

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

Civil Revision No. 22 of 2013

IN THE MATTER OF:

**An application under section 115(1) of
the Code of Civil Procedure, 1908**

IN THE MATTER OF:

Mr. Kartick Chandra Saha, son of late
Krista Lal Saha of Village: Babnapara,
P.S: Nagarpur, District: Tangail.

..... Plaintiff-Respondent- petitioner

-Vs-

Government of the People's Republic of
Bangladesh Represented by the Deputy
Commissioner, Tangail and others

----Defendant-Appellant- Opposite-Parties

Mr. Kamal Hossain, Advocate with
Mr. Manabendra Roy, Advocate.

-----For the Plaintiff-Respondent- petitioner

None appears

-----For the Defendant-Appellant- Opposite- Parties.

Heard and Judgment on 29.08.2023.

Present:

Mr. Justice Mohammad Showkat Ali Chowdhury

Mohammad Showkat Ali Chowdhury, J: On an
application under Section 115(1) of the Code of Civil Procedure (in
short, the Code) a Rule was issued calling upon the opposite parties
to show cause as to why the impugned judgment and order dated
26.08.2012 passed by the learned Joint District Judge, 1st Court,

Tangail in Other Class Appeal No. 08 of 2011 should not be set aside and /or pass such other or further order or orders as to this court may seem fit and proper.

2. The short facts leading for disposal of this civil revision are that the petitioner as plaintiff instituted a suit before the Court of Assistant Judge, Nagarpur, Tangail being Other Class Suit No.32 of 2007 for declaration of title and also for a declaration that the suit land is not vested property and is not included in the peri feri of the Hat-bazar. The defendant Nos.1-4 contested the suit by filing a written statement denying all material allegations made in the plaint.

3. At the time of the trial, the Plaintiff-Respondent-petitioner examined 3 (three) witnesses and the contesting defendants examined 1 witness in support of their respective claim. The learned Assistant Judge, Nagarpur, Tangail on perusal evidence adduced both the parties has been pleased to pass decreeing the suit-in-part in respect of 13 decimals of land out of $17\frac{1}{2}$ decimals of land by the judgment and decree dated 29.06.2010.

4. The defendant challenging the impugned judgment and order and preferred an appeal being Other Class Appeal No. 08 of 2011 along with an application for condonation of delay of 22 days

before the learned District Judge, Tangail which was subsequently condoned and the appeal was registered accordingly.

5. It is further stated in this revisional application that the sole Plaintiff-Respondent-Petitioner on 26.08.2012 filed cross-objection along with application under section 5 of the Limitation Act in Other Class Appeal No.08 of 2011 under Order XLI Rule 22(1) of the Code and in the said cross-objection in appeal there was a delay of 779 days and prayed for condonation of the said delay. It is stated in revisional application that in the petition under section 5 of the Limitation Act it has been stated that the Plaintiff-Respondent-Petitioner's Tadbirkarok is a businessman and he is very much engaged in his business and he was not totally aware about the part decree of the suit and even the appointed lawyer did not inform him of the said part decree of the suit and the Plaintiff-Respondent-Petitioner's Tadbirkarok on 14.08.2012 got the certified copy of the judgment and decree of the Other Class Suit No. 32 of 2007 and understood that the said suit was decreed-in-part. Knowing the fate of the suit he filed a cross-objection in appeal and the reasons of delay is explained in filing cross-objection.

6. The said Appeal being No.08 of 2011, eventually was transferred to the Court of Joint District Judge, 1st Court, Tangail

who passed the impugned order dated 26.08.2012 by rejecting the cross-objection on the ground that the said cross objection has not been filed within one month from the date of receipt of the notice of the appeal.

7. It is claimed in the revisional application that due to lack of proper advice from the engaged lawyer, he could not file cross objection within the statutory period of time and the learned Appellate Court below rejected the cross-objection purely on mechanical way as the same has not been filed within one month from the date of receipt of the notice of the appeal, but Order XLI Rule 22(1) of the Code provides additional provision empowering the appellate court to allow such belated cross objection within such further time as the Appellate Court may see fit to allow but the Appellate Court without noticing the said provision of law very arbitrarily and illegally rejected the cross-objection of the Plaintiff-Respondent-Petitioner.

8. The plaintiff respondent being aggrieved by and dissatisfied with the impugned order dated 26.08.2012 with regard to the rejection of cross objection in appeal preferred this Civil Revision and obtained the instant Rule.

9. At the time of hearing Mr. Kamal Hossain along with Mr. Manabendra Roy appearing on behalf of the petitioner submits that

the learned Appellate Court did not apply judicial mind in passing the impugned order and in very slipshod manner rejected the cross-objection on findings that the cross objection has not been filed within one month but without appreciating the second provision of Order XLI Rule 22(1) of the Code, he passed the order being confined with regard to the provision of 1st part of the Order XLI Rule 22(1) of the Code but there is another provision which contains “as within such further time as the appellate court may seem fit to allow.”

10. In support of the contention of learned Advocate for the plaintiff-respondent-petitioner referred the decision in **the case of Abdul Kader Mondal and others Vs Shamsur Rahman Chowdhury @ Shamsur Rahman Saha reported in 51 DLR (AD) 253.**

11. Finally, the learned Advocate of the petitioner based on Order XL1, Rule 22(1) of the Code and the precedent cited above, has prayed for making the Rule absolute.

