Bench:
Mr. Justice Md. Ruhul Quddus

and

Mr. Justice Kazi Ebadoth Hossain

First Appeal No. 66 of 2011

Md. Abdur Razzaque and twelve others
... Appellants
-Versus-
Md. Kabir Hossain and two others
... Respondents

Mr. Md. Ahia with Syed Bashir Hossain Chowdhury, Advocates
...for the appellants

Mr. Tawhidul Islam with Ms. Monera Haque Mone, Advocates
...for respondents No.1- 2

Judgment on 11.03.2020

Md. Ruhul Quddus, J:

This first appeal at the instance of the plaintiffs is directed against judgment and decree dated 20.10.2010 (decree signed on 26.10.2010) passed by the Joint District Judge, Additional Court, Gazipur in Title Suit No. 260 of 2007 dismissing the suit.

In course of hearing of the appeal, the plaintiff-appellants filed an application under Order XXIII, rule 1 read with section 151 of the Code of Civil Procedure for withdrawal from suit and allowing them to file an application under order IX, rule 9 (1) of the Code in an earlier suit being Title Suit No.161 of 2001 which

was instituted on the same cause of action and was dismissed for default. The said application was kept in record to be decided with the appeal. We also take up the application for disposal.

The plaintiffs instituted Title Suit No. 260 of 2007 for declaration that the judgment and decree dated 28.02.1999 passed in Title Suit 112 of 1998 by the Joint District Judge, First Court, Gazipur was collusive, illegal, fraudulently obtained and not binding upon the plaintiffs.

The said Title Suit No. 112 of 1998 was a suit for specific performance of contract instituted by defendant No.1 Md. Kabir Hossain against plaintiff No.1 Md. Abdur Razzak, which was decreed on compromise.

Plaintiffs' case in brief is that that the plaintiff Abdur Razzak purchased 262 decimals of land from one Sona Mian by two registered sale deeds both dated 03.02.1960. His name was duly recorded in RS Khatian. Said Abdur Razzak, his sons and daughters were living there by erecting six dwelling houses. He executed and registered a power of attorney on 13.06.1995 in favour of his daughter-in-law Momtaz Begum (defendant No.2) in respect of 48½ decimals of land for the purpose of taking loan from bank and establish a poultry farm, but Momtaz Begum in collusion with the deed writer got 148½ decimals written thereon. Abdur Razzak was an illiterate person and after drafting the power of attorney, its content was not read over to him. However, after

he came to know about the fraud practice, revoked her power by another registered deed of revocation dated 21.07.1997 and informed her about the revocation on 15.08.1997 through his learned Advocate.

The defendant Kabir Hossain came to the suit area on 16.07.2001 and disclosed that he had got a decree from Court in respect of 148½ decimals of land and declared to take over possession thereof. On enquiry, the plaintiff came to know that said Kabir Hossain in collusion with Momtaz Begum got a compromise decree in Title Suit No.112 of 1998 from the First Court of Joint District Judge, Gazipur, where she had signed the *solenama* on his (Abdur Razzak's) behalf.

It was further pleaded that earlier Abdur Razzak instituted Title Suit No. 161 of 2001 on the selfsame subject matter against the same set of defendants, which was dismissed for default on 21.01.2003. He was intending to file an application for restoration of the suit on setting aside the dismissal, but on enquiry came to know that the record of the suit was destroyed. In that situation, he was not in a position to file any application for restoration of the suit, record of which was already destroyed. Under the circumstances, he was constrained to institute the present suit afresh.

Meanwhile plaintiff No.1 by a registered *heba* deed dated 15.07.2007 transferred the suit land measuring 149 decimals to

plaintiffs No.2-13 and handed over the possession in favour of them.

Defendants No.1 and 2 entered appearance and contested the present suit by filing a joint written statement denying the material allegations of the plaint and claiming that defendant No.1 Kabir Hossain entered into a registered agreement for sale with defendant No. 2 Momtaz Begum, who was the lawful attorney of plaintiff No.1 Abdur Razzak. In the event of her failure in registering a sale deed, Kabir Hossain instituted Title Suit No. 112 of 1998 for specific performance of contract and ultimately got decree on compromise. On the same cause of action, Abdur Razzak had instituted Title Suit No.161 of 2001 where he (Kabir Hossain) appeared and filed written statement. The said suit was ultimately dismissed for default, against which the plaintiffs did not take any steps and as such they are precluded from bringing any fresh suit on the selfsame subject matter.

On the above pleadings the trial Court framed issues: (1) whether the suit was maintainable, (2) whether it was barred by limitation, (3) whether the plaintiffs had title and possession over the suit land, (4) whether the impugned judgment and decree passed in Title Suit No. 112 of 1998 was obtained fraudulently and (5) what other reliefs the plaintiffs were entitled to.

The parties adduced evidence both oral and documentary in support of their respective cases. However, we need not discuss

the evidence in details as the appellants do not press the appeal on merit, but the application for withdrawal from suit.

Learned trial Judge, on conclusion of trial, decided issues No. 3 and 4 in favour of the plaintiffs, but issues No. 1-2 and 5 against them and as a result the suit was dismissed.

The main reason of dismissal of the suit was that Title Suit No. 161 of 2001 between the same parties on the same cause of action was dismissed for default earlier by order dated 21.01.2003 of the First Court of Joint District Judge, Gazipur. The plaintiffs without restoring that suit instituted the present suit afresh, which was barred by Order IX, rule 9 (1) of the Code. This conclusion was based on the decree of dismissal dated 21.01.2003 passed in Title Suit No. 161 of 2001 (vide exhibit-Gha proved by the defendants). The plaintiffs stated this fact in the plaint of the present suit and PW 1 in his deposition affirmed the said statement.

