IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Obaidul Hassan, *Chief Justice*
Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Ashfaqul Islam
Mr. Justice Md. Abu Zafor Siddique
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO.128 OF 2016

(From the judgment and decree dated 15.02.2011 passed by the High Court Division in Writ petition No.7817 of 2009).

Mrs. Aziz Ara Rahman ……..….**Appellant**

-Versus-

Rajdhani Unnayan Kartipakkha (RAJUK) ……..….**Respondents** and others

For the appellant	**:**	Mr. Kamal-Ul-Alam, senior Advocate with Ms. Shahana Akther, Advocate, instructed by Mr. Syed Mahbubor Rahman, Advocate-on-Record.
For respondents No.1-4	**:**	Mr. Md. Imam Hasan, Advocate, instructed by Mr. Mohammad Ali Azam, Advocate-on-Record.
For the respondent No. 5	**:**	Not represented.
Date of hearing	**:**	**The 5th day of December, 2023**
Date of judgment	**:**	**The 6th day of December, 2023**

JUDGMENT

Obaidul Hassan, C.J. This Civil Appeal by leave granting order dated 24.01.2016 in Civil Petition for Leave to Appeal No.1354 of 2011 is directed against the judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 discharging the Rule.

The relevant facts necessary for disposal of this Civil Appeal are, in a nutshell, that the appellant as writ petitioner filed Writ Petition No.7817 of 2009 before the High Court Division seeking

direction upon the writ respondents to deliver physical possession of Plot No.5, Road No.29, Gulshan Residential Area, Dhaka to the writ petitioner-appellant upon evicting illegal occupant therefrom and to execute and register the lease deed in respect of the said plot in favour of the writ petitioner-appellant.

The appellant filed the Writ Petition contending, *inter alia*, that she got allotment of the aforesaid plot by Rajdhani Unnayan Kartripakkha (RAJUK), which was communicated to her vide Memo dated 16.11.1995. Subsequently, on payment of the entire consideration money to the tune of Tk.36,87,428.00 (Taka Thirty Six Lac Eighty Seven Thousand Four Hundred Twenty Eight only) within the stipulated time the appellant applied for handing over physical possession of the said allotted plot in her favour on 27.09.2004, whereupon the concerned officer of RAJUK when went to the said plot for handing over physical possession of the same to the appellant it was found that a developer firm namely Mega Builders engaged by writ-respondent No.5 Shamsher Ali Miah had been illegally possessing the plot and making illegal construction without obtaining any approved plan from RAJUK. Thereafter, on 03.11.2004 an enquiry committee was constituted by RAJUK to enquire into the matter and that the said enquiry committee by a notice dated 29.11.2004 asked the writ-respondent No.5 to appear at a hearing before the enquiry committee on 03.01.2005 and to submit written statement with relevant papers. Although the writ

respondent No.5 primarily appeared before the enquiry committee and submitted a written statement with some papers but without waiting for the result of the enquiry and decision of RAJUK thereon filed another Writ Petition being No.3030 of 2005 on 07.05.2005 in the High Court Division challenging the validity of the said notice dated 29.11.2004 and obtained a Rule Nisi and an interim order of injunction while the appellant got herself added as a respondent in Writ Petition No.3030 of 2005 and subsequently on 04.07.2005 the said order of injunction was stayed by this Division in Civil Petition for Leave to Appeal No.704 of 2009. Later on, the writ respondent No.5 filed another Writ Petition being No.11099 of 2006 on 16.11.2006 before the High Court Division praying for declaration that the letter of allotment dated 16.11.1995 issued by RAJUK in favour of appellant was without lawful authority and of no legal effect and obtained a Rule Nisi. The appellant as well as RAJUK opposed both the Rules by filing Affidavit-in-Opposition. Upon hearing both the Writ Petitions by a Division Bench of the High Court Division both the Rules were discharged vide two separate judgments dated 05.11.2007 against which the respondent No.5 filed Civil Petition for Leave to Appeal No.713 of 2007 and Civil Petition for Leave to Appeal No.1331 of 2008 before this Division. Upon hearing both the aforesaid Civil Petitions for Leave to Appeal were dismissed by this Division vide judgments dated 27.11.2007 and 25.05.2009 respectively. Thereafter the writ-petitioner-appellant

made several requests and representations to writ-respondents No.2-4 for handing over physical possession of the aforesaid allotted plot and to execute lease deed in her favour, but did not get any response. Lastly, on 05.08.2009 the appellant made a representation in writing to the Chairman, RAJUK annexing thereto the aforementioned judgments requesting him to take necessary steps for handing over physical possession of the allotted plot to her upon evicting the illegal occupants therefrom and also to execute and register the lease deed in her favour. But the respondents did not take any step in this regard, nor make any response thereto. Hence the writ petitioner-appellant was constrained to file Writ Petition No.7817 of 2009 before the High Court Division on 17.12.2009 and obtained Rule and an order of injunction upon the writ respondents from transferring the disputed plot and from changing the nature and character of the property for a period of 03(three) months. The said order of injunction was extended from time to time and lastly on 15.02.2010 it was extended till disposal of the Rule.

