

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

Civil Revision No. 1529 of 2018

IN THE MATTER OF

Md. Nazrul Khalifa and others

.....Defendants-Appellants-Petitioners

-Versus-

1. Md. Mosarraf Hossain Khalifa

.....Plaintiff-Respondent-Opposite party

2. Md. Firoz Ahmed and another

.....Defendants-Respondents-Opposite parties

Mr. Md. Golam Rabbani with

Mr. Md. Firoz Kobir, Advocates

.....For the petitioners

Mr. Md. Shahidul Islam with

Mr. Mohammad Riaz Hossain and

Mr. S.M. Zakir Hossain, Advocates

.....For opposite party No. 1

**Heard on 26.07.23, 02.11.23, 12.11.23, 19.11.23, 26.11.23, 05.12.23
and judgment passed on 12.12.2023**

Present:

Mr. Justice Kazi Md. Ejarul Haque Akondo

Kazi Md. Ejarul Haque Akondo, J.

This Rule, under section 115(1) of the Code of Civil Procedure, 1908, was issued in the following terms-

*“Records be called for. Let a Rule be issued calling upon
opposite party No. 1 to show cause as to why the judgment*

and decree dated 06.02.2018 passed by the learned District Judge, Jhalakati in Title Appeal No. 9 of 2017 affirming the judgment and decree dated 27.02.2017 passed by the learned Senior Assistant Judge, Sadar, Jhalakati in Title Suit No. 8 of 2011 should not be set aside and/ or pass such other or further order or orders as to this Court may seem fit and proper.”

At the time of issuance of the Rule, operation of the impugned judgment and decree dated 06.02.2018 stayed for 1(one) year from the date and lastly, it was extended on 29.08.2022 till disposal of the Rule.

The present opposite party No.1 as the plaintiff filed the instant suit for a decree of declaration of title and confirmation of possession over the suit land. Defendant Nos. 3-5 contested the suit by filing a written statement. After the conclusion of the trial, the learned Trial Judge by his judgment and decree dated 27.02.2017 decreed the suit. Against which the contesting defendants as the appellants preferred an appeal before the learned District Judge, Jhalakati, and the same was numbered Title Appeal No. 9 of 2017.

After hearing the same the learned Judge by his judgment and decree dated 06.02.2018 disallowed the appeal by affirming those of the Trial Court. Being aggrieved by the same the defendants as the petitioners had preferred this civil revision before this Court and obtained the instant Rule.

Anyway, Mr. Md. Shahidul Islam, the learned Advocate appearing with Mr. Mohammad Riaz Hossain, Advocate on behalf of plaintiff-opposite party No.1 by filing an application under Order 23 rule 1(2) read with section 151 of the Code of Civil Procedure, 1908 prayed for withdrawal of the suit with liberty to sue afresh for the reasons stated therein and submits that at the time of hearing of the Rule, it was found that there are some formal defects in the suit though the plaintiffs have other sufficient grounds for decreeing the suit and in such circumstances, if the plaintiff proceeds with the suit it will be dismissed for formal defects and hence the plaintiff is required to file a suit afresh.

He goes on to submit that the formal defects found in the suit are (a) absence of prayer for proper relief, (b) proper relief

inadvertently not asked for, (c) defect of such nature as to entail dismissal of the suit and (d) wrong description of the suit property.

He further submits that the defects occurred due to the inadvertent mistake of the learned Advocate for the plaintiff, and it is the settled proposition of law that the client should not suffer due to the fault of the engaged Advocate as such, this Court may permit the plaintiff to withdraw the suit with liberty to sue afresh, otherwise; the plaintiff will suffer irreparable loss and injury which cannot be compensated in any way.

He lastly submits that both the Courts below though decreed the suit of the plaintiff on concurrent findings but due to the aforementioned reasons the decree passed by the Courts below would be set aside and the plaintiff should be permitted to withdraw the suit with liberty to sue afresh for the ends of justice.

