



Star LAW report

Local inspection and local investigation Order of inspection cannot be extended to investigation

High Court Division (Civil)
The Supreme Court of Bangladesh
Civil Revision No. 6029 of 2001
Arif Iftakhar Ali and others
V
Alhaj Sekandar Ali Hawlader
Before Justice Mohammad Abdur Rashid and Justice
Hasan Foez Siddique
Judgment: April 15, 2002
Result: Rule absolute

Background

Mohammad Abdur Rashid, J: This Rule was obtained by the defendants upon making a revision application under section 115 of the Code of Civil Procedure against order No. 10 dated 08-10-2001 passed by Joint District Judge, Court No. 01 at Gazipur in Miscellaneous Case No. 26 of 2001, which allowed a prayer for inspection of the suit land.

Opposite party as plaintiff on 08-08-2001 instituted Title Suit No. 145 of 2001 against the defendants for a decree of perpetual injunction. In the plaint, it is stated that the plaintiff purchased the suit lands described fully in schedule- 'Ka' and 'Kha' to the plaintiff from different vendors at various times, and got his name mutated. He has been possessing the suit land by paying rents, taxes etc. The land in 'Kha' schedule measures about 4.28 acres and is bounded by a wall. The defendants have got a land to the east of his 'Kha' schedule land. When, the plaintiff started raising the height of the wall, on 04-08-2001 the defendants obstructed and beat the workers, and tried to forcibly enter into the land by breaking the eastern wall.

On such averments, same date the plaintiff made an application under Order 39 rule 1 and 2 of the Code of Civil Procedure for temporary injunction for restraining the defendants from forcibly entering into the land of 'Kha' schedule by breaking the boundary wall and/or interfering, in any way, with the peaceful enjoyment of the land including ongoing construction till disposal of the suit. He also prayed for an order of ad-interim injunction in the above terms. Hearing the application, learned Joint District Judge was pleased to issue notice upon the defendants asking them to show cause as to why they should not be so restrained, and was further pleased to grant an order of ad-interim injunction as prayed for restraining them from entering into schedule 'Kha' land.

The plaintiff then, on 20.08.2001 made and moved an application under Order 39 rule 2(3) of the Code for taking action against the defendants and the officer-in-charge, Hotapara Police Post for violation of the order of injunction dated 08.08.2001. In the application, it is stated that on 09.08.2001 the plaintiff informed the officers-in-charge of Joydebpur police station and Hotapara police post in writing of the order of injunction. On 13.08.2001 the process server duly served the writ of ad-interim injunction upon the defendants. But on 14.08.2001 at about 11 am violating the order of injunction, the defendants with the help of about 200/250 miscreants and in presence of the police officer-in-charge of the Hotapara police post forcibly entered into the land of 'kha' schedule from the east by breaking through the 593 feet long eastern wall. They took away stacked materials, rods, cement, bricks, sands, chips etc. worth Tk. 5,68,289, and/or damaged. The application was registered as Miscellaneous Case No. 26 of 2001 (Violation). Notice was issued upon the defendants and 30.09.2001 was fixed for SR. Same date, the defendant No. 1 and 2 appeared and filed a joint written objection to the application for temporary injunction denying the entire case of the plaintiff, whereupon 26.08.2001 was fixed for hearing of the matter. Then on 09.09.2001 in the violation case the plaintiff made and moved an application under Order 39 rule 7 of the Code for appointment of an Advocate Commissioner for inspection of the suit land of 'Kha' schedule, which was ordered to be heard on date earlier fixed i.e. 08.10.2001. On 08.10.2001, hearing the application, learned Joint District Judge by the impugned order allowed the same being of the view that whether or not there was any violation should be ascertained by a commission, and asked the plaintiff to deposit Taka 1,000.00 only as commissioner's fees. After such order was passed, the defendant No. 1 and 2 made and moved two applications, one for time for filing written objection to the application for violation of

injunction and the other for setting aside the order allowing the prayer for inspection. The learned Joint District Judge allowed the prayer for time but rejected the latter on the view that such order for local inspection would not prejudice any of the parties to the suit.

