

**1 SCOB [2015] HCD 119**

HIGH COURT DIVISION  
(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 940 of 2013

**Farid Hossain**

... Defendant No.6-Petitioner.

-Versus-

**Mosammat Jahanara Begum and eight others**

... Plaintiffs-Opposite parties.

**The Government of Bangladesh and four others.**

... Defendants-Opposite parties.

Mr. Moin Uddin, Advocate

... for the defendant-petitioner.

Mr. Md. Mostafa, Advocate

... for the plaintiff opposite parties.

Heard: on 03.04.2015,19.04.2015,

21.04.2015. Judgment: on 22.04.2015.

**Present:**

**Mr. Justice Muhammad Abdul Hafiz**

**And**

**Mr. Justice S.M. Mozibur Rahman**

**Evidence cannot be corrected in the form of modification under Section 151 of the Code of Civil Procedure, 1908:**

**Discretionary power of a court as has been inserted in Section 151 of the Code of Civil Procedure, 1908 cannot be exercised where alternative remedies are available. After administering oath in the open court when the evidence of a witness is recorded by a trial court it cannot be discarded or changed or corrected in the form of modification except recalling the witness following the prescribed provision of law enunciated in the Evidence Act, 1872. ... (Para 13)**

**Judgment****S.M. Mozibur Rahman, J:**

1. This Rule was issued, at the instance of petitioner defendant No. 6 calling upon the opposite party plaintiffs Nos. 1-9 to show cause as to why the impugned Order dated 07.03.2013 passed by learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 allowing the application dated 29.07.2012 in part filed by the plaintiff-opposite party Nos. 1-9 under Section 151 of the Code of Civil Procedure for correction of deposition and cross examination of P.W. 1 and discharging the plaintiffs from submitting the Memorandum of Understanding should not be set-aside.

2. Short facts, necessary for disposal of the Rule, is that, the opposite parties No. 1-9 as plaintiffs filed Title Suit No. 4890 of 2008 before the learned District Judge, central filing section, Dhaka against the present petitioner and the opposite parties No. 10-14 impleading them as defendants Nos. 1-6 praying for recovery of khash possession after declaration of title in the suit land shown in the schedule of the plaint. Ultimately the suit was transferred to the Joint District Judge, 7<sup>th</sup> Court (Arbitration Adalat), Dhaka, for disposal.

3. The defendant Nos. 1-3, 4-5 and 4 and 6 contested the suit by filing three separate written statements and the defendant No. 6 stated in his written statement that the suit is not maintainable in its present form and manner and that the suit has no cause of action. The plaintiffs have not come to the court with clean hand; the plaintiffs filed the suit by suppression of facts; the suit is barred by law of limitation. The suit is bad for defect of parties, the suit is barred by section 42 of the Specific Relief Act; the suit is barred by estoppel, waiver, acquiescence and the plaintiffs have no right, title, interest, ownership and possession in the suit land. The defendant No. 6 stated that he has been owning and possessing the suit land by way of purchase from its original owner since 1974 to the knowledge of the plaintiffs and other defendants. The defendant No. 6 also mutated the suit land in his name and has been paying the rent and taxes to the Government and City Corporation; that in the city survey the suit land was recorded in the name of the defendant No. 6 vide khatian No. 425, plot No. 3337; that in 1994 the Deputy Commissioner, Dhaka and others tried to evict the defendant No. 6 from the suit land

claiming it as C.S. Plot No. 380; that challenging the said order of eviction the defendant No. 6 as plaintiff filed Title Suit No. 61 of 1994 before the Assistant Judge, 4<sup>th</sup> Court, Dhaka for declaration of title and permanent injunction against the Deputy Commissioner and others; that on 28.03.1995 the suit was decreed declaring that the suit land is situated at C.S. Plot No. 376 and that also a decree of permanent injunction was given in the said suit against the Deputy Commissioner and others restraining them from the suit land at C.S. Plot No. 376 in the name of C.S. Plot No. 380; that against the said decree for declaration of title and permanent injunction the Deputy Commissioner and others did not take any steps before the competent court.

