IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
Present:
Mr. Justice Mustafa Zaman Islam

CIVIL REVISION NO. 1435 OF 2007

Chayya Bithi Co-operative Housing Samity ltd.

..... petitioner.

Versus-

Jore Pukur Par Islamia Hafizia Madrasha and others

é é é ..... Opposite parties.

Mr. A.R.M Qayyum Khan, Advocate with
Mr. Bhuiya Alamgir Hossain, Advocate

é é é é .For the Petitioner.

Mr. Md. Asadullah , Advocate with
Mrs. Rezina Mahumd, Abvocate.

é é ..For the Opposite-Party No.1.

Heard on 26.07.2022, and 28.07.2022
and Judgment on: 02.03.2023.

Mustafa Zaman Islam, J:

Upon an application under section 115(1) of the Code of Civil Procedure, 1908, Rule was issued calling upon the opposite party No.1 to show cause as to why the judgment and decree dated 13.02.2017 (decree signed on 20.02.2007) passed by the learned Additional District Judge, 2nd Court, Gazipur in Title

Appeal No.163 of 2005 reversing those dated 19.06.2005 (decree signed on 25.06.2005) passed by the learned Joint District Judge, Additional Court, Gazipur in Title Suit No. 184 of 2005 dismissing the suit should not be set aside.

It is apt to here that the petitioner herein was the sole defendant before trial court and the opposite party No. 1 here in was the plaintiff.

Relevant facts, for the purpose of this Rule are that the opposite party No. 1 as plaintiff filed a suit for declaration that the schedule property (Pond) was the lease property of the plaintiff and the plaintiff further prayed for a declaration that the registered sale deed being no. 6232 dated 08.05.1996 was inoperative and illegal and not binding upon the plaintiff. The plaintiff stated in the plaint that the suit land a pond under Mouza -45 Joydebpur appertaining to C.S Khatian No. 01 and plot No. 821 measuring about 83 decimals of land was belonged to Bhawal court of wards acquired estate. That Bhawal court of wards acquired estate granted lease the pond to the plaintiff for the year of 1389 BS to to 1398 BS for a period 10(ten) years. Thereafter the Bhawal court of wards acquired estate again granted lease from 1399 BS to 1402 BS for a period of 3(three)

years and the plaintiff has been enjoying the lease for consecutive 13(thirteen) years. Thereafter the plaintiff again applied for lease of the pond for another 3 (three) years but the Bhawal court of wards acquired estate did not grant further lease. Thereafter the plaintiff learnt from a reliable source that the Bhawal court of wards acquired estate executed and registered a sale deed being No. 6232 in favor of the defendant (the present petitioner) on 08.05.1996 without giving any notice to the plaintiff. The plaintiff further stated that the defendant No. 1 in connivance with the officials of the Bhawal court of wards acquired estate created the sale deed showing law price instead of the actual price.

The defendant (present petitioner) contested the suit by filling written statement denying material averments as made out in the plaint stating inter alia that the suit was not maintainable in its present form; that suit was bad for defect of parties and barred by limitation and there was no cause of action to file the present suit. The positive case of the defendant, in brief was that the suit property originally belonged to the Bhawal court of wards acquired estate and the suit property was used as a pond. The defendant Chayya Bithi Co-operative Housing Samity Limited

was established in the year of 1959. The samity on 20.11.1995 filed an application to the Bhawal court of wards acquired estate for a long term lease or purchase the pond in question, in the application the samity categorically stated that for collapsing the edge of the pond the adjacent buildings of the samity were under threat. Thereafter the Bhawal court of wards acquired estate agreed to sale the property and they inform the defendant vide a memo B.R Dhaka 53/95/375 dated 25.04.1996 that the authority fixed the value of the pond at tk. 3,00,000/- and directed the defendant to deposit the amount. Thereafter the defendant deposited the entire amount and the Bhawal court of wards acquired estate executed and registered a sale deed being 6232 dated 08.05.1996 to the defendant and handed over the possession of the pond and after taking the possessing the defendant took permission from the than Gazipur Municipality to filling earth and near about 1,000 trucks earth was flung into the pond. That on 19.08.1996 the defendant invited the secretary of the madrasha to a meeting and the secretary attended in the meeting and defendant assured the madrasha to give all sorts of support to run the madrasha. But the plaintiff for illegal gain with

some false statement filed the suit which was liable to be dismissed.