Deliberation

We heard the learned counsels at length. We have also read the cases as relied upon by them. It deserves a thorough consideration and determination of the nature and extent of the power of the Court under Order 39 rule 7 vis-a-vis Order 26 rule 9 of the Code to order for an inspection.

Under rule 6, 7, 9 or 10 of Order 39 of the Code the Court is empowered to pass various orders in a given situation, which are essentially in nature interlocutory. Interlocutory order as intended by the legislature must be one passed during the course of an action and incidental to the principal object of the action, say, an action like the one taken by the plaintiff against violation of an injunction order under rule 2(3) of Order 39 of the Code. The provisions



enable a party to take interlocutory action for the purpose of assisting him in the prosecution of his cause or protecting or otherwise dealing with the subject matter of the suit.

Under rule 7 of Order 39 of the Code, the Court may make an order for the detention, preservation or inspection of the subject matter of the suit or any question arising therein. The words detention or preservation of a property does not appear to be of any ambiguity but inspection of suit property gives rise to much controversy as to its nature and extent, particularly, vis-a-vis investigation under Order 26 rule 9 of the Code. When the meaning and scope of the word inspection is understood, the nature and extent of the power of the Court to order for inspection would be clearer.

Plain meaning of the word Inspection is to examine a thing or incident very closely. In Ministry of Industries vs. Shafi A Chowdhury, it is observed that the word inspection cannot have a separate meaning and its meaning is restricted by the words detention, preservation, which preceded it to "inspection for the purpose of detention or preservation." One thing however must be kept in mind that inspection can be ordered only in respect of the subject matter of the suit and any question arising thereon. The Court may authorise any person to enter upon or into land or building in the possession of any other party to such suit to collect samples or carry out observation or to do experiment, which may deem necessary for the purpose of full information or evidence in respect of the subject matter of the suit only.

Whereas, under Order 26 rule 9 of the Code, where the Court believes a local investigation to be requisite or necessary for the purpose of elucidating of any matter in dispute or ascertaining damages etc., it may issue a commission to a person directing him to make such investigation and to report back thereon the Court. Under rule 10(1) of the Order, after such investigation, the Commissioner shall return all such evidence he collected together with his report duly signed by him. Under rule 10(2) of the Order, the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record.

Investigation however requires examination and discovery of all facts and circumstances about any fact in issue in order to obtain the truth. Investigation leads a commissioner to go beyond what he sees on the spot and to find out the truth on behalf of the Court by collecting evidence and examination of witnesses, which from its peculiar nature can be best had from the spot. Such evidence enables the Court understand or assesses the fact in issue or which clarifies or explains any point. But the court cannot direct such commissioner to decide any issue, which ought to be decided by Court on evidence. Assistance of the Commissioner is necessary to elucidate any ambiguous or cryptic point, which cannot be clarified by direct evidence in Court. On the other hand a person authorised under rule 7 of Order 39 of the Code has got no power to collect such evidence. He will get to the spot to examine the subject matter of suit or to do anything in respect of such subject matter as the Court directs him to do and inform back to the Court. In directing an inspection the Court must keep this distinction in mind, and it must not extend the scope of inspection to that of local investigation.

Now, turning to the facts of the case at hand, we find that in the application for an order of inspection the plaintiff stated that on 14.08.2001 the defendants entered into the land of 'kha' schedule by breaking the 539 feet eastern wall, and in the interest of justice, a report by inspection was sought for.

