IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL PETITION FOR LEAVE TO APPEAL NO.3135 OF 2014
(From the judgment and order dated 19.05.2014 passed by the High Court Division in Civil Revision No.3437 of 2012)

Terab Ali and others … **Petitioners**

=VERSUS=

Syed Ullah and others … **Respondents**

For the Petitioners :Mr. Chanchal Kummar Biswas, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record

For the Respondents :Mr. Hamidur Rahman, Advocate, instructed by Mr. Mohammad Ali Azam, Advocate-on-Record

Date of hearing and judgment on :The 31st August, 2022

J U D G M E N T

MD. NURUZZAMAN, J:

This Civil Petition for Leave to Appeal is directed against the judgment and order dated

19.05.2014 passed by the High Court Division in Civil Revision No.3437 of 2012 discharging the Rule and thereby affirming the judgment and order dated 15.07.2012 passed by the learned Special District Judge, Sylhet in Civil Revision No.3 of 2012, rejecting the revisional application and thereby affirming the judgment and order dated 11.01.2012 passed by the learned Senior Assistant Judge, Sadar, Sylhet in Title Execution Case No.3 of 1993, rejecting the petition filed by the petitioner-judgment debtors praying for dismissal of the execution case as being time barred.

The facts, leading to filing this Civil Petition for Leave to Appeal, in short, are that the respondent Nos.1-8 herein as plaintiffs instituted Title Suit No.22 of 1983

impleading the defendants for declaration of their title in the suit land, as well as for recovery of khas possession. The principal defendants (petitioners of this petition) submitted written statement in that suit but ultimately did not contest. Accordingly, the said suit was decreed ex-parte on 15.04.1989. For setting aside the said ex-parte decree dated 15.04.1989, the judgment debtors instituted Miscellaneous Case No.36 of 1989 under order 9 Rule 13 of the Code of Civil Procedure on 15.05.1989 which was dismissed for default on 23.05.1989. Thereafter, for setting aside the said ex-parte decree, the judgment debtors as plaintiffs instituted Title Suit No.53 of 1995, in the same Court praying for a decree declaring that the said ex-parte

judgment passed in the said Title Suite No.22 of 1989 is not binding upon them for the reason that the decree passed in that suit was obtained by practicing fraud upon the Court. The said suit was dismissed and against the judgment of dismissal of that suit, they preferred Title Appeal No.309 of 2012 in the Court of District Judge, Sylhet, and the said appeal was also dismissed. Against such judgment of dismissal of the said appeal, they preferred Civil Revision No.6615 of 2002, before the High Court Division and obtained a Rule. At the time of issuance of the Rule, the High Court Division stayed further proceeding of aforesaid Title Execution Case No.03 of 1983. Ultimately, the Rule issued in the said Civil Revision No.6615 of 2002 was discharged

by judgment and order dated 17.12.2009 and the order of stay was vacated. The further case is that the respondent Nos.1-8 herein as plaintiffs decree holders, instituted the Title Execution Case No.3 of 1993 in the original Court of Senior Assistant Judge, Sadar, Sylhet on 21.10.1993 praying for execution of the ex-parte decree obtained by them on 15-04-1989 in Title Suit No.22 of 1989 against the petitioners and the opposite Party Nos.9-52 as judgment debtors stating that as there is no legal impediments against the execution of the original judgment and decree the Decree Holders have filed this Title Execution Case.

The Judgment Debtors have filed a petition supported with verification on 27.02.2011 for disallowing the execution case. They have

averred on that petition that the present Title Execution Case has been filed on the basis of ex-parte decree of Title Suit no. 22 of 1983 passed on 15.04.1989. But the decree holders have filed the instant Title Execution Case on expiry of the specified there years. Thus the instant execution case is barred by limitation and liable to be disallowed.

