

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr. Justice Md. Emdadul Huq

Civil Revision No. 4583 of 2011

Md. Abdul Qyaum

.....Petitioner.

Nazima Zesmin and others.

.....Petitioner

Mr. Pranesh Chandra Roy with

Chittra Roy, Advocates.

.....For the petitioner.

Mr. Mohammad Nijiur Rahman Chowdhury

.....For the opposite party Nos. 1-3.

Heard on: The 8th September, 21st October,
10th and 12th November, 2014.

Judgment on: The 27th November, 2014.

This Civil Revision arose from an application under section 151 of the Code, of Civil Procedure, 1908 (**shortly the Code, 1908**) filed by the Judgment debtor-defendant Nos. 3-5 with a prayer for local investigation for ascertaining the encroachment into part of a non suit land in the process of execution of a decree in Title Execution Case No. 3 of 2008. They also prayed for restitution of the encroached land.

The said Executing Court by order dated 02-11-2009 kept the application pending without recording any decision thereon. So the Judgment debtor applicants filed Civil Revision No. 28 of 2008 and the learned Additional District Judge by the impugned Judgment dated 16-02-2011 allowed the said application and directed the Executing Court to ascertain the truth of the allegations made in the application by way of causing local investigation.

Earlier a Rule was issued on the matter under section 115(4) of the Code, 1908.

The facts relevant for disposal of the Rule are briefly stated below.

The petitioner Md. Abdul Quyum, as plaintiff of Title Suit No. 256 of 2005, obtained a decree for recovery of possession of 5 decimals of land of C.S plot No. 613 as described in the plaint. He also obtained a declaration about his title and the related wrong record. The decree was put to execution and it was reportedly by the court staff that possession of the land was delivered to him.

Thereafter the judgment-debtor-defendant Nos. 3-5 filed an application under section 151 of the Code, 1908 alleging that, in the execution process, encroachment has taken place and 1.75 katha of land of the contiguous plot No. 614 owned and possessed by the said defendants has been wrongly delivered to the decree holder along with part of the suit plot No. 613. So, in that application, they prayed for appointment of an advocate commissioner for conducting local investigation to ascertain the encroachment and also for restitution of possession of the encroached land.

At the hearing of this Revision, Mr. Pranesh Chandra Roy, the learned advocate for the petitioner plaintiff submits that the learned Additional District Judge committed an error of law in not considering that the execution of the decree has been completed by way of delivery of possession and therefore the executing court has no Jurisdiction to entertain the application under section 151 of the Code, 1908 and that the defendants should have filed a fresh suit for restitution of possession under section 144 of the Code, 1908.

Mr. Roy the learned Advocate, next submits that the learned Additional District Judge committed another error in not recording

any finding about his satisfaction about the claim of the defendants title to the contiguous C.S. plot No. 614.

Mr. Roy, the learned advocate further submits that the defendants have in their written statement and also in the application under section 151, clearly stated that they have no objection to the claim of the plaintiff with regard to the suit land being C.S. Plot No. 613 and therefore they can not raise objection to the execution of the decree.

In reply Mr. Rajiur Rahman Chowdhury, the learned advocate for the defendant opposite parties, submits that the subject matter of the suit and of the resultant decree is C.S. plot No. 613 and not plot No. 614, and that accordingly defendant Nos. 3-5 filed a written statement in the trial court admitting plaintiff's claim to the suit Plot No. 613.

Mr. Rahman, the learned advocate, next submits that the decree holder plaintiff, by taking advantage of the decree, cannot encroach upon the contiguous Plot No. 614 and that the defendants have prayed only for ascertaining the location and measurement of the two plots and the fact of encroachment and for restoration of possession if the encroachment is established.

Mr. Rahman, the learned advocate lastly submits that in the circumstances of the case, the only remedy available to the defendants is under section 151 and not under section 144 of the Code, 1908.

