

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

Civil Revision No. 2261 of 2010

IN THE MATTER OF:

**An application under section 115 (1) of the
Code of Civil Procedure**

IN THE MATTER OF:

Subir Mondal and others

..... Defendant-Respondent- Petitioners
-Vs-

(i) Sanjoy Mondal @ Mollick

.....Plaintiff -Appellant- Opposite Party

(ii) Khokon Chandra Mondal @ Mollik and others

.....Pro-forma - Opposite Parties

Mr. Pronay Kanti Roy, Advocate

..... For the Defendant-Respondent- petitioners

Mr. M.A. Muntakim, Advocate along with

Mr. Abdulla Al Baki, Advocate

....For the plaintiff -appellant-opposite party No.1

Heard and judgment on 25.01.2023

Present:

Justice Mohammad Showkat Ali Chowdhury

Mohammad Showkat Ali Chowdhury, J: On an

application filed by the defendant-respondent-petitioners Subir Mondal and others under Section 115(1) of the Code of Civil Procedure, 1908 (in short Code) this court issued a Rule calling upon the plaintiff –appellant- opposite party No.1 to show cause as to why the impugned judgment and order dated 24.02.2010 passed by the learned Joint District Judge, Second Court, Khulna in Miscellaneous Appeal No.07 of 2000 allowing the appeal and reversing the judgment and order dated 10.11. 1999 passed by the

Assistant Judge, Dumuria, Khulna in Miscellaneous case No. 25 of 1999 in dismissing the application for restoration of the suit under order 9 rule 9 of the Code should not be set aside and /or pass such other or further order or orders as to this court may seem fit and proper.

2. At the time of issuance of the Rule, it has further been ordered that pending hearing of the Rule the operation of the impugned judgment and order dated 24.02. 2010 passed by the learned Joint District Judge 2nd Court, Khulna in Miscellaneous Appeal No. 07 of 2000 be stayed for a period of six months and the said order of stay has been extended from time to time.

3. Facts relevant for the disposal of this Rule, in short, are that the plaintiff appellant opposite party filed T.S No. 07 of 1994 impleading the instant defendant respondent petitioners and others for declaration of title and confirmation of possession over the suit land before the court of Assistant Judge, Dumuria, Khulna. The instant defendant-respondent-petitioner nos. 1-4 as defendant nos. 7, 8, 14 and 18 contested the suit by filing written statement. On 21-06-1999 the suit was fixed for final hearing. On that date neither the plaintiff opposite party nor his appointed lawyer appeared before the court by filing hajira, thereafter, upon perusing the records the learned Assistant Judge was pleased to dismiss the suit at 10.10 a.m.

4. Thereafter, the plaintiff-appellant opposite side filed a Misc. Case No. 25 of 1999 under order 9 rule 9 of the Code for setting aside the dismissal order and restoration the suit in its original file and number before the same court and stating inter alia that on 21-6-1999 the plaintiff along with his witnesses came out from his residence to appear before the trial court but for the problem of the Van vehicle they could not appear before the concerned court in time. For that reason, his appointed advocate went to the said court for filing an application praying for time and after arrival of the court the learned advocate found his item was passed over and dismissed. The learned Assistant Judge after perusing evidence on record did not believe the grounds taken by the plaintiff appellant opposite party for his late appearance before the court and dismissed the Misc. Case No. 25 of 1999 vide order dated -10.11.1999.

5. Being aggrieved by the impugned judgment and order of the Assistant Judge, dated-10-11-1999 in Misc. Case No. 25 of 1999 the plaintiff appellant opposite party preferred an appeal before the learned District Judge, Khulna and eventually the appeal was transferred to the Court of learned Joint District Judge, Second Court, Khulna and the appeal was heard by the said appellate court. The learned Joint District Judge after hearing and upon perusing the record and assessing the evidence led by the

both the parties allowed the appeal on 24.02 2010 and by the same judgment set aside the judgment and the order dated 10.11.1999 passed by the Assistant Judge in Misc. case No. 25 of 1999.

6. The defendant-respondent-petitioners being aggrieved by and dissatisfied with the impugned judgment and order dated 24.2.2010 passed by the learned Joint District Judge, 2nd Court, Khulna in Misc Appeal No. 07 of 2000; filed this civil revisional application before this court and obtained the instant Rule.

