

District-Bhola

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

Mr Justice Md Atoar Rahman

Civil Revision No 116 of 2023

Ali Hossain

... plaintiff-petitioner

- versus-

Doctor ATM Mizanur Rahman and others

...defendant-opposite parties

Mr Md Humayun Bashar, Advocate

... for the plaintiff-petitioner

Mr Taposh Kumar Dutta, Advocate

... for the defendant-opposite party No 01

Mr Mohammad Iqbal Hossain, Advocate

... for the defendant-opposite party No 02

**Heard on: 27.11.2023, 07.12.2023,
10.01.2024 and 25.02.2024**

Judgment on: 18.03.2024

This Rule was issued by leave on an application under section 115(4) of the Code of Civil Procedure, 1908 calling upon the opposite parties to show cause as to why the impugned judgment and order dated 22.08.2022 passed by the learned District Judge, Bhola in Civil Revision No 14 of 2017 allowing the revision and thereby reversing the judgment and order dated 20.07.2017 passed by the learned Joint District Judge, Court No 1, Bhola in Miscellaneous Case No 19 of 2015

should not be set aside and/or passed such other or further order(s) as to this court may seem fit and proper.

During issuance of the Rule an order was passed staying operation of the impugned judgment and order.

The short facts for the purpose of disposal of the Rule are that the present petitioner Ali Hossain as plaintiff instituted Title Suit No 40 of 1994 in the Court of 1st Subordinate Judge, now Joint District Judge, Bhola for specific performance of contract impleading the opposite parties as defendants. Defendant Nos 1 and 2 filed separate written statements to contest the suit. On 17.05.2009 the suit was fixed for peremptory hearing. When the suit was called on for hearing, the plaintiff was not found present and, as such, the suit was dismissed for default under Order IX rule 8 of the Code of Civil Procedure. Against which the plaintiff-petitioner filed Miscellaneous Appeal No 05 of 2009 before the learned District Judge, Bhola. On transfer the appeal was heard by the learned Additional District Judge, Bhola who by his judgment and order dated 23.02.2014 dismissed the miscellaneous appeal.

Being aggrieved by and dissatisfied with the above judgment and order the plaintiff-petitioner moved to this court with an application under section 115 (1) of the Code of Civil Procedure. On 07.05.2014 the revisional application was taken up for motion hearing by a single Bench of this Division. After hearing since the Miscellaneous Appeal

No 05 of 2009 was not maintainable in law said Bench summarily disposed of the application and passed an order treating the memorandum of Miscellaneous Appeal No 05 of 2009 as an application under Order IX rule 9 of the Code of Civil Procedure to be numbered and treated as miscellaneous case for restoration of Title Suit No 40 of 1994 in its original file and number as per the provisions of Order IX rule 9 of the Code of Civil Procedure and also direction was given to the learned District Judge, Bhola to transmit and send the memorandum of appeal of the Miscellaneous Appeal No 05 of 2009 to the trial court and also passed an order directing the parties to maintaining status-quo in respect of possession of the suit land.

The defendant opposite party No 1 filed a civil petition for leave to appeal to the Hon'ble Appellate Division being No 1536 of 2014 against the above order of the High Court Division dated 07.05.2014 passed in the Civil Order No 1889 of 2014. Hon'ble Appellate Division after hearing the same by its judgment and order dated 04.09.2014 set aside the order of the High Court Division.

Thereafter the plaintiff petitioner filed a miscellaneous case being Miscellaneous Case No 19 of 2014 before the trial court under Order IX rule 9 of the Code of Civil Procedure for restoration of the Title Suit No 40 of 1994 with an application under section 5 of the Limitation Act for condonation of delay. The defendant-opposite party No 1 in the said miscellaneous case on 25.10. 2015 filed an application

under section 151 of the Code of Civil Procedure for the rejecting the miscellaneous case on maintainability ground. The plaintiff-petitioner filed written objection against the above application on 19.05.2016. Learned Joint District Judge after hearing by his judgment and order dated 20.07.2017 rejected the application for rejection of the miscellaneous case filed by the defendant opposite party No1.

The defendant opposite party No 1 against the above judgment and order filed a civil revision being Civil Revision No 14 of 2017 under section 115 (2) of the Code of Civil Procedure before the learned District Judge, Bhola who after hearing by his judgment and order dated 22.08. 2022 allowed the civil revision and thereby reversed the judgment of the trial court.

Being aggrieved by and dissatisfied with the above judgment and order dated 22.08.2022 the plaintiff-petitioner moved to this court with an application under section 115(4) of the Code of Civil Procedure and obtained the present Rule by leave and the order of stay.