The Decree Holders have filed a written objection against the said petition of the Judgment Debtor. The Decree Holders have averred in their written objection that the original Title Suit no. 22 of 1983 has been decreed on declaring title and recovery of possession against the Judgment Debtors. The Defendants-Judgment Debtors filed written statement on the original suit but did not

contest. That's why that suit has been decreed ex parte. The Defendants-Judgment Debtors filed Miscellaneous Case under Order 9 rule 13 of the Code of Civil Procedure, 1908 and that was disallowed on 23.11.1993. Thereafter the Decree Holders have filed this Execution Case on 8.11.1993. The Judgment Debtor as Plaintiffs filed Title Suit 53 of 1995 to declare the ex parte judgment decree of T.S. 22.83 as void, collusive, inoperative and not binding upon the plaintiff of Title Suit 52 of 1995. That suit no. 53 of 95 has been dismissed on contest on 12.8.1999. Thereafter, the judgment debtors-defendant filed Title Appeal no. 309 of 1999 and that appeal has also been disallowed. The judgment debtors/defendants filed Civil Revision no. 6615 of 02 and the proceedings of

this execution case has been stayed till disposal of the Civil Revision. And then High Court Division disallowed that civil revision with as follows- "And it is further ordered that the order of stay passed by this court staying all further proceedings of Title Execution case No. 3 of 1993 now pending in the Court of Senior Assistant Judge, Sadar, Sylhet is hereby vacated". As such, they prayed for disallowance of the petition.

The learned Senior Assistant Judge after hearing the parties rejected the said prayer by the order dated 11.01.2012.

Feeling aggrieved, by the order dated 11.01.2012 passed the Execution Court, the petitioners preferred Civil Revision No.3 of 2012 before the Court of learned District

Judge, Sylhet. On transfer the said revisional application was heard by the learned Special Judge, Sylhet, who by his judgment and order dated 15.07.2012 rejected the revisional application and thereby affirmed the order dated 11.01.2012 passed by the learned Senior Assistant Judge, Sadar, Sylhet.

Feeling aggrieved, by the judgment and order dated 15.07.2012 passed by the appellate Court, the judgment debtors as petitioners preferred Civil Revision No.3437 of 2012 before the High Court Division and obtained the Rule.

In due course, a Single Bench of the High Court Division upon hearing the parties was pleased to discharge the Rule by the impugned judgment and order dated 19.05.2014 and thereby affirmed the order of the Execution Court.

Feeling aggrieved, by the judgment and order dated 19.05.2014 passed by the High Court Division, the judgment debtors as petitioners filed the instant Civil Petition for Leave to Appeal.

Mr. Chanchal Kummar Biswas, the learned Advocate appearing on behalf of the petitioners submits that the High Court Division failed to consider that the miscellaneous case is not a continuation of the suit and the very first execution case was barred by limitation and the unreported decision of a case as passed in Civil Revision No.4949 of 2001 and the decision referred by the High Court Division are not at all applicable in the facts and circumstances of the present case. He further submits that the ex-parte decree passed in Title Suit No. 22

of 1983 on 15.04.1989 and the execution case has been filed on 20.10.1993 which is beyond the period of 3 years as codified by the article 182 of limitation Act, 1908. The learned Executing Court relied on a synopsis of a decision of High Court Division of Pakistan passed in 1998, published in a D.L.R. reference book, though the decision has neither binding effect nor is applicable in the instant case after independence. And reliance on reference book is not legal. Moreover, the decision appears as stare decisis in the Pakistan contest and learned special District Judge as well as the High Court Division failed to consider it. He next submits that the learned Courts below failed to consider that there has been a great change in Limitation Act in