I have heard submissions from learned Advocate Mr. ARM Qayyum Khan and Md. Bhuiya Alamgir Hossain for the defendant petitioner. They sought to point out the flaws in the impugned judgment and decree through the following arguments:-

(a)At the very outset submitted that the court of appeal misdirected itself in its total approach of the matter and misread and misappropriated the the evidence on record. That the appellate court came to a wrong decision that the plaintiff/opposite party acquired a vested right in getting lease the the pond in question and the learned appellate court very emotionally observed that the expenditure of the madrasha was fulfilled by the income of the pond and reversed the well founded decision of the trial court that the plaintiff opposite party after expiry the lease period had not right to get a declaration that they had lease right over the property in question (pond) and the learned trial court rightly observed that the plaintiff had no legal right to disturb the ownership of the property of Bhawal court of wards acquired estate to transfer the property to anybody. The

appellate court failed to consider that at the time of selling the pond in question the madrasha was not a lessee and had no legal right to challenge the sale deed and further prayed for a declaration that the suit pond was a lease property of the plaintiff/opposite party. Thus the learned Appellate Court committed an error of law resulting in an error of such decree occasioning failure of justice.

(b) The learned Advocate for the petitioner further submitted that the court of appeal came to a wrong findings that the trial court in her judgment stated that the sale deed being No. 6232 dated 08.05.1996 was in operative and against that findings of the trial court the present petitioner did not file any cross appeal so the petitioner admitted the findings of the trial court. The appellate court came to this wrong finding on the basis of the observation of the trial court that since the defendant (present petitioner) did not get the possession of the pond on the basis of the sale deed and the plaintiff appellant had been enjoying the possession of the pond, so the plaintiff had right to file complain regarding the pond to the court of law.

(c) Mr. Khan further submitted that the trial court misread the evidence and come a wrong finding that ñবিবাদী দলিল মূ-ল দখ-লর

দাবী দালিলিকভা-ব দখল প্রমানিত নয়, ফ-ল বিবাদী ছায়া বিথি সমবায় সমিতি লিঃ কর্তৃক দলিল মূ-ল দখল প্রমানিত না হওয়ায় ঐ দলিলটি অকার্যকর ব-ল গন্য করা যায়। the learned Trial court also observed that ñবাদী মাদরাসার নালিশী পুকুর দাবী কর-লও পি, ডব্লিও-৩ নিজ হা-ত লেখা রশিদ আদাল-ত দাখিল করায় এবং ঐ রশিদ দ্বারা মা-ছর পোনা ছাড়ার দাবী করায় এই সাক্ষী অবিশ্বাসী সাক্ষী। নালিশী পুকুর বাদী মাদরাসার দখল সাক্ষ্য দ্বারা প্রমানিত নয়। So the findings of the trial court in respect of possession was contradictory. The learned Advocate further submitted that the trial court totally misread the evidence in respect of possession of defendant. The DW-1 in his deposition clearly stated that ñ the Bhawal court of wards acquired estate after selling the property through registered sale deed handed over the possession and on the basis of permission from the Gazipur Municipality filled earthò the DW-3 also stated in his deposition that ñ the B.R estate handed over the possession after executing and registered sale deed being No. 6232 dated 08.05.1996.ò so the learned trial court totally misread the evidence and came to a wrong finding that the defendant did not get the possession of the suit pond on the basis of the sale deed and the appellate court failed to perform its duty as a court of appeal also agreed with the wrong finding of the trial court on scrutiny the evidence on record rather the appellate court also

agreed with the wrong finding of the trial court thus committing error of law resulting in an error in such decree occasioning failure of justice. The learned Advocate for the petitioner referred several decisions 58 DLR 538,470,471, 29 BLT-490, 49 DLR 414, 60 DLR 64 and 54 DLR, 111.

