

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

Present:

Mr. Justice Md. Iqbal Kabir

Civil Revision No. 2811 of 2018

IN THE MATTER OF:

An application under section 115(1) of the Code of Civil Procedure.

AND

IN THE MATTER OF:

Anwar Miah

....Petitioner

Versus

Md. Hamdu Miah and others

....Opposite parties

Mr. Sudipta Arjun with

Mr. Bidhayak Sarker, Advocates

....For the Petitioner

Mr. M Khaled Ahmed, Senior Advocate with

Ms. Nadia Mehrin, Advocate

....For the Opposite Party Nos. 1-4

Judgment on 11.02.2025.

Under section 115(1) of the Code of Civil Procedure, this Civil Revisional has been filed wherein this Court issued Rule in the following terms:

“Let a Rule be issued calling upon the opposite party Nos. 1-5 to show cause as to why the impugned judgment and order dated 08.02.2018 passed by the learned District Judge, Moulvibazar in Miscellaneous Appeal No. 25 of 2017 dismissing the appeal summarily and affirming the judgment and order dated 20.09.2016 passed by the learned Joint District Judge, 1st Court, Moulvibazar in Miscellaneous Case No. 04 of 2011 filed under Order IX Rule 13 of the Code of Civil Procedure, dismissing the case should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.”

The facts relevant for disposal of the Rule, in short, are that the opposite party Nos. 1 to 5 as the plaintiff filed Title Suit No. 15 of 2000 before the Court of Joint District Judge, 1st Court, Moulvibazar against the

present petitioner for partition of the suit, thereby claiming a saham of 3.14 acres land. The Defendants Nos. 1 to 3, 5, and 6 filed written statements denying all material assertions made by the plaintiffs. However, defendant No. 5 as the tadbirkar of the suit on behalf of the other contesting defendants prayed for adjournment and subsequently, he died. After the death of defendant No. 5, the plaintiffs along with the local elderly people assured the defendants that they would amicably settle the dispute and would withdraw the suit. The defendants believed such assurance was given by the plaintiffs and did not look after the suit afterward the said title suit No. 15 of 2000 decreed Ex-party in respect of the suit land and they also filed Title Execution Case No. 01 of 2011.

The defendant petitioner and the pro-forma opposite party Nos. 23, 24 filed Miscellaneous Case No. 04 of 2011 under Order IX, rule 13 of the Code of Civil Procedure for setting aside the ex-party preliminary decree dated 22.03.2003 and ex-parte final decree dated 16.01.2011 stating that they did not contest the suit due to the assurance given by the plaintiffs to withdraw the suit. According to him if the Title Suit No. 15 of 2000 would have contested by the defendants then the result would be otherwise and as such prayed that the exparte judgment and decree be set aside being void and inoperative so that the petitioner would get a chance to contest the Title Suit No. 15 of 2000 by restoring the same to its original file and number.

The Joint District Judge, 1st Court, Moulvibazar by its judgment and order dated 20.09.2016 dismissed the miscellaneous case mainly on the reason that the petitioner could not prove that defendant No. 5 was the tadbirkar and there was any decision for amicable settlement of the matter in dispute/or withdrawn the suit.

Being aggrieved the petitioner filed Miscellaneous Appeal No. 25 of 2017 before the learned District Judge, Moulvibazar along with an application for condonation of delay of 186 days in filing the miscellaneous appeal on the ground that the appellant is physically ill and

undergoing treatment and the delay has been caused due to the illness of the appellant.

The Court of the District Judge, Moulvibazar fixed the case for maintainability hearing along with an application for condonation of delay, upon hearing the parties the court vide its judgment and order dated 8-2.2018 dismissed the appeal summarily.

Mr. Sudipta Arjun, learned Advocate appearing on behalf of the petitioner submits that both the courts below without considering the averments made in the application under Order IX, rule 13 and in the memorandum of appeal most arbitrarily dismissed the case, as such committed an error of law resulting in an error in the order occasioning failure of justice.

He submits defendant-petitioner is the co-sharer/owner of the suit land mentioned in the second schedule of the plaint. According to him unless Title Suit No. 15 of 2000 is restored there would be a multiplicity of proceedings between the parties and to avoid such proceedings, the courts below should have taken lenient views in disposing of the miscellaneous case as well as appeal and as such committed an error of law resulting in an error in the order occasioning failure of justice.

He next submits that the petitioner-appellant filed an application for condoning the delay of 186 days in filing the appeal along with a medical certificate issued by the doctor to support his application. But the court without allowing him to prove the certificate by calling the doctor as a witness and without giving any notice to the opposite parties most arbitrarily dismissed the appeal at the time of the maintainability hearing and as such committed an error of law resulting in an error in the order occasioning failure of justice.

He lastly submits that the impugned judgment and orders of the court below are neither proper nor under the law.

Mr. M Khaled Ahmed, learned Senior Advocate for the opposite party Nos. 1-4 submits that the petitioner was present by filing Vokatnama, but was absent at the time of the hearing therefore, there is

no scope to say being not aware of the case they remain absent. However, the appellate Court affirmed the judgment and order of the trial court therefore the case is barred by limitation under Article 164 of the first schedule of the Limitation Act. He claims Article 164 of the Limitation Act, 1908 clearly prescribed the period of limitation for a defendant to file a suit for order to set aside an ex parte decree is 30 days starting from the date of the decree or where the summons was not duly served when the applicant knows of the decree. In support of his submission cited a decision reported in 14 BLC (AD) 164. He brought notice that the petitioner of the revisional application appeared in the original partition suit in the manner stated above, therefore, needs to have filed the Miscellaneous case within 30 days from the date of passing ex parte decree. In the present case, there is no scope to condone the delay beyond 30 days in the above-mentioned miscellaneous case.

According to him following the settled principle of law and article 164 of the 1st Schedule of the Limitation Act miscellaneous case was rejected by the Court and the Appellate court affirmed the judgment and order of the trial court. He submits principle of law is settled that where the result is as clear as daylight when a suit, appeal, or any other legal proceedings should be buried at the inception based on the principle time should not be consumed at the fruitless litigation. This principle was laid down in the decision reported in 53 DLR (AD) 12. As such, rejection of the Appellate Court's Order in Misc. Appeal No. 25 of 2017 is also just, proper, and following the law.

This Court went through the judgment and records available before this Court, wherefrom it transpires that he had come to know about the ex parte decree dated 18-05-11 and filed the Miscellaneous Case which was hopelessly barred by the law of limitation.

However, it has brought notice to this Court that the final decree was completed by way of delivery of possession before filing a Miscellaneous Case for setting aside the ex parte decree. The execution was implemented and completed on 19.05.2011 following the provision of

Order 21 Rule 35 of the Code of Civil Procedure by way of "Dokholi Porowana". According to him in such a situation a miscellaneous case for setting aside the exparte decree is not maintainable. In support of his submission cited a decision reported in 26 BCR (AD) 292.

In the light of the facts and circumstances as stated above and the relevant law relied upon, I find no merit in this Rule and it is therefore liable to be discharged.

Accordingly, the Rule is discharged without any order as to cost.

Communicate the order.