Pakistan after 1971. In Pakistan the Article 182 of the Limitation Act has been omitted and there is no other provision for limitation regarding filing of execution proceeding except article 181 and according to the provision of article 181 of Limitation Act of Pakistan, limitation starts, when the right to apply accrues, and learned Executing Court failed to realise that the decision relied on has been passed under Article 181 of the Limitation Act of Pakistan. But in our Limitation Act, there is specific provision for limitation for filing execution proceedings prescribing 3 years from the date of the decree or order and where there has been appeal from the date of final decree or order of appellate court or withdrawal of appeal or where there has been a review of the

judgment from the date of the decision passed in review or where the decree has been amended the date of amendment etc. No where the period of miscellaneous case under order 9 rule 13 or any other miscellaneous case under order 41 rules 19 and 21 has been included. From the decision referred by the judgment debtors in ILR VOL LIV page 1052, it is found that though the period of limitation of appeal is included but the period of miscellaneous appeal has been omitted. Both the courts below fails realize it. He last submits that all the statements made in the written objection filed the decree holders against the petition dated 27.02.2011 filed by the judgment-debtors, is not correct. The miscellaneous case under order 9 rule 13 has been dismissed for failure of taking steps

of service of notices and subsequent Title suit no. 53 of 1995 challenging the ex-parte decree on the ground of fraud etc. has failed due to the latches of the engaged lawyer and the ex-parte decree passed in Title Suit No. 22 of 1989 is non-executable and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

Mr. Hamidur Rahman, the learned Advocate appearing on behalf of the respondents made submissions in support of the impugned judgment and order of the High Court Division and, prayed for dismissal of the instant Civil Petition for Leave to Appeal.

We have considered the submissions of the learned Advocate for the respective parties. Perused the impugned judgment of the High Court

Division and other connected materials on record.

As per Article 182 of the Limitation Act, 1908 the very first execution case must be filed within 03 (three) years of the date of decree. And admittedly as well as documentarily the Title Execution case in question bearing no. 03 of 1993 was filed on 20.10.1993 where as the original Title Suit no. 22 of 1989 was decree ex-parte on 15.04.1989 which makes the Title Execution case no. 03 of 1993 hopelessly barred by limitations for at least 01 and half years. We surprising observed that all the courts below missed the clear and unambiguous provisions of law.

This Division ridiculously found that the learned senior Assistant Judge of the executing

court arrived at this perverse finding on point of limitation based on a ruling of a foreign court i.e. Peshawar High Court of Pakistan. The relevant portion of the order is worth mentioning:

> **"The learned counsel of the contesting judgment debtors has cited a decision of ILR Vol. LIV page no. 1052. But the facts and circumstances of that decision are not similar with the facts and circumstances of the instant execution case. But the learned counsel of the decree holders has vehemently opposed the above mentioned proposition. The learned counsel of the decree holders has**

cited a decision, "Art. 181:- Ex-parte decree-Application for setting aside ex-parte decree was filed on 1.3.1996- Application for execution of decree was dismissed by Executing Court on 30.9.1992, became sub-judice because of application filed by judgment debtors Application for setting aside exparte having been rejected on 13.3.1996, Application for execution filed thereafter, was well within time order of the execution court rejecting execution application was set aside and it was directed to proceed with execution application already filed before it. United Bank limited Vs. Victory

Engineering company, SIE, Abbottabad: 1998 CLC 690 (The Limitation Act, 1908, 3rd Edition, 2009, Dhaka Law Reports Publication, page no. 507). The decree holders have filed the execution case on disposal of the miscellaneous case filed by the judgment debtors. On reliance upon the above discussion and the decision cited by the learned counsel of the decree holders it transpires that the execution case filed by the decree holders in justified period. Moreover, the judgment debtors have filed the instant petition after long period of 18 years. It

transpires from the petition and the circumstances that the judgment debtors have waived their right to raise the present plea of limitation."

In this connection, our considered view is that case laws of any jurisdiction is applicable in our jurisdiction subject to the provisions of Article 111 read with Article 149 of the Constitution of Bangladesh, 1972 only and anything beyond that periphery, specially from Subordinate Judiciary, could be termed as judicial adventurism.

