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

Present

Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 354 of 2015

IN THE MATTER OF:

Jebun Nessa Khatun being dead her legal heirs:
Md. Kamrul Huda and another

... Plaintiff-Appellants

Versus

Abul Kashem Al Asad and others

... Defendant-Respondents

Mr. Md. Abdus Salam Mondal, Advocate with
Mr. Md. Abul Kalam Azad, Advocate

... For the Plaintiff-Opposite Party-Appellants

Mr. Chanchal Kumar Biswas, Advocate with
Ms. Umme Masumun Nesa, Advocate

... For the Defendant-Respondents

Judgment on: 29.05.2025

Md. Riaz Uddin Khan, J:

This appeal is directed against the judgment and decree dated 30.11.2008 passed by the Additional District Judge, 3rd Court, Sylhet in Civil Revision No. 48 of 2008, allowing the same by rejecting the plaint and thereby reversing the Order No. 17 dated 05.06.2008 passed by the Senior Assistant Judge, Sadar, Sylhet rejecting the application for rejection of plaint.

Facts in a nutshell, for disposal of this appeal is that the petitioner being plaintiff on 12.11.2007 instituted a suit being Title Suit No. 393 of 2007 in the Court of the learned Senior Assistant Judge, Sadar Court, Sylhet for declaration that decree in Title Suit No. 206 of 1970 in respect of saham allotted in favour of defendant Nos. 1 and 3 is illegal, void, collusive, fraudulently obtained and not binding upon the plaintiff and proforma defendant no.4 for a further declaration that the application dated 29.05.2007 for permission of construction of 8-storied building from defendant No.2 on the land described in the application is illegal, void, collusive and against the lawful interest of the plaintiff and proforma defendant No. 4 and with a further prayer for permanent injunction against defendant Nos. 1 and 2 from proceeding further in respect of the impugned application dated 29.05.2007.

The plaintiff petitioner filed an application under Order 39 Rule 1 of the Code of Civil Procedure for temporary injunction restraining defendant No.2 from according permission as sought for by defendant opposite party no.1 in respect of constructing 8-storied building over the suit land and to restrain defendant Nos. 1-3 not to do anything causing any change in the nature and feature of the suit land. The trial court registered the suit on 12.11.2007 and on 13.11.2007 upon hearing of the application for injunction directed defendant nos.1-3 to show cause within 7 days as to why temporary injunction shall be granted.

Thereafter on 06.01.2008 defendant No.1 filed an application under Order 7 Rule 11 read with section 151 of the Code of Civil Procedure for rejection of the plaint stating *inter alia* that the defendant rightly got his saham in Title Suit No. 206 of 1970 and legally got the possession therein by Title Execution Case No. 8 of 1988, the plaintiff and proforma defendant No. 4 were aware of that case and refrained themselves from contesting since summons were duly served and the suit land is not Waqf property and the plaintiff suppressing the fact filed the suit and the plaintiff has no cause of action and the suit is barred by law. The defendant No.2 also on 16.01.2008 filed an application for rejecting the plaint under Order 7 Rule 11 of the Code of Civil Procedure on the contention that the suit is barred by law.

The plaintiff petitioner contested the said applications by filing two separate written objections contending *inter alia* that the instant case arises of a positive case of fraud and forgery in substance against the interest of the sisters of the plaintiff by the brother i.e. defendant No. 1. for which no time limitation is required and to prove the alleged fraud and forgery evidences are very much necessary and the pliant discloses a bundle of facts which is the cause of action and as such the applications for rejection of plaint is liable to be rejected.

Both the applications for rejection of the plaint were taken up for hearing and upon hearing the parties the trial court was pleased to reject the applications for rejection of the plaint by his order No. 17 dated 05.06.2008.

Being dissatisfied with the aforesaid order of the trial court the defendant No.1 filed Civil Revision No. 48 of 2008 in the Court of District Judge, Sylhet under section 115(2) of the Code of Civil Procedure. The plaintiff contested the civil revision by filing counter affidavit refuting and opposing the grounds taken in the revisional application.