By making the application under rule 7 of order 39 of the Code, the plaintiff sought for inspection to ascertain whether or not there was any wall on the eastern boundary of 'Kha'- schedule and any/or such wall broken down; or whether or not, the defendants, constructed any pillars on 'Kha'- schedule land of the plaintiff, and if they did, then, what are the present age or dimensions of such pillars. In view of the provisions of rule 7 of order 39 of the Code, the Court, cannot order an inspection to ascertain the facts, since finding out the truth as to the facts would require the person to be appointed to collect evidence and examine witness. It should not escape the notice that all such facts had to be ascertained with reference to 14.08.2001 only, the alleged date of incidence. There may however be a valid order for inspection of the present position of the suit land, but such inspection would not serve any useful purpose for determination of the alleged violation on 14.08.2001 of the injunction order dated 08-08-2001.

Learned Joint District Judge fell in serious error in allowing the prayer on the view, whether or not there was violation of the injunction order was determinable by commission. Whether or not there was any violation of the ad-interim order of injunction dated 08.08.2001 and/or whether or not the defendants on 14.08.2001 violated the injunction order are the pertinent issues to be determined by the Court itself in the proceeding against violation of Miscellaneous Case No 26 of 2001. The Court cannot delegate its power to any person. In the proceeding pending against violation of an order of injunction under rule 2(3) of Order 39 of the Code, the plaintiff would have ample opportunity to prove his case of violation by evidence.

In total misconception of the law and without applying his judicial mind to the facts and circumstances of the case and the law learned Joint District Judge allowed the prayer of the plaintiff and appointed a commissioner. The learned Joint District Judge acted illegally in ordering inspection in the case by impugned order, which has no doubt resulted in failure of justice.

Decision

The Rule is made absolute, however, without any order as to costs. The impugned order dated 08.10.2001 ordering inspection is hereby set aside. Order of stay granted at the time of issue of the Rule on 11.11.2001 is recalled and vacated. The learned Joint District Judge is directed to proceed expeditiously with the proceedings pending before him.

Mr Ajmalul Hossain with Mr Amrul Islam Mandal, Advocates for the petitioners. Mr Mohammed Habibullah, Advocate for the opposite party.

READER'S queries

Your Advocate



Your advocate is **Mr. Probir Neogi** of the Supreme Court of Bangladesh. His professional interests include civil law, constitutional law and banking law. Send your legal and human rights queries to the Law Desk, The Daily Star. A panel of lawyers will address your prob-

Q: I have some agricultural land at Rupganj in Narayanganj district. Recently, I went to the local Tahsil Office to pay yearly rent (khajna). But they informed they are unable to accept land rent under S.A. Record and I should record my lands under R.S. Record (Bangladesh) for payment of land rent. Accordingly, I submitted necessary documents to record my name in R.S. Porcha. To my utter surprise they informed, two plots of land cannot be recorded in my name because they have been declared vested. I do not understand why these two plots cannot be recorded in my name under R.S. Records when I have been paying rent for these plots under S.A. Records for so many years and, moreover, the Vested Property Act was repealed by the last Awami Government. Subsequently, I studied the via documents thoroughly and discovered that on the top of the Document it was written "Released by the Section Officer, S.G.A. Dept. Dhaka vide Memo dated 12.06.1970". It seems the property was declared Enemy Property which was released on the above date and subsequently sold to a local Muslim. And I purchased the property from him in 1987. Please advise what is S.G.A. Dept. and its current status and what administrative and legal recourse I can take to get my two plots of land registered in my name under R.S. Records.
S. M. Nurul Alam, 25, Rankin Street, Wari, Dhaka

Your Advocate: It is not clear what S.G.A. Department is. It appears from your letter that the property you purchased in 1987 was taken over by the government and enlisted as enemy property (thereafter termed as vested property). Subsequently, by a memo dated 12.06.1970 the property was released. Without examining the records of the concerned enemy property case and the purchase documents of you and your vendor it is difficult to render a specific opinion in detail. However, as it appears from your letter, it is advisable that after consulting a competent civil lawyer with all the relevant papers, you may go for a civil suit seeking for declaration of your title in the land and a further declaration that R.S. Records prepared in the name of the government in respect of the land in question is wrong, illegal and not binding upon the plaintiff and also for a direction upon the relevant authority to correct the R.S. Records.