7. The learned Advocate Mr. Pronoy Kanti Roy appearing on behalf of the defendant-respondent-petitioners submits that on the date of final hearing of the title suit neither the plaintiff nor the appointed advocate was present in trial court, not only that, after dismissal of the suit the learned advocate of the plaintiff did not take necessary step on that day. He further submits that after dismissal of the suit the plaintiff being the petitioner filed Miscellaneous Case being no. 25 of 1999 under order 9 Rule 9 of the Code for setting aside the dismissal order and restoration of the said suit and he firmly asserts that the trial court lawfully rejected the said petition and rightly did not believe the reason stated by the plaintiff appellant opposite for not appearing before the court. He further submits that in Misc. Appeal No. 07 of 2000, the learned Joint District Judge failed to consider the willful negligence of the plaintiff appellant opposite party and his non-appearance before

the trial court was intentional and to harass the defendant-respondent-petitioners.

8. He next submits that the learned appellate court did not apply judicial mind in disposal of the Misc. appeal and the plaintiff appellant opposite party in that case in spite of his failure to prove his ground of non appearance before the court when the suit was being called allowed the appeal without assigning any cogent reason and that is why the appellate court committed error of law resulting in error in the decision occasioning failure of justice.

9. On the other hand, the learned Advocate Mr. M.A.M Mottakim along with Abdulla Al Baki on behalf of the plaintiff appellant opposite party has contended that the dismissal order of the suit passed by the learned trial court was at 10.10 a.m. and he was prevented from appearing before the court due to the wheel of the van vehicle was punctured, that is why he was prevented from appearing before the court on time and that was the sufficient cause but the learned Assistant Judge very whimsically and illegally dismissed the suit for default of the plaintiff appellant opposite party No. 1. He further submits that in Miscellaneous Case No. 25 of 1999 learned Assistant Judge without any reason did not believe the cause of non appearance of the plaintiff before the court when the case was called for hearing.

10. He next submits that the learned Assistant Judge also wrongly opined that the plaintiff appellant opposite party intentionally did not appear before the court and he goes further submitting that dismissal of the suit at 10.10 a.m. was quite unjustified and on those wrong and illegal findings he rejected the said Miscellaneous Case.

11. He has further contended that the learned Joint District Judge in the impugned judgment and order very elaborately discussed the evidence on record and found that the cause of late appearance of the plaintiff appellant opposite party before the court below is believable. The appellant court further opined that the lower court ought to allow Misc. Case but not doing so committed gross illegality. He finally has contended that the impugned judgment and order of the learned Joint District Judge in Misc Appeal No.7 of 2000 was justified in allowing the appeal and setting aside the Judgment and order of the Assistant Judge in Misc Case No. 25 of 1999 dated 10.11.1999. He has prayed for discharging the Rule.

12. I have perused the record and heard the learned advocates for both sides at length. On perusal of the record, it appears to me that the learned Joint District Judge very elaborately discussed the evidence on record and the reasons for late appearance of the plaintiff-appellant-opposite parties before the

trial court and found that the grounds taken by plaintiff-appellant has been supported by the evidence on record and facts and circumstances. The learned appellate court observed that learned court below failed to understand the facts and the causes for late appearance of the plaintiff-appellant-opposite party before the court below and ought to set aside dismissal order and the appellate court further opined that the learned court below committed mistake in facts and law.

13. On perusal of record and considering the facts and circumstances of the case as narrated above, it appears to me that the grounds taken by the learned advocate for the defendant respondent petitioner in this instant case are not justified in view of the facts and circumstance. The judgment and order of the trial court appears to be based on surmise and conjecture. Record reveals that the original suit was dismissed at 10.10 a.m. At that time it is a bit difficult on the part of the litigant people to appear before the court from the remote area. The trial court if at all did not believe the cause of delay of the plaintiff appellant opposite party in appearing before the trial court while dismissal of the suit was passed at 10.10 a. a.m, in that case under Order 9 Rule 9 of the Code the trial court could allow the miscellaneous case by imposing cost upon the plaintiff-appellant-opposite party but for non appearance of the plaintiff appellant opposite party No.1

before the trial court at 10.10 a.m (not much time of the court hour passed), the trial court must ought not to close the door of the court for ventilating the grievances in his original suit (which may have strong ground) by rejecting Misc. Case No. 25 of 1999. In the judgment and order, the learned trial court did not make any observation that the plaintiff-appellant-opposite party time and again asked for adjournment and he is dragging the suit years together. In such premises, the attitude of the trial court appears to me was nothing but arbitrary and capricious exercise of power and highly perverted and committed miscarriage of justice to the plaintiff appellant opposite party which is highly deprecated by this court.

