

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO.1129 OF 2019.

IN THE MATTER OF:

An application under Section 115 (4) of the Code of Civil Procedure.

- AND -

IN THE MATTER OF:

Md. Hatem Ali Shikder

..... Defendant-Petitioner.

-Versus-

A. Salam Khalifa and others

..... Plaintiff-Opposite parties.

Mr. Ajgor Hossain, Advocate

..... For the petitioner.

Mr. Dipayan Saha, Advocate

.... For the opposite parties.

Heard and Judgment on: 29.07.2024.

On an application of the petitioner Md. Hatem Ali Shikder under section 115 (4) of the Code of Civil Procedure the leave was granted and the Rule was issued calling upon the opposite parties to show cause as to why the impugned order No.03 dated 29.11.2018 passed by the learned District Judge, Barishal in Civil Revision No.53 of 2018 reversing the order No.89 dated 28.08.2018 and order No.90 dated 25.09.2018 passed by the Senior Assistant Judge, Bakerganj, Barishal in Miscellaneous Suit No.22 of 2010 arising out of partition suit No.05 of

1988 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the opposite parties as plaintiffs instituted Title Suit No.5 of 1988 for partition of the suit land before the learned Assistant Judge, Bakerganj, Barishal.

The suit was decreed ex-parte. Thereafter, the defendant petitioner filed Miscellaneous Case No.22 of 2010 before the trial Court for setting-aside the ex-parte decree under Order IX rule 13 of the Code of Civil Procedure.

The trial Court directed the parties to submit C.P cost but ultimately the said miscellaneous case was dismissed for none appearance of the petitioner.

Subsequently, the petitioner filed an application under Order IX Rule 9(A) read with Section 151 of the Code of Civil Procedure. The trial Court after hearing the parties and considering the said application facts and circumstance of the case restored the Miscellaneous Case by its order No.81 dated 05.04.2018 subject to payment of the cost of Tk.10,000/-.

The petitioner failed to deposit the said amounts on the due dates and accordingly the Court recalled the said order by its order dated 12.03.2018 for none payment of the C.P cost.

Against the said order the petitioner filed similar application depositing the C.P cost on the same day. But the Advocate of the petitioner was not present at the time of hearing of the matter and the Court considering the application took view that the application has not been properly filed and accordingly rejected the said application by its order dated 13.03.2018.

On the same day the petitioner on depositing Tk.2000/- again filed an application under Order IX rule 9(A) read with section 151 of the Code of Civil Procedure and the trial Court after considering the facts and circumstances of the case allowed the said application by its order dated 28.08.2018 subject to payment of Tk.5000/- as C.P cost on 25.09.2018.

The petitioner on the same day deposit the C.P cost along with the cost of Tk.2000/- and the Court accordingly considering the facts recalled the order dated 12.03.2018 and restored the miscellaneous case by its order dated 25.09.2018.

Against the said order of the trial Court the plaintiff opposite parties filed revisional application before the learned District Judge under Section 115(2) of the Code of Civil Procedure.

The revisional application was heard and disposed of by the learned District Judge, Barishal, who after hearing the parties and considering the facts and circumstance of the case allowed the

revisional application and setting-aside the order of restoration passed by the trial Court dated 28.08.2018 and 25.09.2018.

Being aggrieved by and dissatisfied with the impugned order dated 29.11.2018 of the revisional Court the defendant No.1 as petitioner filed this revisional application under section 115(4) of the Code of Civil Procedure accordingly the leave was granted and the Rule was issued.

Mr. Ajgor Hossain, the learned Advocate appearing on behalf of the petitioner submits that the appellate Court without considering the material facts of the case allowed the miscellaneous case setting-aside the impugned judgment of the trial Court about the restoration of the miscellaneous case. He further submits that the petitioner filed an application under Order 9 rule 9(A) read with section 151 of the Code of Civil Procedure and the trial Court restored the miscellaneous case considering the provision of Order IX rule 13 of the Code of Civil Procedure subject to payment of Tk.2000/-. Thereafter, the petitioner deposited the said amounts of Tk.2000/- along with the C.P cost of Tk.5000 and the trial Court allowed the same but the learned District Judge only considering the provision of Section 9(A) took view that the Section 9(A) is not applicable in the miscellaneous case and aforesaid Section is only applicable for the case of original suit.

