

*Present:-*

*Mr. Justice Mahmudul Hoque*

**Civil Revision No. 986 of 2020**

Md. Shahjahan Osta and others  
... Petitioners

-Versus-

Rafique Khalifa and others  
...Opposite-parties

Mr. Md. Abdul Kader Bhuiyan with  
Mr. Sheikh Md. Niamul Islam and  
Mr. Muhammad Shaikh Sadi, Advocates  
...For the petitioners

Mr. Md. Asadur Rahman Khan, Advocate  
...For the opposite-party Nos. 1-10, 11 & 13-22.

**Heard on 16.05.2024, 20.05.2024 and  
Judgment on 26<sup>th</sup> May, 2024.**

In this application under Section 115(4) of the Code of Civil Procedure, by granting leave to revision to the petitioners, Rule was issued calling upon the opposite party Nos. 1-22 to show cause as to why the impugned judgment and order dated 25.11.2019 passed by the learned District Judge, Chandpur in Civil Revision No. 48 of 2018 allowing the same and thereby reversing the judgment and order dated 18.03.2018 passed by the learned Senior Assistant Judge, Sadar, Chandpur in Title Execution Case No. 09 of 1988 rejecting the application under Section 151 of the Code of Civil Procedure for restoration of the execution case dismissed for default on 30.07.2007

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 abridge are that the opposite-parties, as plaintiff, filed Partition Suit No. 171 of 1967 in the Court of 1<sup>st</sup> Munsif (now Assistant Judge), Chandpur against the present petitioners and others, as defendant, which was decreed in preliminary form by judgment and decree dated 28.06.1969 and 05.07.1969 respectively. Said Preliminary decree was made final on 12.07.1972. Thereafter, one of the defendants, named Kalu filed Title Suit No. 121 of 1972 challenging the decree passed in Partition Suit No. 171 of 1967. One Ayub Ali filed another Partition Suit No. 211 of 1976 which was dismissed by judgment and decree dated 24.12.1977. Appeal No. 76 of 1984 was preferred which was also dismissed for default on 30.12.1985. Thereafter, filed Miscellaneous Case No. 03 of 1986 for re-admission of appeal which was also rejected on 24.07.1986. The decree-holder put the decree in execution by filing Execution Case No. 09 of 1988. In Title Suit No. 121 of 1972 the plaintiff tried to get an order of stay of execution case which was resisted by the decree-holder and finally the suit was

dismissed by judgment and decree dated 29.08.1988. Thereafter, preferred Title Appeal No. 149 of 1988 in which proceedings in Execution Case No. 09 of 1988 was stayed and the appeal was remanded to the Court of Assistant Judge, Chandpur, wherein, the suit was renumbered as Title Suit No. 35 of 1993 and dismissed for default on 09.08.1993. They filed an application under Section 151 of the Code of Civil Procedure which was also rejected on 24.08.1993. Thereafter, they filed Miscellaneous Case No. 13 of 1993 for restoration which was allowed and subsequently, Title Suit No. 35 of 1993 was dismissed by judgment and decree dated 01.06.1994. Title Appeal No. 110 of 1994 was filed wherein proceedings of Execution Case No. 09 of 1988 was stayed. Said Title Appeal No. 110 of 1994 was dismissed by judgment and decree dated 11.09.1996. Thereafter, some titleless persons filed Title Suit No. 104 of 1997 which was dismissed on 02.11.2001. They preferred Title Appeal No. 156 of 2001 in which again proceedings in Execution Case No. 09 of 1988 was stayed vide order dated 01.01.2002. Subsequently, said appeal was allowed and sent the Title Suit No. 104 of 1997 on remand to the trial court for fresh trial. Title Suit No. 104 of 1997 while was pending, parties to the proceeding

got their dispute amicably settled by executing a solehnama at the instance of the local elites and the same was filed in Title Suit No. 104 of 1997 and in support of solehnama, plaintiff Fazal Khalifa as P.W.1 and defendant No. 11 (defendant No. 1 in Partition Suit No. 171 of 1967) deposed as P.W and D.W and it was fixed for order on 28.08.2006. On the date fixed defendant Nos. 14 and 78-84 filed written objection against solehnama. But the matter was not disposed of for long time giving date one after another and finally on 07.05.2017 the suit was dismissed for default.

