

Bench:

Mr. Justice Bhishmadev Chakrabortty

Civil Revision No. 4139 of 2013

Mariam Bibi and others petitioners

-Versus-

Abdul Malik being dead heirs Md. Nozrul
Islam and others opposite parties

Mr. Dider Alam Kollol with

Ms. Sharmin Rubayat Islam, Advocates

..... for the petitioners

No one appears for the opposite parties

Judgment on 08.05.2024

Leave was granted and rule was issued calling upon the opposite parties to decide the question raised that whether the District Judge, Sylhet in passing the judgment and order on 30.10.2013 in Civil Revision No. 08 of 2013 allowing the revision setting aside the judgment and order of the Assistant Judge, Jakigonj, Sylhet passed on 09.01.2013 in Miscellaneous Case No. 08 of 2011 allowing the case by restoring the original suit to its original file and number by setting aside the *ex parte* decree, committed an error on an important question of law which has resulted an erroneous decision occasioning failure of justice.

The material facts for disposal of the rule, in brief, are that the predecessor of opposite parties 1(a)-1(k) as plaintiff instituted Title Suit No. 19 of 2004 in the Court of Assistant Judge, Jakigonj, Sylhet against the predecessor of the present petitioners praying for

declaration that the deed bearing No. 3175 dated 18.09.1965 registered on 22.09.1965 was forged, collusive and not binding upon him. In the suit the predecessor of the petitioners as defendant 1 appeared and filed written statement but subsequently did not contest and accordingly it was decreed on 12.05.2011 *ex parte*. Thereafter, the petitioners as heirs of defendant 1 filed Miscellaneous Case No. 08 of 2011 under Order 9 Rule 13 of the Code of Civil Procedure (the Code). In the case they stated that their father used to look after the suit. PW 1 was examined in part on 26.11.2006 but immediate after civil court's vacation defendant 1 of the suit died on 04.01.2017 leaving behind his 2 sons and the wife (petitioners herein); that no notices were served upon the aforesaid petitioners; that petitioner 1 was an old lady and suffering from various diseases and petitioners 2 and 3 were mentally sick, and as such they failed to appear in the suit to contest it. The *ex parte* decree, therefore, should be set aside.

The plaintiffs contested the miscellaneous case by filing written objection denying the facts stated in the case. The parties examined 1 witness each and documents submitted by the petitioners were exhibited. The Assistant Judge considering evidence of the petitioners both oral and documentary allowed the miscellaneous case and restored the original suit to its file and number. Being aggrieved by, the plaintiffs as petitioners filed a civil revision before the District Judge, Sylhet under section 115(2) of the Code. The District Judge

heard the revision and by the judgment and order dated 30.10.2013 allowed the same, set aside the judgment and order passed in the miscellaneous case. In this juncture, the petitioners approached this Court with this application under section 115(4) of the Code upon which leave was granted and rule was issued to ascertain the legality and propriety of the judgment and order passed by the District Judge.

Mr. Didar Alam Kollol, learned Advocate for the petitioners taking me thorough the materials on record submits that in the miscellaneous case filed under Order 9 Rule 13 of the Code, the petitioners sufficiently explained the reasons which prevented them from appearing before the Court when the suit was called on for hearing. Learned District Judge failed to take into account that the statement made in the application is sufficient to allow a miscellaneous case and set aside the *ex parte* decree. He further submits that it is the cardinal principle that the matter of setting aside an *ex parte* decree is to be looked into leniently but the revisional Court below departed from that principle and most arbitrarily allowed the revision and thus committed an error on an important question of law occasioning failure of justice which is required to be interfered with in this revision.

No one appears for the opposite parties, although the record shows that notices have been duly served upon them.

I have considered the submissions of Mr. Kollol, gone through the rule petition, grounds taken therein and the judgments passed by the Courts below.

It transpires that the plaintiffs instituted the suit against the predecessor of these petitioners. The suit was decreed *ex parte* on 12.05.2011. In the miscellaneous case filed under Order 9 Rule 13 of the Code the petitioners stated that their predecessor used to take steps in the suit. He filed written statement therein to contest the suit. It is also stated that PW1 was examined in part on 26.11.2006 and their predecessor, original defendant 1 died on 04.01.2007. The fact of death of defendant 1 on that particular day was not denied by the opposite parties. It is found that after the death of the original defendant his heirs did not contest the suit. It has been asserted in the application that petitioner 1, wife of deceased defendant was seriously ill and was bed ridden due to her old age ailment and that one of the son of the defendant was also suffering from various diseases. The aforesaid facts stated in the case has been corroborated by PTW 1 in evidence. Although PTW1 was cross-examined by the opposite parties but nothing contrary has come out. For the sake argument, if it is admitted that the notices were served upon the defendant-petitioners, but they have been able to make out the case that they were prevented by sufficient cause when the suit was called on for hearing. The Assistant Judge in his findings although did not address

this point but he considered the statements made in the case as well as the oral evidence to that effect and ultimately took correct decision in allowing the miscellaneous case. It is further found that in allowing the case for restoration of the suit, the trial Court imposed cost of Taka 2,500/- to be deposited to the concerned Court. But the District Judge without considering it most erroneously allowed the revision setting aside the judgment and order passed in the miscellaneous case and thereby committed an error on an important question of law which is required to be interfered with under section 115(4) of the Code. The judgment passed by the District Judge, Sylhet in the revision suffers from patent legal infirmity and is to be set aside.

Therefore, I find merit in this rule. Accordingly, the rule is made absolute. No order as to costs. The judgment and order passed by the District Judge on 30.10.2013 in Civil Revision No. 08 of 2013 is hereby set aside and those of the Assistant Judge, Zakigonj, Sylhet passed in Miscellaneous Case No. 08 of 2011 is hereby restored. Consequently, the original suit is restored to its file and number.

Communicate this judgment and order to the concern Courts.