

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Akhtaruzzaman

Civil Revision No. 3745 of 2018

Amir Ali alias Hossain Uddin petitioner

-Versus-

Md. Jasim Uddin and others

..... Opposite parties

With

First Miscellaneous Appeal No. 16 of 2018

Amir Ali

..... appellant

-Versus-

Md. Jasim Uddin and others

..... respondents

Mr. Mahmudul Mursalin, Advocate

..... for petitioner in the revision and
appellant in the appeal

Mr. Tapos Bandhu Das, Advocate

..... for opposite party 1 in the revision
and respondent 1 in the appeal

Judgment on 26.11.2023

Bhishmadev Chakrabortty, J.

Since the parties to the rule and appeal are almost same and common question of fact and law are involved in both, these have been heard together and are being disposed of by this judgment.

Rule in the aforesaid civil revision was issued at the instance of defendant and the plaintiff-opposite parties were called upon to show cause as to why the judgment and order dated 19.07.2018 passed by the Joint District Judge, Court No. 3, Sylhet in Title Suit No.71 of 2010 rejecting the application under Order 7

rule 11 of the Code of Civil Procedure (the Code) should not be set aside and/or such other or further order or orders passed to this court may seem fit and proper. At the time of issuing of the Rule, all further proceedings of the suit was stayed which still subsists.

The appeal at the instance one of the heir of the plaintiff is directed against the judgment and order dated 20.08.2017 passed by the Joint District Judge, Court No. 3, Sylhet rejecting Miscellaneous Case No. 11 of 2012 filed under Order 22 rule 9 of the Code for setting aside the order of abatement passed in Title Suit No. 56 of 2009.

Facts relevant for disposal of the Rule issued in the civil revision, in brief, are that opposite party 1 as plaintiff instituted Title Suit No. 71 of 2010 against the mother of the petitioner for specific performance of contract dated 04.12.2008. In the said suit, the defendant 1(Ka) appeared and filed written statement. During pending of the suit, he filed an application under Order 7 rule 11 of the Code praying for rejection of the plaint only on the ground that that suit has been filed after 1 (one) year 10 (ten) months and 26 (twenty-six) days from the execution and registration of the *bainapatra* and, as such, it is barred by limitation under article 113 of the Limitation Act. The plaintiff resisted the said application by filing written objection denying the statements made in the application. It was stated that he instituted the suit within 1 (one)

year from the date refusal to register the *kabala*. However, the Joint District Judge, Court No. 3, Sylhet after hearing both the parties by its judgment and order dated 19.07.2018 rejected the application under Order 7 rule 11 of the Code. In this juncture, defendant 1(ka) approached this Court with the aforesaid revision and obtained the Rule with an ad interim order of stay.

The facts relevant for disposal of the first miscellaneous appeal, in brief, are that the original defendant of Title Suit No. 71 of 2010 as plaintiff instituted Title Suit No. 56 of 2009 in the selfsame Court for declaration that the *bainapatra* dated 04.12.2008 registered in the Sub-registry Office of Bianibazar is fraudulent, collusive and also for cancellation of the same. The defendant has been contesting the said suit by filing written statement. During pending of the aforesaid suit the sole plaintiff died on 18.10.2011 in a hospital in the United Kingdom (UK), but his heirs were not substituted within the period of limitation and, therefore, the suit was abated. After the said order of abatement one of the heir of plaintiff by his constituted attorney filed Miscellaneous Case No. 11 of 2012 before the same Court on 20.07.2012 under Order 22 rule 9 of the Code for setting aside the abatement and to substitute the petitioner in his place. He contended therein that opposite parties 2 and 3 i.e. the daughters of the deceased told the previous attorney that they would appoint

attorney afresh to take steps in the suit. But, subsequently they did not come forward and, thereafter, the petitioner sent a power of attorney on 23.02.2012 from the UK. The attorney submitted it to the concerned ministry on 15.03.2012 and the authority attested it on 08.05.2012. The attorney submitted it to the Sylhet Collectorate. They authenticated it on 17.06.2012 and handed over to him on 27.02.2012. The attorney then contacted the learned Advocate and filed the miscellaneous case on 25.07.2012 for setting aside the abatement.

