

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

CIVIL REVISION NO. 125 of 2022

**Ramit Kumar Kanungo represented by
his constituted attorneys Mohammad Ali Sha
and others.**

...Petitioners

-Versus-

Ali Imam and others.

....Opposite parties

Mr. Md. Mahbub Ali, Senior Advocate with
Mr. Sk. Md. Jahangir Alam, Advocate

..... For the petitioners

Mr. Md. Ruhul Quddus, Advocate with
Mr. Md. Akter Rasul, Advocate

..... For opposite party Nos. 1 and 3

Heard and Judgment on: 09.07.2024

Md. Badruzzaman, J:

This Rule was issued calling upon the opposite parties to show cause as to why order dated 27.09.2021 passed by learned Joint District Judge, 1st Court, Chattogram in Other Suit No. 345 of 2017 rejecting an application filed by the petitioners praying for hearing of the matter in presence of the attorneys of the plaintiff after reviewing its earlier order dated 10.03.2021 should not be set aside.

At the time of issuance of the Rule on 23.12.2021 this Court stayed operation of the impugned order for a period of 6 (six) months which was, subsequently, extended time to time.

Facts, relevant for the purpose of disposal of this Rule, are that the petitioner through his constituted attorneys (ten in number) as

plaintiff instituted Other Suit No. 345 of 2017 praying for a decree of declaration of title to the suit property measuring 0.8562 acre with other declarations that unregistered deed of Will and Certificate of Probate issued in Probate Case No. 186 of 1986 by the District Delegate and 1st Court of Sub-ordinate Judge, Chattogram and mutation khatians and registered deeds of declarations of *heba* as described in the schedule of the plaint are void, illegal and not binding upon the plaintiff.

Opposite party Nos. 1-3 as defendants entered appearance to contest the suit and thereafter, filed an application under Order VII rule 11 (a) of the Code of Civil Procedure for rejection of the plaint on the ground that there was no cause of action of the suit. The trial Court, upon hearing, vide order dated 15.03.2018 rejected the application. On 01.04.2018 defendant No. 1 filed an application praying for a direction upon the plaintiff to appear in-person before the trial Court on the allegation that the plaintiff is a fictitious person and his so-called attorneys instituted the suit by using the name of the plaintiff. The trial Court, upon hearing the parties, vide order dated 03.02.2021 allowed the application and directed the plaintiff to appear in-person before it on 15.02.2021. The plaintiff prayed for adjournment and the trial Court fixed on 24.02.2021 for personal appearance of the plaintiff. The plaintiff did not appear before the trial Court in-person on that day and the trial Court dismissed the suit on 24.2.2021 for non-compliance of its order dated 03.02.2021. Thereafter, the plaintiff through his attorneys on 10.03.2021 filed an application under Order IX rule (9) read with section 151 of the Code of Civil Procedure praying for restoration of the suit to its original file

and number on the ground that the learned Advocate did not communicate the order to the plaintiff in time.

The trial Court, upon hearing, fixed next date on 28.04.2021 for hearing of the application in presence of the plaintiff. Thereafter, the suit could not be proceeded as all the Courts of Bangladesh were locked down due to the Covid-19 pandemic. On 27.09.2021 the plaintiff filed an application for review of order dated 10.3.2021 and prayed for hearing the application filed on 10.03.2021 under Order IX rule (9) of the Code of Civil Procedure in the presence of the constituted attorneys of the plaintiff. The trial Court, upon hearing the learned Advocate, rejected the application and fixed the application under Order IX rule (9) of the Code of Civil Procedure for hearing on 06.01.2022.

Being aggrieved by said order dated 27.09.2021 the plaintiff has preferred this revision through his attorneys under section 115(1) of the Code of Civil Procedure and obtained the instant Rule and order of stay, as stated above.

