IN THE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Nizamul Hoq

CIVIL APPEAL NO.36 OF 2011

(From the judgment and order dated the 20th day of August, 2009 passed by the High Court Division in Civil Revision No.2785 of 2004)

The Chairman, District Council, Feni, Deputy Commissioner, Feni : . . . Appellant

-Versus-

Feni Alia Madrasha Mosque Committee : . . . Respondent

For the Appellants : Syed Amirul Islam, Senior Advocate instructed by Mr. Md. Nawab Ali (dead), Advocate-on-Record

For the Respondent : *Ex-pate*

Date of Hearing : 15.03.2016 and 16.03.2016

Date of Judgment : The 29th day of March, 2016

(JUDGMENT)

Md. Abdul Wahhab Miah, J: This appeal, by leave, is from the judgment and order dated the 20th day of August, 2009 passed by a Single Judge of the High Court Division in Civil Revision No.2785 of 2004 making the Rule absolute.

Facts necessary to dispose this appeal are that respondent No.1 as the plaintiff instituted Title Suit No.138 of 1981 in the Court of the then Munsif (now Assistant Judge), 2nd Court, Feni Sadar, Feni for the following principal relief:

"(ক) নিম্ন তপছিলে বর্ণিত পুকুর বাবত ১নং বিবাদী হইতে ৪নং বিবাদী ২/৩ নং বিবাদীর যোগাযোগে ১০/৮/৮১ ইং তারিখে হাসিলকৃত নালিশী বন্দোবস্ত সম্পূর্ণ তঞ্চক, যোগযোগ, বে-

আইনী, ভূয়া, ক্ষমতার বহিভূর্ত, অকার্যকারী এবং বাদীর উপর বাধ্যকর নহে মর্মে বাদীকে বিবাদীগণ বিরুদ্ধে ডিক্রি দানের,

(খ) নালিশী পুকুরে বাদী মসজিদের Wakf By Immemorial user বহাল থাকাবস্থায় এবং বাদী মসজিদের স্বত্ব দখল বহাল থাকাকালীন ১-৩ নং বিবাদী যেন কাহাকেও নালিশী পুকুর বন্দোবস্ত না দেয় এবং ১-৪ নং বিবাদী যেন নালিশী পুকুরে প্রেবশ না করে ও নালিশী পুকুর বন্দোবস্ত না দেয় এবং ১-৪ নং বিবাদী যেন নালিশী পুকুরে প্রবেশ না করে। বাদীকে নালিশী পুকুর হইতে বেদখল না করে তৎমর্মে ১-৪ নং বিবাদীর বিরুদ্ধে স্হায়ী নিষেধাজ্ঞার ডিক্রিদানের এবং নালিশী পুকুর বর্ধিত বাদী মসজিদ Wakf By Immemorial user মর্মে বাদীর অনুকুলে বিবাদীগণ প্রতিকুলে ঘোষণা মূলক ডিক্রি প্রদানের ও মর্জি হয়।

(গ) মূল মোকদ্দমার বিচার সাপেক্ষে ১০/৮/৮১ ইং তারিখের অনুষ্ঠিত তথাকথিত নিলাম মূলে ৪নং বিবাদীর অনুকুলে যে নীলামী বন্দোবস্তের ঘটনা হইয়াছে ১-৩নং বিবাদী তাহার কার্যকর না করেন ও এবং ৪ নং বিবাদীকে যেন তৎমূলে নালিশী পুকুরে কোন দখল না দেন এবং ৪নং বিবাদী যেন নালিশী পুকুরে প্রবেশ না করে ও নালিশী পুকুর হইতে বাদীকে বেদখল না করে তৎমর্মে ১-৪নং বিবাদীর বিরুদ্ধে অস্হায়ী নিষেধাজ্ঞার জারীর আদেশ দানের।”