For a better understanding we need to travel down the legal memory lane a bit through the history of doctrine of Stare Decisis and enforcement of enlisting laws in our

jurisdiction. Pakistan became independent on the 14th August, 1947 and Bangladesh emerged as a sovereign independent State on 26th March, 1971. As Article 111 and Article 149 are as follows:

> **"BINDING EFFECT OF SUPREME COURT JUDGMENTS-**
>
> **111. The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."**
>
> **"SAVING FOR EXISTING LAWS-**
>
> **149. Subject to the provisions of this Constitution all existing laws shall continue to have effect but may**

be amended or repealed by law made under this Constitution."

Prior to the provisions of Article 149 continuance of existing laws in our jurisdiction was regulated by LAWS CONTINUANCE ENFORCEMENT ORDER, 1971 which was as follows:

"LAWS CONTINUANCE ENFORCEMENT ORDER MUJIBNAGAR Dated 10th day of April, 1971

I, Syed Nazrul Islam, the Vice President and Acting President of Bangladesh, in exercise of the powers conferred on me by the Proclamation of Independence dated tenth day of April. 1971 do hereby order that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the

Proclamation aforesaid continue to he force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh formed by the will of the people of Bangladesh and that all government officials-civil, military, judicial and diplomatic who take the oath of allegiance to Bangladesh shall continue in their offices on terms and conditions of service so long enjoyed by them and that all District Judges and District Magistrates, in the territory of Bangladesh and all diplomatic representatives elsewhere shall arrange to administer the oath of

allegiance to all government officials within their jurisdiction

This Order shall be deemed to have come into effect from 26th day of March 1971

SYED NAZRUL ISLAM Acting President."

Before that, the similar kind of provisions were enforced through Article 225 of the Constitution of Pakistan 1962 and Article 224 of the Constitution of Pakistan 1956. As per the section 8(1) of the Indian Independence Act, 1947, the combination of The Government of India Act, 1935 and the Indian Independence Act, 1947, the two constitutional instruments, served as an interim constitutional order for Pakistan until its Constituent Assembly adopted

its own constitution on 1956 and Article 292-293 of the Government of India Act 1935 served the comparable purposes of continuance of existing laws in our jurisdiction then.

And regarding the binding effect of precedents of Supreme Court, Article 212 of the Government of India Act 1935; Article 163 of Constitution of Pakistan 1956 and Article 63 in Constitution of Pakistan of 1962 served the purposes of the present Article 111 of Bangladesh Constitution.

By dint of the above mentioned constitutional provisions the case laws of the then higher courts namely Dhaka High Court, Federal Court of Pakistan (14 August 1947 of its independence to 1956); Supreme Court of Pakistan (1956 to 25 March 1971); Calcutta High

Court, Federal Court of India (1935-1947 13th August) the Privy Council (till 13th August, 1947) is applicable with binding effect in our jurisdiction.

In this end, opinion of two eminent jurists of our country are worth studying. Former Honb'le Judge of Appellate Division of the Supreme Court of Bangladesh Late Mr. Justice Kazi Ebadul Haque in his book namely 'The Code of law of Precedent (Nojir Ain Songhita)', Volume 1, 1st Edition (November 2011), Page 3, Bangla Academy observed that:

> **"Now the question is, whether the decisions of the Privy Council, the Indian Federal Court and the Calcutta High Court during the period before the independence of Pakistan through**

the partition of India on August 14, 1947 and the decisions of the Pakistan Federal Court and Supreme Court and Dhaka High Court on December 16, 1971 i.e. Bangladesh Pre-independence shall be binding on the courts of Bangladesh.

According to the Law's Continuance Enforcement Order and Article 149 of the Constitution of Bangladesh, those precedents are binding as common law unless later overruled by any decision of the Appellate Division of the Supreme Court of Bangladesh or any law enacted by the Legislature. But the decisions of those courts rendered after those dates shall not be binding

as foreign precedents. They will only be examples that produce persuasive efficacy. During the colonial rule, if the Privy Council as the highest court in the decision of a case invented a rule of law, it was binding on all the subordinate courts including the High Court Division of this country. Similarly, the ruling of the Federal Court of India and the Calcutta High Court, when a rule of law was laid down in a case, were binding on it and all the courts subordinate to it. It has already been mentioned that those pre-independence precedents are still binding as common law."