The Civil revision was ultimately heard by the Additional District Judge, Third Court, Sylhet who upon hearing the parties by his impugned judgment and decree dated 30.11.2008 was pleased to allow the Civil Revision and ultimately rejected the plaint by reversing the order of the trial court.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree dated 30.11.2008 the plaintiff petitioner moved this Court by filing civil revision and a single bench of this Court on 08.03.2009 was pleased to issue rule and stay operation of the impugned judgment and decree and further directed the trial court to proceed with the suit. It was registered as Civil Revision No.6476 of 2009. However, upon an application filed by the petitioner the civil revision was converted into First Appeal which is registered as First Appeal No.354 of 2015 vide order dated 02.09.2015 passed by a Division Bench of this Court. Thereafter, upon applications filed by the respondent a Division Bench of this Court vide order dated 02.12.2015 was pleased to dispense with the preparation of paper-books and directed the office not to call for the lower court records. The matter was made ready for hearing and fixed for hearing before this Court.

Mr. Md. Abdus Salam Mondal, the learned advocate for the appellants submits that the learned trial court correctly rejected the applications under order 7 Rule 11 read with section 151 of the Code of Civil Procedure with a finding to the effect that the cause of action of the two suits are different and the issues are not same. The allegations regarding fraud, non service of summons or Waqf property cannot be decided without taking evidence. There is mixed question of law and fact concerned here which cannot be decided at this stage of the suit without taking evidence. On the other hand the learned Additional District Judge without reversing the aforesaid finding set aside the order dated 05.06.2008 and straightly rejected the plaint on the ground of limitation and thereby committed serious error of law occasioning failure of justice.

He then submits that the revisoinal court fell into grave error of law in not taking into consideration that the court cannot look into any documents other than the plaint to decide whether the plaint is liable to be rejected and in the instant case relying on the applications for rejection of the plaint the revisional court rejected the plaint by setting aside the order of the trial court illegally.

The learned advocate next submits that the revisional court manifestly erred in law in rejecting the plaint on the ground of limitation, it must appear to be barred by law from reading of the plaint, but not on the basis of the statements made in the written statement or in the application for rejection of pliant.

He then submits that the learned Additional District Judge committed serious error of law in not taking into notice that the plaint ought to have looked into to decide whether a suit is barred by law, the plaint cannot be rejected and plea of implied bar has to be decided on taking evidence unless the bar is patent and as such the decision taken by the revisional court is liable to be set aside to secure the ends of justice.

He further submits that the revisional court could not consider the material allegations of the plaint and also could not consider the basic principles of Order 7, Rule 11 of the Code of Civil Procedure and thereby came to a wrong decision allowing application filed by the defendant-respondents.

He further submits that the revisional court considering the extraneous papers having taken decision which caused serious illegality to perform the natural and impartial justice overlooking the allegations of fraudulent activities of the defendant respondents.

He then submits that the revisional court without microscopic examination of the original record of the disputed Partition Suit No. 206 of 1970 along with evidence having taken decision depriving plaintiff-appellant from her ancestral property who made a cause to establish her *bonafide* right of paternal property in the instant suit.

The learned advocate for the appellant lastly submits that the plaintiff-appellant practically came to know within a month after filing the application of defendant No.1 before the authority of the concerned city corporation (defendant no.2) and filed the instant suit and this fact may be proved by adducing evidence by the plaintiff. In support of his contentions the learned advocate for the plaintiff appellant cited a catena of decisions of our superior court reported in 9 MLR (AD) 370, 11 BLT (AD) 157, 32 BLD (AD) 64 and 21 BLD (AD) 32.

Mr. Chanchal Kumar Biswas, the learned advocate appearing for the respondent No.1 submits that nowhere in the plaint, plaintiff stated the cause of action for filing the suit in respect of first prayer, so as per Order VII rule 11 (a) plaint is liable to be rejected for want of cause of action.

He then submits that in paragraph No. 5 of the Plaint plaintiff stated that she and pro-forma defendant no. 4 are Pardanishin Ladies and accordingly they were entrusted with their step brothers for taking legal steps and their step brothers very secretly and beyond their knowledge got the whole land as their own Saham list. In this statement there is no such allegation of fraud. But from the depositions of both two sisters in another suit it transpires that both the plaintiff and pro-forma defendant no. 4 had knowledge about result of the suit as well as story of gift, all which clearly proved that there is no fraud committed by the defendants.

