and circumstances in the instant case and prayed for condoning the delay. However, to buttress the above assertion the learned counsel then placed his reliance in the decision so have been reported in 11 BLT HC 379 as well 10 MLR HC 344 and contends that, in those decisions the plaint was rejected finding it barred by limitation. By referring another decision reported in 53 DLR AD 12 the learned counsel also submits that, it has been propounded therein that even a plaint can be rejected under section 151 of the Code of Civil Procedure not only under Order 7 Rule 11 of the Code of Civil Procedure if it finds that, ultimate result of the suit is as clear as day light when a suit should be barred at its inception so that no further time is consumed in a fruitless litigation." To intensify the said proposition taken by our Appellate Division, the learned counsel further contends that, since from the cause of auction incorporated in the plaint as well as from other statement it is clearly found that, the contract was terminated on 15.10.2015 so under no circumstances can the said period of cause of auction be stretched by making out the story of alleged correspondence as well as by issuing legal notice to save the limitation and therefore it is crystal clear that, the suit is barred by limitation under the provision of Article 115 of the Limitation Act and finally prays for making the rule absolute on setting aside the impugned judgment and order.

Conversely, Mr. Sikder Mahmudur Razi along with Mr. Md. Zahirul Islam, the learned counsels appearing for the plaintiff opposite party no. 1 by filing a counter-affidavit vehemently opposes the contention so taken by

the learned counsel for the petitioner and at the very outset submits that, the learned judge of the trial court has rightly passed the impugned order which is liable to be sustained. To supplement that assertion, the learned counsel next contends that, it is well settled by this court as well as by the Appellate Division that, the point of limitation can well be agitated at the trial with the help of the evidence supposed to be produced and adduced by the parties to the suit which cannot be regarded as barred by law as stipulated in clause (d) of Order 7 Rule 11 of the Code of Civil Procedure and therefore the submission so placed by the learned counsel for the petitioner has got no substance at all.

The learned counsel further contends that, the cause of auction in filing a suit has to be gathered from the plaint as has been provided in clause (d) of the said order and in the plaint there has been clear assertion that soon after terminating the contract, the plaintiff has made several correspondence with the defendant no. 1 claiming payment of money and since the defendant failed to pay any heed by making payment of the dues, the plaintiff then finally issued a legal notice on 24.07.2019 demanding money and the said legal notice was also replied by the defendant on 24.09.2019 and therefore it proves that, the allegation of the plaintiff as well as the cause of action was alive during that period of time and since the suit was filed on 04.11.2019 so the suit cannot be termed as barred by limitation let alone barred by law. When we pose a question to the learned counsel for the opposite party giving reference to Article 115 of the Limitation Act where it has clearly been stipulated that the limitation will run from the date of breaking the contract which has happened in this case

on 15.10.2015, the learned counsel then referred the provision provided in section 19 of the Limitation Act and contends that, since the defendant acknowledged the liability of the plaintiff by replying the legal notice as well as receiving various correspondence in particular, issuing email on 16.06.2016 so the cause of action was kept on continuing that is to say, there had been recurrent cause of action even though it has not been asserted in the plaint which can be cured by making amendment to the plaint but for that reason the plaint cannot be rejected finding the suit is barred by limitation.

The learned counsel in that regard has placed his reliance in a slew of decisions reported in the online Portal "Manupatra" held in the case of Kohinoor Chowdhury-Vs- Sree Kamada Ranjan Bhattacharja which was also reported in 6ADC (2009) 488 as well as in the case of Md. Shahabuddin and others –Vs- Habibur Rahman and others reported in 16 BLD (AD) 279. However, in those two decisions, it has been settled that the question of limitation is a mixed question of law and fact and needs to be settled only upon taking evidence. Insofar as regards to filing a separate application for condonation of delay in filing the instant revision he by referring to paragraph no. 6 to the decision reported in 2000(41) ALR 786 also contends that, in the cited decision even though the delay was 10 days in preferring the appeal but no separate application was filed when the court came to a decision that the appeal is barred by law and finally prayed for discharging the rule. At this, we invite the attention of the learned counsel for the petitioner with regard to the applicability of section 19 of the Limitation Act in counting limitation, when Mr. Md. Manzur Al Matin,