Per contra, Mr. Asadullah appearing with Mrs. Rezina Mahmud, learned Advocate for the opposite party no. 1 have attempted to rebuff the submission by the plaintiff-opposite party in the following terms:-

(i) The learned counsel has supported the judgment and decree passed by the Appellant Court and submitted that the same is liable to be upheld by this court and the revision be dismissed with costs.

(ii) The trial court misreading and non consideration of the evidence on record came to its findings that the plaintiff after expiry the lease period lost its substantive lease hold right over the suit pond and hence no right to file for a suit for a declaration to the effect that the suit property was leased property of the plaintiff; and the appellate court rightly reversed the findings considering that since the plaintiff enjoyed the pond for more

than 13 years consecutively, so the plaintiff acquired a vested right to claim the property as lease property.

(iii) The learned advocate further submitted that the Bhawal court of wards acquired estate without cancelling the lease and without issuing any notice to the plaintiff sold out the property in connivance with the officials of the Bhawal court of wards acquired estate without cancelling the lease and without issuing any notice to the plaintiff sold out the property in connivance with the officials of the Bhawal court of wards acquired estate and the appellate court rightly found bad smell of machination and rightly cancelled the disputed sale deed.

(IV) The learned Advocate further submitted that both the court below came to a concurrent finding on possessions that the defendant did not get the possession of the suit pond on the basis of the deed in question,

(V) The learned Advocate lastly submitted that the appellate court did not misconstrued or misread the evidence and accordingly, interference is not called for by this court. In this contention he referred several decisions in difference issue reported in - 14 DLR (AD) 147 , 8 BLC (AD) 21, 32 DLR (AD)

170, 46 DLR (AD) 121, 6 MLR (AD) 86, 6 MLR (AD) 67, 39 (DLR) 352, 38 DLR (AD) 308 and 45 DLR-120

Analysis-

With the assistance of the exhaustive and thorough submissions before me, I may now proceed to examine the controversy before me.

Since the question arises as to misreading, non consideration of the material evidence affecting affecting the merit of the suit misconception of law committed by the court below, I have scrutinized and gone through the pleading of the patties, evidence, both oral and documentary and relevant provisions of law to come to a proper conclusion. Upon pleadings, the trial court framed following issues

(a) In the suit maintainable in its present from

(b) Is the suit barred by limitation

(c) Is the suit bad for defect of parties

(d) Whether the plaintiff has any right title and possession over the suit land

(e) Is the plaintiff entitled to get any relief and prayed for

Plaintiffs examined 04 witnesses while defendant no. 1 examined 03 witnesses in support of their respective cases. Both the parties adduced number or documents which were exhibited

Trial court, upon consideration of evidence both oral and documentary found that the plaintiff had no locustandi to file the suit hence dismissed the suit but the appellate court reverse the judgment and decree of the trial court. Hence, this rule.

Now the question arises whether there is any justification to interfere with the findings and decision of the court of appeal in reivisional jurisdiction of this court.

The scope of the revisional power under section 115(1) of the Code of Civil Procedure as is stands now may be seen. The jurisdiction of the High Court Division while hearing a revision petition is purely discretionary and the discretion is to be exercised only when there is an error of law resulting in an error in the decision and by that error failure of justice has been occasioned and interference is call for the ends of justice and not otherwise. Error in the decision of the subordinate courts do not by itself justify interference in revision unless it is manifested that by the error of substantial injustice has been rendered. The

decision which is calculated to advance substantial justice through not strictly regular may not be interfere with in revision.

Power of revision is intended to be exercised with a view to sub-serve and not to defeat the ends of justice. The above principle of law the High Court Division is required to follow while adjudicating upon a matter in exercise of its revisional jurisdiction under section 115(1) of the Code of Civil Procedure. Here, it must not be overlooked that there is a lot of difference between a revision and appeal. An appeal confers right on the aggrieved party to complaint in the prescribed manner to the Higher forum whereas the supervisory of revisional power has for its objects the right and responsibility of the higher forum to keep the subordinate courts within the bounds of law.

