

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Miscellaneous Appeal No. 383 of 2023

With

Civil Rule No. 1002(FM) of 2023

In the matter of:

Auko-Tex Limited represented by its Managing Director Abdus Sobhan, son of Md. Ansar Ali and Johra Khatun of South Panishail, Jiranibazar, BKSP, Police Station-Kashimpur, District-Gazipur and at present: House No. 103(1st Floor), Northern Road, DOHS, Baridhara, Dhaka-1206.

... Appellant

-Versus-

Wahida Anowar of House of 16, Road No. 08, Block- A, Section-12, Mirpur, Pallabi, Dhaka and others.

... Respondents.

Mr. Imam Hasan with

Mr. Md. Shahinul Islam, Advocates

...For the appellant-
petitioner

No one appears

...For the respondent-opposite-party no. 1

Heard and Judgment on 14.07.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

Since the point of law and fact so figured in the appeal and that of the rule are intertwined, they have heard together and are being disposed of by this common judgment.

At the instance of defendant no. 4 in Title Suit No. 288 of 2023, this appeal is directed against the judgment and order dated 20.07.2023 passed by the learned Joint District Judge, 1st Court, Dhaka in the said suit allowing an application for injunction so filed by the plaintiffs-respondents under section 151 of the Code of Civil Procedure holding that, the plaintiffs have good *prima facie* arguable case. It is at that stage, the defendant no. 4 as appellant preferred the instant appeal. After preferring the appeal, the self-same defendant no. 4 as petitioner also filed an application for staying operation of the impugned judgment and order on which this court issued rule and passed an order of stay of the operation of the said order initially for a period of 3(three) months which gave rise to Civil Rule No. 1002(FM) of 2023. However, the order of stay was lastly extended on 19.02.2024 for another 6(six) months.

The salient facts leading to preferring this appeal are:

The present respondent nos. 1-7 as plaintiffs originally filed the aforesaid suit seeking following prayers:

- “(ক) নালিশী তফসিল বর্ণিত প্লটটিতে বাদীগণের ষোল আনা স্বত্ত্ব-স্বার্থ বিদ্যমান আছে মর্মে এক ঘোষণামূলক ডিক্রি দিতে,
 (খ) বাদীগণের পূর্বসূরী শেখ আনোয়ার আলীকে দাতা দেখাইয়া এবং বিবাদী গণের পূর্ববর্তী এম খোরশেদ উদ্দিন ভূঁইয়াকে গ্রহীতা দেখাইয়া সম্পাদিত ও রেজিস্ট্রীকৃত দলিল নং ২৭৪৯, তারিখ ২৭/১২/১৯৭২ ইং জাল, তথ্যকতাপূর্ণ, বাতিল, ফেরবি, ফলবলহীন

ও বাদীগণের উপর বাধ্যকর নহে মর্মে এক ঘোষণামূলক ডিক্রি দিতে,

(গ) ১-৩ নং বিবাদীগণকে দাতা দেখাইয়া এবং ৪নং বিবাদীকে গ্রহীতা দেখাইয়া সম্পাদিত ও রেজিস্ট্রীকৃত দলিল নং ১৫৮০, তাং- ২৭/০২/২০১৯, জাল, তথ্যকতাপূর্ণ, অকার্যকর, ফেরবি, ফল বলহীন ও বাদীর উপর বাধ্যকর নহে মর্মে এক ঘোষণামূলক ডিক্রি দিতে,

(ঘ) সকল বাধা অপসারণক্রমে নালিশী প্লটটির খাস দখল বাদীগণের বরাবরে প্রদানের ডিক্রি দিতে,

(ঙ) বিজ্ঞ আদালত কর্তৃক নির্ধারিত সময়ের মধ্যে বাদীগণের বরাবরে খাস দখল বুঝাইয়া না দিলে বিজ্ঞ আদালতের মাধ্যমে দখল উদ্ধার পূর্বক বাদীগণের বরাবরে বুঝাইয়া দেওয়ার ডিক্রি দিতে,

(চ) মোকদ্দমার খয়-খরচ বাদীগণের পক্ষে ও বিবাদীগণের বিরুদ্ধে প্রদানের ডিক্রি দিতে,

এবং

(ছ) আইন ও ইকুইটি মতে বাদীগণ আর যে সকল প্রতিকার পাইতে পারে তাহা প্রদানের ডিক্রি দিতে।”

On the date of filing the said suit dated 03.04.2023, the plaintiffs also filed an application for temporary injunction under order XXXIX, rule 1 and 2 read with section 151 of the Code of Civil Procedure for injunction restraining the defendants from changing the nature and character of the suit property or selling the flats of the building under construction being built on the suit properties. On the basis of the said application, the learned Judge of the trial court vide order dated

03.04.2023 issued show cause notice upon the defendants directing them to explain within 15 days as to why an order of temporary injunction will not be granted.