In the plaint, the plaintiff stated, *inter alia*, that the suit tank along with the other adjacent land originally belonged to Noakhali District Council and on 20.03.1967, the District Council by its resolution leased out the same to Feni Town Hall Committee for 99 years but the said lease was acted upon only for 43 decimals land out of 108 decimals land and rest 65 decimals land which is the suit tank was not acted upon. The plaintiff Mosque Committee took possession of the suit tank from defendant Nos.1-3 by an oral gift in 1923 and subsequently got its possession. Since the establishment of Alia Madrasha Mosque in 1923 and immediately after establishment of Alia Madrasha, the suit tank is being possessed and used by the students of the said Madrasha and the local Muslims. The plaintiff Mosque has been cultivating and selling fish and by its income it constructed a pucca ghat measuring 100 feet long for using by the mussullis for the purpose of ablution and accordingly, the plaintiff has been in possession of the suit tank. On several times, the suit tank was leased out to many and the same is being used for religious purpose of the locality as well as the plaintiff. Subsequently, Sub-Divisional Officer of Feni and

defendant Nos.1-3 made the plaintiff caretaker of the suit tank and entrusted it with the authority to use the same as per its necessity and for the purpose of giving lease to various persons the documents were also prepared in order to avoid complications. The plaintiff has been enjoying the suit tank along with land by way of 'waqf immemorial user' since 1923. On 26.04.1971, the Sub-Divisional Officer prepared some papers for leasing out the suit tank to one Enamul Huq Khan for 25 years at a salami of taka 5000. After the payment of said salami, Enamul Huq Khan executed a nadabi deed in favour of the plaintiff by recognising it as the owner by way of waqf by immemorial user. Thereafter, on 10.08.1981, defendant Nos.1-3 in collusion with each other created another lease document in favour of defendant No.4 most illegally and arbitrarily and on that day some employees of the District Council tried to catch fish from the suit tank, but the moazzin of the plaintiff mosque resisted them and on being resisted they disclosed about the creation of lease document in favour of the said defendant and hence the plaintiff was constrained to file the suit.

Defendant Nos.1-3 contested the suit by filing written statement contending, *inter alia*, that on an application of the Feni Town Hall Committee the suit tank along with the other lands measuring an area of 1.08 acres land was leased out for constructing Feni Town Hall by the resolution of the Noakhali District Council dated 20.03.1967 and thereafter a decision was taken for giving lease of the said land to the Town Hall Committee for 10 years. But subsequently, approval was not given by the controlling authority and the District Council had no authority to give lease for 99 years and no permanent lease was given to the Town Hall. Thereafter, on 13.05.1967, decision was taken for giving lease of the said quantum of land to the Town Hall for 10 years by fixing some lease

money. Although agreement was executed in favour of the District Council, the possession of the suit tank was not handed over to the Town Hall and in the meantime, 10 years period had already expired. In 1977 the Town Hall was established on 43 decimals vacant land. Town Hall did not take any steps for getting possession of the suit tank. Town Hall is separated by other land by a boundary wall. The Deputy Commissioner of Feni had the authority to give lease of the suit tank to the Mosque Committee. In 1975, a pucca ghat was constructed to the north side of the tank for using the tank by the staff of the District Council. The local people, the teachers and the students of the Madrasha and the musullis of the Mosque have been using the said ghat although on 01.05.1980 the plaintiff filed an application for getting lease of the suit tank, it did not participate in the auction. On 13.08.1981 Feni Pourashava prayed for granting lease of the land along with the suit tank to defendant No.4 and ultimately, lease was given to him for 5 years and hence the suit was liable to be dismissed.

At the trial both the parties adduced evidence, oral and documentary. The learned Munsif, 2nd Court, Feni by his judgment and decree dated 28.02.1998 decreed the suit in part restraining defendant Nos.1-3 from settling the suit tank to anybody else and also with the further declaration that the plaintiff mosque acquired the right to use the pond as 'waqf of immemorial user'.