He next submits that as many as 5 (five) suits challenging the preliminary and Final Decree of Title Suit No. 206 of 1970 had been filed, all the suits failed and the present plaintiff was party to all those suits. Since within the very knowledge of the plaintiff and pro-forma defendant no. 4, final decree was drawn up and as their own admission their father gifted this property to present defendant nos. 1 and 3, so without prayer for declaration of title, the present suit is hit by section 42 of the Specific Relief Act.

The learned advocate further submits that since the defendant nos. 1 and 3 got the delivery of possession of the suit land by virtue of Title Execution Case No. 8 of 1988 through court and after getting possession mutated their names, so without any prayer for recovery of possession, the present suit is not maintainable.

He next submits that from the plaint, application for rejection of plaint as well as all the public documents filed by the defendants it is crystal clear that the suit which have been filed by the plaintiff is not maintainable and also a fruitless litigation. Accordingly the decision in the Case of Abdul Jalil and others Vs. Islami Bank Bangladesh and others reported in 53 DLR (AD) 12 is fully applicable in the present case, wherein our Apex Court decided that "As the ultimate result of the suit is as clear as day light such a suit buried at its inception so that no further time is consumed in a fruitless litigation”.

The learned advocate finally submits that from application for rejection of plaint and other documents which have been filed by the defendants, the plaintiff did not deny those documents by filing any reply and all those documents are public documents as per definition of section 74 of the Evidence Act, it appears that the plaintiff had knowledge about preliminary and final decree of Title Suit No. 206 of 1970 as well as result of all five suits which had been filed challenging the earlier decree passed in Title Suit No. 206 of 1970. All which clearly proved that the present suit is nothing but abuse of the process of court just to harass the defendant nos. 1 and 3. In this context our Apex Court in the case of Rasheda Begum Vs. M.M Nurussafa and others reported in 24 BLD (AD) 223 held that "Rejection of plaint is not confined to the provision of Order VII rule 11 of the Code of Civil Procedure. In an appropriate case, while the proceeding itself is an abuse of the process of the court, the court having re-course of section 151 will be competent to reject the plaint or strike out part of the relief prayed for".

We have heard the learned advocate for both the parties and perused the plaint, memorandum of appeal, both the judgments and order/decree along with other materials on record available before us.

It appears from the plaint that the plaintiff claiming herself a pardanishin lady alleged that the scheduled land of Title Suit No.206 of 1970 originally belonged to Haji Abdur Rahman who created a Waqf Estate by executing registered deed of waqf dated 17.09.1915 relating to a portion of the suit land. In Title Suit no.206 of 1970

Abdus Salam and Abdus Subhan were made defendants and during pendency of the suit Absus Subhan died leaving behind many heirs among them the plaintiff was his daughter. The plaintiff came to know that in the said Title Suit no.206 of 1970 interest of late Absus Subhan is found to have been allotted by a saham in favour of the defendant nos. 1 & 3 only, who are her step brothers, keeping all other heirs in dark. The defendant nos. 1 & 3 time and again and occasionally obtained signature of the plaintiff in various blank and printed papers in the name of the common interest of heirs of Absus Subhan. Being pardanishin lady having strong *bonafide* belief on her step brothers she thought that her interest will be protected but the defendants for their own gain surreptitiously and secretly beyond the knowledge of the plaintiff created forged papers and document using her and others signatures showing a deed of gift obtained saham even on waqf property. Then defendants by submitting forged papers in collusion with the revenue officer mutated their names and recently submitted application to the office of defendant no.2 for permission to construct a 8-story building and then she submit objection before the defendant no.2 who did not take any positive step for which she filed the suit on the prayer that the decree in Title Suit no.206 of 1970 in respect of saham allotted to the defendant nos.1 & 3 are illegal, void, fraudulently obtained and not binding upon her and for further declaration that the application for permission of construction of 8-story building dated 29.05.2007 is illegal and for further decree of permanent injunction.