In support of his submission Mr. Rahman, the learned advocate refers to the case of Abdul Hamid vs. Dr. Quddus reported in 34 D.L.R. (AD), page-208 also and to the case of Military Estate Officer vs. Mohammad Ali 2002 B.L.D(AD), page-113.

Findings and decision in Revision

It is evident that the petitioner (plaintiff) admittedly obtained a decree for recovery possession of 5 decimal of land of C.S. Plot No. 613 as described in the plaint.

It is revealed from the pleadings that the plaintiff had alleged dispossession by defendant Nos. 1 and 2 from suit plot No.613 and that the defendants Nos. 3-5 in their written statement did not raise objection to the decree prayed for by the plaintiff. However the objection raised by defendant Nos. 3-5 in the application under section 151 is that their plot there has been encroachment into the non-suit plot No. 614 in the execution process and therefore such encroachment must be ascertained in the same Execution Case.

So the legal issue in this Revision is whether she alleged encroachment can be ascertained upon an application under section 151 of the Code, 1908 or whether a fresh suit under section 144 of the Code, 1908 should be filed by objector defendants for that purpose.

Section 144 of the Code, 1908 is applicable to a restitution of possession where dispossession takes place due to a delivery of possession pursuant to a decree, but the decree is subsequently reversed or varied by a superior court or other competent court.

In the instant case there is no reversal or variation of the decree of the trial court. The allegation is about mere encroachment into a contiguous plot in the execution process.

In view of the above I hold that the provision of section 144 is not applicable in the present situation, rather exercise of the jurisdiction under section 151 is the proper remedy for ascertaining the allegation. On this issue, the observation made by the Appellate Division in the case of Abdul Hamid vs. Dr. Quddus,

reported in 34 D.L.R.(AD) (2008), page-208 is relevant and it is quoted below:

“The underlying principle of restitution is that when a person is deprived of some right or property by an erroneous judgment, order or decree then in the event of the reversal of that judgment, order or decree, he may become entitled to restitution of his right or property and that it is the duty of the court to see that the ends of justice be met. Such restoration becomes all the more necessary if the erroneous judgment or order has caused injury to the person deprived of his property. If any law specifically provides for restitution, such as section 144 of the code, restitution must be granted by the court under this section its term being mandatory. But this section is not exhaustive; it only defines the procedure for restitution in the case of a reversal of a decree. In the case of reversal of an order the same remedy should be given by the court in the exercise of its inherent power under section 151 C.P.C. The inherent power of the Court should be exercised at its discretion, according to the merit of each case”.

Similar view was taken by the Appellate Division in the case of Military Estate Officer vs. Mohammad Ali, 2002 (AD) B.L.D, page-113, in the following words:

“If it is found in an appropriate case that though the party is for all fairness entitled to get possession of any property can he be deprived of his entitlement simply because that provision of section 144 of the Code is not applicable in his case. The civil courts’ hands are not tied up in such matters. In such a situation inherent right of the court has been recognized by section 151 of the Code. The result of applying the principle of the said section to a case which comes before the court is that the court has to make such order as would enable it to do effective and complete justice between the parties”.

The above two cases arose in the context of different set of facts but the principle of law as enunciated in the observations quoted above are applicable to the present case.

The learned Additional District Judge has legally and correctly recorded his finding to the effect that the allegation made

in the application under section 151 of the Code, 1908 should be resolved by holding a local investigation. I agree with his finding and direction.

However I also agree with Mr. Pranesh Chondra Roy the learned Advocate for the petitioner (decree-holder) that in directing the local investigation in question the Executing Court should be primarily satisfied about the claim of the defendants title to Plot No. 614.

In view of the above, I hold that the Rule has no merit.

In the result the rule discharged with the direction that the learned Senior Assistant Judge shall give both sides an opportunity being heard on the standing of the defendants in claiming contiguous Plot No. 614 and on being satisfied about such claim he shall pass necessary orders for causing local investigation about the allegation of made in the application under section 151 of the Code, and thereafter dispose of the matter in accordance with law.

No order as to costs.

Send a copy of this judgment to the said court.