Being aggrieved by the judgment and decree of the learned Munsif, the defendant-appellant filed Title Appeal No.29 of 1998 before the District Judge, Feni. The learned Additional District Judge, Feni by his judgment and decree dated 15.05.2004 allowed the appeal and set aside the judgment and decree of the learned Munsif. Against the judgment and

decree of the Appellate Court, the plaintiff preferred the above mentioned civil revision before the High Court Division. A single Bench of the High Court Division by the impugned judgment and order made the Rule absolute, set aside the judgment and decree of the Appellate Court and restored those of the learned Munsif. Against the judgment and order of the High Court Division, the appellant filed Civil Petition for Leave to Appeal No.2785 of 2004 before this Division and leave was granted to consider the following submissions:

> "Syed Amirul Islam learned Counsel, appearing for the petitioners submitted that the High Court Division as well as the trial Court failed to take into consideration the provision of Section 91 of the Local Government Ordinance, 1976 which requires that if a person wants to file a suit against the District Council 30 days notice must be served on the District Council before instituting any suit and in the instant case the plaintiff did not serve any such notice to the District Council, Feni and as such, the suit is not maintainable for want of non-service of any such notice upon the District Council and therefore, the impugned judgment is not sustainable in law. The learned Council further submitted that the High Court Division committed an error of law in setting aside the judgment of the Court of Appeal below inasmuch as performing ablution and bathing in the pond by the people of the locality do not extinguish the title of the District Council and convert the suit tank into a waqf by immemorial user; that the High Court Division as well the trial Court committed an error of law in holding that the suit pond has become waqf by immemorial user inasmuch as there is not an iota of evidence to show that the pond was excavated for the use of Musulli of the present Mosque nor there is any evidence at all that the plaintiff got the possession of the suit tank exclusively, rather it is admitted that the pond was leased out to various persons from time to time until 1981 by the petitioners. The learned Counsel also submitted that the finding of the High Court Division that the Court of Appeal below 'without assigning any cogent ground or reasons' reversed the finding of the trial Court is erroneous and contrary to evidence and

materials on record inasmuch as the Court of Appeal below after considering the averment of the parties, the materials and evidence on record, reversed the findings of the trial Court by assigning cogent reasons and the findings of the Court of Appeal below are based on evidence and materials on record; that the High Court Division committed an error of law in setting aside the judgment of the Court of Appeal below and restoring the judgment of the trial Court inasmuch as the learned Advocate of the plaintiff-petitioner candidly submitted before the High Court Division that the Mosque Committee applied to the District Council for getting lease of the tank in question but the District Council did not grant lease to Mosque Committee and this admitted fact completely negated the contention that the suit tank is waqf by immemorial user, more so, when the property has not been enlisted as waqf property with the appropriate authority and no mutwalli has ever been appointed for the same."

Syed Amirul Islam, learned Counsel, appearing for the appellant has, in fact, seriously argued the first submission on which leave was granted, namely, that the suit was not maintainable in law in view of the non-compliance with the provisions of section 91 of the Local Government Ordinance, 1976 (the Ordinance) inasmuch as before institution of the suit, no notice as required under the said section was served upon the District Council, Feni. He elaborated his submission submitting that the point for non-maintainability of the suit was very much taken in the written statement and issue No.1 also was framed to the effect "অত্রাকারে ও প্রকারে অত্র মামলা চলিতে পারে কিনা?", but the trial Court avoided to decide the said issue on the finding that at the time of hearing the suit or argument, the learned Counsel of the defendants did not raise the said point specifically (in the judgment, in Bangla, it has been recorded as "অত্র মামলা শুনানীকালে বা যুক্তিতর্কের সময় ১-৩ নং বিবাদীপক্ষের বিজ্ঞ কৌশলী অত্র মামলার রক্ষনীয়তা সম্পর্কে সুনির্দিষ্ট ভাবে কোন আপত্তি উৎস্থাপন করেন নাই")। He has further submitted that the Appellate Court