4. In view of the above pleadings of the parties to the suit the learned Joint District Judge after framing issues as usual and observing all other legal formalities in this regard made the suit ready for trial. Accordingly, examination in chief of P.W.1 was started on 24.07.2011 and taking long five days it was ended on 08.04.2012. Thereafter P.W. 1 was being cross-examined on and from 27.05.2012 and on 29.07.2012 he stated in cross that a Memorandum of Understanding was executed 15 days before the execution of power attorney Ext.1 between the parties to the suit. On that date i.e. on 29.07.2012 petitioner filed a petition for a direction upon the plaintiff to submit the said Memorandum of Understanding. Learned Joint district Judge after giving both sides an opportunity of being heard allowed the petition directing the plaintiffs to submit the paper as the petitioner prayed for. On the other hand plaintiffs also filed a petition on 27.05.2012 long one year after the conclusion of examination in chief of P.W. 1 praying for correction of deposition made by P.W. 1 and this petition was heard and disposed of on 07.03.2013 allowing the petition for correction of deposition made by P.W. 1 one year ago. At the same time learned trial court exempted the plaintiffs from submitting the Memorandum of Understanding regarding which he passed earlier order to submit it on the basis of the petition of this petitioner defendant no. 6 exercising his inherent power envisaged in section 151 of the Code of Civil Procedure, 1908.

5. After hearing of both the parties, the Joint District Judge and Arbitration Adalat Dhaka, allowed the application of the plaintiffs in part by his impugned judgment and order dated 07.03.2013 correcting the deposition of P.W. 1 which he made one year ago as well as exempting the plaintiffs from submitting the Memorandum of Understanding in contrary to the order he passed earlier on 23.01.2013.

6. Being aggrieved by and dissatisfied with the impugned judgment and order dated 07.03.2013 passed by the learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 petitioner moved the instant civil revisional application and obtained the Rule.

7. Mr. Md. Moin Uddin, the learned Advocate appearing on behalf of the defendant-petitioner, submits that that on 29.07.2012 at the time of cross examination P.W. 1 admitted that সমঝোতা চুক্তিপত্র সম্ভবত ১০/০৩/২০০৮ ইং তারিখে স্বাক্ষরিত হয়, এটা রেজিস্ট্রি হয় নাই। সমঝোতা চুক্তি সম্পর্কে আমি কোন ব্যাখ্যা দিব না। সমঝোতা চুক্তিপত্র দাখিল করিব প্রয়োজনে। As such, he submits that on the same date the petitioner filed an application for direction upon the plaintiffs to submit the said সমঝোতা চুক্তিপত্র for ends of justice. That on 23.01.2013 the Trial Court heard the both sides and allowed the application given by the petitioner for submitting Memorandum of Understanding. He further submits that the deposition of P.W. 1 was started on 24.07.2011 and ended on 08.04.2012 and cross examination was started on 27.05.2012 one year after the plaintiffs filed application for correction of the deposition of P.W. 1 and that P.W. 1 admitted in cross examination that he got Master Degree in Economics from Dhaka University; that subsequently on 07.03.2013 the Trial Court changed his mind and allowed the application of the plaintiffs given for correction of deposition of P.W. 1 and the learned Court below allowed the petition along with a separate order that plaintiffs are exempted from filing the Memorandum of Understanding in contradiction with his earlier order dated 23.01.2013 and as such the Trial Court committed error of law which is liable to be interfered with.

8. In support of his arguments, he cited the following decisions given in the case of Bangladesh Vs. Luxmi Bibi and Ors. Reported in 2BLT (AD) 1994 Page-183, the case of Harun-Or-Rashid and others Vs. Quyum Khan and others reported in 7BLT Page-34, the case of Abdul Noor Vs. Makhan Mia, reported in 60 DLR(AD) 2008, the case of Harun-or-Rashid Vs. Gulaynoor Bibi reported in 19BLC(AD) Page-123. Accordingly, he submits that in pursuance to the decisions given in the cases he referred the present Rule is liable to be made absolute for ends of justice.

