

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 666 of 2021

Md. Mahfuz Chowdhury being dead his heirs
Md. Zakaria Chowdhury and another
..... Petitioners

-Versus-

Md. Shafiqul Islam and others
..... Opposite-Parties

Mr. Md. Aminul Haq, Advocate
... For the Petitioners

Mr. A.M. Mahbub Uddin, Senior Advocate
... For the Opposite Party No. 5

Mr. Mohiuddin M.A. Kader, Advocate
... For the Opposite Party No. 1

Judgment on 10.02.2025

In this revision Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 17.06.2019 passed by the learned District Judge, Dinajpur in Other Appeal No. 87 of 2018 disallowing the appeal and thereby affirming the judgment and decree dated 05.07.2018 passed by the learned Assistant Judge, Khansama, Dinajpur, in Other Suit No. 40 of 2016 decreeing the suit ex parte should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of this Rule, in short, are that the opposite party No. 1, as plaintiff, filed Other Suit No. 40 of 2016 in the

court of learned Assistant Judge, Khansama, Dinajpur impleading the petitioners and the opposite party Nos. 2-9, as defendants, for declaration of title and mandatory injunction, stating that the defendants published a notice inviting application for appointing an Assistant Headmaster and two lecturers, one for Islamic History and another for Production Management and Marketing in Shapla Girls School and College in the “Daily Prothom Alo” dated 14.06.2015. In response to the said advertisement the plaintiff and 12 others including the defendant No. 6 applied for the post of lecturer of Islamic History. Selection test was held on 09.12.2015 in Dinajpur Government College under supervision of the defendant Nos. 4 and 5. In the exam the plaintiff stood first. On 15.12.2015 the plaintiff met the defendant Nos. 1 and 2 and requested them to appoint him as lecturer for Islamic History, but the defendant Nos. 1 and 2 though assured the plaintiff, but delaying issuance of appointment letter. On 21.08.2016, when the plaintiff again met the defendant Nos. 1 and 2 and requested them to appoint him as lecturer for Islamic History, the defendant Nos. 1 and 2 demanded Tk. 15,000,00/- from him and expressed that if the said amount is not paid they would appoint the defendant No. 6. Subsequently, the plaintiff came to know that

the defendant Nos. 1 and 2 received Tk. 15,000,00/- from the defendant No. 6 and decided to appoint him, hence the present suit.

The defendant Nos. 1 and 2 entered into appearance on 01.01.2017 and prayed for time to file written objection. Thereafter, on several dates they took time for filing written statement and written objection. The trial court allowed several adjournments to the defendant, lastly with cost of Tk. 200/-, but the defendants utterly failed to file written objection against the application for injunction as well as written statement in the suit. Consequently, the suit was fixed for ex parte hearing and it was appearing in the cause list from 03.07.2017 to 25.06.2018 for ex parte hearing, but the defendants did not come forward to contest the suit by filing written statement or seeking any adjournment, resultantly, the trial court by its order dated 05.07.2018 decreed the suit ex parte and drawn the decree on 12.07.2018. Thereafter, defendant Nos. 1 and 2 preferred Other Appeal No. 87 of 2018 against the judgment and decree of the trial court before the District Judge, Dinajpur, who after hearing by the impugned judgment and decree dated 17.06.2019 disallowed the appeal ex parte. At this juncture, the petitioners moved this Court by filing this revisional

application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

Mr. Md. Aminul Haq, learned Advocate appearing for the petitioner submits that the opposite party No. 1 filed the suit for declaration and mandatory injunction against the governing body of the Shapla Girls School and College. The petitioner, as defendant, appeared in suit, prayed for time to file written objection and written statement. Chairman of the committee defendant No. 1 fell in ill for long time who used to maintain communication with the learned Advocate and take all the necessary steps on behalf of the college. Because of his long illness, he could not communicate with the learned Advocate and did not inform anything to other members of the governing committee. Consequently, the defendants could not file written statement in the suit and failed to contest the same. After obtaining ex parte decree when the plaintiff filed an application for execution of the decree, the governing committee came to know that the suit was decreed ex parte against the defendants, then the defendants preferred appeal on 29.07.2018 and in usual course the appeal was fixed for hearing on 02.01.2019 and thereafter fixed on 11.03.2019 amongst other dates for hearing. In the meantime, defendant No. 1

Chairman of the governing committee died. As a result, the defendant could not take any step for hearing the appeal, consequently, by the impugned judgment and decree dated 17.06.2019 the appeal was dismissed ex parte.

He submits that there was no intentional laches on the part of the defendant-appellant in conducting the suit as well as the appeal, but the person who was entrusted with the job of pursuing the proceeding on behalf of the college fell ill and ultimately died, as such, steps could not be taken in the appeal. He finally submits that the plaintiff in suit though claimed that he stood first in the examination, but the record does not show that. He humbly submits that, to get an opportunity to dispose of the appeal on merit, the matter may be sent back on remand to the appellate court for ends of justice, so that both the parties will get chance to place their respective cases.

Mr. A.M. Mahbub Uddin, learned Senior Advocate appearing for the opposite party No. 5 in substance impliedly supported the argument of the learned Advocate for the petitioner.