12. No one entered appearance to contest the Rule though Civil Revision number along with the name of the learned Advocate of the opposite parties posted in the Cause list.

13. From perusal of materials on record and on hearing the submission of the learned Advocate of the petitioner it appears to

me that the simple issue is raised in the instant Rule for adjudication by the court is whether the learned appellate court committed illegality in passing the impugned order?

14. In order to appreciate the legal position of law, it would be profitable to reproduce the relevant provision of Order XLI Rule 22(1) of the Code which runs as under;

“ Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.”

15. On perusal of the provision of Order XLI Rule 22(1) of the Code, it appears that if cross-objection is not filed within one month, the law has given ample power to the Appellate Court to allow a cross-objection, (if it is beyond 01 (one) month) and can extend further period on the ground that if the court see it fit to

allow that delay occurred due to some reasons and to my mind that the delay if it is properly explained in the petition, in that case, the Appellate Court may allow the cross-objection. This power of the Appellate Court is discretionary but this discretionary power must be judicious and by no stretch of imagination, it is to be exercised capriciously. So, for proper adjudication of the appeal, the appellate court must not adhere with the provision within of one month in filing cross objection and this within one month for filing cross objection is not mandatory and the said provision has given power to the appellate court to extend further period in filing cross objection as the Appellate Court may see fit to allow.

16. In the case of Abdul Kader Mondal and others Vs Shamsur Rahman Chowdhury @ Shamsur Rahman Saha, reported in 51 DLR (AD) 253, wherein their Lordships with regard to Section 5 of the Limitation Act, observed, “the principle that substantial justice shall take preponderance over technical consideration should always be kept in view in deciding whether or not there is sufficient cause for the delay.” In the case of Vishwanath Vs. Maharaj, AIR 1977 All, 459 wherein it has been held, “the appellate court may however, in its discretion and on showing of sufficient cause, extend the period within which the cross objection can be filed.”

17. I have gone through the text of the ground taken in the petition under section 5 of the Limitation Act wherein the petitioner very elaborately made explanation that what causes prevents him from filing the cross-objection before the appellate Court within the stipulated period of time and it is to my mind that the explanation given by the petitioner in the petition under section 5 of the Limitation Act, 1908 is very much sufficient and satisfactory.

18. To my mind basing on facts and circumstances and provision of law, the learned lower appellate court ought to allow the said cross objection in appeal by exercising power under 2nd part of Order XLI Rule 22(1) of the Code but the said appellate court ignored and failed to appreciate the said provision of law and thereby the appellate court closed the door of the court to the respondent plaintiff for redressing his grievances and occasioned failure of justice which is not tenable by law. It is to be remembered that the provision of Order XLI, Rule 22(1) of the Code is not watertight rather safety valve has been provided in Order XLI, Rule 22(1) of the Code, in that case, the respondent in filing cross objection in appeal has been prevented to file cross objection against the decree within 01 (one) month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal due to satisfactory reasons.

19. Having regard to the facts and circumstances and the provision of Order XLI, Rule 22(1) of the Code and the precedents cited above, it is patently clear from the record that that the impugned order is illegal and calls for interference of this court. In view of the above, this Rule has substance and accordingly, it deserves to be appreciated by this Court.

20. In the result, the Rule is made absolute without any order as to costs. The impugned judgment and order dated 26.08.2012 passed by the learned Joint District Judge, 1st Court, Tangail, in Other Class Appeal No. 08 of 2011 is hereby set aside and cross-objection deserves to be allowed by condoning delay of 779 days .

21. The order of stay granted earlier by this court is hereby recalled and vacated.

22. Since the Other Class Appeal No. 08 of 2011 is long pending with the learned Joint District Judge, 1st Court, Tangail and the said appellate court is directed to dispose of the appeal along with cross objection expeditiously preferably within 6(six) months from the date of receipt of this judgment and order.

23. Office is directed to communicate the judgment and order to the court concerned at once.

Head Notes:

1. On perusal of the provision of Order XLI Rule 22(1) of the Code, it appears that if cross-objection is not filed within one month, the law has given ample power to the Appellate Court to allow a cross-objection, (if it is beyond 01 (one) month) and can extend further period on the ground that if the court see it fit to allow that delay occurred due to some reasons and to my mind that the delay if it is properly explained in the petition, in that case, the Appellate Court may allow the cross-objection. This power of the Appellate Court is discretionary but this discretionary power must be judicious and by no stretch of imagination, it is to be exercised capriciously. So, for proper adjudication of the appeal, the appellate court must not adhere with the provision within of one month in filing cross objection and this within one month for filing cross objection is not mandatory and the said provision has given power to the appellate court to extend further period in filing cross objection as the Appellate Court may see fit to allow.

2. Order XLI, Rule 22(1) of the Code of Civil Procedure, 1908

To my mind basing on facts and circumstances and provision of law, the learned lower appellate court ought to allow the said cross objection in appeal by exercising power under 2nd part of Order XLI Rule 22(1) of the Code but the said appellate court ignored and failed to appreciate the said provision of law and thereby the appellate court closed the door of the court to the respondent plaintiff for redressing his grievances and occasioned failure of justice which is not tenable by law. It is to be remembered that the provision of Order XLI, Rule 22(1) of the Code is not watertight rather safety valve has been provided in Order XLI, Rule 22(1) of the Code, in that case, the respondent in filing cross objection in appeal has been prevented to file cross objection against the decree within 01 (one) month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal due to satisfactory reasons.

3.