The writ-respondent No.1 herein also respondent No.1-RAJUK contested the said Writ Petition by filing an Affidavit-in-opposition and contended that there are 10 apartments including parking space in the ground floor of the disputed plot which is occupied by the respondent and others and unless all the occupants of the flat are evicted therefrom, RAJUK will get no scope to hand over the vacant possession of the land by executing lease deed.

On the other hand, the writ-respondent No.5 also respondent No.5 herein filed affidavit-in-opposition contending, *inter alia*, that the land of disputed plot belonged to him which he purchased by four registered deeds dated 06.06.1980 and got mutated his name in the said land and paid up to date rent. The Dhaka City Survey was prepared without any objection by erstwhile DIT now RAJUK in the name of the respondent No.5 in Khatian No.1649 which is final proof of his ownership. Subsequently the respondent No.5 entered into an agreement with a developer company for construction of a residential building in accordance with the plan approved by RAJUK. Thereafter, when dispute arose he filed two Writ Petitions being No.3030 of 2005 and 11099 of 2006 and both the Rules issued in those Writ Petitions had been discharged on the ground of maintainability.

Being aggrieved he filed Civil Petitions for Leave to Appeal No.713 of 2007 and 1331 of 2008 before this Division which were also dismissed. Subsequently, he filed Title Suit No.373 of 2005 praying for declaration of title to the extent of .1020 acres of land appertaining to C.S. Plot No.268. Therefore, the present Writ Petition filed by the appellant is not maintainable during the pendency of the said suit.

Upon hearing the High Court Division discharged the Rule vide impugned judgment and order dated 15.02.2011. On being aggrieved and dissatisfied with the judgment and order dated

15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 the appellant filed Civil Petition for Leave to Appeal No.1354 of 2011 before this Division. Upon hearing on 24.01.2016, this Division granted leave and hence the instant Civil Appeal.

Mr. Kamal-Ul-Alam, learned senior Counsel appearing on behalf of the appellant contends that the judgments and orders of the High Court Division in Writ Petitions No.3030 of 2005 and 11099 of 2006 between the self same parties as affirmed by the judgments and orders of this Division in Civil Petitions for Leave to Appeal Nos.713 of 2007 and 1331 of 2008 respectively holding that the disputed plot allotted to the appellant is not situated in C.S. and S.A. Plot No.268 as claimed by the respondent No.5 and the said plot has not been released from acquisition made in L.A. Case No.10/63-64 and as such the High Court Division on the face of the aforesaid decisions of the Apex Court was in breach of Article 111 of the Constitution in passing the impugned judgment and order discharging the Rule issued in Writ Petition No.7817 of 2009. The learned senior Counsel contends next that the High Court Division was wholly wrong in law and acted beyond its jurisdiction in not giving effect to the binding force of the earlier decisions of the Appellate Division in Civil Petitions for Leave to Appeal No.713 of 2007 and 1331 of 2008 regarding the disputed plot of the case in hand holding that the aforesaid decisions of the Appellate Division

although has got binding force but the fact of pendency of Title Suit No.373 of 2005 filed on 03.09.2005 by the respondent No.5 was not brought to the notice of the Appellate Division and as such the impugned judgment is liable to be set aside. The learned senior Counsel urges next that on the face of the decisions and findings in the Writ Petition Nos.3030 of 2005 and Writ Petition No.11099 of 2006 as affirmed by the Appellate Division in Civil Petition for Leave to Appeal No.713 of 2007 and Civil Petition for Leave to Appeal No.1331 of 2008 to the effect that C.S. Plot No.268 being a requisitioned and acquisitioned land the occupant therein will be treated as a trespasser under the principle of law enunciated in 9 BLC(AD)56, and as such the High Court Division was wholly wrong in law in passing the impugned judgment and order discharging the Rule holding that the respondent No.5 is in possession of plot No.268 and as such direction for delivery of possession of the disputed C.S. Plot No.268 to writ-petitioner-appellant cannot be given unless the dispute is settled in Title Suit No.373 of 2005. The learned senior Counsel contends, in fine, that the High Court Division was wrong in law in discharging the Rule on total misconception of law as to applicability of the principle of *res judicata* in writ proceedings inasmuch as it is settled law that a decision in earlier writ petitions on the selfsame issues between the same parties operates as *res judicata* in subsequent proceedings either in suits or writ proceedings and a question decided in an

earlier writ petition disposed of on merit cannot be reagitated in a subsequent suit between the same parties on the principle of *res judicata*.