Defendant 1 contested the case by filing written objection. Amongst other he stated there that the petitioner was aware about the death of his mother but intentionally did not execute the power of attorney in time to contest the suit. Since, the petitioner wilfully did not come to the Court for substitution within the period of limitation, therefore, the Court correctly passed order of abatement of the suit. In the premises above, the miscellaneous case would be rejected.

Both the parties examined 1 (one) witness each to prove their respective cases. However, the Joint District Judge by the judgment and order under challenge in the aforesaid appeal rejected the miscellaneous case and upheld the order of abatement.

Mr. Mahmudul Mursalin, learned Advocate for the petitioner of the Rule submits that the trial Court failed to

appreciate that on plain reading of the plaint of Title Suit No. 71 of 2010 it is crystal clear that the suit for specific performance of contract is barred by limitation as per article 113 of the Limitation Act. In the plaint it has been admitted that the defendant as plaintiff instituted Title Suit No.56 of 2009 for cancellation of the aforesaid *bainapatra* and, as such, the time should be counted from the institution of aforesaid title suit. The trial Court ought to have rejected the plaint of the suit considering the provisions of Order 7 Rule 11(d) of the Code and by not doing so committed error of law resulting in an error in such order occasioning failure of justice. The impugned order, therefore, may be inferred with by this Court in revision and the plaint of the suit be rejected.

In the appeal he refers to the cases of *Abdul Kader Mondaland others v. Shamsur Rahman Chowdhury alias Shamsur Rahman Saha*, 51 DLR (AD) 253 and *Shakainath Rohanta v. Md. Tatikuddin Mondal and others*, 19 BLD (HCD) (1999) 57 and submits that the principle that substantial justice shall take preponderance over technical consideration should always be kept in view in deciding whether or not there is sufficient cause for the delay in making the application. He then submits that it has been consistently held by the superior courts of this sub-continent that the provisions of Order 22 rule 9 (2) (3) of the Code should be liberally construed. Abatement of a suit

precludes a fresh suit on the same cause of action without trial of the case on merit. If abatement is not set aside, the applicant will be deprived of the opportunity of proving his claim only on account of his being late in praying for setting aside abatement. He further submits that cause of delay shown in the miscellaneous case ought to have considered by the trial Court liberally because it is the fact that the sole plaintiff died in the UK and his sons were living there. The appellant arranged power of attorney therefrom and for that reason there has been a delay in making the application. However, he finally submits that he has no objection if the rule issued in the civil revision is discharged and the instant miscellaneous appeal is allowed with a direction to dispose of both the suits by the same Court hearing analogously.

Mr. Tapos Bandhu Das, learned Advocate for opposite party 1 in the Rule and respondent 1 in the first miscellaneous appeal opposes the rule as well as the appeal. He refers to the provisions of article 113 of the Limitation Act and submits that on a plain reading of the third column of the aforesaid article it is crystal clear that the second portion after "or" is qualified by the term "if no such date is fixed." Therefore, the knowledge of refusal will only come to play when no date is fixed in the contract. In this case the date of performance was fixed, therefore, the notice of refusal is immaterial in counting limitation. The contract was for

one year i.e. it could have been performed within 03.12.2009 and the suit could have been filed with one year from the date, i.e., on or before 02.12.2010. Since the suit was filed on 22.11.2010 and, as such, it is not barred by limitation. The Rule, therefore, issued in the civil revision should be discharged.

In the appeal, Mr. Das submits that he has no objection if the appeal is allowed and the order of abatement is set aside and both the suits are sent to the same Judge for disposal on merit hearing analogously.

We have considered the submissions of the learned Advocates for both the sides, gone through the materials before us and consulted the relevant provisions of law.

