

District: Gazipur

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Present

Justice Sardar Md. Rashed Jahangir

Civil Revision No. 2738 of 2015

In the matter of :

Mohammad Ali

... Petitioner

-Versus-

Samorto Banu and others

... Opposite parties

Ms. Jobaida Pervin, Advocate

... For the petitioner

Mr. Ashim Kumar Mallik, Advocate

... For the opposite parties

Heard and Judgment on: 08.01.2024

Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 22.04.2015 passed by the Joint District Judge, First Court, Gazipur in Title Appeal No.66 of 2011 rejecting the application filed under Order XXIII rule 1(2) read with section 107(2) of the Code of Civil Procedure on behalf of plaintiff-appellant for withdrawal of the suit as well as the appeal with permission to sue a fresh should not be set aside.

The present petitioner as plaintiff filed Title Suit No.962 of 2008 before the Court of Assistant Judge, Kapashia, Gazipur for a declaration that the deed of Nadabinama being No.7715 dated 31.08.1987 of Sreepur Sub-register office is collusive, fraudulent, void and not binding upon the plaintiff. After hearing learned

Assistant Judge on 02.11.2010 by his judgment and decree dismissed the suit on contest against defendant Nos.1-6; against which plaintiff took Title Appeal No.66 of 2011 before the District Judge, Gazipur and subsequently, the appeal was transferred to the Joint District Judge, First Court, Gazipur for hearing. Before the said Court, plaintiff-appellant filed an application under Order XXIII, rule 1(2) read with section 107(2) of the Code of Civil Procedure for withdrawal of the original suit as well as appeal with permission to sue a fresh, contending inter-alia that due to inadvertence and bonafide mistake the substantive suit was filed with some formal defect, i.e. the suit ought to have been filed for partition together with other consequential and incidental reliefs, since the defendants and plaintiff are in joint possession on some of the portion of the suit land and some necessary and relevant statements and facts regarding the chain of title of the plaintiff could not be incorporated in the plaint of Title Suit No.962 of 2008.

Learned Joint District Judge, First Court, Gazipur by his order dated 22.04.2015 rejected the application by merely a non-speaking order holding that the plaintiff in the mean time filed Title Suit No.08 of 2014 before the Court of Assistant Judge regarding the suit property.

Challenging the said order dated 22.04.2015, plaintiff preferred this revisional application and obtained the present Rule together with an interim order, staying operation of the impugned order of learned

Joint District Judge dated 22.04.2015 passed in Title Appeal No.66 of 2011.

Ms. Jobaida Pervin, learned Advocate appearing for the petitioner submits that the Court of appeal below committed error of law resulting in an error in the decision in rejecting the application filed under order XXIII, rule 1(2) of the Code of Civil Procedure for withdrawal of the suit as well as appeal as a whole. She next submits that the principle is well settled that withdrawal of a suit by necessary implication blots out the effect of the judgment and decree, prior to withdrawal, but learned Joint District Judge committed an error of law in dismissing the appeal treating the same for non-prosecuted but rejecting the application and refusing to setting aside the judgment and decree dated 02.11.2010 passed in Title Suit No. 962 of 2008. She further submits that learned Joint District Judge failed to appreciate that the Title Suit No.08 of 2014 has been filed challenging 03(three) specific registered deeds which are not subject matter of the present suit; thus, the subject matter and cause of action of the said suit is altogether different from the present one. As such, filing of Title Suit No.08 of 2014 shall not serve the purpose of filing the present suit a fresh. In support of the arguments she cited the judgments of the case of Abdur Rahman and others -Vs- Kheru Malitha and others reported in 50DLR(AD)71; the case of A.Z.M. Khalilur Rahman -Vs- Md. Syed Hossain and others reported in 25DLR 485 and case of Mustafa

Kabir Uddin Ahmed -Vs- Badrun Nessa Chowdhury reported in 54DLR416 and in view of above prays for making the Rule absolute.

On the other hand, Mr. Ashim Kumar Mallik, learned Advocate for the opposite party Nos.2-6 contesting the Rule by filing a counter affidavit, contending that the Court of Joint District Judge rightly rejected the application filed under Order XXIII rule 1(2) of the Code of Civil Procedure, because it was filed as a device to harass the opposite parties by impleading them again as defendants as one of the several suits. He next submits that the suit of the plaintiff was dismissed in the trial Court holding that the defendants have right, title and possession over the suit land and the plaintiff failed to prove his exclusive title and possession over the suit land. Thus, his suit is hit by section 42 of the Specific Relief Act. He further submits that during pendency of the instant civil revisional application on 17.05.2017, the plaintiff filed Title Suit No. 145 of 2017 before the Senior Assistant Judge, Second Court, Gazipur for partition, impleading the present opposite parties as defendants and all the aforesaid steps of the plaintiff proved that he has clear intention to harass the defendants by filing several suits and in view of the above, he prays for discharging the Rule with cost.

Heard learned Advocate for both the parties, perused the revisional application together with the annexures and the counter affidavit filed by the opposite parties; having gone through the cited judgments and relevant provisions of law.

It appears that the present petitioner being plaintiff filed Title Suit No.962 of 2008 for a declaration that the Nadabinama deed being No.7715 dated 31.08.1987 of Sreepur Sub-register office is collusive, fraudulent and not binding upon the plaintiff. The said suit was dismissed on contest by the judgment and decree dated 02.11.2010 of Assistant Judge, Kapashia, Gazipur.