Mr. Md. Ahia, learned Advocate for the appellants submits that PW 1 in his evidence stated about dismissal of the earlier suit and destruction of its record in a hurry, which prevented him from filing application for restoration of the earlier suit and compelled to institute the present suit. Learned Advocate produces an information slip showing that the record of Title Suit No. 161 of 2001 was really destroyed. Mr. Tawhidul Islam, learned Advocate

for the respondent does not challenge the authenticity of the said information slip.

Mr. Ahia on placing the application for withdrawal from suit submits that a serious fraud was committed in obtaining the compromise decree in the first suit for specific performance of contract and the plaintiffs' homestead was taken away by that fraud practice. As soon as plaintiff No. 1 came to know about the so-called compromise decree, he instituted Title Suit No. 161 of 2001 praying relief against the same. But his learned Advocate joined with the defendants and did not inform him the date of hearing of the suit. As a result he could not remain present before the Court when the suit was called on for hearing and was dismissed for default. It was surprising that immediately after the dismissal order was passed, the record was destroyed without following the time-frame given in the Civil Rules and Order. After he came to know about the dismissal order, the plaintiff became puzzled and instituted the present suit under wrong advice of their learned Advocate.

Mr. Ahia concedes that the ground of dismissal of the present suit is based on law, but he submits that under the peculiar and uncommon circumstances, law should not be so mechanical to throw the plaintiffs out of remedy and make them totally non-suited. Order XXIII, rule 1 (2) of the Code provides a scope of withdrawal from suit with permission to sue afresh. The scheme

and purpose of the law is that a litigant if chooses a wrong forum, he should not be simply thrown out for that mistake and should get an opportunity to address his grievance in a proper forum. Mr. Ahia then refers to the cases of *Abdur Rahman and others vs Kheru Malitha and others*, 50 DLR (AD) 71 and *A Z M Khalilur Rahman vs Md. Syed Hossain and others*, 25 DLR, 485 and submits that in those cases suit was allowed to be withdrawn at appellate stage. In a case like the present one, the plaintiffs can withdraw from the suit with a permission to prosecute his previous suit, and they have already been advised to file an application for reconstruction of the record of the suit and file an application under Order IX, rule 9 (1) of the Code with an application for condonation of delay for setting aside the dismissal order and restore the suit.

Mr. Towhidul Islam, learned Advocate appearing for the respondents does not controvert the legal submission of Mr. Ahia. Mr. Islam, however, submits that if the application for withdrawal from the suit is accepted, the impugned judgment and order should be recalled as a whole so that no factual inference can be drawn against the defendant in defending his case in the earlier suit, if restored.

We have considered the submissions of the learned Advocates of both the sides and gone through the decisions cited. Although the decisions cited by Mr. Ahia do not exactly match the

case in hand, it has been settled there that a suit can be withdrawn at appellate stage with a permission to sue afresh on setting aside the impugned decree. Order XXIII, rule 1 of the Code speaks of withdrawal from suit with a permission to sue afresh. In the present case, the prayer of the appellants is not exactly to sue afresh, but to file an application for restoration of another suit which was instituted earlier on the same cause of action by the original owner Abdur Razzak (plaintiff No.1) and was dismissed for default in his absence. The plaintiffs stated that the record of the suit was destroyed and as such plaintiff No.1 was not in a position to file any application for restoration of the suit, record of which was already destroyed. Under the situation he was constrained to bring this suit afresh. The facts of institution of the earlier suit and its dismissal for default are also admitted by the defendants. Despite finding of valid title and adjudication of two issues in their favour, the plaintiffs have been simply thrown out because of the precluding clause of Order IX rule 9 (1) of the Code. The scheme of Order XXIII, rule 1 of the Code is that a litigant if chooses a wrong forum, he should not be made non-suited only for that mistake without giving any opportunity to address his grievance in a proper forum while section 151 thereof says that the Court has inherent power to pass any order to meet the ends of justice or to prevent abuse of the process of Court. It lengthens the hands of the Court to do justice when there is no other specific remedy open to an aggrieved party.

It has already been stated that Title Suit No. 161 of 2001 filed by plaintiff No.1 was dismissed for default and thereafter the record of the suit was destroyed, and the plaintiff could not file any application for restoration of the same and was wrongly advised to bring a suit afresh on the same cause of action. On trial two important issues including their title over the suit land were decided in favour of the plaintiffs, but ultimately the suit was dismissed because of the precluding clause of Order IX, rule 9 (1) of the Code. Under the peculiar and uncommon circumstances, we are of the view that section 151 of the Code would come into play and the plaintiff-appellants would be allowed to withdraw from the suit to prosecute the earlier suit instituted on the same cause of action, which was dismissed for default.

According to section 107 (2) of the Code, the appellate Court shall have the same power and shall perform as nearly as may be the same duties of the Courts of original jurisdiction. If an application for withdrawal from suit is allowed by the appellate Court, the impugned judgment and decree cannot stand alone and becomes useless. In that view of the matter, it would be convenient if the impugned judgment and decree is recalled, which the trial Court can do in an appropriate case.

Accordingly, the impugned judgment and decree is recalled as a whole and the application for withdrawal from the suit is allowed so that the plaintiffs can file an application under Order

IX, rule 9(1) of the Code for restoration of Title Suit No. 161 of 2001 on reconstruction of record.

If the plaintiff-appellants, on reconstruction of the record, file an application for restoration of the suit as a follow-up of this judgment, they would get benefit of section 14 of the Limitation Act in praying for condonation of delay in filing the application for setting aside the dismissal and restoration of the suit.

The first appeal is thus disposed of. Send down the lower Court's record.

Kazi Ebadoth Hossain, J:

I agree.