He further submits that the petitioner filed the application under Order IX rule 9(A) along with section 151 of the Code of Civil Procedure

and though section 9(A) has been mentioned but ultimately the said application was under Section 151 of the Code of Civil Procedure. He submits that this is a partition suit and which was decreed ex-parte and in such a case the defendant as opposite party filed application under Order IX rule 13 of the Code of Civil Procedure but unfortunately since the learned Advocate was not appeared when the matter was called on for hearing the trial Court rejected the said application for default however, on an application of the petitioner the trial Court after considering the facts and circumstance of the case recalled the said order subject to payment of Tk.2000/- as cost and the trial Court rightly passed the said order whereas the revisional Court only one considering the provision of Section 9(A) allowed the revisional application setting-aside the impugned judgment of the trial Court which is clear error in law resulting in an error in the decision occasioning failure of justice. He prayed for making the Rule absolute.

Mr. Dipayan Saha, the learned Advocate appear on behalf of the opposite party oppose the Rule.

I have heard the learned Advocate, of the petitioner and the impugned order, of the revisional Court and all the papers and documents as available on the record.

The opposite party as plaintiff instituted Title Suit No.5 of 1988 for partition the said suit was decreed ex-parte. The defendant

petitioner against which filed Miscellaneous Case No.22 of 2010 under Order IX rule 13 of the Code of Civil Procedure.

It appears that subsequently the matter was taken up for hearing but the learned Advocate of the petitioner was not present thus the Court dismissed the said miscellaneous case. Thereafter, the petitioner again filed an application for recalling the said order under Order IX rule 9(A) read with Section 151 of the Code of Civil Procedure.

It appears that the trial Court after considering the material facts of the case restored the said order directing the parties to deposit the cost of Tk.2000/-. It appears that the petitioner deposited the said cost of Tk.2000/- along with C.P cost of Tk.500/- and the trial Court by its order dated 18.08.2018 and 25.09.2018 allowed the miscellaneous case and fixed the matter for hearing of the miscellaneous case on 15.11.2018.

In the meantime the plaintiff opposite party filed revisional application before the learned District Judge, Barishal being No.53 of 2018 under Section 115(2) Code of Civil Procedure.

The said revisional application was heard and disposed of by the learned District Judge. The learned District Judge only considering the provision of Order IX rule 9(A) of the Code of Civil Procedure took view that the aforesaid provision is applicable only for the suit not in the miscellaneous case and accordingly allowed the said revisional

application and recalled the order of restoration passed by the trial Court by its order dated 29.11.2018.

It appears that initially the petitioner filed miscellaneous case under Order IX rule 13 of the Code of Civil Procedure for setting-aside the ex-parte decree. But due to the fault of the learned Advocate he was not present when the matter was called for hearing the trial Court rejected the said miscellaneous case.

It appears that the defendant-petitioner immediately after the said order filed an application for recalling the said order under Order IX rule 9(A) read with Section 151 of the Code of Civil Procedure. It appears that the trial Court after consideration of the said facts restored the miscellaneous case by recalling the order for discharge with a cost of Tk.2000/-. It appears that the petitioner immediately after the said order deposited the said amount of Tk.2000/- along with Tk.5000 as C.P cost and thus the trial Court restored the said application and fixed the matter for taking evidence.

It appears that though in the application the petitioner mentioned the provision of Order IX rule 9(A) of the Code but also mentioned the Section 151 of the Code of Civil Procedure. Since this is a partition suit and the trial Court after consideration of the facts and circumstance of the case recalled the default order subject to payment of Tk.2000/- as per provision of law and accordingly the miscellaneous case was restored.

It appears that the revisional Court though only considering the provision of Section 9(A) passed impugned judgment but did not consider the provision of Section 151 of the Code of Civil Procedure the inherent power of the Court that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Since this is a partition suit and in such a case it is better to dispose of the partition suit considering the right and title of the parties as per evidence on record but unfortunately the said partition suit was decreed ex-parte. The petitioner then and then filed application under Order IX rule 13 of the Code of Civil Procedure for setting-aside the ex-parte decree. In such a case it is better to dispose of the miscellaneous case filed under Order IX rule 13 of the Code of Civil Procedure by the trial Court considering the evidence on record as adduced by the parties. In such a case only on the basis of the provision of law or misquoting of the Section the restoration order of the trial Court should not be recalled.

Considering the aforesaid facts and circumstances of the case and the discussions as made above, I find merit in the Rule.

In the result, the Rule is made absolute. The impugned order No.03 dated 29.11.2018 passed by the learned District Judge, Barishal in Civil Revision No.53 of 2018 reversing the order No.89 dated

28.08.2018 and order No.90 dated 25.09.2018 passed by the Senior Assistant Judge, Bakerganj, Barishal in Miscellaneous Case No.22 of 2010 arising out of partition suit No.05 of 1988 is hereby set-aside.

Since this is a long pending case the trial Court is directed to dispose of the miscellaneous case as early as possible preferably within 06 (six) months from the date of receipt of this order.

The order of stay granted earlier by this court is hereby recalled and vacated.

Communicate the order at once.