On the other hand, Mr. Md. Imam Hasan, learned Counsel appearing for the respondents No.1-4 echoing with the same voice of the learned Counsel for the appellant submits that RAJUK is the original owner of the disputed plot by way of acquisition and the appellant took allotment of the said plot from RAJUK in accordance with law and RAJUK has no objection if the possession of the plot in question is handed over to the appellant.

However, none appears on behalf of the respondent No.5 to contest the appeal.

We have considered the submissions of the learned Counsel for both the sides, perused the impugned judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 as well as other materials on record.

It is undisputed that earlier the respondent No.5 filed Writ Petitions No.3030 of 2005 and 11099 of 2006 before the High Court Division regarding the allotment of the disputed plot in favour of the appellant but upon hearing both the Rules were discharged vide judgments and orders dated 05.11.2007. Against the judgment and order passed in Writ Petition No.3030 of 2005 the respondent No.5 filed Civil Petition for Leave to Appeal No.713 of 2007 before this Division which was dismissed upon hearing on 27.11.2007.

Subsequently, while the respondent No.5 filed Civil Petition for Leave to Appeal No.1331 of 2008 before this Division challenging the judgment and order dated 05.11.2007 passed by the High Court Division in Writ Petition No.11099 of 2006 which was also dismissed on 25.05.2009.

While discharging the Rule in Writ Petition No.11099 of 2006 the High Court Division observed the following:

> "It appears from the writ petition that the petitioner himself admitted that the land was handed over to the requiring body and in such circumstances the petitioner cannot claim the land by way of right and admittedly the said land in question was requisitioned in accordance with law. So the allegation of discrimination does not apply in the instant case.
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> In view of the decisions as referred to and the provision of law specially the Town Improvement Act 1953 and in view of the notification dated 30.06.2001 published in the Bangladesh Gazette on 02.08.2001 it appears that the land claimed by the petitioner is still a requisitioned property and in such circumstances the petitioner has no *locus standi* to challenge the impugned allotment made by the requiring body in accordance with law. Hence we find no merit in this Rule."
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> (underlines supplied by us)

Again, the High Court Division observed in the judgment dated 05.11.2007 passed in the Writ Petition No.3030 of 2005 as under:

"Furthermore the petitioner in the instant case miserably failed to show the nexus in between the plot No.5, Road No.29, Gulshan Model Town and C.S. Plot No.268 in any manner. Furthermore the petitioner categorically admits the said land was requisitioned under L.A. Case as evident in Annexure-H to the writ petition. He also failed to show any document that the said plot No.268 was released from requisition by the authority under any law. From a plain comparison of Annexure- H to the writ petition with Annexure-I to the affidavit-in-opposition it appears that only 14.68 acres of land were released out of 22.50 acres of land in 20 plots, but no land of plots namely 268, 267 or 270 has been released as per the gazette notification as evident in Annexure-I and as such the plot No.268, 267, 270 are still under requisition. Also the respondent No.2 annexed two inquiry slip wherein it transpires that the entire C.S. Plot No.268 has been requisitioned and the admitted predecessor-in-interest of the petitioner Hazera Khatun took entire compensation money as per the award register maintained by the authority and the same is under direct control of Kartipakkhya. In a case reported in 9 BLC(AD)56 (Abdul Huq vs. Government of the People's Republic of Bangladesh represented by the Secretary, Ministry of Land and others) their Lordships observed as follows:

> "Though the petitioners have been alleging to be in possession of the land but their possession are no better than that of trespassers as upon requisition of the lands, the authority has taken

over the possession from the original owners and handed over to the requiring body that is RAJUK."

Since none of the plots namely C.S. Plots No.267, 268 or 270 has ever been released from requisition in any manner and since the impugned order challenged by the petitioner is mere a notice of appearance for submitting some papers to resolve a dispute relating to title and description and since the petitioner appeared and submitted two written replies therein, the petitioner cannot get any relief in this Rule as prayed for."