9. Mr. Md. Mostofa, the learned Advocate appearing on behalf of the plaintiff opposite parties submits that the record of schedule land was prepared on the basis of settlement. But the plaintiff did not file any settlement case. The plaintiff has filed a photocopy of Khatian no. 14, plot no. 2479 of 2010 Joggasola Mouja. On the perusal of the photocopy of this record it appears that 5.00 acre land has been recorded in the name of plaintiff Nurul Islam. The plaintiff has filed some photocopy of rent receipt. The plaintiff did not file original copy of the

rent receipt. These photocopies are not acceptable as a document. The plaintiff did not adduce any witnesses and produced any original document to prove the case. With regard to the impugned judgment and order he has clearly stated that the learned Court below did not commit any error of law.

10. In support of his arguments, he referred the case of Charandwip Bhumihin Krishi Vs. The Cox's Bazar and others reported in 1988 BLD(AD) page-63. Accordingly, he submits that the Rule issued earlier may be discharged for ends of justice.

11. In view of the above facts and circumstances of the case we have perused the Revisional application, impugned order dated 07.03.2013 and other documents/papers as available in record. It appears from the record that the Trial Court started recording examination in chief of P.W. 1 on 24.07.2011 and ended on 08.04.2012 cross examination of whom was commenced on 27.05.2012 when the plaintiff filed the petition for correction of deposition and cross examination of P.W. 1. After giving both sides an opportunity of being heard he allowed the petition on 07.03.2013 exercising his discretionary power conferred on him under Section 151 of the Code of Civil Procedure, 1908.

12. Now pertinent question in the instant case before us is whether the Trial Court is correct in passing the impugned order dated 07.03.2013 allowing the plaintiffs petition for correction of deposition and cross examination of P.W. 1 as well as discharging the plaintiffs from submitting the Memorandum of Understanding respecting which he earlier allowed an application of the petitioner asking the plaintiffs to submit the said Memorandum of Understanding by his order dated 23.01.2013.

13. We have carefully examined the impugned order dated 07.03.2013 passed by the learned Joint District Judge and found that in exercise of his power conferred on him under Section 151 of the Code of Civil Procedure, 1908 he has arbitrarily allowed the plaintiffs petition submitted for correction of one year old deposition of P.W. 1. Besides, he has exempted the plaintiffs from filing the memorandum of understanding reversing his own order dated 23.01.2013. It is long settled principle of law that where an alternative remedy exists a party cannot have recourse to the inherent jurisdiction of the court under Section 151 of the Code of Civil Procedure, 1908. But in this case it is clearly seen that Trial Court passed the impugned judgment and order whimsically and arbitrarily without applying his judicial mind allowing the petition for correcting the deposition of the P.W. 1 as prayed for by the plaintiffs. Discretionary power of a court as has been inserted in Section 151 of the Code of Civil Procedure, 1908 cannot be exercised where alternative remedies are available. After administering oath in the open court when the evidence of a witness is recorded by a trial court it cannot be discarded or changed or corrected in the form of modification except recalling the witness following the prescribed provision of law enunciated in the Evidence Act, 1872.

14. In the instant case we have observed that Trial Court did not follow the accurate provision of law in course of passing the impugned order dated 07.03.2013. He has manifestly acted at his own whim and caprice which is neither desirable nor acceptable in the eye of law.

15. On perusal of the impugned judgment and order it is further seen that Trial Court passed a *suo-motu* order exempting the plaintiffs from filing the Memorandum of Understanding in contravention of his earlier order dated 23.01.2013 in strength of which he directed the plaintiff to submit the Memorandum of Understanding on the basis of the application filed by the petitioner defendant. This portion of order passed by the Trial Court is also seen to be injudicious and not consistent with the existing provision of law provided to be applied in this regard as we have cited earlier.

16. We have gone through the cases referred by the learned Advocates for both sides as has been stated earlier and found that the facts and circumstances of the case cited by the learned Advocate of the opposite parties are not consistent with that of the instant case before us.

17. In view of the discussion made above we are of the view that the Trial Court committed an error of law in the impugned order resulting in an error in the decision occasioning failure of justice and as such the impugned order dated 07.03.2013 passed by the learned Joint District Judge and Arbitration Adalat, Dhaka in Title Suit No. 4890 of 2008 is set aside.

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

19. The order of stay granted earlier by this Court stands vacated.

20. Send a copy of this judgment to the court below at once.