LAW news

Claims against the British Geological Survey for Arsenic Poisoning

BLAST

A writ has been filed in the High Court in England on behalf of Mr. Binod Sutradhar against the Government Department in charge of the British Geological Survey (BGS); (the Natural Environment Research Council), for damages for the injuries sustained as a result of the BGS's failure to test for arsenic in 1992.

At this stage the claim has been issued at the High Court in London on behalf of one claimant who is representative of most of the issues that will be raised.

A formal response from the defendants' solicitors by mid October is expected. Should the defendants proceed by way of an application to strike out, the court hearing will take place in March/April 2003. The hearing, although not a full trial, will be very decisive. In case of failure of the application to strike out, the whole case will most likely be brought to a complete close. In case of win full trial will be continued, which will most likely take place in early 2005 unless the defendants seek an early settlement of the case. Expert opinion disputing all the scientific points that the defendants will raise has been obtained and success of striking out of the claim is very likely.

Facts of the Case

Mr. Binod Sutradhar was born in 1958. He has resided in the village of Ramrail in the Sutradhar Bari in the thana of Brahmanbaria Sadar in the Brahmanbaria region of Bangladesh. Prior to 1986, Mr. Sutradhar drank pond water which was not contaminated with arsenic. During the period of 1986 to 1999, Mr. Sutradhar drank ground water (at an average of approximately 3 litres per day) from a tube well situated in his village which was contaminated (the level of arsenic in the tube well, when tested in December 2001, was found to be much higher than recommended safety level) with arsenic. Mr. Sutradhar has since diagnosed with arsenicosis and has developed ulcers, burns and has much more vulnerable to skin cancer and other forms of cancer. Mr. Binod's case is illustrative of most of the issues that will be raised. Therefore, at this stage his case will be representative of all the other claimants (near about 400). However, we anticipate issuing more claims as the case progresses.

Summary of the claim

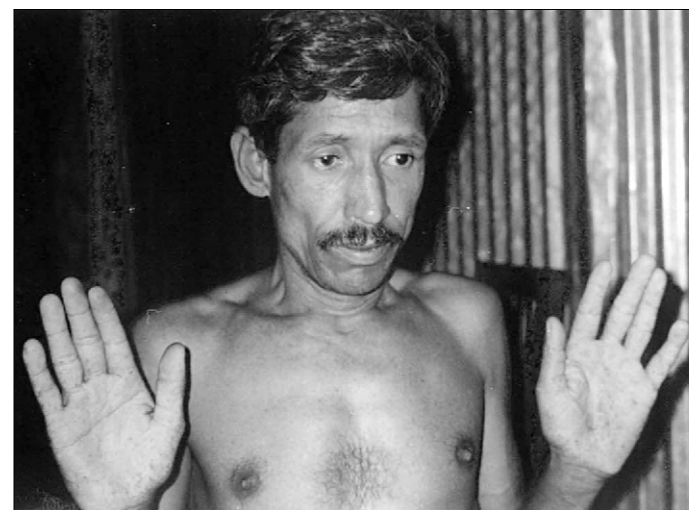
The claimant seeks damages for his personal injuries consequent upon the negligence of the defendant through one of its departments, the British

LAW quotations

"Nature's law says that the strong must prevent the weak from living, but only in a newspaper article or textbook can this be packaged into a comprehensible thought. In the soup of everyday life, in the mixture of minutia from which human relations are woven, it is not a law. It is a logical incongruity when both strong and weak fall victim to their mutual relations, unconsciously subservient to some unknown guiding power that stands outside of life, irrelevant to man."

Anton Pavlovich Chekhov (1860-1904), Russian author, playwright.

"The law will never make a man free; it is men who have got to make the law free."
Henry David Thoreau (1817-1862), U.S. philosopher, author, naturalist.