Mr. Mohiuddin M.A. Kader, learned Advocate appearing for the opposite party No. 1 submits that after holding examination in writing, the governing committee ought to have published result of the examination by affixing the same on the notice board. Because of their mala fide intention they did not publish result and surprisingly appointed defendant No. 6, Md. Masum in the post who stood second.

He submits that the Principal, Dinajpur Government College who was convenor of the examination committee by its letter dated 20.09.2022, informed the investigating officer PBI that no result sheet of the examination was prepared as the Chairman of the governing body without concluding viva voce examination, left the college and did not put his mark on the result sheets. So the result alleged to have been published by the governing body vide Annexure-‘C’ to the supplementary affidavit filed by the petitioner is manufactured for the purpose of justifying their misdeed.

He submits that the defendants entered into appearance in suit on 01.01.2017 and prayed for time to file written objection and

written statement. The trial court allowed as many as eight adjournments to file the written statement. Being failed the suit was fixed for ex parte hearing on 03.07.2017 and it was continuing in the cause list upto 25.06.2018. However, the trial court by recording evidence of plaintiff in part adjourned the same till 05.07.2018 for order, but the defendants did not come. Consequently, on the date fixed the trial court decreed the suit ex parte. Though the defendants preferred appeal against the judgment and decree of the trial court, when the appeal was fixed for hearing they did not take any step in the appeal to get the same heard and disposed of. Consequently, the appeal was disallowed ex parte. Thereafter, they moved this court by filing this revision at a delay of 132 days and obtained the present rule. The very conduct of the defendants starting from trial court upto this Court are mala fide, only to harass the plaintiff opposite party and to obstruct the plaintiff to enjoy the fruit of the decree.

He finally argued that, the petitioners could not explain their default in filing written statement, taking step in appeal as well as filing this revision at a delay of 132 days, as such, for gross

negligence on the part of the defendant-petitioner they cannot be given any liberty to get the appeal heard on merit as of right, as such, the rule is liable to be discharged.

Heard the learned Advocates of both the sides, have gone through the revisional application, plaint in suit, order sheets of the trial court and impugned judgment and decree of both the courts below.

From perusal of order sheets of the trial court, it appears that the defendants took several adjournments for filing written objection and written statement, but did not file. The suit was fixed for ex parte hearing and continued in the list for 17 days starting from 03.07.2017 to 25.06.2018, but no step taken on behalf of the defendants. Therefore, the trial court had no other option, but to dispose of the suit ex parte, accordingly, the trial court decreed the suit by its order dated 05.07.2018. Thereafter, the defendants could have filed an application under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the ex parte decree assigning sufficient cause for not appearing in suit. In that case they could have given a clear and positive case on their behalf, but instead of taking recourse to Order 9 Rule 13 application, the defendants preferred appeal before the District Judge, wherein, they again started

same drama by not appearing before the court when the appeal was fixed for hearing. The appellate court fixed as many as eight days for hearing of the appeal and awaited for the appellant to come forward, but in the similar way like before the trial court the appellants showed sheer negligence in conducting the appeal, consequently, the appellate court heard the respondent and after hearing by the impugned judgment and decree disallowed the appeal ex parte.

The facts and circumstances stated above amply constitutes serious negligence and disregard to the court on the part of the defendants which deserves no consideration at all. However, to appreciate the matter in dispute, I have gone through the plaint in suit and the ex parte order passed by the trial court. The plaintiffs claimed that in the examination he stood first, but I find nothing in the record as exhibit showing result of the examination, however, the trial court decreed the suit as the defendants failed to contest the suit.

It is the settled principle of law that plaintiff is to prove his case independent of the case of the defendant. Learned Advocate for the opposite party No. 1 submits that result of the examination was not published by the governing body, therefore, it was not possible on the part

of the plaintiff to show the result sheets, but the petitioner by filing a supplementary affidavit annexed annexure-‘C’ showing result of the examination which is absolutely contrary to the actual facts and circumstances of the case and created doubt that the same has been prepared subsequently, for the purpose of the suit. Actual fact of the case has not been disclosed by both the parties requiring complete adjudication of the dispute on evidence. In this situation, I think that though serious negligence on the part of the defendants found but for ends of justice the appeal is required to be sent back on remand to the appellate court for fresh hearing.

Apart from this Order 41 Rule 17 of the code provides that in the absence of appellant, the appellate court may pass an order dismissing the appeal for default, but in the instant case the appellate court in the absence of the appellant instead of dismissing the appeal for default passed the judgment ex parte on merit in violation of the Rule 17 of order 41 of the code.

In view of the above, I am inclined to make the rule absolute though the negligence on the part of the petitioner is not liable to be condoned in anyway.

In the result, the Rule is made absolute with costs of Tk. 20,000/- to be paid to the opposite party No. 1 within 15 (fifteen) days from the date of receipt of this judgment and order, failing which the rule shall stand discharged.

Judgment and decree passed by the appellate court is hereby set aside.

The appeal is hereby sent back to the appellate court on remand for fresh hearing affording opportunity to the parties to place their respective cases and pass judgment in accordance with law within 03 (three) months from the date of receipt of this judgment, without allowing any unreasonable adjournment to the appellant. For taking adjournment by appellant, if the appeal couldn't be disposed of by the appellate court within the aforesaid period of three months the appellate court should dismiss the appeal.

Communicate a copy of this judgment to the court concerned and send down the lower court records at once.