Opposite parties No. 1-3 entered appearance and filed counter-affidavit and supplementary affidavit to contest the Rule contending that the plaintiff is a fictitious person. He should be brought before the Court for proving his existence and on the prayer of the learned Advocate for the opposite parties, we directed the petitioner namely Ramit Kumar Kanungo to appear in-person before us on 02.07.2024 but on that day, the learned Advocate for the petitioner prayed for time and we adjourned the matter till today.

Mr. Md. Mahbub Ali, learned Senior Counsel appearing with Mr. Sk. Md. Jahangir Alam, learned Advocate for the petitioner submits that the defendants did not file written statement before the trial Court but filed an application for personal appearance of the plaintiff which was misconceived and the trial Court vide order dated 03.02.2021 illegally directed the plaintiff to appear in-person to prove his existence. The learned Advocate further submits that since the plaintiff was unable to come before the Court, he appointed his attorneys to institute the suit by registered deed of power of attorney dated 11.4.2017 being No. 5769 and as such, the constituted attorneys are competent to proceed with the suit by representing the plaintiff and there was no necessity at that stage of the proceeding to direct the principal (the plaintiff) to appear in-person for proving his existence. Learned Advocate further submits that the trial Court dismissed the suit for default on 24.2.2021 for non-compliance of its order dated 03.02.2021 which was also illegal and as such, the plaintiff filed an application under Order IX rule (9) of the Code of Civil Procedure on 10.03.2021 for setting aside the dismissal order and as per the provision of law the said application should have been instantly registered as a miscellaneous case and should have issued notices upon the defendant-opposite parties to contest the case but the trial Court illegally fixed the application for hearing on 28.04.2021 in presence of the plaintiff. The learned Advocate further submits that the plaintiff on 27.09.2021 filed an application for review of order dated 10.03.2021 and for hearing of the application filed under Order IX rule 9 of the Code of Civil Procedure in presence of his constituted attorneys but the trial Court without considering the relevant provisions of law, rejected the

application by fixing the next date on 06.01.2022 for hearing of the application in presence of the plaintiff. The learned Advocate also submits that since the defendants did not submit written statement as yet and there is no pleadings of the defendants before the Court, and as such, they cannot ask the plaintiff to appear in-person and resultantly, the orders passed by the trial Court directing the plaintiff to appear in-person are illegal and without jurisdiction. The learned Advocate finally submits that since the plaintiff instituted the suit through his constituted attorneys, the plaintiff may appear, if required, before the trial Court at the time of examination of the witnesses and as such, the order passed by this Court directing the petitioner to appear in-person should be recalled.

Mr. Md. Ruhul Quddus, learned Advocate appearing with Mr. Akter Rasul, learned Advocate for opposite party Nos. 1 and 3, submits that since the trial Court directed the plaintiff to appear in-person, he should have complied with said order and being failed to do so, the trial Court committed no illegality in dismissing the suit for default and rejecting the application for review of order dated 10.3.2021.

We have heard the learned advocates as well as perused the plaint, application filed by defendant No. 1 for direction upon the plaintiff to appear in-person, application for restoration of the suit, the order sheet of the suit and other materials available on record. On perusal of the record, it appears that the plaintiff Ramit Kumar Kanungo, through his constituted attorneys (ten persons) as plaintiff instituted Other Suit No. 345 of 2017 against the opposite parties praying for a decree of declarations including declaration of title to the suit land as described in the schedule of the plaint. It has claimed

by the plaintiff that by registered power of attorney he appointed Abdul Hadi Mia and 9 (nine) others as his constituted attorneys in respect of the suit land by giving all powers including the power to institute any suit in respect of the suit property and being authorized by said power of attorney, said Abdul Hadi Mia and 9 (nine) others instituted the present suit representing the plaintiff Ramit Kumar Kanungo. *Prima-facie*, we find no illegality in instituting the suit by the plaintiff through his constituted attorneys.