Mr. Binod Sutradhar, a victim of arsenic contamination and petitioner of the writ

Geological Survey (the BGS), relating to the execution of work leading to preparation of a report on groundwater quality undertaken in 1992 in the Brahmanbaria region of Bangladesh.

Costs and damages

It is clear that the great majority of those passing through the medical filter have melanosis and keratosis. The level of damage resulting from these symptoms is on the lower level of the severity bracket, which means that the likely award will be around £5,000 - £20,000 depending on the degree of illness.

Bangladesh Legal Aid and Services Trust (BLAST), last year, undertook an action programme for realising compensation for the victims (totaling four hundred) of arsenicosis in collaboration with two U.K. based law firms.

LAWSCAPE

NASA was interviewing some Bangladeshi professionals to be sent to Mars. Only one could go -- and couldn't return to Earth.

The first applicant, an engineer, was asked how much he wanted to be paid for going. "One crore Taka" he answered, "because I want to donate it to BUET."

The next applicant, a doctor, was asked the same question. He asked for Tk. two crore. "I want to give one crore to my family," he explained, "and leave the other crore for the advancement of medical research." The last applicant was a lawyer. When asked how much money he wanted, he whispered in the interviewer's ear, "Three crore Taka." "Why so much more than the others?" asked the interviewer. The lawyer replied, "If you give me Tk. 3 crore, I'll give you Tk. 1 crore, I'll keep Tk. 1 crore, and we'll send the engineer to Mars."

LAW week



Special Tribunal for five offences

The government is going to establish special tribunal for the trial of five offences including murder, rape, keeping of illegal arms, cases relating to bomb blast, hoarding and drug trafficking. President Iajuddin Ahmed has promulgated an Ordinance named "Special Tribunal for Speedy Trial Ordinance" on 24 October. Normal procedures of the criminal court will also continue. The tribunal will not be able to take cognizance of any case without prior approval of the government, according to the Ordinance. Even the police official or the magistrate will not be able to send any case to the tribunal without government's order. After submission of chargesheet government will publish selected list of cases in official gazette. Only such cases will be tried by the tribunal. The government will decide the jurisdiction of the tribunal. At the first instance the government is planning to set up 6 tribunals in the divisional cities which will be increased up to 19 later on. According to the Ordinance the District and Sessions judges and the judges of equal footing will be appointed as judge of the tribunal. Retired judges will also be considered for appointment to the tribunal. The judges of the tribunal will be appointed by the president. The tribunal must dispose of a case within 135 days. The court will initially have 90 days trial period, which may be extended first by 30 days and then by 15 days with the permission of the Higher Court. On expiry of the stipulated period a case would be sent back to the court from where it was shifted. The judge of the tribunal must explain the reasons of failure to dispose of the case in the stipulated time. According to the ordinance a convict may prefer an appeal against the verdict of the tribunal within 30 days of its pronouncement. Time for investigation is fixed for 30 days and if within this time the investigation is not completed additional 15 days will be given with the permission of the superior authority. Unlike the normal courts, the special tribunals would accept visual evidence. However, the Ordinance does not contain any penal provision. Conviction of the criminals will be determined under the Penal Code and the case will be conducted under the Code of Criminal Procedure 1908, according to the Ordinance. -Law desk

Army violating the constitutional rights!

The Army, deployed by the government to recover illegal arms and arrest the notorious criminals under the Code of Criminal Procedure (CrPC), are allegedly not following the law. It is also alleged that the army operation is not compatible with the constitutional provisions. The Army were called in reportedly under section 129, 130 and 131 of the CrPC. According to these sections the magistrate or the Metropolitan Police Commissioner may seek help of Army to maintain law and order. But it was seen that the Army are violating the provisions of the said law. Though it is claimed that the Army have been called in for joint operation, it is seen that the operation is being conducted by the Army alone. It is alleged that the Army do not produce the arrested persons before the court within 24 hours. But according to Article 33(2) of the Constitution the arrested person must be produced before the magistrate within 24 hours of his arrest, which is one of the fundamental rights guaranteed by the Constitution. -Bhorer Kagoj, 20 October.

