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

Present:
Mr. Justice Md. Bashir Ullah

Civil Revision No. 850 of 2006

In the matter of:
An application under Section 115(1) of the Code of Civil Procedure, 1908
And

In the matter of:

Mosammat Momtaj Begum

---Pre-emptee-Respondent - Petitioner.
-Versus-
Md. Fazlur Rahman Khan and others

---Pre-emptor-Appellant-Opposite parties.

Mr. Hasnat Quaiyum with
Ms. Abeda Gulrukh, Advocates
----For the petitioner.
None appears, Advocate
--- For the opposite party.

Judgment on: 07.03.2024

At the instance of the petitioner, this Rule was issued on 19.03.2006 calling upon the opposite party No.1 to show cause as to why the Order No. 15 dated 06.02.2006 passed by the Joint District Judge, 2nd Court, Chandpur in Miscellaneous Appeal No. 32 of 2004 arising out of pre-emption Case No. 30 of 1998 should not be 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 the operation of the impugned order No. 15 dated 06.02.2006 passed by Joint District Judge, 2nd court, Chandpur in Miscellaneous Appeal No.32 of 2004

was stayed for a period of three months and the order of stay granted was extended time to time and eventually it was extended till disposal of the Rule.

It is stated that the opposite party No.1 as petitioner filed Pre-emption Case No. 30 of 1998 before the Court of Assistant Judge, Chandpur on 24.08.1998 impleading the petitioner as pre-emptee-opposite party No.1 along with others. The petitioner as pre-emptee contested the case by filing written objection. The date for final hearing was fixed on 03.06.1999 but at the time of hearing the pre-emptor was absent. So the Assistant Judge, Chandpur dismissed the case for default. Against the dismissal order the pre-emptor filed an application under Section 151 of the Code of Civil Procedure for restoration of the case on 29.06.1999. Upon hearing the court directed the petitioner to file the application in proper form.

Thereafter, the Pre-emptor-opposite party filed an application under Rule IX Order 9 of the Code of Civil Procedure. On the other hand the Pre-emptee-petitioner filed an application under Order 7 Rule 11 of the Code of Civil Procedure for rejection of the application. Upon hearing the parties the learned Court allowed the application filed by the pre-emptee-petitioner and rejected the application of the pre-emptor-opposite party.

The pre-emptor-opposite party being aggrieved preferred Miscellaneous Appeal No. 35 of 2000 before the District Judge,

Chandpur. Upon hearing the appeal the District Judge disposed of the appeal and directed to take evidence in the Miscellaneous Case. As per direction of the appellate Court the Assistant Judge, Chandpur heard the case. P.W.1 and D.W.1 were examined in the matter. Upon hearing both the parties, the learned Assistant Judge, Chandpur rejected the case on 28.06.2004.

Against the order, the pre-emptor-opposite party filed Miscellaneous Appeal No.32 of 2004. When the date of hearing was fixed on 06.02.2006, the pre-emptor-opposite party filed an application under order 41 Rule 27 of the Code of Civil Procedure for taking additional evidence. The learned Court allowed the application on 06.02.2006 with cost of Tk. 400/-. The order dated 06.02.2006 passed by the learned Joint District Judge, 2nd Court, Chandpur runs as follows:

> "অদ্য আপীল শুনানীর জন্য দিন ধার্য্য আছে। প্রতিপক্ষ হাজিরা দিয়াছে। প্রার্থীপক্ষ এক দরখাস্ত দ্বারা দরখাস্তের বর্নিত কারণে ৪১ অর্ডার ২৭ রুলের বিধান মতে তপছিল বর্নিত ব্যক্তিকে সাক্ষী মান্য করার জন্য প্রার্থনা করেন। জোর আপত্তি সহ কপি জারী হয়। দরখাস্ত শুনানীর জন্য পেশ করা হইল। শুনলাম। দরখাস্ত ও নথি পর্যালোচনা করলাম। উভয় পক্ষের বিজ্ঞ আইনজীবীর বক্তব্য শুনলাম। আরও পূর্বে এ ব্যাপারে পদক্ষেপ গ্রহণের সুযোগ থাকা সত্ত্বেও বিলম্বে দরখাস্ত করায় ৪০০/- CP Cost টাকা প্রদানের শর্তে

মঞ্জুর। উল্লেখিত ব্যক্তিকে সাক্ষী মান্য করা হউক। আগামী ৬-৩-০৬ ইং তারিখ CP Cost প্রদান করতঃ সাক্ষ্য গ্রহণের জন্য ধার্য্য।"

Being aggrieved by and dissatisfied with the Order No.15 dated 06.02.2006 passed by the Joint District Judge, 2nd Court, Chandpur in Miscellaneous Appeal No.32 of 2004 the pre-emptee-respondent-petitioner filed the instant Civil Revision.