although noticed the objection taken by the plaintiff as to the maintainability of the suit for non-service of notice in compliance with the provisions of section 91 of the Ordinance, it without deciding the said issue conclusively just observed that in the plaint no existence of the notice as per provision of the Ordinance was available and that though the District Council law was binding upon the plaintiff, no notice was served upon the District Council by the plaintiff, so the suit was not maintainable, but the trial Court did not make any discussion on the said point; consequently, no decision was given by it on the question whether the suit was maintainable in law which was a defect in the judgment and decree of the trial Court (in the judgment, in Bangla, it has been stated as "আদালতে বাদীর দাখিলী আর্জিতে উক্তরুপ নোটিশের কোন অস্তিত্ব খুজিয়া পাওয়া যায় নাই। জেলা পরিষদের আইনটি বাদীর উপর বাধ্যকর ও হইলেও বাদী জেলা পরিষদের উপর কোন প্রকার নোটিশ না দেওয়ায় ও মেয়াদ উত্তির্ণ সময়ে মোকদ্দমা দায়ের না করায় মোকদ্দমাটি রক্ষণীয় নয়। অত্র ব্যাপারে নিম্ন আদালত কোন প্রকার আলোচনা করেন নাই। ফলে মোকদ্দমাটি রক্ষনীয় কিনা উল্লেখিত বিষয়ে আইনানুগ ভাবে কোন সিদ্ধান্ত গৃহিত হয় নাই। যাহা নিম্ন আদালতের রায়ের একটি ত্রুটি হিসাবে বিবেচনা করা যায়।").

In support of his contention, Syed Amirul Islam has referred the cases of the Trustees of the Port of Chittagong-Vs-Sadharan Bima Corporation and others, 32 DLR 99; Nur Muhammad and others-Vs-Moulvi Mainuddin Ahmed and others, 39 DLR(AD) 1; Narayangonj Popurashava, represented by its Administrator, Narayangonj, Chairman, Narayangonj Pourashava and others, 46 DLR 295 and Abul Bashar Sowdagar and others-Vs-Bacha Meah and others, 59 DLR(2007)112.

From the leave granting order as quoted hereinbefore, it is apparent that besides the maintainability of the suit for non-service of notice upon the District Council pursuant to section 91 of the Ordinance, leave was granted on merit as to the claim of the plaintiff to the suit tank as 'waqf by

immemorial user', but we do not consider it necessary at all to embark upon the other submissions on which leave was granted. Because if the suit itself was not maintainable in law, then the other questions are not required to be gone into.

Let us see the soundness of the submissions of Syed Amirul Islam.

Section 91 of the Ordinance in clear terms has provided that no suit shall be instituted against a local parishad or against any member, officer or employee of a local parishad in respect of any act done or purporting to be done in official capacity, until the expiration of one month next after notice in writing has been, in the case of local parishad, delivered or left at its office (in the instant case, the suit was filed against the Chairman, Zilla Parishad, Feni, two of the officials of the Zilla Parishad and an individual) and in the case of a member, officer or employee, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left. Although there is no consequence in the section the very language that no suit shall be instituted against a local parishad . . . until the expiration of one month next after notice in writing has been delivered of left at its office and that the plaint shall contain a statement that such notice has been so delivered or left clearly shows that service of notice as required by section 91 of the Ordinance was mandatory and in the absence of such notice, the suit could not be instituted, in other words the suit could not be maintained. And in the context, we may refer to some cases of this Division as well as of the High Court Division. In the case of Trustees of the Port of Chittagong-Vs-Sadharan Bima Corporation and others (supra), wherein

Mustafa Kamal, J (as then he was) sitting in a Division Bench with Abdul Wadud Chowdhury, J held that:

