

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.163 OF 1997**IN THE MATTER OF:**

Mr. Nazmul Afaq

..... Plaintiff-Petitioner.

-Versus-

Taher Uddin alias Abu Mia and others

..... Opposite Parties.

Mr. Syed Abdur Rahim, Advocate

..... For the petitioner.

Mr. Md. Zahedul Bari, Advocate

---- For the opposite parties.

The 31st October, 2024

MD. SALIM, J:

By this Rule, the opposite parties were called upon to show cause as to why the impugned judgment and decree dated 15.05.1996 passed by the learned Additional District Judge, 3rd Court, Kishoreganj in Other Appeal No.113 of 1994 allowing the appeal and reversing the judgment and decree dated 24.02.1994 passed by the learned Assistant Judge, Nikli, Kishoreganj in Partition Suit No.9 of 1992 decreeing the suit in part.

Facts in a nutshell for disposal of the Rule are that the plaintiffs-opposite parties filed Partition Suit No.9 of 1992 before the Assistant Judge, Nikli, Kishoreganj, for partition of

immovable properties described in the schedule of the plaint of the suit.

Defendants 5, 6, and 11-24 contested the suit by filing separate written statements denying the material allegations of the plaint.

The learned Assistant Judge, Nikli, Kishoreganj during the trial framed necessary issues.

Subsequently, the learned Assistant Judge, Nikli Kishoreganj, partly decreed the suit by the judgment and decree dated 03.03.1994.

Being aggrieved, the plaintiff and defendants filed separate appeals bearing Other Appeal No.109 of 1994 and Other Appeal No.113 of 1994, respectively, before the District Judge, Kishoreganj. Eventually, the learned Additional District Judge, 3rd Court, Kishoreganj, disallowed the plaintiff's appeal and allowed the defendant's appeal by the judgment and decree dated 15.05.1996 in reversing the judgment and decree passed by the trial court.

Being aggrieved, the plaintiffs as petitioners filed this Civil Revision application under Section 115 of the Code of Civil Procedure before this Court and obtained the instant Rule and order of status quo.

Mr. Syed Abdur Rahim, the learned Counsel appearing on behalf of the plaintiff-appellant petitioner, prays to withdraw the suit with permission to sue afresh due to the formal defects of the suit.

I have considered the language of Order XXIII Rule 1(2) read with Section 107 of the Code of Civil Procedure, which clearly gives a right to a plaintiff to withdraw a suit at any time. When the plaintiff withdraws a suit without seeking permission to sue afresh as contemplated under Rule 1(2), empowers a court to allow a plaintiff to institute a suit for the same subject matter of a suit or part of the claim if it is satisfied that the suit would fail by reason of some “formal defect” or for some “other sufficient grounds.”

“Formal defect” has not been defined anywhere in the Code. However, some suitable authorities believe the expression “formal defect” should receive wide and liberal meaning. Even when a plaintiff cannot withdraw his suit with liberty to sue afresh on the grounds of any “formal defect,” the Court may still allow him to do so on any other ground sufficient for the satisfaction of the Court.

In the instant case, it appears that according to the submission of the learned Counsel for the plaintiff, there are some formal defects found in the suit; as such, it seems to be

reasonable and sufficient to pass the necessary order for withdrawal of the suit.

The withdrawal of a suit by necessary implication blots out the effect of the judgments and decrees prior to withdrawal. If the prayer for withdrawal is allowed and, at the same time, the decree or decrees passed by the Courts below are retained, it would create a situation that is contradictory in terms. Therefore, an order of setting aside judgments and decrees in the suit withdrawn should naturally follow.

In this case, the plaintiff-petitioner prays for permission to sue afresh. The withdrawal of the suit with permission to sue afresh will not prejudice any vested interest of the defendants. The defendants will not suffer, and withdrawing the suit is not a violation of any law.

Considering the facts and circumstances of the case, the prayer for withdrawing the suit may be allowed with cost of Tk 2000/-.

Accordingly, the Rule is disposed of. The Partition Suit No.9 of 1992 is hereby withdrawn subject to pay the cost of TK. 2000/-. The judgment and decree dated 15.05.1996 passed by the learned Additional District Judge, 3rd Court, Kishoreganj in Other Appeal No.113 of 1994 allowing the appeal and reversing the judgment and decree dated 24.02.1994 passed by the

learned Assistant Judge, Nikli, Kishoreganj in Partition Suit No.9 of 1992 decreeing the suit in part are hereby set aside. The plaintiff-petitioner is at liberty to file an appropriate suit within three months of receipt of the lower record by the trial court below.

Let the order of status quo is hereby vacated.

Communicate the order and send down the L.C. Records at once.

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(Md. Salim, J).