Mr Md Humayun Bashar, the learned Advocate appearing on behalf of the plaintiff-petitioner has submitted that out of misconception and mistake by the learned Advocate the present petitioner earlier filed Miscellaneous Appeal No 05 of 2009 against the order of dismissal for default instead of filing miscellaneous case in the trial court under Order IX rule 9 of the Code of Civil Procedure. But the learned District Judge in deciding the civil revision neither

considered the mistake of concerned lawyer in filing miscellaneous appeal nor considered the observation of the Hon'ble Appellate Division and thereby committed an error of law resulting in an error in the decision occasioning failure of justice.

Mr Taposh Kumar Dutta, the learned Advocate, appearing on behalf of the defendant opposite party No 1 opposing the Rule and submitting background of the case stated that the dismissal order of the suit dated 17.05.2009 was challenged in Miscellaneous Appeal No 05 of 2009 before the learned District Judge, Bhola who after hearing the parties disallowed the appeal on merit by the judgment and order dated 23.02.2014 and thereby affirmed the order of the trial court dated 17.05.2009 dismissing the suit for default. The said judgment of the court is still in existence and, as such, there is no scope for the trial court to set aside the order of dismissal of the suit for default dated 17.05.2009. The learned trial court is bound by the decision of the superior court as per Article 111 of the Constitution of Bangladesh. So the present Miscellaneous Case being No 19 of 2019 filed under Order IX, Rule 9 of the Code of Civil Procedure is not maintainable.

He has further submitted that as the Hon'ble Appellate Division did not give any direction to the trial court to re-open the matter under Order IX rule 9 of the Code of Civil Procedure the trial court being *factious officio* cannot entertain any such application under Order IX rule 9. As such, the order of the trial court dated 20.07.2017 is not

sustainable in law and, hence, the judgment and order of the learned District Judge, Bhola dated 22.08.2022 allowing the revision and there by setting aside the order of the trial court dated 20.07.2017 is just and proper and, as such, according to him, the present rule is liable to be discharged.

Mr Mohammad Iqbal Hossain, the learned Advocate appearing on behalf of the defendant opposite party No 2 has submitted in favor of the Rule.

I have heard the submissions advanced by the learned Advocates and perused the application and the impugned judgment along with connected papers on record.

It appears that the learned District Judge in the impugned judgment passed in the Civil Revision No 14 of 2017 having quoted the entire judgment, passed by their Lordships on 04.09.2014 in the Civil Petition for Leave to Appeal No 1536 of 2014, opined that the decision passed by the learned judge of the trial court was contrary and contradictory to the above mentioned judgment of the Hon'ble Appellate Division and ultimately he on the basis of the above judgment of the Appellate Division allowed the Civil Revision No 14 of 2017.

I have gone through the judgment dated 04.09.2014 passed by the Hon'ble Apex Court. Upon meticulous examination of the same I

failed to find out that by this judgment the plaintiff-petitioner had expressly or impliedly been debarred from filing miscellaneous case under Order IX rule 9 of the Code of Civil Procedure against the dismissal order of the suit dated 17.05.2009 under the provisions of Order IX rule 8 of the said Code. Where a suit is wholly or partly dismissed under Order IX rule 8 of the Code of Civil Procedure the plaintiff may apply for an order to set the dismissal aside under Order IX rule 9 and if he satisfies the court that there was sufficient cause for his non appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit. Thus, the Miscellaneous Case No 19 of 2015 filed by the plaintiff-petitioner in the trial court by which the suit was dismissed for default under Order IX rule 8 should have been disposed of by that court on merit along with the application submitted under section 5 of the Limitation Act.

It is to be mentioned here that since the Miscellaneous Appeal No 05 of 2009, against the dismissal order of the suit for default dated 17.05.2009, was *ex-facie* not maintainable in law the judgment passed by the learned Additional District Judge in that miscellaneous appeal does not have any implications.

In view of the discussions made above, I am of the opinion that the learned trial judge rightly rejected the application filed under section 151 of the Code of Civil Procedure by the defendant opposite

Party No 1 in miscellaneous case on 20.07.2017. But the learned District Judge committed an error of law resulting in an error in his decision occasioning failure of justice holding that the miscellaneous case was barred by the judgment and order passed by the Hon'ble Appellate Division. Accordingly, I find substance in the Rule and, as such, the same deserves to be made absolute.

In the result, the Rule is made absolute.

The impugned judgment and order passed by the learned District Judge in Civil Revision No 14 of 2017 is set aside. Learned judge of the trial court is directed to proceed with the Miscellaneous Case No 19 of 2015 and dispose of the same within a shortest possible time in accordance with law.

The order of stay granted at the time of issuance of the Rule is hereby vacated.

Communicate this order at once.