It appears that in Title Suit No. 71 of 2010 defendant 1(ka) petitioner herein filed application under Order 7 rule 11 of the Code. The defendant took ground therein that as per the agreement, provisions of Limitation and Registration Acts, the time for filing of the suit has been provided for 1 (one) year from the execution and registration of the *bainapatra* and it has been filed after more than 1 (one) year 10 (ten) months and, as such, it is barred by limitation. The Joint District Judge considered the provision of law of article 113 of the Limitation Act and found that the tenure of the *bainapatra* ended on 03.12.2009, but the kabala was not executed and registered. The plaintiff could have

filed the suit within 02.12.2010 but he filed it on 22.11.2010, i.e., well within the period of limitation prescribed by the law. Therefore, we find no error of law in the impugned order which has been challenged in the aforesaid civil revision and, therefore, we find no merit in this rule.

In the first miscellaneous appeal, we find that the predecessor of the appellant instituted the original suit for declaration that the *bainapatra* as stated earlier is collusive, fraudulent and prayed for its cancellation. During pending of the suit, the sole plaintiff died in the UK on 18.10.2011. Her 1 (one) son and 2 (two) daughters also resided in the UK. This fact is not denied by defendant 1 specifically in the written objection. In paragraph 3, 4, 5 and 6 of the miscellaneous case the petitioner categorically stated the fact of execution of the power of attorney by the petitioner in the UK and sending it to this country and that it took time in complying procedural formalities and finally the attorney received the power on 22.07.2012 and instituted the miscellaneous case on 25.07.2012. In this way there has been a delay of 190 days in filing the application for setting aside the abatement. He prayed for setting aside the abatement by substituting the petitioner in place of his deceased mother.

We have considered the evidence of PTW 1. In his evidence he corroborated the statements made in the miscellaneous case. He

stated that he placed the power of attorney before the concerned authority for authentication which was delivered to him on 22.07.2012. Although this witness was cross-examined at length, but nothing came out adverse. On perusal of the impugned judgment passed in the miscellaneous case, we find that the learned Judge failed to take into account those facts and rejected the case. The decision of the Joint District Judge, therefore, should be interfered with by this Court. In rejecting the case the appellant has been precluded from bringing any fresh suit on the same cause of action. Learned Joint District Judge could have considered that the delay in filing the application was not deliberate. It appears that the petitioner has explained the cause sufficiently. The learned Judge ought to have allowed the miscellaneous case by setting aside the abatement substituting the petitioner in place of her deceased mother. Accordingly, we find merit in this appeal.

It appears that Title Suit No. 71 of 2010 has been filed for specific performance of contract and Title Suit No. 56 of 2009 has been filed for declaration that the *bainapatra* is collusive and fraudulent. Both the suits are pending before the Joint District Judge, Court No. 3, Sylhet. In Title Suit No. 71 of 2010 it is to be decided whether the *bainapatra* is genuine and the plaintiff is entitled to get decree for its performance. On the other hand, in Title Suit No. 56 of 2009 it is to be decided also whether the

bainapatra is a genuine. In both the suits the parties are almost same, therefore, we find that both the suits are to be tried simultaneously or analogously by the trial Court to avoid conflicting decision and to secure the ends of justice.

In view of the discussions made herein above, we find no merit in the Rule issued in Civil Revision No. 3745 of 2018 and, accordingly, the Rule is discharged. The order of stay granted earlier by this Court stands vacated. The order passed by the Joint District Judge, Court No.3, Sylhet in title suit 71 of 2010 is upheld. But, we find merit in first Miscellaneous Appeal No. 16 of 2018 and, accordingly, the appeal is allowed. The judgment and order passed by the Joint District Judge, Court No. 3, Sylhet in Miscellaneous Case No. 11 of 2012 dated 20.07.2017 is hereby set aside and the miscellaneous case is allowed. The petitioner of the miscellaneous case be substituted in place of sole plaintiff after setting aside abatement.

The Joint District Judge, Court No. 3, Sylhet shall proceed with Title Suit No. 56 of 2009 and Title Suit No. 71 of 2010 and disposed of both the suits hearing analogously or simultaneously as the Court thinks fit within a period of 1 (one) year from the date of receipt of this judgment and order. In dealing with the suits the Learned Joint District Judge shall not allow either party any adjournment without dire necessity.

Communicate this judgment and order to the Court
concerned.

Md. Akhtaruzzaman, J.

I agree.