In support of his above contention the learned Advocate referred to the decision in the case of Noor Jahan and others -vs- Abdur Rahman and others reported in 13 BLC(2008)807 wherein in paragraph Nos. 7 and 8 it was held that-

“The expression “formal defect” occurring in Rule 1(2)(a) of Order XXIII has not been defined anywhere in the Code. The expression “formal defect” within the meaning of clause (a) of sub-rule (2) connotes defects of various kinds springing out of some error made by plaintiff in plaint in good faith. The expression “formal defect” should not be construed strictly but must be given a wide and liberal meaning and must be deemed to connote a kind of defect which does not affect the merit of the suit. (Para-7)”

“Some examples of “formal defect” may be taken note of:

- i. Defect is not apparent on the face of the record but discovered on evidence being led.*
- ii. Defect with respect to form prescribed by Rules of Procedure: Kunji Jonabhai Kolecha vs Ambalal Kanjibhai Patel AIR 1972 Gujarat 63.*
- iii. Certain technical factors, though, plaintiff may have a good case on merit and object of Sub-Rule 2 is to cure defect only to remedy the failure of justice.*

iv. Absence of prayer for a proper relief and non-payment of requisite Court Fee: Radha vs Dibakar, AIR 1989 NOC 193.

v. Proper relief inadvertently not asked for: Md Rahim vs Bakshi Khan, PLD 1983 Peshawar 115.

vi. Defect of such nature as to entail dismissal of suit: Nazir Mooraj vs Md Sultan Khan PLD 1966 (WP) Karachi 356.

vii. Wrong description of property: 1992 MLD 1301 (SCAJK).

viii. Non-identification of a property conveyed in a deed of conveyance with the property described in schedule to plaint.

ix. Failure on the part of plaintiff to bring all partible i.e. ejmali or joint properties in hotchpot.

x. Dismissal of suit for non-production of evidence in support of plaintiff's claim.

xi. Failure of plaintiff to give formal proof of a document which was essential for his success in the suit. (Para-8)"

He also referred to the decision in the case of Abdul Wahed Mia vs. Saira Khatun reported in 1995(III) BLT SC (HCD)148, para-7 and 8 wherein it was observed that-

"I have heard the learned Advocates of both the sides perused the application and other materials on record and I find much substance in the contention of the learned Advocate for the plaintiff in respect of his application for withdrawal of the suit with permission to sue afresh on the same cause of action. I have also examined the relevant provisions of law and some decisions cited at the bar in this connection namely decisions reported in 25 D.L.R-485, and A.I.R 1934 All. 450 and I am in full agreement with views expressed in the above decisions to the effect that the formal defect or "other Sufficient grounds" as under subrule 2 of rule 1 of Order 23 C.P.C should be liberally construed and there is no legal bar in granting an application for withdrawal of a suit with liberty to file a suit afresh on the self-same matter even at the revisional stage provided the other requirements of the aforesaid provisions of law are fully complied with. In the instant case as I have already stated that there is no objection to the application and the prayer of the plaintiff under Order 23 rule 1 of the Code of Civil

Procedure by the defendant petitioner, I need not go further into this matter for any other consideration. In the facts and circumstances of the case and in the interest of justice, the application which appears to be a bonafide one should be allowed without making any further observation or finding as to the submission of the learned Advocates on the other points involved in this case (Para-7)."

"For the reasons stated above, the application under Order 23 rule 1 of the Code of Civil Procedure filed on behalf of the plaintiff opposite party is allowed on condition that the plaintiff must pay a cost of Tk. 500/00 to the defendant-petitioner at the time of the institution of any fresh-suit on the same cause of action if it is not otherwise barred by limitation. The impugned judgment and decree of the court below are set aside and the plaintiff opposite party is allowed to withdraw from the present suit with liberty to institute a fresh suit for the same cause of action if not otherwise barred by limitation (Para-8)."

Conversely, Mr. Md. Golam Rabbani, the learned Advocate appearing for the defendants-petitioners found it difficult to oppose the submissions made by the learned Advocate for the plaintiff-opposite party No. 1.

I heard the learned Advocates for the contending parties and perused the materials on record and found substance in the submissions so made by the learned Advocate for the plaintiff-opposite party No. 1. Accordingly, the application filed by opposite party No. 1 under Order 23 rule 1(2) read with section 151 of the Code of Civil Procedure, 1908 for withdrawal of the suit with liberty to sue a fresh is allowed.

As a result, the Rule is disposed of without cost.

Stay vacated.

The impugned judgment and decree dated 06.02.2018 passed by the learned District Judge, Jhalakati in Title Appeal No. 9 of 2017 disallowing the appeal by affirming the judgment and decree dated 27.02.2017 passed by the learned Senior Assistant Judge, Sadar, Jhalakati in Title Suit No. 8 of 2011 decreeing the suit is hereby set aside.

Resultantly, the plaintiff-opposite party No. 1 is hereby permitted to withdraw from the instant suit with liberty to institute a fresh suit in respect of the self-same subject matter of the instant suit.

Let a copy of this judgment along with Lower Court Records be sent to the Court below at once.

(TUHIN BO)