

Present:

**Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Mansur Alam**

First Appeal No. 394 of 2017

In the Matter of:

Sufia Begum and others.

.....Plaintiff-appellants.

-Versus-

Nazrul Islam being dead his legal heirs
Farida Nasrin and others

.....Defendant-respondents.

Mr. Sherder Abul Hossain with
Mr. Mokarramus Shaklan, Advocates

.....For the appellants.

Mr. Taposh Kumar Dutta, Advocate

..... For the Respondents.

**Heard on 15.05.2025, 01.06.2025 and
Judgment on 01.06.2025.**

Sheikh Abdul Awal, J:

This First Appeal is directed against the judgment and decree dated 08.10.2017 (decree signed on 12.10.2017) passed by the learned Joint District Judge, Arbitration Court, Dhaka in Title Suit No. 06 of 2016 rejecting the plaint.

The short facts of the case for disposal of this appeal are that one Sufia Begum and others as plaintiffs filed Title Suit No. 311 of 2015 in the Court of the learned Joint District Judge, 4th Court Dhaka praying the following reliefs:

(ক) নিম্ন তফসিল "ক" বর্ণিত সম্পত্তি হইতে আগত নিম্ন তফসিল “খ” বর্ণিত সম্পত্তির

বাদীগণ ষোল আনা মালিক মর্মে বাদীগণের অনুকূলে ও বিবাদীগণের প্রতিকূলে এক ঘোষণার ডিক্রী দিতে:

(খ) নিম্ন তফসিল "খ" বর্ণিত সম্পত্তিতে ১-৫ বিবাদীগণ ৬নং বিবাদীর মাতা আলেয়া বেগম এবং ৭নং বিবাদীর পিতা আমীর হোসেন খানের নামে ঢাকা সিটি জরিপের রেকর্ড ভুল মর্মে বাদীগণের অনুকূলে ও বিবাদীগণের প্রতিকূলে এক ঘোষণার ডিক্রী দিতে;

(গ) নিম্ন তফসিল "খ" বর্ণিত সম্পত্তিতে বাদীগণ শাস্তি পূর্ণভাবে ভোগ দখলে থাকায় বাদীগণের অনুকূলে বিবাদীগণের প্রতিকূলে এক চিরস্থায়ী নিষেধাজ্ঞার ডিক্রী দিতে; ও

(ঘ) ময় আদালত ব্যয়ের ডিক্রী বাদীগণের অনুকূলে দিতে;

(ঙ) আইন ও ইকুইটিতে বাদীগণ আর যে যে প্রতিকার পাওয়ার হকদার তৎমর্মে বাদীগণের অনুকূলে ও বিবাদীগণের প্রতিকূলে এক ডিক্রী দিতে বিত্ত আদালতের মর্জি হয়।

The said suit which was renumbered on transfer in the Court of the learned Joint District Judge, Arbitration Court, Dhaka as Title Suit No. 06 of 2016.

Defendants entered appearance in the suit and filed written statements denying all the material allegations made in the plaint contending, inter-alia, that the suit is not maintainable in its present form and manner, the plaintiff filed the suit on false

averments by creating some forged documents and as such, the suit is liable to be dismissed.

Soon thereafter, the defendants filed an application under Order VII, Rule 11 of the Code of Civil Procedure for rejection of the plaint.

The plaintiffs resisted the said application by filing written objection stating that the contents of the plaint do disclose the cause of action of the suit, the suit is well maintainable in law and fact and as such, the application for rejection of plaint is liable to be rejected.

The learned trial Judge after hearing the parties and on considering the materials on record by the impugned judgment and order dated 08.10.2017 allowed the application under Order VII, Rule 11 of the Code of Civil Procedure holding that the contents of the suit do not disclose any cause of action for the suit.

Being aggrieved by the aforesaid impugned judgment and order dated 08.10.2017 the plaintiffs preferred this appeal before this Court.

Mr. Sherder Abul Hossain, the learned Advocate appearing for the plaintiff-appellants in the course of arguments takes us through the plaint of the suit and other materials on record and then submits that the contents of the plaint do disclose cause of action for the suit. In this case plaintiffs' title based on a series of registered deeds and without taking any evidence it cannot be said that the contents of the suit do not disclose any cause of action for the suit or the registered deeds are forged, the suit is barred by any law. However, in the midst of the arguments the

learned Advocate referring an application under Order XXIII, Rule 1(2) of the Code of Civil Procedure for withdrawal of the suit with permission to sue afresh submits that during trial the plaintiff side found some formal defects and mistakes in the plaint and also found some deeds wrongly mentioned in the plaint which are not at all related with the suit land. He adds those documents may give rise to separate cause of action for the suit and thus require different forms of relief, which cannot be accommodated within the framework of the present suit. Finally, the learned Advocate submits that the defects as made in the plaint are formal in nature and during pendency of the suit plaintiffs filed an application for withdrawal of the suit on 15.02.2017, which was rejected by the trial Court vide order No. 42 dated 08.10.2017 on the sole finding that that the application for withdrawal of the suit was not filed through lawfully executing power of attorney. The appeal is a continuation of the original suit and thus, this court is empowered to entertain and dispose of the application for withdrawal of the suit with permission to sue afresh .

Mr. Taposh Kumar Dutta, the learned Advocate for the respondents, on the other hand, by filing a counter affidavit opposes the prayer for withdrawal of the suit. It is contended in the counter affidavit that the application filed by the appellant-applicants under Order XXIII, Rule 1(2) of the Code of Civil Procedure, 1908 for withdrawal of the suit with permission to sue afresh is not maintainable inasmuch as 2 plaintiffs out of 3 plaintiffs filed the application and it is on record only one plaintiff named Rajia Khatun has sworn affidavit in support of

the application and without prayer of all the plaintiffs the suit cannot be fully withdrawn. The learned Advocate further submits that the present application for withdrawal of the suit with the liberty to sue afresh does not have any leg to stand as because the plaintiff-appellants have not specifically mentioned about the formal defects in the application which are not curable by amendment of plaint.

Having heard the learned counsels for both the parties and having gone through the memo of appeal, application for withdrawal of the suit and other the materials on record including the impugned judgment and order.

On scrutiny of the record, it appears that the plaintiff-appellants have clearly mentioned as to formal defects of the suit in the application under Order XXIII, Rule 1(2) of the Code of Civil Procedure, 1908 and there is sufficient ground for which the withdrawal should be allowed. The law has given to right the plaintiff to avail the remedy under Order XXIII rule 1 of the Code of Civil Procedure even at the appellate stage. But the relief contemplated under this provision of law is one of discretionary nature.

In the case of A.Z.M Khalilur Rhaman Vs. Md. Syed Hossain and others reported in 25 DLR 485 and Abdur Rahman Vs. Khru Malitha and others reported in 50 DLR (AD) 71 and so many other cases it has been consistently held that the plaintiffs are always entitled to withdraw the suit at any time after the institution of the suit, even during pendency of the appeal.

For the reasons stated in the application under Order XXIII, Rule 1(2) of the Code of Civil Procedure, 1908 and in view of the principle laid down in the above decisions, we are inclined to allow the application.

Accordingly, the application under Order XXIII, Rule 1(2) of the Code of Civil Procedure for withdrawal the suit with permission to sue afresh is allowed.

Consequently, the appeal is disposed of in the above manner. In the facts and circumstances of the case there will be no order as to costs.

Send down the LC Records at once.

Md. Mansur Alam, J:

I agree.