the learned counsel submits that, since there has been no acknowledgement ever furnished by the defendant in reply to the alleged communication alleged to have been made by the plaintiff in his favour, so that very provision provided in section 19 of the Limitation Act has got no manner of application in counting limitation giving rise to separate cause of action in filing the suit.

However, we have considered the submission so advanced by the learned senior counsel for the petitioner and that of the opposite party no. 1 at length. We have also gone through the revisional application in particular, the impugned judgment and order and other papers so appended therewith in the revisional application vis-a-vis the decision cited at the bar. The only point-in-issue to dispose of the instant rule as to whether the suit is barred by law in other wards, whether the point of limitation can be regarded as barred by law in filing the suit or not. We admit that the point of limitation is a mixed question of law and facts but that very mixed question of law and facts can only be gathered to count limitation if it is disputed one. But the case in hand, we find that, the date of termination of contract among the plaintiff and defendant is not disputed one and if we go through the provision of Article 115 of the Limitation Act we find the very vital ward that is, “breaking” herein “termination” and the limitation will run only from that “breaking” having no scope to consider “date of knowledge” or any further communication following the termination of contract. The learned counsel for the opposite party tried to impress us from the statement made in paragraph no. 14 onwards and submits that, since soon after terminating the contract the plaintiff repeatedly made

representation to the defendant asking it to pay back the amount as stated in the plaint so that very "date of termination" cannot be taken as limitation only for filing of the suit. When we pose a question to the learned counsel that section 19 of the Limitation Act clearly speaks about the "written acknowledgement" which has never been made by the defendant in favour of the plaintiff when the learned counsel for the opposite party no. 1 finds it difficult to convince us by showing any written acknowledgement ever given by the defendant, in favour of the plaintiff to survive limitation and if it is so, then the provision of section 19 of the Limitation Act has got no role to play in surviving the cause of action vis-a-vis subsists the limitation. So it our considered view that, point of limitation will only be formulated as one of the issues in a suit, when there has been any controversy with regard to the claim and counter claim between the parties in regard to arising cause of auction in a suit but in the instant suit, it is crystal clear that the termination of contract was made in a particular date on 15.10.2015 and since Article 115 clearly speaks when the limitation will run to file a money suit so there has been no ambiguity that, the suit has been filed going beyond that point of limitation. The another aspect in this revision is that, at the time of issuance of the rule though the delay of 123 days had been condoned provisionally leaving the issue alive for the opposite parties to make any submission and the plaintiff opposite party has raised that very objection contending that, that very delay has to be explained by filing a separate application and in support of his submission he cited a decision. But on going through the same we find it has got no manner of application in the facts and circumstances of the instant case because it is an age old

practice of this court that if there has been short delay, this court uses to condone the delay considering the explanation made in the original revisional application taken in a separate paragraph filed under section 115 of the Code of Civil Procedure. Herein the instant case, we find from paragraph no. 15A that, the brief was earlier handed over to another Advocate then that of the current Advocate causing the delay which is found to be satisfactory and therefore the delay of 123 days is finally condoned.

Regard being had to the above facts and circumstances we find the learned judge of the trial court has very erroneously rejected the application filed under clause (d) of Order 7 Rule 11 of the Code of Civil Procedure and therefore we don't find any substance in the impugned order.

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

The impugned order is hereby set aside resulting in the plaint is rejected and the suit be dismissed.

The order of stay grated at the time of issuance of the rule stands recalled and vacated.

Let a copy of this order be communicated to the court concerned forthwith.

Mohi Uddin Shamim, J:

I agree.

Kawsar /A.B.O