(underlines supplied by us)

More importantly, this Division while dismissing the Civil Petition for Leave to Appeal No.1331 of 2008 filed by the respondent No.5 against the judgment and order dated 05.11.2007 passed by the High Court Division in Writ Petition No.11099 of 2006 observed the following:

"We have perused the leave petition as well as the judgment and order dated 05.11.2007 passed in Writ Petition No.3030 of 2005 as well as the Annexures-3(C), 4 and 5 at pages 331, 332 and 335 of the paper book and having regard to the discussion made in the impugned judgment by the High Court Division and the submissions of the learned Advocate for the leave-petitioner we are of the view that the Plot No.5 of Road No.29 of Gulshan Residential Area is not situated in C.S. and S.A. Plot No.268 as claimed by the leave petitioner and the said plot No.268 has not been released from the acquisition made in L.A. Case No.10/63-64 as claimed

by the leave-petitioner. Accordingly we do not find any merit in the leave petition."

(underlines supplied by us)

It is transparent from the above that the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 found that plot No.5, Road No.29, Gulshan Model Town is not situated in C.S. Plot No.268 and none of the plots namely C.S. Plots No.267, 268 or 270 has ever been released from requisition in any manner. Subsequently, this Division upon an elaborate discussion firmly established the above findings of the High Court Division in Civil Petition for leave to Appeal No.1331 of 2008 while the Civil Petition for Leave to Appeal No.713 of 2007 filed by the respondent No.5 against the judgment passed in Writ Petition No.3030 of 2005 was also dismissed by this Division. In view of the observations made by this Division in Civil Petition for leave to Appeal No.1331 of 2008 it is by now finally settled that respondent No.5 cannot claim any valid right and claim over the land of disputed plot of the case in hand while the respondent No.1 became the owner of the land of disputed plot by way of acquisition. Although in the present case the respondent No.5 claims to be in possession of the disputed plot in view of the settled legal proposition the status of the respondent No.5 in the disputed plot is no better than a mere trespasser.

It is the case of the appellant that she took the allotment of the disputed plot from the respondent No.1, RAJUK vide memo dated

16.11.1995. Now the pertinent question is that whether the appellant has acquired a valid right and title of the disputed plot. Since it has already been settled by this Division that the land of disputed plot was acquired by RAJUK in accordance with law and the said land was not delisted from the acquisition, it is our considered view that the appellant having taken allotment of the same from RAJUK has acquired a legitimate right and title over it.

There is another facet of the case that is the respondent No.5 instituted Title Suit No.373 of 2005 impleading the appellant as well as respondent No.1 along with others seeking declaration of title in the land of the disputed plot. Then a pertinent question arises whether the principle of *res judicata* is applicable in Writ Petition. It transpires from the record that while discharging the Rule issued in Writ Petition No.7817 of 2009 the High Court Division observed that the writ petition is not maintainable since a title suit is pending over the title of the land in question. The learned Counsel for the appellant strenuously claims that since High Court Division has already made decision regarding the right and title of the respondent No.5 in Writ Petitions No.11099 of 2006 and 3030 of 2005 filed by him, the same issue cannot be reopened in the Writ Petition No.7817 of 2009 inasmuch as it is barred by the principle of *res judicata*. In this regard, it is our considered view that the High Court Division committed illegality in passing the impugned judgment without taking into consideration that earlier in Writ Petitions

No.11099 of 2006 and 3030 of 2005 the High Court Division found that the respondent No.5 has no right and title over the disputed plot. But in the case in hand, the High Court Division while dealing with the Writ Petition filed by the appellant held relying on the claim of the respondent No.5 to the effect that since the case involves the disputed question of facts as to the title over the disputed plot the same should be settled in Title Suit No.373 of 2005 filed by the respondent No.5 and as such the Writ Petition is not maintainable. The above findings of the High Court Division is absolutely unwarranted inasmuch as the fresh consideration of title of the respondent No.5 in disputed plot which has already been decided earlier by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 is barred by the principle of *res judicata*.

The rationale behind the principle of *res judicata* has been elucidated by the Indian Supreme Court in the case of State of Karnataka and others vs. All India Manufacturers Organization and others, AIR 2006 SC 1846. The relevant portion is extracted below:

> "32. *res judicata* is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim *nemo debet bis vexari pro una et eadem causa* (P. Ramanatha Aiyer, Advanced Law Lexicon (Vol.3 3rd Edn., 2005) at page 3170.) ("No one ought to be twice vexed for one and the same cause") and second, public policy that there ought to be an end to the same

> litigation (Mulla, Code of Civil Procedure (Vol.1, 15th Edn., 1995) at page 94. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "the CPC") is not the foundation of the principle of *res judicata*, but merely statutory recognition thereof and hence, the Section is not to be considered exhaustive of the general principle of law. (see Kalipada De v. Dwijapada Das) The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to re-agitate the matter again and again. Section 11 of the CPC recognises this principle and forbids a court from trying any suit or issue, which is *res judicata*, recognising both 'cause of action estoppel' and 'issue estoppel'."
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> (underlines supplied by us)