Former Attorney General of Bangladesh and Senior Advocate of the Supreme Court Late Mahmudul Islam in his "Constitutional Law of Bangladesh" (page 915, 3rd edition, reprinted on January 2019, Mullick Brothers, Dhaka) opined that:

> **"JUDGMENTS OF THE PRIVY COUNCIL, FEDERAL COURT AND SUPREME COURT OF PAKISTAN:**
>
> **Now the question is whether the laws declared by the Privy Council, Federal Court and the Supreme Court of Pakistan before the liberation of Bangladesh are binding precedents. Because of the then existing constitutional dispensation the statements of law by these courts**

formed part of the corpus juris of this country and were continued as existing laws by virtue of the Laws Continuance Enforcement Order, 1971 and art.149 of the Constitution and are as such binding on the High Court Division and the subordinate courts until the Appellate Division renders any contrary decision. The Indian Supreme Court made a distinction between principles of substantive law and the principles relating to interpretation of statutes and opined that the former were continued by the Constitution but not the latter.' The Indian Supreme Court seems to have rightly

made the distinction and it is submitted that art.149 of the Constitution should be deemed to have continued the principles of substantive law laid down by earlier Supreme Courts and Privy Council as part of the 'existing law'."

Concerning the execution proceedings this Division observed in the case of Bangladesh Jatiya Samabaya Bank Ltd. vs. Sangbad Daily Paper and others reported in 36 DLR(AD) (1984) 5 as follows:

"It is well settled that 12 years is to be counted from terminus quo mentioned in clauses (a) and (b) of section 48(1). Although the period of 12 years has been fixed which has been

termed as an "outside period" the decree must be kept alive under the Limitation Act and Article 182 requires the first application for execution to be made within 3 years of the decree and each successive application to be made within three years of the final order passed on the last application. In Pingle Venkata Rama Reddy Vs. Kakaria Buchanna & others. AIR. 1963 Andhra Pradesh F.B. page I it was held that section 48 deals with the maximum limit of the time for execution. This includes the "out side period" after which no execution could be granted. It was considered that section deals with the

maximum limit of time for execution and no application would be entertained after this period, notwithstanding that the last application was filed within three years of the final order made on the previous application as required by article 182 of the Limitation Act. It was further noticed that the section requires the decree-holder to be diligent in realising the fruits of the decree. Even if successive applications are filed within three years of each order, it will not avail the decree-holder if the last one is not put in within the period - specified in section 48. It was

considered that the judgment debtor is under no obligation to establish that the earlier petition was out of time. It is enough for him to show that the execution proceeding which was the subject matter of enquiry is hit by section 48 C.P.C. In Lalji Raja and Sons Vs. Firm Hansraj Nathuram, A.I.R. 1971 (S.C) 974 the Supreme Court of India considered that section 48(1) of the Code indicated that the period is a period of limitation not a bar as was a judicial opinion at one time. The opinion that has now crystalised is that section 48 is controlled by the provision of the Limitation Act. In India by Limitation Act, 1963

section 48 of the Code is deleted and its place has now been taken by Article 136 of the Limitation Act, 1963. In this view the contention of Dr. Kamal Hossain that the execution proceeding is hit by Article 182 of the Limitation Act has considerable force.

This view has been expressed in 27 D.L.R. Dac. 72 Md. Abdur Rahim and others vs. Sree Sree Gredhari Jeo where it was observed:

> **Both prescribe the period of limitation for the execution of the decree. The Civil Procedure Code fixes the longest period, whereas the Limitation Act the earliest period to take the first**

step in execution and the subsequent steps known as steps-in-aid.