It further appears from the application under rule 11 of order VII of the Code of Civil Procedure filed by the defendant no.1 that his first point for rejection of plaint on the ground that the plaintiff did not mention when she came to know about the decree passed in the Title Suit no.206 of 1970 and allotment of saham hence no date of cause of action has been mentioned. On this ground the trial court was not satisfied and refused to reject the plaint. Even the revisional court was also not convinced and did not discuss the point of cause of action. Non-mentioning of date of cause of action and want of cause of action is not the same thing. For non-mentioning of date, a plaint cannot be rejected. If the plaint fails to disclose any cause of action then the plaint should be rejected. Cause of action is bundle of facts. Here in the case in hand it cannot be said that the plaint discloses no cause of action. The plaintiff in her plaint alleged committing fraud and forgery against the defendant no.1 & 3 though did not mention any date when she came to know about it but on that ground the plaint should not be rejected.

Secondly, the defendant claimed that they got the property from their father deceased Abdus Subhan through gift and got saham accordingly and the plaintiff knew it earlier. In an eviction of bharatia suit being no.117 of 1986 the plaintiff examined herself as witness on 14.06.1997. In another suit no.307 of 1989 filed by proforma defendant no.4 the plaintiff was made defendant and summons were served upon her and that suit was dismissed. In Title Suit no.147 of 1988 filed by one of the wives of late Absus Subhan the plaintiff was made defendant no.29 and summons were served upon her. Title suit no. 20 of 1991, 278 of 1990, 344 of 1990 and 166 of 1991 were filed challenging the decree of Title Suit no.206 of 1970 and the present plaintiff was made defendant in all those suits and summons were duly served upon her but in all those suits the present plaintiff did not turn up to agitate her grievance. Stating all these, the defendant claimed that the present suit is barred by limitation. The trial court on this point observed that it is mixed question of law and facts which cannot be decided without taking evidence. But the revisional court after examining the documents as stated in the application for rejection of plaint and came to the finding that the present suit is hopelessly barred by limitation and the same has become a fruitless suit and the plaintiff has no chance to win in the long run and the fruitless litigation should be buried at its inception. The revisional court relied upon a decision reported in 53 DLR (AD) 12. If we minutely examine the plaint then it is revealed that the plaintiff claimed herself a pardanishin lady who on *bonafide* belief thought her step brothers defendant nos. 1 & 3 would protect her right but they have committed fraud and forgery upon her by occasionally obtaining signature and creating forged papers. So, the papers and documents submitted by the defendants, especially regarding the knowledge of the gift and allotment of saham of the defendants are highly disputed at the preliminary stage and without taking evidence this matter cannot be decided at this stage of the suit. The learned advocate for the defendant respondent heavily relied upon two decisions reported in 53 DLR (AD) 12 and 24 BLD (AD) 223. In the case reported in 53 DLR (AD) 12 the plaintiffs filed Title Suit no.42 of 1999 alleging that they have earlier filed Title Suit no.177 of 1994 claiming declaration and partition of the property of CS plot no.371 and lost up to the Appellate Division wherein it was held that the entire property of the CS plot was belonged to the predecessor of the defendant. The plaintiffs filed the suit for same prayer on the contention of committing fraud. The Appellate Division found on the same claim the earlier suit was filed and finally decided by the highest court of the land and there is no fraud. Finally the Appellate Division held that the suit is barred as the plaintiffs cannot be allowed to re-open the same matter afresh after losing up to the Appellate Division. The facts of this reported case is palpably different from the facts of the present suit. In the present suit the plaintiff never contested any suit against the present defendants in relation to the suit property.

