

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

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

CIVIL PETITION FOR LEAVE TO APPEAL NO. 3676 OF 2017
(From the judgment and order dated 08.07.2015
passed by the High Court Division in Civil
Revision No.1130 of 2014)

Mrs. Rahima Begum : Petitioner

=VERSUS=

Md. Zahidul Islam being dead
his heirs:-1(a) Kazi Tamjidul
Islam and others : ... Respondents

For the Petitioner :Mr. A.K.M. Badruddozza,
Advocate, instructed by Mr.
Mohammad Ali Azam,
Advocate-on-Record

For the Respondent :Mr. B. M. Elias, Advocate,
Nos.1(a) - 1(d) instructed by Mr. Mohammad
Abdul Hai, Advocate-on-Record

Date of hearing :The 22nd August, 2022

Judgment on :The 22nd August, 2022

JUDGMENT

MD. NURUZZAMAN, J:

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

08.07.2015 passed by the High Court Division in Civil Revision No.1130 of 2014 discharging the Rule.

The facts, leading to filing this Civil Petition for Leave to Appeal, in short, are that the petitioner herein, as plaintiff, instituted the Title Suit No.3777 of 2008 in the Court of Assistant Judge, 3rd Court, Dhaka against respondent herein as defendant for ejectment of the defendant claiming as her tenant on the ground of default stating that the plaintiff inducted the defendant in the shop premises, like four other shops erected temporarily in her six storied apartment Building on plot No.9, Road-13/D, Sector-6 of Uttara Model Town, by an oral agreement dated 01.06.2002 upon receipt of an advance of

Tk.3,50,000/- fixing monthly rent at Tk.2000/-.

After the expiry of the said agreement, the plaintiff though requested the defendant but the defendant did not come forward to execute the written agreement. As the defendant did not pay any rent, the plaintiff adjusted Tk.72,000/- for 36 month, i.e., 3 years. After the expiry of such period, the plaintiff enhanced the monthly rent in consonant to the rent of four other shops of the plaintiff. Like other occasions, the defendant failed to pay any rent for which the plaintiff deducted more from the advance money. She also deducted Tk.25,000/- as arrear utility bills consumed by the defendant. On repeated demand, the defendant did not pay rent and thus, became defaulter. The plaintiff served notice dated

06.04.2008 upon the defendant under section 106 of the Transfer of Property Act, 1882 terminating the tenancy asking to vacate the possession of the shop and handed over the same within 30.04.2008. The defendant did not pay any heed to the plaintiff and hence, brought the suit.

The defendant contested the suit by filing written statement denying all the material allegations made in the plaint contending, inter alia, that in response to the plaintiff's invitation through her husband Abul Kalam Azad, the defendant decided to purchase possession of shop premises measuring 106 square feet fixing the consideration money at Tk.3,50,000/- and accordingly, he paid Tk.2,00,000/- on 16.03.2002 vide two receipts, on 28.04.2002

paid at Tk.1,00,000/- and on 18.08.2002 vide another receipt paid at Tk.50,000/- and in this way, the defendant paid entire consideration money towards the purchase of possession of shop-1 belonged to the plaintiff and took possession of shop premises where he was carrying on business of hardware with electricity connection fixing sub-meter, though it was stipulated that after completion of all works of the building, the plaintiff would execute the required transfer document, but she denied and, as such, the defendant vide notice dated 22.02.2005 requested to execute transfer document but the plaintiff did not pay heed and continued to harass the defendant and, as such, he made G.D. entry to concern Police Station in this regard. The

defendant further claimed that, he never agreed to pay any rent to the plaintiff and, as such, question of deduction does not arise at all. Hence, the suit is liable to be dismissed.

On conclusion of the trial, the learned Assistant Judge, 3rd Court, Dhaka dismissed the suit by his judgment and decree dated 13.04.2010.

Feeling aggrieved, by the judgment and decree dated 13.04.2010 passed the trial Court, the plaintiff as appellant preferred Title Appeal No.142 of 2010 before the learned District Judge, Dhaka. On transfer the said appeal was heard by the learned Additional District Judge, 3rd Court, Dhaka, who by his judgment and decree dated 20.07.2011 disallowed

the appeal and thereby affirmed the judgment and decree passed by the trial Court.

Feeling aggrieved, by the judgment and decree dated 20.07.2011 passed by the appellate Court, the plaintiff-appellant as petitioner preferred Civil Revision No.1130 of 2014 before the High Court Division and obtained the Rule.

In due course, a Single Bench of the High Court Division upon hearing the parties was pleased to discharge the Rule by the impugned judgment and order dated 08.07.2015 and thereby affirmed the judgment and decree of the Courts below.

Feeling aggrieved, by the judgment and decree dated 08.07.2015 passed by the High Court Division the plaintiff as petitioner

filed the instant civil Petition for leave to appeal.