The High Court Division while exercising its revisional jurisdiction is competent to reverse the judgment of the courts below when the same has been made either upon misreading or non consideration of the material evidence caused failure of justice; or when the same has been passed on the basis of evidence which cannot be considered as legal evidence and had the same been not taken into consideration the judgment would not have been one as has been made; or when the appellate court

in giving a particular finding has committed any error of law resulting in an error in the decision occasioning failure of justice or such finding is found to have resulted from glaring misconception of law; or when the findings arrived at by the appellate court is contrary to the evidence; or when there appears error of law apparent on the face of the record occasioning failure of justice. It is also of the view of our Apex court that once the conditions in section 115(1) of the Code of Civil Procedure are satisfied and the High Court's jurisdiction to interfere is established, the proceeding as a whole form start to finish can be scrutinize and any order necessary for doing justice may be passed there is no limit to the area in which the revisional power is to be exercised by the High Court division in the facts and circumstances of the each case.

In the case of Nurul Islam and others VS Abdul Munshi and others reported in 58 DLR 538 where in their lordships observed in paragraph 34 that

ñ when the appellate court reverse the finding of fact without taking notice of the documentary evidence, the revisional court may reassessed the evidence and can come to its own finding on the point in the case of ignoring of material

evidence or in the case of arriving at a decision upon ignoring material evidence and the finding arrived at is vitiated by error of law or finding of fact not based on evidence or their was not proper legal evidence in support of the finding or important evidence ignored by the lower appellate court, the High Court Division as a revisional court is a quite within its jurisdiction to interfere with the finding and the decision of the lower appellate court, their lordships further observed in paragraph 35 the term occasioning failure of justice has a far reaching significance it invest the High court Division with wide power not only go to into the question of law but also to the question of fact in such of fact and to make scrutiny and to assess evidence for itself for its own satisfaction, this court is to see to what extend such failure of justice has been perpetrated.ò

There is an unending debate between the parties with respect to the legality of the impugned judgment and decree passed by the lower Appellant Court. Now reverting back to the case in hand, as stated at the outset, the plaintiff instituted the suit for declaration that the property in question was leased property of the plaintiff and the sale deed being No. 6232 dated

08.05.1996 was illegal, collusive in operative and not binding upon the plaintiff.

Needless to say that in order to succeed in the suit the plaintiff would have first to establish that they had locustandi to file the suit and they had also substantive right to enjoy the property and had possession in the suit land. Admittedly the plaintiff was a lessee under the Bhawal court of wards acquired estate from 1389 B.S to 1398 B.S and 1399 B.S to 1402 B.S and after expiry the lease period the lessore did not extend the lease period, so the plaintiff lost subsisting lease hold right.

It appears from the record that while the plaintiff filed the suit for declaration at that time the plaintiff was not a lessee under the Bhawal court of wards acquired estate and since the plaintiff lost the subsisting lease hold right in consequence thereof the plaintiff was not entitled to get any relief of declaration, in the case, Bangladesh VS Abdul Alim Sarker reported in 6 MLR (AD) -184, wherein held that -

"The period of lease having been expired and there been subsisting lease hold right in consequence thereof the plaintiff is not entitled to get any declaration or injunction. Furthermore the plaintiff cannot claim any damage against the government caused

by the third party. Judgment and order of the High Court Division being illegal are set aside. In another case Mollikpur fisherman co-operative society limited VS The Secretary, Ministry of Land and others reported in 15 BLD (AD) - 214 their Lordships observed "When the term of the petitioners lease expired by the end of 1401 B.S and the petitioner did not acquired any continuing right there under the impugned notification for leasing out the fisheries in question on the fresh terms cannot be said to violate the lease agreement."

Be that, the PW-1 in his cross examination clearly stated that " ১৪০২ স-ন চৈত্র মা-স লি-জর মেয়াদ শেষ হ-ল প-র আর লিজ নবায়ন হয় নাই। " PW-3 in his cross examination stated that "দাখিলী খরিদা রশিদ তার হা-তর লেখা। সে মৎস্য ব্যবসায়ী নয়, মাছ খরিদা রশিদ কে দাখিল ক-র তা সে জা-ননা ব-ল জানায় " Learned trial court observed regarding PW-3 " নিজ হা-ত লেখা রশিদ আদাল-ত দাখিল করায় ঐ রদিশ দ্বারা মা-ছর পোনা ছাড়ার দাবী রায় এই সাক্ষী অবিশ্বাসী সাক্ষী। নালিশী পুকুর বাদী মাদরাসার দখল সাক্ষ্য দ্বারা প্রমানিত নয়। " So, the learned trial court found that at the time of filing the suit the plaintiff has lost its subsisting lease hold right and they did not possess the pond in question, so the plaintiff had no locustandi to file the suit consequence thereof the plaintiff was not entitled to get any declaration as prayed for.