Since no ad-interim order was passed on the application for temporary injunction, the plaintiffs then on 10.05.2023 filed an application under section 151 of the Code of Civil Procedure on the self-same prayer made earlier in the application for temporary injunction. Thereafter, on 30.05.2023, the plaintiffs filed another application also under section 151 of the Code of Civil Procedure seeking self-same prayer made in their earlier application. However, on the basis of the applications for temporary injunction filed under section 151 of the Code of Civil Procedure, the learned Judge then vide his order dated 20.07.2023 allowed the same and passed an ad-interim order of injunction against the defendant no. 4-appellant ex parte restraining it (defendant no. 4) from selling or transferring the scheduled property till filing of written objection by that defendant no. 4 against the application for temporary injunction or to dispose of the said application. It is at that stage, the defendant no. 4 as appellant preferred this appeal and also filed an application for stay of the operation of the said order on which the rule was issued as has been stated hereinabove.

Mr. Imam Hasan, the learned counsels appearing for the appellant-petitioner upon taking us to the memorandum of appeal including the impugned order and that of the application for stay and the the documents appended therewith at the very outset submits that, the learned Judge of the trial court erred in law in not taken into consideration of the fact that,

the plaintiffs-respondents have no *prima facie* case in obtaining any order of injunction yet the learned Judge found good *prima facie* arguable case misconceivably in their favour and passed ad-interim injunction.

The learned counsel in his second leg of submission also contends that, since from the materials on record, it shows that, the summons neither of the suit nor two applications filed for ad-interim injunction under section 151 of the Code of Civil Procedure were at all served upon the defendant no. 4-appellant but still the learned Judge came to a finding that, even after receiving show cause notice of the application for injunction, the defendant no. 4 did not appear and then allowed the application for injunction *ex parte* vide impugned order which cannot sustain.

The learned counsel by referring to the “service return” so submitted by the process server which has been annexed with the application for stay as of Annexure-‘F’ series also submits that, though it was alleged by the process server that, one, Saddam as guard of the appellant received the summons but that guard is not any agent representing the appellant-petitioner and that very fact has clearly been asserted in the written statement as well as in written objection so filed by the appellant against the suit and application for temporary injunction.

The learned counsel in that regard, by referring to the provision of order V, rule 12 of the Code of Civil Procedure contends that, the summons will be regarded as “served” if the same is received by the defendant or its assigned agent but the alleged guard is neither any agent let alone authorized by the appellant to receive the summons or show

cause notice alleged to have issued on the basis of the applications for injunction so filed under section 151 of the Code of Civil Procedure so the learned Judge has misplaced the said provision while passing the impugned order observing that, in spite of receiving show cause notice, the defendant no. 4 did not appear to contest the application for injunction.

The learned counsel further contends that, since after filing the written statement as well as the written objection by the appellant both dated 19.10.2023, it also filed another application under order XXXIX, rule 5A(3) of the Code of Civil Procedure also on 19.10.2023 for vacating (প্রত্যাহার) the order of ad-interim injunction and the learned Judge upon entertaining the said application on the same date fixed the said application for hearing on 13.02.2024 (which was fixed earlier) and thereby he clearly violated the statutory provision so enshrined in order XXXIX, Rule 5A(3) of the Code of Civil Procedure innot hearing the matter within seven days of the appearance of the appellant and therefore, the impugned order cannot be sustained in law.

When we pose a question to the learned counsel for the appellant-petitioner to let us apprise as to whether, the learned Judge of the trial court has ever taken up the original application for temporary injunction on which a show cause notice was issued and subsequently an ad interim order of injunction was passed, the learned counsel then very vehemently submits that, in spite of insisting by the defendant no. 4 to take up the application for injunction for hearing, the learned Judge has not yet taken up the application for hearing as the plaintiffs of the suit have not been

pressing the said application and finally prays for allowing the appeal as well as making the rule absolute.