Next in the reported case of 24 BLD (AD) 223 (supra) the appellant before the Appellate Division as plaintiff earlier filed Other Class Suit No.37 of 1987 for partition and got decree of saham of certain land and execution case no.01 of 1996 was filed. 2 (two) Miscellaneous cases were filed under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the decree and both were dismissed. One of them went up to the Appellate Division but lost. At this stage the defendant no.3 filed Miscellaneous Case no.5 of 1996 under Order 9 Rule 13 of the Code of Civil Procedure and the same was dismissed. Thereafter the said defendant as plaintiff filed other class suit no.96 of 1998 (renumbered as 41 of 2000) for declaration of setting aside the decree passed in earlier suit no.37 of 1987 praying for saham. The Appellate division found the case is barred by principle of *res-judicata* under section 11 of the Code of Civil Procedure and finally observed that continuation of the Other Class Suit No.41 of 2000 as regard the matter that was in issue in the earlier suit of 37 of 1987 wherein the plaintiff was a party should not be allowed being an abuse of the process of the Court. In an appropriate case, while the proceeding itself is an abuse of the process of the court, the court having recourse of provision of section 151 would be competent to reject the plaint or strike out part of the relief prayed for or sought in a subsequent suit. We have already noticed that the fact of the present suit is quite different from the reported case. In the present suit the plaintiff never contested any suit against the present defendants in relation to the suit property. However, it appears that proforma defendant no.4 of the present suit as plaintiff earlier filed Title Suit no.307 of 1989 challenging the decree of Title Suit no.206 of 1970 in the Court of Assistant Judge, Sadar, Sylhet and the proceedings in Title Execution Case No. 8 of 1988 filed by the defendant nos. 1 and 3 for delivery of possession in the "Saham" they got in the aforesaid Title Suit no.206 of 1970. It further appears that upon application by the defendant No. 1 for rejection of plaint under rule 11 of order VII of Code of Civil Procedure, the plaint of that suit was rejected on 25.4.1991 and against that order of rejection of plaint, Title Appeal No. 95 of 1991 was filed before the District Judge, Sylhet which was dismissed for default by order dated 28.08.1995 by the District Judge, Sylhet. In such view of the matter the prayer for declaration that the decree passed in Title Suit No.206 of 1970 not binding upon the proforma defendant no.4 is not maintainable. Because, there is an old maxim that which one cannot get directly cannot get indirectly. What relief the proforma defendant cannot claim, the plaintiff also cannot seek such relief regarding the proforma defendant no.4 as it would tantamount to abuse of the process of the Court.

In the light of the decision held in the case of 24 BLD (AD) 223 (supra) that in an appropriate case, the court having recourse of provision of section 151 would be competent to strike out part of the relief prayed for or sought in a subsequent suit we are of the view that the prayer made in the present suit so far relates to the declaration regarding the proforma defendant no.4 is liable to be strike out.

Another point raised by the learned advocate for the defendant respondent no.1 that the defendants mutated their names on the strength of Title Execution Case no.8 of 1988 and without prayer for recovery of possession the suit is not maintainable, is not the correct proposition of law. Because the plaintiff brought allegation of fraud and forgery and it is settled principle that fraud vitiates everything. Admittedly both the plaintiff and the defendant nos.1 & 3 are daughter and sons of late Abdus Subhan and centering the property of late Abdus Subhan the dispute arose. Whether property was gifted to the defendants by late Abdus Subhan is disputed question of the present suit and whether any fraud was practiced is also matter of evidence. If the plaintiff can prove that she is a co-sharer in the property and fraud has been committed upon her then possession of one co-sharer is to be considered possession of other co-sharers and as such on this ground the plaint cannot be rejected without giving the plaintiff any opportunity to prove her case by adducing evidence.

The revisional court by rejecting the plaint travelled beyond its jurisdiction considering extraneous documents filed by the defendants only to come to a conclusion that the suit is barred by limitation. Since those documents are not admitted documents and plaintiffs should have given an opportunity to prove her case.

In the facts and circumstances and the position of law as discussed above, we are of the view that the learned Additional District Judge sitting in revisional jurisdiction in passing the impugned judgment by rejecting the plaint on the ground of limitation considering the averments and documents of some other cases committed serious error of law which resulted failure of justice and cannot be sustained. In such view of the matter we are constrained to interfere with the impugned judgment.

Accordingly, the appeal is **allowed in part**, however without any order as to cost.

The judgment and decree passed in Civil Revision No. 48 of 2008 dated 30.11.2008 is thus set aside and the Order No. 17 dated 05.06.2008 passed by the Senior Assistant Judge, Sadar, Sylhet is hereby affirmed subject to striking out the relief sought for so far relates to the declaration regarding the proforma defendant no.4. The trial court is directed to proceed with the suit expeditiously keeping in the mind that the suit is filed in the year 2007.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.

Ziaul Karim
Bench Officer