> *"19. There is no doubt that ordinarily the right to sue accrues immediately upon the accrual of cause of action. Thus, in Ballentine's Law Dictionary (1948 edition) the legal meaning of "accrual of cause of action" is stated to be "the coming or springing into existence of a right to sue". Now, the right to sue does not mean a right to a mere filing of the suit. It means that right of obtaining from the Court an adjudication of the matters raised in the suit. If upon filing a suit without serving a notice u/s 109 (1), of the Chittagong Port Act, the plaintiffs finds that "unless such notice is proved, the Court shall dismiss te suit", it means that his right to file the suit is unaffected, but his right to sue, i e, the right to receive adjudication from the Court on matter raised in the suit is impeded and obstructed. He has to remove that obstruction by serving a notice under sec.109(1). It is only then that he acquires a full right to sue. His cause of action has arisen before he has served the notice, but his right to sue is postponed and suspended till he serves a notice. The law requires the Court to see if the notice has been proved or not. If it has not been proved, the Court has no other option but to dismiss the suit. The defendant Port Trust is not even required to take up the defence that no notice u/s 109(1) has been served. It is also not competent to waive the mandatory requirement of notice. The duty and responsibility of adjudicating the notice provisions of section 109(1) fall squirely and exclusively upon the Court. It is neither dependent upon the defendant's plea of absence of notice nor upon the defendant's waiver of the requirement of notice. A suit is a still-born suit without notice u/s 109(1). In one other legislations of the kind, quoted above, a similar provisions exists.*
>
> . . .
>
> *"21. It appears, therefore, that in the context of the special features of section 109(1), "accrual of the right to sue" in sec.109(2) cannot be co-extensive with "accrual of the cause of action". Plaintiff's right to sue has been positively obstructed by the provision of notice in section 109(1). He can file a suit without a*

notice only on the pain of a mandatory dismissal. The dismissal will be automatic, even if the defendant fails to plead absence of notice or even if the defendant waives the notice. Under these circumstances, plaintiff's liberty to file a suit is not a right to sue at all. His right to sue accrues only after the expiry of the notice period of one month. The word "next" in section 109(2) is a clear pointer to that direction. Section 109(2) in our view do not set out special period of limitation for actions or purported actions under the Chittagong Port Act. The general law of limitation is unaffected by section 109(2). It only gives the Port Trust a protection against unnoticed litigations and section 109(3) affords it an opportunity to tender sufficient amends within 6 months next after the accrual of the right to sue. The plaintiff, however, has to file the suit within 6 months after the notice period is over."

In the case of Nur Muhammad and others (supra), this Division held that:

"*In our opinion, section 14A of the (Emergency) Requisition of Property Act has, in clear and unmistakable terms put an express embargo on entertainment of any suit or application against any order or action under the Act. Not only this, if any suit or appeal was pending from before the enactment of this section (this section was inserted by E.P.Ordinance No.XII of 1963) against any order or action under the Act it was to abate."*

In the case of Narayangonj Popurashava, represented by its Administrator, Narayangonj; Chairman, Narayangonj Pourashava and others (supra), a Single Bench of the High Court Division held that:

"9. . . . *the notice under section 152 of the Pourashava Ordinance, 1977 is a pre-requisite in all circumstances for institution of a suit against Pourashava for anything done in official capacity*."

In the said case, the Single Bench further held that:

"10. . . . *It is true that there is no consequential provision for non-service of the notice. But when the language of the section absolutely prohibits institution of the suit without prior notice, the*

suit becomes still-born and has to be buried at its institution. I could not but therefore hold that the provision is mandatory."

In the case of Abul Bashar Sowdagar and others (supra), another Single Bench of the High Court Division considering the provisions of sections 91 and 92 of the Pourashava Ordinance held that where there are mandatory provision of law to be complied with before filing a suit, such provision must be complied with before institution of the suit. In the case in hand since the provision of section 91 of the Ordinance was not complied with the suit was not maintainable.

We respectfully agree with the views expressed in the above referred cases and in view of the language used in section 91 of the Ordinance which are similar to the respective statute involved in those referred cases. We hold that service of notice under section 91 of the Ordinance upon the District Council, Feni (at the time of filing the suit, it was Noakhali) was a must before institution of the suit and as admittedly no notice as required by the said section of the Ordinance was delivered or left at the office of the District Council, Noakhali (now Feni) before the institution of the suit. The suit was not maintainable in law and the same was liable to be dismissed on the ground of its maintainability alone without deciding the other issues involved in the suit.

For the discussions made above, we find merit in the appeal and accordingly, the same is allowed and the suit is dismissed. However, there will be no order as to costs.

J.

J.

J.

J.