On the other hand, the decree-holder filed an application before the execution court in Execution Case No. 09 of 1988 for dismissing the same for non-prosecution on the ground that the dispute between the parties has been settled amicably out of court and to that effect both the parties by executing a solehnama got their property amicably partitioned and got possession and the said solehnama has been filed in Title Suit No. 104 of 1997 and deposed in court in support of the statements made in the application. The decree-holder also filed an application for amendment of plaint and vacating the order of stay which was passed in Title Appeal No. 156

of 2001 on 12.09.2006. The court fixed on 18.09.2006 for hearing both the applications and on the date fixed called for record of Partition Suit No. 171 of 1967 and fixed next date for hearing on 10.11.2006. On that date the presiding officer was on leave, consequently, fixed on 26.11.2006. On that date the decree-holder though filed hajira did not take any step for hearing of the applications. Consequently, next date fixed on 28.01.2007 for hearing. On the date fixed the decree-holder did not take any step for hearing those applications. Resultantly, the court issued show cause to the decree-holder as to why the execution case shall not be rejected for default fixing next date on 06.02.2007 which was duly informed to the learned Advocate for the decree-holder, who seen the order by signing on 29.01.2007. Thereafter, on 06.02.2007 decree-holder took no step, for ends of justice the court again fixed on 26.02.2007 for showing cause, said order also informed to the learned Advocate for the decree-holder who seen the same on 07.02.2007. On 26.02.2007 as usual decree-holder took no step, the court again fixed on 24.04.2007 for hearing. On the date fixed the decree-holder took no step, consequently, the court again fixed on 11.06.2007 for order. On the dated fixed the court again fixed on

30.07.2007 for order. On that date the decree-holder took no step, consequently, the execution court by order dated 30.07.2007 dismissed the execution case for default. Thereafter, the decree-holder opposite-party filed an application under Section 151 of the Code of Civil Procedure praying for restoration of the execution case on 05.03.2018. The execution court by its order dated 18.03.2018 rejected the application.

Being aggrieved, the decree-holder filed Civil Revision No. 48 of 2018 before the learned District Judge, Chandpur who after hearing by the impugned judgment and order dated 25.11.2019 allowed the revision and restored the Execution Case No. 09 of 1988 in its original number and position. At this juncture, the present petitioners, moved this Court by filing this application under Section 115(4) of the Code seeking leave to revision and obtained the present Rule and order of stay.

Mr. Md. Abdul Kader Bhuiyan, learned Advocate appearing for the petitioners at the very outset submits that there is no provision in Order 21 of the Code of Civil Procedure for restoration of execution case either under Section 151 or any provision of the

Code, but there is a provision for filing a fresh execution case. In the event of dismissal of the same for default subject to provision under Article 181 of the Limitation Act the decree-holder can file execution case afresh and can maintain same process upto 12 years from the date of decree as provided in Section 48 of the Code of Civil Procedure. He submits that execution case was filed in the year 1988 and it was dismissed for default on 30.07.2007, but the application for restoration under Section 151 of the Code was filed on 05.03.2018. Therefore, there is no scope for restoration or filing a fresh execution case being hopelessly time barred. The execution court rightly rejected the application, but on a revision the revisional court most unfortunately failed to appreciate the provisions of law, and restored the execution case in its original file and number, as such, committed an error of law in the decision occasioning failure of justice. He candidly submits that since Title Suit No. 104 of 1997 was dismissed on 07.05.2017. The plaintiff in that suit could have taken step for restoration of the same and get the suit compromised on the basis of solehnama already filed before it. But they wrongly filed application for restoration of the execution case after about 11 years, as such, not maintainable in law.