But the learned appellate court reverse the well founded findings of the trial court without giving any valid reason supported by law. The learned appellate court observed the plaintiff acquired a vested right since the plaintiff enjoyed the pond on lease for a long term of 13 years. But the learned appellate court failed to appreciate that at time of filling the suit the lease period already been expired and the plaintiff lost its subsisting lease hold right, so the findings of the appellate court has no legal basis and the appellate court totally misconstrued with the proposition of law and facts.

It appears that both the courts below gave wrong findings on possession of the suit property by the defendant. The learned trial court upon consideration the testimony of PW-3 found that the plaintiff was not in possession of the suit property but the learned trial court further found that the defendant did not get the possession of the suit property on the basis of the sale deed and for that reason the trial court gave a observation that the deed could be treated as an inoperative deed. The findings of the trial court is absolute contradictory. The appellate court considering the findings of the trial court observed that since the defendant did not file any cross appeal against the findings of the trial court

regarding the deed in question, so the defendant accepted the findings of the trial court.

For come to a proper findings I have examined the testimony of DW-1 and DW-3.

DW-1 in his chief stated that " নালিশী জমির দাগ ৮২১। এই দা-গ ০.৮৩ একর জমি আমা-দর নিকট বিক্রয় ক-র গত ইং-রজী ০৮/০৫/১৯৯৬ইং তারি-খ ৬২৩২ নং রেজিষ্ট্রকৃত দলি-ল ইতিপূ-র্ব জমি বিভিন্ন লোক-জন-দর দেওয়া হই-তা। নালিশী জমি আমরা ৩,০০,০০০/- টাকায় খরিদ ক-রছি। নালিশী জমি কোর্ট অব ওয়ার্ডস এ-স্টট আমা-দর নিকট বিক্রি ক-র দখল বুঝাইয়া দেয়। ইহার পর আমরা পৌরসভার অনুমতি নি-য় নালিশী জমি-ত রক্ষার জন্য মাটি ভরাট ক-রছি। মাটি ভরা-টর সময় যে সব ট্রা-ক ক-র মাটি আনি উহার রশিদও জমা দি-য়-ছ।.ò DW-3 in his chief stated that " আমার নাম মোঃ মাজহারুল ইসলাম, সরকারী ম্যা-নজার, B.R Estate, প-ক্ষ গাজিপুর। নালিশী জমির সা-বক মালিক ছিল B.R Estate, বোর্ড মিটিং এর সিদ্বান্ত ম-ত ছায়া বিথী সমবায় গৃহ নির্মান সমিতির নিকট গত ৮/৫/১৯৯৬ ইং তারি-হ দলিল নং ৬২৩২। ঐ দলি-ল ভাওয়াল এ-স্টট এর প-ক্ষ স্বাক্ষর ক-রন তৎকালীন ম্যা-নজার সাহাবুদ্দিন আহ-স্মদ। আমি তাহার স্বাক্ষর-ক চিনি। এই তার স্বাক্ষর Ext-1. জমি বিক্র-য়র পর ছায়া বিথী সমবায় সমিতি লিমি-টড কে দখল বুঝাইয়া দেয়। " But the learned trial court in her judgment observed that the defendants witnesses failed to prove their possession in the suit property. And the appellate court agreed with the decision of the trial court

without giving his own reasoning. But the proposition of law is otherwise.