14. On critical examination of the impugned judgment and order of the learned appellate court, it appears to me that the learned appellate court on proper assessment of the material evidence on record rightly passed the impugned judgment and order based on evidence, facts and law. It is well settled principle that the appellate court is the final court of facts and as such the revisional court must not interfere with the findings of facts of the case/suit made in appeal by the appellate court unless there remain error of law, non consideration and misreading of material evidence affecting the merit of the case or manifest perversity and the finding of the appellate court as the last court of fact is final.

In support of the above observation, I can rely on decisions laid down in the cases of **Kochi Mia V. Suruj Mia, 51 DLR (AD) 57, Shahjahan v. Mir Hossain, 1997 BLD (AD) 218, Hazrat v. Santosh, 5 BLC (AD) 11 and Sona Mia v. Abdul Khaleque, 1990 BLD (AD 209)**. Their lordships in those cases observed, **“the finding of the appellate court as the last court of fact is final and cannot be interfered with in revision.”** In the case of **Bangladesh Vs. Chand Mia, 1992 BLD (AD) 48**, it has been held, ***“It is no function of the revisional court to sit in appeal over the findings of the appellate court.”***

15. On perusal of the impugned judgment and order, I do find no non consideration and misreading of material evidence affecting the merit of the case, no perverse findings has been made and no illegality has been committed by the appellate court in passing the impugned judgment and order and that is why those does not call for interference by this court.

16. In view of the facts, circumstances and evidence on record and the case law mentioned above, I do find no merit in this Rule.

17. In the result, the Rule is discharged without any order as to costs. The impugned judgment and order dated 24.02.2010 passed by the learned Joint District Judge, Second Court; Khulna in Miscellaneous Appeal No.07 of 2000 is hereby affirmed.

18. The order of stay granted at the time of the issuance of the Rule by this court is hereby recalled and vacated.

19. Since the original Title Suit No. 07 of 1994 is long pending, on that score, the learned trial court is directed to dispose of the said Title suit within 8 (Eight) months without fail from the date of the receipt of this judgment of this Court.

20. Let the L.C.R be send down along with a copy of this judgment to the court concerned at once.

Head Notes:

Order 9 Rule 9 of the Code of Civil Procedure, 1908-

On perusal of record and considering the facts and circumstances of the case as narrated above, it appears to me that the grounds taken by the learned advocate for the defendant respondent petitioner in this instant case are not justified in view of the facts and circumstance. The judgment and order of the trial court appears to be based on surmise and conjecture. Record reveals that the original suit was dismissed at 10.10 a.m. At that time it is a bit difficult on the part of the litigant people to appear before the court from the remote area. The trial court if at all did not believe the cause of delay of the plaintiff appellant opposite party in appearing before the trial court while dismissal of the suit was passed at 10.10 a. a.m, in that case, under Order 9 Rule 9 of the Code the trial court could allow the miscellaneous case by imposing cost upon the plaintiff-appellant-opposite party but for non appearance of the plaintiff appellant opposite party No.1 before the trial court at 10.10 a.m (not much time of the court hour passed), the trial court must ought not to close the door of the court for ventilating the grievances in his original suit (which may have strong ground) by rejecting Misc. Case No. 25 of 1999. In the judgment and order, the learned trial court did not make any

observation that the plaintiff-appellant-opposite party time and again asked for adjournment and he is dragging the suit years together. In such premises, the attitude of the trial court appears to me was nothing but arbitrary and capricious exercise of power and highly perverted and committed miscarriage of justice to the plaintiff appellant opposite party which is highly deprecated by this court.

2. It is no function of the revisional court to sit in appeal over the findings of the appellate court.

On critical examination of the impugned judgment and order of the learned appellate court, it appears to me that the learned appellate court on proper assessment of the material evidence on record rightly passed the impugned judgment and order based on evidence, facts and law. It is well settled principle that the appellate court is the final court of facts and as such the revisional court must not interfere with the findings of facts of the case/suit made in appeal by the appellate court unless there remain error of law, non consideration and misreading of material evidence affecting the merit of the case or manifest perversity and the finding of the appellate court as the last court of fact is final. In support of the above observation, I can rely on decisions laid down in the cases of **Kochi Mia V. Suruj Mia, 51 DLR (AD) 57, Shahjahan v. Mir Hossain, 1997 BLD (AD) 218, Hazrat Vs.**

Santosh, 5 BLC (AD) 11 and Sona Mia v. Abdul Khaleque, 1990 BLD (A.D 209). their lordships in those cases observed, “**the finding of the appellate court as the last court of fact is final and cannot be interfered with in revision.**” In the case of **Bangladesh Vs. Chand Mia, 1992 BLD (AD) 48,** it has been held, “*It is no function of the revisional court to sit in appeal over the findings of the appellate court.*”