

**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 26<sup>th</sup> 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, 4<sup>th</sup> 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, 3<sup>rd</sup> 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



decree of the Assistant Judge, 3<sup>rd</sup> 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, 4<sup>th</sup> 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, 4<sup>th</sup> 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.