Though record shows that, upon serving of the notice of the appeal as well as the rule one, Mr. Abrar Khan Taslim, learned counsel entered appearance for the respondent no. 1 by filing a power and the matter has been appearing at the top of the list yet the learned counsel did not bother to turn up to oppose the appeal as well as the rule.

Be that as it may, we have considered the submission so advanced by the learned counsel for the appellant and perused the memorandum of appeal including the impugned order and other documents appended with the application for stay.

We have also very meticulously gone through the provision so expounded in order XXXIX, rule 5A(3) of the Code of Civil Procedure as well. At the first instance, we have perused the prayer so have been made in the original suit which was filed for declaration of title, declaration of certain sale deeds claiming to be void and not binding upon the plaintiffs as well as for recovery of khas possession. On going through prayer 'ga' to the plaint, we find that, the plaintiffs have challenged the propriety of the registered sale deed being no. 1580 dated 27.02.2019 through which the defendant no. 4-appellant acquired suit property from the defendant nos. 1-3. It is also admitted position that, the said property on which the defendant no. 4-appellant acquired in regard to 6 kathas 12 chataks of land is a leasehold land of Rajdhani Unnayan Kartipakkha (precisely, the RAJUK) and upon going through the written statement, we find from paragraph no. 'ja' that, the vendors upon taking permission from RAJUK

sold out the same in favour of the defendant no. 4-appellant. So invariably, RAJUK is a necessary and proper party on whose presence the suit is required to be disposed of. In any case, we would like to confine our discussion and observation keeping ourselves within the ambit of the validity of the impugned order of ad-interim injunction though passed ex parte against the defendant no. 4-appellant.

On going through the impugned order, we find that, the learned Judge just in one line has found “good *prima facie* arguable case” in favour of the plaintiffs but he has not assigned any reason how he found such “good *prima facie* arguable case” in their favour though fact remains, the suit was also filed for recovery of khas possession as evident from prayer ‘gha’ (घ) to the plaint. So, if any suit is filed for recovery of khas possession it invariably proves that, the plaintiffs have got no possession in the suit property for which such prayer has been made. So, if the plaintiffs are found to have no possession in the suit land no injunction in any form can be granted.

Furthermore, though the property is a leasehold property of RAJUK, so the allegation of the plaintiffs that, the defendant no. 4 is going to transfer or sell the property elsewhere also cannot be sustained. In any view of the matter, the assertion of the learned Judge of the trial court that the plaintiffs have got a “good *prima facie* arguable case” does not at all stand. On top of that, the learned Judge of the trial court has not discussed two other basic principles followed in adjudicating an application for injunction as the learned Judge has not discussed as to whether the balance of inconvenience stand against them and they would suffer

irreparable loss and injury if an order of injunction is not granted and understandably in absence of those two principles to have found in favour of the plaintiffs no ad-interim injunction can be granted.

Having said that, since the application filed by the defendant no. 4-appellant under order XXXIX, rule 5A(3) of the Code of Civil Procedure has not been taken into consideration by the learned Judge by disposing the matter (interim order of injunction) within 7(seven) days of the appearance of the appellant rather set the date for hearing on 13.02.2024 so the learned Judge has patently violated the provision so have been provided therein.

Regard being had to the above facts and circumstances, we don't find any shred of merit or substance in the impugned order which is liable to be set aside.

In the result, the appeal is allowed however without any order as to costs.

The impugned judgment and order dated 20.07.2023 passed by the learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 288 of 2023 is set aside consequent to, the application for temporary injunction filed on 03.04.2023 stands rejected.

Since the appeal is allowed, the connected rule being Civil Rule No. 1002(FM) of 2023 is hereby made absolute.

Resultantly, the order of stay passed at the time of issuance of the rule stands vacated in the event of setting aside the impugned order.

However, the learned Judge of the trial court is directed to dispose of the Title Suit No. 288 of 2023 as expeditiously as possible.

Let a copy of this judgment be transmitted to the learned Joint District Judge, 1st Court, Dhaka forthwith.

Md. Bashir Ullah, J.

I agree.