Mr. A. K. M. Badruddozza, the learned Advocate appearing on behalf of the petitioner submits that the High Court Division miserably failed to understand that the possessional right cannot be accrued without properly executed and registered transfer of conveyance. He further submits that the Courts below as well as the High Court Division did not consider at all that the shop premises in question was erected temporarily in the building upon a plot which belonged to RAJUK from which they got only lease holding right and without any prior approval of RAJUK, the plaintiff cannot sold out any portion of land therefrom or possession thereof but the High

Court Division committed error in agreeing to the finding of the Courts below that payment in question was not made as advance rent and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

Mr. B. M. Elias, the learned Advocate appearing on behalf of the respondent Nos.1(a)-1(d) made submissions in support of the impugned judgment and order of the High Court Division. Mr. Elias in support of his contentions refer to the case of Banichitra Pratisthan Limited Vs. Bilkis Begum and others reported in 38 BLD(AD)225. Therefore, he argued that the defendant is not liable to be evicted and, as such, there is no necessity to interference in the judgment of the High Court Division as well as Courts below.

We have considered the submissions of the learned Advocate for the respective parties. Perused the impugned judgment of the High Court Division and other connected materials on record.

It is true that a practice has been grown up specially by the landed property-owners that after even prior to the constructing of super markets in urban areas, without executing proper deeds, they use to realize a significant sum of currency from the traders as advance/salami/possession sale and evict them after expiry of the tenure and sometimes enhance the monthly rent, though such process and transactions are unauthorized and unlawful.

These advance or salami/possession sale is nothing but 'premium'. Under the Registration

Act, 1908, the transfer of possessory right is required to be registered. In the present case admittedly there was a monetary transaction of BDT 3,50,000 (three lac fifty thousand) between the parties concerned. One party claimed that the some was paid as advance of rent and the other party asserted that the transaction was not as advance rent rather as consideration money for sale of possession. However, no execution and registered transfer of possessory rights over the suit land exists. If it so, then it cannot be constructed that there existed a sale of possession. In absence of any such sale of possession, the respondent could at best be termed as nothing else but a periodical tenant who could be evicted if became a defaulter.

Moreover, though there was no material on record before the Courts below including the High Court Division that there was any valid contract or deal toward sale or transfer of the suit shop by the Plaintiff-Appellant Petitioner in favor of the Respondent-Defendant, the High Court Division committed significant legal error of law by declaring possessory right of Defendant Respondent in the suit shop without any registered sale deed or Contract and any proper suit to that effect in a suit for eviction of tenant.

The question as to whether the Defendant have paid the money for the consideration of purchase of the possessory right cannot be determined devoid of appreciating the fact without any suit with proper prayer in a suit

for eviction because Trial Court was not required to frame any such issue to ascertain the possessory right of the Defendant-Respondent.

Moreover, documentarily the shop premises in question was erected provisionally in the building upon a plot which belonged to Rajdhani Unnayan kartripakkha (in short, RAJUK) from which the leave petitioner got only lease holding right and without any prior approval of RAJUK for commercial purpose, so, the plaintiff petitioner cannot sold out any possession thereof.

Hence, the submission of the learned Advocate for the leave petitioner as to possessional right cannot be accrued without properly executed and registered transfer and

payment in question is convincing, thus, the High Court Division committed error in agreeing to the finding of the Courts below in holding that the monetary transaction was for sale of possession, as such, dismissing the suit is merit worthy.

As admittedly, the suit was filed by the Plaintiff-Petitioner for eviction of the Defendant-Respondent without seeking any remedy as to the determination of the possessory right of the shop in question but the Courts below as well the High Court Division without any coherent rationale attached recognition to the so called possessory right of the Defendant-Respondent which is nothing but insignificant, hence, we find legal infirmity in dismissing the suit, holding monetary transaction was for

sell of possession seems to us in a suit for eviction is nothing but superfluous. It, rather, amounts to passing preventive decree in favour of the Defendant in the plaintiff's suit for eviction of monthly tenant.

In this regard, it would not be out of place to say that such situation like the present case would not be arisen, if the transferors and purchasers or possession holders before purchase of possession of any property comply with the provisions of section 55 of the Transfer of Property Act, 1882, Section 10 of the Premises Rent Contract Act, 1991 as well as Registration Act, 1908.

We have gone through the precedent referred by the learned Advocate for the respondent and found that the facts and circumstances of the present case and referred

case is quite distinguishable, as such, we are unable to accept the same and to apply squarely in the present case, although, we are respectfully agreeing with the decision and the principles enunciated in that cases.

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

Accordingly, the leave petition is disposed of. The impugned judgment and order of the High Court Division and both the Courts below are set aside. The suit is decreed.

J.
J.
J.

The 22nd August, 2022
Hamid/B.R/*Words 1877*