I have to decide next whether the lower appellate court performed his duty properly as a court of appeal in deciding the issues involved in the suit. The appeal is a re-hearing of the cause and the appellate court can re-assessed the evidence on record. The appellate court as a final court of fact should assessed both oral and documentary evidence very carefully to come to an independent finding. The appellate court can decide any question of law and fact even in absence of any cross objection or appeal by the either party. In the present case the appellate court made agreement with the findings of the trial court that the defendant did not get possession over the suit pond on the basis of the sale deed, so this deed could be treated as inoperative only for the defendant did not file any cross appeal/cross objection against the findings of the trial court but the duty of the appellate court is to examine the findings of the trial court whether the findings was based on law and fact. In this case both the court below came to the such findings upon misreading the evidence on record caused failure of justice because the DW-1 and DW-3 in their deposition categorically

stated that they got possession after the sale deed executed and registered.

In the case of heirs of late "Jotindranath: Mondal Shibopada Mondal and others VS Gouri Dashi and others reported in 29 BLT (HCD) 490 his lordship observed in paragraph-39 1 hold the view that the appellate court can decide any question of law and fact even in absence of any cross objection or appeal by the defendant-respondent as it made in the instant case. My such view got support from the decision reported in 1983 BLD (AD) Page-62" This decision is squarely applicable considering the facts and circumstances of the present case.

In another case reported in 49 DLR (HCD) 414 a single bench of this division observed in paragraph-12 "the learned advocate for the pre-emptee petitioners have argued in reply with reference to two decisions reported in the court of Ashini Kumar Kormokar being dead his heirs; Sree Radha Raman Kormokar and others VS Porimohon and others and the Derasatullah and other VS Manik Mondal and others reported in 36 DLR (AD) 1 and 88 respectively submitting that this court can rectify any illegality in exercise of its revisional jurisdiction at the instance

of the parties or even suo-moto. I am inclined to accept this view at is appears to me to have substance. This court is revisional jurisdiction is not powerless and can for the ends of justice rectify any illegality committed by the inferior court even if such defect is not pointed out by either party."

I respectfully agree with the judgment referred as above. I found the findings of the trial court as well as the appellate court in respect of the deed in question is totally misconceived one and deserve interference. I am inclined to expunge the findings of the trial court that the deed being No. 6232 dated 08.05.1996 was inoperative.

The learned advocate of the opposite party vehemently argued that the defendant and some officers of the Bhawal court of wards acquired estate in connivance with each other created the sale deed showing shocking low price instead of the actual price.

The plaintiff came with this allegation in the plaint and the plaintiff ought to be proved the allegation without any doubt.

Now let me see what is the law regarding burden of proof. Section 101 of the Evidence Act lays down the provision of the burden of proof which runs thus:-

"101 who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must proof that those facts exists.

When a person is found to prove the existence of any fact it is said that the burden of proof lies on that person."

The burden of proof lays on the party who substantially asserts the affirmative of the issue and not upon the party who desires it. It is reasonable and just that the suitor, who relies upon the existence of the fact, should be called upon to prove the own case. The party or whom the onus of proof lies must, in order to succeed established his case and he cannot, on failure to do so, take advantage of the weakness of his adversaries case. He must succeed by the strength of his right and clearness of his own prove.

To settle this particular issue, I have examined the witnesses adduced by the plaintiff opposite party. The plaintiff did not adduce any evidence to prove that the defendant and the officials of the Bhawal court of wards acquired estate in connivance with each other created the deed of sale and furthermore the plaintiff did not adduce any witness or

documentary evidence to prove that the price of the suit pond was under the actual value, so I do not find any substance in the submission of the learned advocate for the opposite party in this point.

Conclusion:

In view of the discussion made above and the facts and circumstances of the case and also the legal position the plaintiff was not entitled to obtain any decree in its favour. I find that the lower appellate court was absolutely wrong in allowing the Title Appeal No.163 of 2005 arising out of the judgment and decree dated 19.06.2005 passed by the learned Joint District Judge, Additional Court, Gazipur in Title Suit No.184 of 2005.

I find merit in this Rule,

In the result, the Rule is made absolute without any order as to cost.

The judgment and decree passed by the Additional District Judge, Gazipur in Title Appeal No. 163 of 2005 is set aside and accordingly the judgment and decree dated 19.06.2005 passed by the learned Joint District Judge, Additional Court, Gazipur in Title Suit No. 184 of 2005 is restored.

The pond in question not to be used for other purpose subject to prior permission of the concerned authority.

Lower courts records be sent down at once with a copy of the judgment.