It was further observed:

An application for execution has therefore to satisfy first Article 182 of the Limitation Act the earliest period prescribed and then also section 48 of the Code which prescribed the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail.

This is a correct approach and it is interesting to note that the learned Judges commented that

these two provisions though expressed in different language "create anomaly" "The removal of the anomaly is the function of the Parliament and not the court". Precisely for this reason, in India section 48 has been deleted by the Limitation Act, 1963 and the period of limitation is now governed by Article 136 instead of the previous article 182."

The same view was reiterated by this Appellate Division in the case of Assistant Custodian, Enemy Property (Vested and Non-Resident) (L and B) and ADC(Revenue), Pabna vs. Md. Abdul Halim Mia reported in 1996 16 BLD (AD) 73 as follows:

"In support of his submission that the last Execution Case was barred by Section 48 C.P.C. Mr. Moksudur Rahman has relied upon some decisions all of which are not relevant. This Court has, however, already pronounced itself on this point in the case of Bangladesh Jatiya Samabaya Bank Ltd. Vs. The Sangbad, Daily Paper and others. BCR 1983, (AD) 418. The said decision was given on consideration of the cases of Md. Abdur Rahim and others Vs. Sree Sree Gredhari Jeo, 27 DLR (Dhaka) 72, Pingle Venkata Rama Reddy Vs. Kakaria Buchanna and others, AIR 1963 Andhra Pradesh (FB)1 and Lalji Raja and Sons Vs. Firm Hansraj

Nthuram, AIR 1971 (SC) 974. This Court approved of the approach of the then Dhaka High Court in the afore-cited cases in 27 DLR (Dhaka) 72 and affirmed that both Section 48 C.P.C. and Article 182(2) of the First Schedule to the Limitation Act provide the period of limitation for the execution of a decree. The Civil Procedure Code fixes the longest period whereas the Limitation Act fixes the earliest period to take the first step in execution and the subsequent steps known as steps-in-aid. This Court also affirmed further view of then Dhaka High Court that an application for execution has

therefore to satisfy first Article 182 of the Limitation Act being the earliest period prescribed and then also Section 48 C.P.C. which prescribes the maximum period of limitation. If the execution petition is hit by any of the two provisions it is to fail."

We can sum up in this way that the case laws declared by any superior court other than Bangladesh including Pakistan after 25th March, 1971 (that is after independence of Bangladesh) and that of India after 13th August, 1947 (that is after partition of Pakistan) are not applicable in our jurisdiction as binding precedents. They may have some sort of persuasive efficacy in our legal arena and can

be used to assist or guide Bangladesh Supreme Court in unaling decisions on new facts. Hence, both the Division of the Supreme Court of Bangladesh can discuss and cite foreign case laws in reaching any decision on some points of law applicable in Bangladesh. However, no reliance ipso facto could be placed upon those precedents in any way as was relied upon by the learned Senior Assistant Judge, Sylhet.

Moreover, as the Judges of Sub-ordinate Judiciary, as a whole, are not empowered to interpret laws or making a precedent, rather, are bound to apply "existing laws" as it is, it is better for them only to cite or rely on the existing laws and case laws applicable in our jurisdiction and at the same time refrain from rely on foreign case law, not covered under the

constitutional scheme framed through Article 111 and Article 149 of the Constitution of Bangladesh as discussed above. Moreover, as per the provisions of the Law Reports Act, 1875 and practices of the Court, using of reference books other than recognized law reports, is not appropriate.

Accordingly, we find merit in submissions of the learned Counsel for the leave petitioner. However, in our opinion, it is worth disposing of the leave petition instead of granting leave.

Hence, this petition is disposed of. The impugned judgment and order of the High Court Division and Courts below are set aside. The application filed in Execution Court for

rejecting the execution case is allowed. The Execution Case is dismissed as barred by law.

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The 31st August, 2022
Hamid/B.R/*Words 4,501*