At this juncture, a plausible question albeit carrying a great importance peeps into our mind whether the principle of *res judicata* is applicable in case of a subsequent suit. In this regard, it has been observed by the Indian Supreme Court in oft-cited case of Gulab Gulabchand Chhotalal Parikh vs. State of Bombay AIR 1965 SC 1153 that-

> "73.....the provisions of section 11 CPC are not exhaustive with respect to an earlier decision operating as *res judicata* between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of *res judicata*, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it will

> operate as *res judicata* in a subsequent regular suit. .....The nature of the former proceeding is immaterial."
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> (underlines supplied by us)

It appears from the aforesaid decision that any previous decision on a matter in controversy in a legal proceeding including writ petition decided after full contest by the parties or after affording fair opportunity to the parties to prove their case will operate as *res judicata* in a subsequent regular suit. Therefore, in view of the above decision of the Indian Supreme Court we hold that since the right and title of the respondent No.5 in the disputed land has not been found by the High Court Division in Writ Petitions No.11099 of 2006 and 3030 of 2005 filed at the instance of the respondent No.5, subsequent suit being No.373 of 2005 instituted by the respondent No.5 for declaration of title so far as it relates to the disputed plot claimed by the appellant in Writ Petition No.7817 of 2009 is barred by the principle of *res judicata*.

Be that as it may, it transpires from the additional paper book filed by the appellant that the defendant No.3-appellant filed an application for rejection of plaint of Title Suit No.373 of 2005 under Order VII Rule 11 of the Code of Civil Procedure, 1908, but the trial Court upon hearing on 28.02.2012 rejected the said application. Challenging the aforesaid order dated 28.02.2012 the appellant filed Civil Revision No.1516 of 2012 before the High Court Division and

upon hearing the High Court Division on 15.05.2018 set aside the order 28.02.2012 passed by the trial Court and allowed the application for rejection of plaint of Title Suit No.373 of 2005.

While arguing the learned senior Counsel for the appellant emphatically claims that in Civil Petition for Leave to Appeal No.1331 of 2008 this Division held that the disputed plot is not situated in C.S. and S.A. Plot No.268 as claimed by the respondent No.5 and the said plot has not been released from acquisition made in L.A. Case No.10/63-64 and as such the High Court Division on the face of the aforesaid decision of the Apex Court was in breach of Article 111 of the Constitution. To address the said issue we need to advert to the provisions of Article 111 of the Constitution of Bangladesh which enunciates as follows:

> "Article 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."

In the case of *Secretary, Posts and Telecommunications Division, Ministry of Posts and another vs. Shudangshu Shekhar Bhadra and others* reported in *25 ALR(AD)(2022) 19 at paragraph 22* this Division very eloquently stated that:

> "……..<u>the provision of Article 111 of the Constitution enjoining upon all courts below to obey the law laid down by this Court, judicial discipline requires that the High Court Division should follow the decision of the</u>

> Appellate Division and that it is necessary for the lower tiers of courts to accept the decision of the higher tiers as a binding precedent.
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> (underlines supplied)

In view of above, it is quite evident that the law declared by this Division regarding a subject matter is always binding on the High Court Division as well as other subordinate Courts. Since this Division in Civil Petition for Leave to Appeal No.1331 of 2008 has already categorically found that the respondent No.5 has no right and title in the disputed plot the impugned judgment passed by the High Court Division violates the provisions of Article 111 of the Constitution.

In the light of the aforesaid reasons as well as an elaborate discussion regarding the factual and legal aspects of the case the impugned judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 warrants interference by this Division. Therefore, we find merit in the submissions of the learned senior Counsel for the appellant. In the prevailing circumstances, the impugned judgment and order of the High Court Division cannot stand at all in the eye of law.

Accordingly, the instant Civil Appeal is **allowed**.

The judgment and order dated 15.02.2011 passed by the High Court Division in Writ Petition No.7817 of 2009 is set aside.

The respondents No.1-4 are hereby directed to hand over the possession of plot No.5, Road No.29, Gulshan Residential Area, Dhaka within 60(sixty) days in favour of the present appellant from the date of receipt of this order.

The respondents No.1-4 are also directed to complete all legal formalities including execution of all legal deeds and registration in favour of the appellant in accordance with law.

C.J.

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The 06th day of December, 2023
RRO/Total words- 4,540