

5 SCOB [2015] HCD 37

High Court Division

Civil Revision No. 2592 of 2000

None appears

.. .. For the petitioners.

Mrs. Hurun Nahar after death of her heirs:

None appears

Md. Hasanur Rashid and others

.. .. For the opposite parties.

.. .. Petitioners.

The 26th of August, 2015

Versus

Mozammel Haque after death her heirs:

Mrs. Shamsun Nahar and others

.. .. Opposite parties.

Present:

Justice Krishna Debnath

Code of Civil Procedure, 1908

Order 23, Rule1:

During the course of pendency of original proceedings in the Trial Court, the Court may permit the plaintiff to withdraw the suit with liberty to file a fresh one, when there is a formal defect in the suit or for any other reason as provided, but such a right is not available to the plaintiff when there is already a judgment against him as aforesaid manner.

... (Para 9)

Judgment

Krishna Debnath:

1. This Rule under Section 115(1) of the Code of Civil Procedure was issued calling upon the opposite party Nos. 1(a) to 1(f) to show cause as to why the impugned orders dated 29.03.2000 and 09.04.2000 in Title Appeal No. 257 of 1997 passed by the Additional District Judge, 4th Court, Dhaka setting aside those of the Trial Court should not be set aside.

2. The facts relevant for the purpose of disposal of the Rule, in short, are that, plaintiff-appellant-opposite party filed a Title Suit No. 40 of 1994 in the Court of Assistant Judge, 3rd Court, Dhaka for partition. Plaintiff-appellant-opposite parties case, in short, is that Malik Dewan, Salim Dewan and Kalim Dewan in Savar District Dhaka Mouza No. 582 in C.S. Khatian No. 137 measuring area of 3.53 decimals of land mutually divided 3 shares and every sharer got 1.22 decimals of land. Kadam Molla purchased 1.22 decimals of land from Malik Dewan. Kadam Molla died behind 2 sons namely Yaz Uddin Molla and Moyez Uddin. They became owner of 164 decimals by way of inheritance and nilam purchase in C.S. Dag No. 323. Moyez Uddin Molla died behind one son namely Madan Molla and 3 daughters Hamela, Amela and Baytunnesa. Thereafter Jahangir Nagar University

acquired 1.22 decimals of land and accordingly compensation money was received by Yaz Uddin Molla, Mone Molla and other share holders. Said Hamela, Amela and Baytunnesa did not receive compensation money and thereafter Baytunnesa and Hamela Khatun sold out .02 decimals of land to their sister Amela Khatun. The plaintiff-appellant-opposite party purchased .01 decimals of land from Baytunnesa and $.04\frac{1}{2}$ decimals land from Amela Khatun by exchange deed. Accordingly plaintiff-appellant-opposite party became owner of 05.5 decimals of land and they are possessing the same. But defendant-respondent-petitioner No. 14 on 07.06.1991 erecting home and boundary wall by bricks and planting vegetable in the suit land and also plaintiff-appellant-opposite party was dispossessed from her possession of 05.5 decimals of land and as such the cause of action raised on that date.

3. The case of the defendant-respondent-petitioners in short, is that the defendant No. 6 Madan Molla and defendant No. 5 Yamuddin Molla purchased 1.24 decimals of land from Hosain Uddin son of Pachu Mandal on 01.03.1955 by registered deed in C.S. Plot No. 323. Jahangir Nagar University acquired 1.22 decimals of land and accordingly Yamuddin and Madan Molla and other share holders received compensation money from Jahangir Nagar University. Thereafter defendant No. 11 Rahela Khatun purchased 3 decimals of land on 21.03.1983 by registered deed from Madan Molla and defendant No. 14 Hurun Nahar purchased the said 3 decimals of land by registered deed on 02.05.1991 from defendant No. 11 Rahela Khatun. Defendant No. 14 purchased 3.5 decimals of land from Madan Molla by registered deed on 02.05.1991 and accordingly the defendant No. 14 possessing 6.5 decimals of land. Plaintiff-appellant-opposite party without any legal claim and without any cause of action want to grab the suit land and filed this suit.