Mr. Md. Asadur Rahman Khan, learned Advocate appearing for the opposite-parties submits that there is no impediment in restoring an execution case dismissed for default under Section 151 of the Code of Civil Procedure without filing an execution case afresh. He submits that by the impugned judgment and order restoring execution case in its original number and position the revisional court has not committed any error in the decision occasioning failure of justice, as the revisional court in restoring execution rightly observed that this is a long pending litigation between the parties. If the decree-holder is ousted from getting benefit of the decree after fighting years together serious injustice would be done to them and for ends of justice restoration of the execution case is just and practicable and both the parties to the proceedings will get their property partitioned through court and enjoy the fruit of the decree, as such, there is nothing to be interfered with by this Court.

Heard the learned Advocates of both the sides, have gone through the revisional application, application under Section 151 of the Code of Civil Procedure filed by the decree-holder praying for restoration of the execution case, order sheets, written objection



thereto and the impugned judgment and order passed by both the courts below.

It is true that Partition Suit No. 171 of 1967 was decreed on contest on 28.06.1969 in preliminary form. Thereafter, the decree was made final on 12.07.1972. Because of initiation of several proceedings by judgment-debtors before the court challenging validity of the decree, the decree-holder could not put the decree in execution upto 1988 and after long fighting and being successful could file Execution Case No. 09 of 1988 for execution of the decree. Subsequently, said execution proceeding was stayed in several proceedings including Title Appeal No. 156 of 2001 initiated by judgment-debtors. The appeal was disposed of and Title Suit No. 104 of 1997 was sent back on remand to the trial court for fresh trial, consequently, stay order passed in that appeal has become automatically vacated. Thereafter, the dispute between the parties has been settled by executing a solehnama which was filed by the parties in Title Suit No. 104 of 1997 and both the parties deposed in support of solehnama on 20.08.2006. But the defendant Nos. 14 and 78-84 filed written objection against the solehnama requiring the

court to hear both the parties. Similarly, the decree-holder filed an application in Execution Case No. 09 of 1988 praying for dismissing the same for non-prosecution. After filing solehnama in Title Suit No. 104 of 1997 and deposing in support of that solehnama and filing application for non-prosecution in Execution Case No. 09 of 1988, the decree-holder as well as plaintiff in Title Suit No. 104 of 1997 took no further step to get the title suit disposed of on compromise making the solehnama part of the decree and also the decree-holder did not move the application for non-prosecution on the ground of settlement of the dispute amicably. Consequently, the execution court by order dated 30.07.2007 dismissed the Execution Case No. 09 of 1988 for default instead of dismissing the case for non-prosecution and the trial court dismissed Title Suit No. 104 of 1997 on 07.05.2017 for default. After dismissal of both the Execution Case No. 09 of 1988 and Title Suit No. 104 of 1997 the decree-holder came with an application under Section 151 of the Code of Civil Procedure for restoration of Execution Case No. 09 of 1988. The execution court by order dated 18.03.2018 rejected the same holding that the decree-holder did not come within the time for restoration of the case which is barred by limitation.

Then the decree-holder filed Civil Revision No. 48 of 2018 before the learned District Judge, Chandpur who by the impugned judgment and order dated 25.11.2019 allowed the revision and restored Execution Case No. 09 of 1988 in its original number and position. The revisional court in the impugned judgment and order held that original Partition Suit No. 171 of 1967 was decreed in the year 1972. After long run, the parties to the proceedings got their dispute amicably settled by solehnama. Both the parties unconditionally conceded that the preliminary decree as well as final decree passed in Partition Suit No. 171 of 1967 shall be valid and binding upon them and both the parties agreed to file said solehnama in Title Suit No. 104 of 1997 and on the basis of solehnama they will get the suit disposed of making the solehnama part of the decree. And decree-holder also will file an application in Execution Case No. 09 of 1988 praying for dismissal of the same for non-prosecution. Accordingly, both the parties filed solehnama in Title Suit No. 104 of 1997 and deposed in support of that solehnama, but before disposal of the suit on compromise and passing order, the decree-holder filed an application before the execution court praying for dismissal of the Execution Case No. 09 of 1988 for non-