Programme to dissuade early marriage

Two non-governmental organisations named STAR and PIACT have taken some commendable initiatives to discourage the early marriage in the districts of Manikganj, Rajbari, Pabna, Sirajganj and Rajshahi. STAR has confined their activities in Rajbari, Pabna and Sirajganj district while Rajshahi has been selected by PIACT. Both the NGOs have chalked out their programmes including data collection on child marriage, rallies, songs, staging drama and distribution of leaflets to give motivation among people against the early marriage. A survey report of the STAR revealed that 50% girls who are married in these districts are below 18 years of age. The report has identified the vulnerable economy of the char area in the four districts as the reason behind the early marriage. -The Independent, 19 October.

Telephone hampering hearings

Telephone at the chamber of judges of the lower court are hampering hearing of cases. It was alleged that the judges used to come back to their chambers stopping the hearing when the phone rang. This creates confusion among the lawyers as well as the common people about the judges' neutrality from political pressure. According to Article 116 of the Constitution the judges will be independent while conducting cases. But they seldom enjoy the freedom. They often do their job according to the direction of the executive authority. According to the report of the Transparency International our lower courts are indulged in corruption. The lawyers alleged that at the time of hearing of the case the judges often went to their chambers twice or thrice to receive phone calls. -Ittefaq, 17 October.

Suggestion made to amend Act

An inter-ministerial meeting suggested amendment to the Repression on Women and Child Repression Act in order to quick disposal of cases. The meeting was organised by the Ministry of Women and Child Affairs. The suggestion included the increase of number of courts and build up awareness about law on suppression. In the present law the victim has to wait for permission of police for medical examination and for this delay evidence of violation generally disappears. The meeting also suggested the inclusion of lessons of the two laws in the BCS courses. -Bangladesh Today, 20 October.

Law and order deteriorating in N-districts

The law and order situation of the northern districts is still deteriorating despite the various preventive steps taken by the government. Dacoity, looting, terrorist attacks, intimidation are still continuing. At least 450 persons were allegedly killed during the last 6 months and 10 days in this region. The local people professed that law enforcers did not arrest the terrorists and anti social elements. -Bangladesh Today, 17 October.

EC reschedules UP polls

The Election Commission has brought changes in the schedule for holding election of the union parishad. Earlier the commission scheduled holding of the election of this local government from January 11 to February 7 next year. Now the election will be held from January 11 to February 28 instead of the date mentioned above. The commission extended the duration on the backdrop of the deteriorated law and order situation. The decision came on a meeting chaired by the Chief Election Commissioner on 16 October. The commission argued that if the polls were held in limited number of union parishads in a day the home ministry would be able to deploy adequate force to maintain law and order. In 1997 the election of the union parishad was held throughout the country for 16 days. -Financial Express, 17 October.

Migrated women forced to prostitution

Most of the women migrated to the Middle East or to India for jobs were forced to prostitution. They were migrated as the domestic maids and many of their masters actually used them as a source of income by employing them as sex workers. This is revealed by a research conducted by the Action against Sexual Exploitation of Children (ATSEC). ATSEC carried out the research for 18 months and interviewed 496 women after they had returned to Bangladesh between October 1999 to 2001. About 208 had gone to the Middle East, 70 to Kolkata, 190 to Mumbai or Uttar Pradesh and 28 to Malaysia. They also interviewed traffickers, manpower agents, local leaders and family members of the women. It is found in the research that 82.2% of the women were promised jobs as domestic help, the rest went to work as cleaners in school and hospitals. But the reality is that majority of them were forcefully employed into prostitution. Moreover 6% admitted that sex works was their only occupation. As their family provided them money to go abroad they remain obligated and could not come back empty handed. This is why the women sold their bodies and when they came back they did not disclose it to anyone. -The Daily Star, 21 October.

Corresponding Law Desk

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