It appears that the suit was instituted in 2017 and the defendants appeared therein, but without filing any written statement to contest the suit, filed an application under Order VII rule 11 of the Code of Civil Procedure praying for rejection of the plaint which, upon hearing, was rejected by the trial Court and the defendants did not challenge said order before any higher forum. Since the defendants did not file written statement by making out their case to contest the suit, it is to be considered that they have no pleadings before the trial Court. They filed an application before the trial Court praying for personal appearance of the plaintiff before the has commenced, contending that there was no existence of the plaintiff. Since there is no pleading before the trial Court on behalf of the defendants, they had no right to challenge the existence of the plaintiff. They should have first filed written statement by making out a specific case that there was no existence of the plaintiff and that could be an issue during trial of the suit. Moreover, since the plaintiff by registered power of attorney, authorized Abdul Hadi Mia and 9 (nine) others to institute the suit and/or other proceedings in respect of the suit properties, there is no bar to proceed with the suit at the instance of the attorneys of the plaintiff unless the power of

attorney is cancelled by the principal. Even during trial, if a question arises that there is no existence of the plaintiff, Ramit Kumar Kanungo, the defendants will get opportunity to agitate said issue during trial of the suit. Since the application for personal appearance of the plaintiff was filed before filing of the written statements, the same was misconceived one and the trial Court upon misconception of law by order dated 03.02.2021 directed the plaintiff to appear in-person before it and thereafter, upon misconception of law dismissed the suit for default on 24.2.2021 for non-compliance of said order dated 03.02.2021.

It also appears that, within 30 days of the dismissal of the suit for default on 24.2.2021, the plaintiff filed an application on 10.03.2021 under Order IX rule (9) read with section 151 of the Code of Civil Procedure supported by affidavit praying for restoration of the suit. Accordingly, the trial Court had jurisdiction to directly set aside the dismissal order in order to avoid delay and expedite disposal of the suit as per provisions under Order 9 rule (9A) of the Code of Civil Procedure. But the trial Court vide order dated 10.3.2021 fixed the application for hearing on 27.9.2021 for hearing of the application in presence of the plaintiff though there is no requirement under law to hear and dispose of such an application in presence of the plaintiff. It also appears that the plaintiff on 27.09.2021 filed an application for review of order dated 10.03.2021 which was rejected by the trial Court by the impugned order by fixing the next date on 06.01.2022 for hearing of the application filed under Order IX rule (9) of the Code of Civil Procedure in presence of the plaintiff.

After dismissal of a civil suit for default an application under Order IX rule (9) of the Code of Civil Procedure is to be filed by the plaintiff for restoration of the suit and as per provisions under Order IX rule (9A) of the Code, if such application is made supported by affidavit within thirty days from the date of dismissal, the Court has jurisdiction to directly set aside the dismissal without requiring the plaintiff to adduce evidence to satisfy the Court about sufficient causes as required under rule (9) of Order IX of the Code in order to avoid delay and expedite disposal.

It appears that after dismissal of the suit for default on 24.2.2021, the plaintiff filed application under Order IX rule (9) of the Code supported by affidavit on 21.3.2021, within 30 days from the dismissal order. As such, the requirements of rule (9A) of Order 9 of the Code were complied with. Accordingly, the trial Court should have heard and disposed of the application instantly in view of the provisions under rule (9A) of Order 9 of the Code without requiring the plaintiff to appear in-person. So, the orders dated 10.03.2021 and 27.09.2021 passed by the trial Court for hearing of the application filed under Order IX rule (9) of the Code of Civil Procedure in presence of the plaintiff are misconceived and against the proposition of law which are liable to be set aside.

In that view of the matter, we find merit in this Rule.

Accordingly, the Rule is made absolute.

The parties shall bear their own cost.

The orders dated 10.3.2021 and 27.09.2021 are set aside.

The trial Court is directed to dispose of the application filed by the plaintiff under Order IX rule (9) of the Code of Civil Procedure

dated 10.3.2021 as per provisions under Order 9 rule (9A) of the Code.

The personal appearance of the plaintiff-petitioner before us is dispensed with.

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

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)