

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 1706 of 2020

Abdul Mohammad Salem Jamadar
... Petitioner

-Versus-

Moslehuddin and others
...Opposite-Parties

Mr. Md. Alamgir, Advocate for
Mr. Md. Jahangir Kabir, Senior Advocate
...For the Petitioner

Mr. Suproakash Datta, Advocate
...For the Opposite-Party Nos. 2-9.

Judgment on 12th November, 2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioner calling upon the opposite parties to show cause as to why the impugned judgment and order No. 22 dated 23.07.2020 passed by the learned Additional District and Sessions Judge, Charfashion, Bhola in Title Appeal No. 70 of 2017 rejecting the application under Section 151 of the Code of Civil Procedure for restoration of the appeal should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The petitioner, as plaintiff, instituted Title Suit No.

361 of 2008 against the opposite-parties, as defendant in the Court of Senior Assistant Judge, Charfashion, Bhola for a declaration of title in the suit property. The trial court after hearing dismissed the suit by its judgment and decree dated 24.07.2017. Thereafter, the plaintiff preferred Title Appeal No. 70 of 2017 before the appellate court. Eventually, the appeal was transferred to the learned Additional District Judge, Bhola for disposal before whom the appellant sought adjournment for hearing but the court rejected the prayer. Being apprehended that they will not get justice before that court filed Miscellaneous Case No. 13 of 2020 for withdrawal of Title Appeal No. 70 of 2017 and to transfer the same to any other court of competent jurisdiction for disposal. Learned District Judge, Bhola heard the application and after hearing by its order dated 05.03.2020 admitted the same, called for the records and passed an order staying further proceeding of the appeal. Said order was duly communicated to the court of learned Additional District Judge, Charfashion, Bhola who received the same on 11.03.2020. The appeal was fixed for hearing on 12.03.2020. On that date the appellant filed an application praying for adjournment on the

ground that the learned Advocate for the appellant being an Election Commissioner in the election of the Bar Association engaged in the election process.

Unfortunately said application for adjournment was not moved by the learned Advocate. Consequently, the appellate court rejected the application as being not moved by the appellant and took the matter for hearing and after hearing the learned Advocate for the respondent dismissed the appeal. Thereafter, the appellant filed an application under Section 151 of the Code of Civil Procedure on 23.07.2020 praying for re-admission of the appeal in its original position and number. The appellate court heard the application and by the impugned judgment and order dated 23.07.2020 rejected the same. At this juncture, the petitioner moved this Court by filing this revisional application under Section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of status-quo.

Mr. Md. Alamgir, learned Advocate appearing for Mr. Md. Jahangir Kabir, learned Senior Advocate for the petitioner submits that when an application under Section 24 of the Code of Civil

Procedure was filed before the learned District Judge, Bhola praying for transfer of the Title Appeal No. 70 of 2017 from the court of learned Additional District Judge and the learned District Judge passed an order calling for records staying further proceeding of the appeal and duly communicated to the learned Additional District Judge on 11.03.2020 the appellate court below ought not to have taken the appeal for hearing on the following day on 12.03.2020. He submits that the appellate court below intentionally disregarded the order of the superior court by taking the appeal for hearing on the following day after receipt of the order of stay passed by the learned District Judge. He submits that on the date fixed however, the appellant filed an application seeking adjournment on the ground of engagement of the learned Advocate in Bar Association election. The appellate court in total disregard to order of stay of the learned District Judge intentionally took the matter for hearing at 4.30 P.M. and rejected the application and dismissed the appeal after hearing the respondents.

He submits that when application for adjournment is rejected by the court, the court ought to have given a direction to the learned

Advocate for the appellant to get prepared himself for hearing of the appeal. In that case, the court can took up the matter for hearing, but in this instant appeal no such time was given to the appellant. Apart from this the appellate court in the absence of appellant can pass only order dismissing the appeal for default. But in the instant appeal the appellate court illegally heard the learned Advocate for the respondents and dismissed the appeal on merit, which the appellate court cannot do under Rule 17 of Order 41 of the Code of Civil Procedure.

He finally submits that in this situation when the appellate court came to know that the proceeding was stayed by the learned District Judge on 05.03.2020 and received the order by him on 11.03.2020 he ought to have re-admit the appeal on his own motion correcting his own wrong, but the conduct of the learned appellate court was intentional and rejection of application under Section 151 of the Code of Civil Procedure is palpably illegal, as such, the impugned judgment and order is liable to be set aside.

Mr. Suproakash Datta, learned Advocate appearing for the opposite-parties submits that the appellant in his application for

adjournment suppressed the fact of filing miscellaneous case before the learned District Judge and passing order of stay for which the appellate court was not aware of the fact of order of stay. He further submits that in the application under Section 151 of the Code of Civil Procedure for restoration of the appeal the appellant also intentionally suppressed the fact of filing miscellaneous case under Section 24 of the Code of Civil Procedure and order passed therein by the learned District Judge. Moreover, when an appeal was dismissed for default or disposed of ex parte only procedure to be followed by the appellant either by filing an application under Order 41 Rule 19 or Rule 21 of the Code. But in the instant case, the appellant instead of taking recourse to such provision of law for the reason best known to him filed an application under Section 151 of the Code praying for restoration of the appeal, but there is no provision in the Code for restoration of the appeal under Section 151 of the Code of Civil Procedure.