Mr. Hasnat Quaiyum with Ms. Abeda Gulrukh learned Advocates appearing on behalf of the pre-emptee-respondent-petitioner submits that the pre-emptor-appellant-opposite party never filed any application before the trial Court for admitting evidence nor was refused by the court.

He then submits that the impugned order, as it appears, is totally a non-speaking order in that the appellate Court did not record any reason in its support. So, the Rule may kindly be made absolute.

He also submits that the pre-emptor-appellant-opposite party instituted the case to harass the petitioner mentally and physically. Earlier, the case of the opposite party was rejected thrice in different forum and filing of such application at this stage is nothing but to prolong the litigation and cause delay in the proceeding.

No one appears on behalf of the pre-emptor-Appellant-Opposite party to oppose the Rule.

Heard the Advocate for the pre-emptee-respondent-petitioner and perused the application and the materials on record.

Order XLI Rule 27 of the Code of Civil Procedure runs as follows:

> (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
>
> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial causes,
>
> the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
>
> (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Upon perusal the above mentioned law, it is clear that under Rule 27 additional evidence may be taken by the appellate Court only if trial Court has improperly refused to admit evidence which it ought to have done or the appellate Court requires the same for proper adjudication. It appears from the record that the pre-emptor-appellant-opposite party neither filed any application for admitting evidence nor was refused by the trial Court. But the appellate Court failed to appreciate such vital aspect. Thus, the appellate Court committed error of law occasioning failure of justice in allowing the application for acceptance of additional evidence upon fanciful consideration.

In this regard this Court finds support from the decision passed in ***Mohammad Ali Akhand Vs. Bahatan Nessa Bewa and others,*** reported in 1998 BLD (AD) 50, wherein the apex Court held:

> "It is clear that this power can be exercised only where the court requires further evidence for one of the two causes specified in the rule. None of these requisites was fulfilled in this case. To permit the defendants to adduce additional evidence at the appellate stage would only amount to giving them an opportunity to fish out evidence in order to prove their case and made up

> the lacuna which, at the present moment, exists. In our opinion the lower appellate Court did not commit any error of law in rejecting the prayer for additional evidence in the facts and circumstances of the case. It was, therefore, not proper for High Court Division to interfere with the concurrent decision of the two courts below and send back the case to the lower appellate court for disposal of the appeal on merit."

Sub-Clause (2) of Rule 27 of Order 41 of the Code of Civil Procedure further provides that whenever the appellate Court allows admission of additional evidence, it must record the reasons for the order. Upon perusal of the impugned order dated 06.02.2006 passed by the learned Joint District Judge, 2nd Court, Chandpur, it appears that the court did not record any reason for allowing the application for additional evidence in compliance with the provision of Sub-Clause (2) of Rule 27 of Order 41. Thus, the appellate Court committed error of law occasioning failure of justice in allowing the application for acceptance of additional evidence without assigning any proper reason in accordance with law. In this regard, this court relied upon the decision passed in ***Pronab Kanti Mondal Vs. Shannyashi Mondal & others,*** reported in (2003) 23 BLD 327.

In the facts, circumstances of the case and decisions discussed above I am of the view that the appellate Court has misread and misconstrued the materials on record and committed an error of law resulting in an error in such order occasioning failure of justice.

Thus, I find substance in the Rule.

In the result, the Rule is made absolute. There will be no order as to costs.

The impugned Order No. 15 dated 06.02.2006 passed by the learned Joint District Judge, 2nd Court, Chandpur in Miscellaneous Appeal No. 32 of 2004 is thus set aside.

Communicate the judgment at once to the concerned Court.

(Justice Md. Bashir Ullah)

Aziz/abo