Challenging which plaintiff took Title Appeal No. 66 of 2011 before the District Judge, Gazipur and the same was transferred to the Court of First Joint District Judge, Gazipur for hearing. Before the said Court plaintiff-appellant filed an application under Order XXIII rule 1(2) read with section 107(2) of the Code of Civil Procedure praying for withdrawal of the appeal as well as the original suit with permission to sue a fresh, contending that the original suit, the Title Suit No.962 of 2008 has been filed with some formal defect, i.e. the plaintiff ought to have filed the suit for partition together with other consequential reliefs, since the defendants are in joint possession with the plaintiff in the suit jote. The next contention of the application was that the chain of title of plaintiff has not been properly incorporated by the way of assertion of the plaint of the said suit and during pendency of the suit the plaintiff has been dispossessed by the defendants, but the said facts could not be incorporated by way of amendment of the plaint of the said suit.

Learned Joint District Judge of First Court, Gazipur after hearing the application as well as both the parties by its order dated

22.08.2015 rejected the same, noting dismissal of the appeal for non-prosecution, upholding the judgment and decree dated 02.11.2010 passed by the Assistant Judge, Third Court, Gazipur in Title Suit No.962 of 2008.

I have examined the plaint of Title Suit No. 8 of 2014, annexed as Annexure-‘D’ to the revisional application, it transpires that the said suit has been filed challenging the legality and propriety of 03(three) registered deeds, which in no manner creates bar to withdraw or permit to withdraw the suit with a further permission to sue a fresh or in other words cannot be a ground to reject the application filed under Order XXIII Rule 1(2) of the Code of Civil Procedure. Learned Joint District Judge also failed to consider that the Code provides almost an unqualified right to the plaintiff to withdraw from his suit at any time and the withdrawal of such suit also by necessary implication blots out the effect of the judgment and decree passed prior to filing of the application for withdrawal of the suit.

For dealing with the principle to accord permission for withdrawal of a suit together with permission to sue a fresh, it would be just to examine the relevant provisions first, i.e. the provision of Order XXIII rule 1, which is reproduced herein below:

“1.(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.”

(2) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule(2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject- matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.”

From a plain reading, it appears that sub-rule (2) of rule 1 contemplated that permission can be granted subject to the satisfaction

of the Court that the suit must fail for some formal defects and or for other sufficient grounds and if it is found that there is such formal defect or sufficient ground to allow the plaintiff to withdraw from his suit. The Court has no option but to permit him and in the present case the contention of the plaintiff is that without prayer of partition the present suit is not at all maintainable, since the defendants are in joint possession with the plaintiff.

In the case of Nakimuddin Sana -Vs- Sonallah Biswas, reported in 5DLR89(Dacca), it was held that:

“When such an application is filed the first thing that the Court has to decide is whether there is any formal defect or sufficient ground for which the withdrawal should be allowed. If there is no such defect or sufficient ground the clear duty of the Court is to dismiss the application. If on the other hand, there is such formal defect or sufficient ground, and the Court gives the permission to withdraw, it must give the permission to institute a fresh suit on the same cause of action on such terms as in the circumstances of the case he thinks fit. The sole ground for giving permission to withdraw under Clause 2 of Order 23 rule 1 is ‘formal defect’ or sufficient ground’ and the plaintiff’s sole object in seeking permission to

withdraw under this clause is to institute a fresh suit.”

If a suit as well as the appeal is allowed to be withdrawn, the plaintiff must put such a position that he would have not at all filed the suit in question and which also reflected in the language of our Apex Court employed in the judgment of the case Abdur Rahman and others -Vs- Kheru Malitha, reported in 50DLR(AD)71 holding that-

“the withdrawal of a suit by necessary implication blots out the effect of the judgment and decree prior to withdrawal.”

From the discussions made in above, it can safely be held that the plaintiff-appellant is entitled to withdraw from his suit under the provision of Order XXIII rule 1, together with an order setting aside the judgment and decree dated 02.11.2010 passed by the Assistant Judge, Kapashia (Third Court), Gazipur in Title Suit No. 962 of 2008.

And under the present facts and circumstances, since the plaintiff already filed Title Suit No. 145 of 2017 before the Senior Assistant Judge, Second Court, Gazipur for partition of ejmali property, impleading the present opposite parties as defendants (the suit has been renumbered as Title Suit No. 188 of 2021); thus, it is not necessary to accord further permission to the plaintiff to institute a partition suit again for the self same claim.

In the premise above, this Court is of the view that the application of the plaintiff-appellant-petitioner is entitled to be allowed without permission to sue a fresh, since the plaintiff already filed a partition suit being No. 145 of 2017.

Consequently the judgment and order of Joint District Judge dated 22.04.2015 passed in Title Appeal No.66 of 2011 is hereby set aside. The application dated 22.04.2015 under Order XXIII rule 1(2) read with section 107(2) of the Code of Civil Procedure is hereby allowed in the manner as has been discussed in above and the judgment and decree dated 02.11.2010 passed by the Assistant Judge, Third Court (Kapashia), Gazipur in Title Suit No.962 of 2008 is hereby set-aside.

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

The trial Court is directed to hear and dispose of the Title Suit No.188 of 2021 as expeditiously as possible.

Communicate the judgment and order at once.