prosecution stating that they already filed solehnama in Title Suit No. 104 of 1997 and also stated that they got their dispute amicably settled out of court and got their share and possession of the property. In execution case the decree-holder also filed an application for amendment of plaint for substitution of some heirs of deceased judgment-debtors. Consequently, execution court called for the record of Partition Suit No. 171 of 1967 fixing subsequent date for hearing of the application. But the decree-holder after filing those applications before the execution court and filing solehnama in Title Suit No. 104 of 1997, did not take any step to get both the execution case and title suit disposed of as per their prayer, consequently, both the execution case and title suit were dismissed for default.

Order 21 of the Code provides no provision for restoration of the execution case dismissed for default, like Indian jurisdiction, but Section 48 of the Code of Civil Procedure provided that the decree-holder can file a fresh execution case in the event of dismissal of earlier one for default subject to limitation as provided in Article 181 of the Limitation Act. It means that from the date of dismissal for default the decree-holder can come with a fresh application within 3

years from the order. In this way an execution proceeding can be maintained upto 12 years from the date of decree.

Apart from this the court can exercise its inherent power to secure ends of justice and to give relief to the litigant under Section 151 of the Code. In that case, before exercising such power the court is to see, whether the proceeding is otherwise barred by limitation. Had it been filed by the decree-holder just after dismissal of execution proceeding, exercise of that power under Section 151 of the Code would be appreciated, but in the instant case, the decree-holder came with an application for restoration of the execution case after about 11 years. Because of such inordinate delay the decree-holder is legally barred from filing a fresh execution case under Article 181 of the Limitation Act and also barred under Section 48 of the Code of Civil Procedure as the decree in execution exceeded the limitation from the date of decree. Therefore, the revisional court has committed error of law in the decision occasioning failure of justice.

However, to appreciate the facts and circumstances of the case, I have gone through the solehnama filed by the parties in Title Suit No. 104 of 1997 wherein, the parties admitted that they got their

property amicably partitioned and got delivery of possession as per solehnama. Where the matter in dispute has been settled amicably out of court nothing left for the court to execute further. I failed to understand why the decree-holder has come with an application for restoration of the execution case and wanted to put the decree in execution through court where they already got their saham amicably and delivery of possession of their respective saham out of court. If the decree-holder did not get his share and delivery of possession as per solehnama promised by other co-sharers they could have come before the court not after 11 years, but immediate after the dismissal of execution case.

Apart from this, I like to note and observe that it is a matter of great inconvenience for both the parties where the matter was settled before a decade. However, if the decree-holder and other co-sharers who got the dispute amicably settled out of court and filed the solehnama in Title Suit No. 104 of 1997, the plaintiff in that suit or their legal heirs can file an application under Order 9 Rule 4 or Rule 9 of the Code for restoration of Title Suit No. 104 of 1997 and after restoration get the suit disposed of on compromise making the

solehnama part of decree which will give all the parties an opportunity and scope to have their rightful claim enjoyed, but not in Execution Case No. 09 of 1988. Therefore, the plaintiff in Title Suit No. 104 of 1997 may be advised to file an application for restoration of Title Suit No. 104 of 1997 as early as possible to get the suit restored and then disposed of on compromise making the solehnama part of the decree to secure ends of justice between the parties to the litigation which was initiated in the year 1967.

In the light of the observations made above, the decree-holder as well as the present petitioners can take proper step to restore the Title Suit No. 104 of 1997 as early as possible and in that case the trial court may consider the application for restoration and restore the same in its original number and position considering facts and circumstances of the case and to give effective reliefs to the parties.

Taking into consideration the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioners calling for interference by this Court.

In the result, the Rule is made absolute, however, without any order as to costs.

The impugned judgment and order of the revisional court is hereby set aside and order of the trial court is hereby maintained.

Order of *stay* granted at the time of issuance of the Rule stand vacated.

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