4. Learned Assistant Judge, 3rd Court, Dhaka after hearing both parties dismissed the suit. Plaintiff-appellant filed appeal before the learned District Judge and learned District Judge transferred this appeal for disposal to Additional District Judge, 4th Court, Dhaka. In this stage plaintiff-appellant filed an application under Order 23 Rule 1 of the Code of Civil Procedure on 29.03.2000 to withdraw the plaint. Learned Additional District Judge, 4th Court, Dhaka directed to withdraw the plaint. The plaintiff-appellant filed another application for amendment of the order dated 29.03.2000 before the Court of appeal under Section 152 of the Code of Civil Procedure to amend the order dated 29.03.2000 and accordingly the learned Additional District Judge, 4th Court, Dhaka allowed the same on 09.04.2000.

5. Being aggrieved thereby the defendant-respondent-petitioner moved this Court by filing a revisional application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

6. None appears.

7. I have perused the application filed by the defendant-respondent-petitioners and ground stated therein. It appears from record that plaintiff-appellant-opposite party filed a Partition Suit before the Assistant Judge, 3rd Court, Dhaka which was dismissed by the learned lower Court. The learned Court below in her judgment stated that “নালিশি সম্পত্তিতে বাদীপক্ষের মালিকানা অর্জিত হয়নি এবং নালিশি জায়গায় তার দখলও নেই সেহেতু বাদীপক্ষ প্রার্থীত মতে কোন ফাঁদািল ফঁহঁিল qLcjl eu z” The plaintiff appellant filed an appeal and subsequently they filed a petition under Order 23 Rule 1 to withdraw the suit with liberty to file afresh one. Learned Additional District Judge, 4th Court, Dhaka ordered to withdraw the suit on 29.03.2000 and subsequently on 09.04.2000 learned Court setting aside the judgment and

decree of the Assistant Judge, 3rd Court, Dhaka and further directed to return the plaint to the plaintiff-appellant-opposite party.

8. It appears from Order 23 that where the Court is satisfied that a suit must fail by reason of some formal defect, or that there are 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 such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

9. It is well settled that defects can be cured by filing a petition for amendment of the plaint. The discretion of the Court to allow withdrawal of suit with liberty to sue afresh has to be exercised judiciously. When such discretion is exercised properly there is nothing wrong in it, but in this case it appears from record that plaintiff-appellant-opposite party did not prove his title and possession in the suit land. It was decided by the lower Court that defendant-respondent-petitioner is the owner of suit land and they did not dispossess the plaintiff-appellant-opposite parties. In this case on the passing of the judgment and decree by the Trial Court, whereby the suit was dismissed, a vested right had accrued in the defendants. The said right could not be permitted to be taken away by the plaintiff. Neither any justification was offered by the plaintiff in the application seeking withdrawal of the suit nor the appellate authority has given any reason to justify the aforesaid ground of permission. During the course of pendency of original proceedings in the Trial Court, the Court may permit the plaintiff to withdraw the suit with liberty to file a fresh one, when there is a formal defect in the suit or for any other reason as provided, but such a right is not available to the plaintiff when there is already a judgment against him as aforesaid manner.

10. According to above discussion, I find that the learned Additional District Judge, 4th Court, Dhaka committed gross error and I find merit in this Rule and as such there is reason to make absolute the Rule.

11. In the result, the Rule is made absolute without any order as to cost. The impugned order passed on 29.03.2000 and 09.04.2000 in Title Appeal No. 257 of 1997 by the learned Additional District Judge, 4th Court, Dhaka are set aside.

12. The order of stay as granted at the time of the issuance of the Rule and extended subsequently is hereby vacated.

13. Communicate the judgment to the Court below.