He finally submits that the appellant ought to have preferred this revision against the judgment and decree dated 12.03.2020 by which the appeal was dismissed by the appellate court. But instead

of filing revision against the order of dismissal, filed revision against the order rejecting the application under Section 151 of the Code of Civil Procedure which was not passed by the appellate court in violation of any law, as such, the appellate court committed no error in the decision occasioning failure of justice, hence, the Rule is liable to be discharged.

Heard the learned Advocates of both the parties, have gone through the revisional application, application filed by the appellant seeking adjournment, application under Section 151 of the Code, judgment and decree dated 12.03.2020 and the impugned judgment and order passed by the appellate court in Title Appeal No. 70 of 2017.

Facts of the case need not be repeated. It is facts that the petitioner, as plaintiff, filed Title Suit No. 361 of 2008 for a decree of declaration of title which was dismissed by the trial court. Thereafter, he preferred Title Appeal No. 70 of 2017 before the learned District Judge, Bhola. Eventually, the said appeal was transferred to the Court of learned Additional District Judge, Charfashion, Bhola for hearing and disposal wherein, the appellant

took adjournment one after another. At a point of time, the appellant apprehended that he will not get proper justice before that court, consequently, he filed Miscellaneous Case No. 13 of 2020 under Section 24 of the Code of Civil Procedure praying for transfer of the said appeal from that court to any other court of competent jurisdiction. Learned District Judge accepted the application and by order dated 05.03.2020 called for the records and stayed further proceeding of the appeal. From Annexure-I, information slip, it appears that the order of the learned District Judge was duly committed to the court concerned who received the same on 11.03.2020. After receipt of the order of stay the learned Additional District Judge ought to have sent the records to the learned District Judge, but instead of sending the records, on the following day i.e. on 12.03.2020 learned Additional District Judge took the matter for hearing, however, the appellant also filed an application seeking adjournment. The appellate court rejected the application for time as none moved the same. Thereafter, took the appeal for hearing and in the absence of the appellant heard the learned Advocate for the respondents and after hearing by the

judgment and decree dated 12.03.2020 dismissed the appeal on merit. Thereafter, the appellant filed an application under Section 151 of the Code of Civil Procedure praying for restoration/re-admission of the appeal. Said application was also rejected by the impugned judgment and order observing that the reason for dismissal of the appeal has been clearly stated in the order of dismissal dated 12.03.2020.

As per provision of law an appeal cannot be disposed of on merit upon hearing the learned Advocate for the respondents. If the appellant found absent on the date fixed, only scope lies with the appellate court to dismiss the appeal for default, but in the instant case the appellate court in one hand disobeyed the order of the superior court, took the matter for hearing, rejected the application for time and on the other hand, dismissed the appeal after hearing the learned Advocate for the respondents which is total violation of Order 41 Rule 17 of the Code of Civil Procedure. However, when the appellant came up with an application under Section 151 of the Code of Civil Procedure praying for restoration of the appeal, the appellate court ought to have considered the same bearing in mind

that the court itself committed serious illegality and an error of law in disposing the appeal, disobeying the order of the superior court and also considering that an appeal cannot be disposed of on merit in the absence of the appellant. The appellate court unfortunately took a stand to defeat the appellant anyhow by disposing the appeal at the whims of the appellate court which cannot be condoned in anyway. From the language used in the judgment and order dated 12.03.2020, it cannot be construed that the appellate court below has no knowledge of provision of law, but it indicates from all the facts and activities whatever the court has done is absolutely intentional. A Judge should play his role impartially having no biasness to any particular party to the proceeding. In the instant case, I find that the appellate court below wanted to dispose of the appeal anyhow by dismissing the same to the detriment of the appellant, and accordingly, he did it. It is really unfortunate, unexpected, undesirable and unwarranted from a Judge having status of Additional District Judge. Therefore, the Judge concern named Mr. Nurul Islam is hereby warned not to repeat the same in future.

From the above observations, I find that the appellate court committed serious error in disposing the appeal on merit disobeying the order of the learned District Judge, as well as rejecting the application under Section 151 of the Code of Civil Procedure calling for interference by this Court.

Taking into consideration the above, I find merit in the Rule as well as in the submissions of the learned Advocate for the petitioner.

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

Impugned order dated 23.07.2020 is hereby *set aside*. Application under Section 151 of the Code of Civil Procedure is hereby allowed. The impugned judgment and decree dated 12.03.2020 passed by the appellate court in Title Appeal No. 70 of 2017 is hereby *set aside* and the appeal is re-admitted in its original number and position.

The appellate court is hereby directed to hear the appeal on merit and disposed of the same within a shortest possible time

giving top most priority preferably within 03(three) months from the date of receipt of this judgment and order.

The order of status-quo shall continue till disposal of the appeal.

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