

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

First Miscellaneous Appeal No.239 of 2022.

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Md. Abdul Khaleque and others
..... Appellants.

-Versus-

Shaha Alam Mazumder and others.
..... Respondents.

Mr. A.K.M. Shamsul Haque, Advocate
..... For the appellant.

Mr. Golam Mostofa Lasker, Advocate
.... For the respondents.

Heard and Judgment on: 04.03.2024.

This First Miscellaneous Appeal at the instance of the appellant Md. Abdul Khaleque and others is directed against the impugned judgment and order No.44 dated 05.07.2022 passed by the learned District Judge, Chandpur in Miscellaneous Case No.01 of 2016 dismissing the miscellaneous case for default.

Facts necessary for disposal of the appeal in short, is that, the respondent Nos.1-3 as plaintiffs instituted Title Suit No.280 of 1967 (partition) renumbered as Title Suit No.38 of 1994. The said suit was decreed ex-parte on 12.06.1994.

Against which the defendant-petitioner preferred Title Appeal No.111 of 1994 before the learned District Judge. Eventually the said appeal was dismissed for default on 05.10.1996.

Against the said order of dismissal the defendant-petitioner filed Miscellaneous Case No.1 of 2016 with a prayer for condonation of delay of 7154 days.

The matter was called on for hearing on 05.07.2022 and though the petitioner filed hazira but the learned Advocate was not turned up to place the Miscellaneous Case and accordingly the learned District Judge dismissed the said miscellaneous case for default by its order No.44 dated 05.07.2022.

Being aggrieved by and dissatisfied with the impugned order of the learned District Judge the defendant petitioners filed this First Miscellaneous Appeal No.239 of 2023.

Mr. Golam Mostofa Lasker, the learned Advocate enter appeared on behalf of the respondent Nos.1-3 through vokalatnama to contest the appeal.

Mr. A.K.M. Shamsul Haque, the learned Advocate submits that the defendant-appellants filed hazira and they have no lasses but due to fault of the learned Advocate the appellant should not be suffered and if the appeal has not been allowed the parties will suffer irreparable loss and injury.

However, the learned Advocate Mr. A.K.M. Shamsul Haque for the appellants and the learned Advocate Mr. Golam Mostofa Lasker, for the

respondents submits that on the advice of the well wishers and the elite of the area the parties have settled the dispute out of Court amicably among them and accordingly they made a Solenama and thus both the learned Advocate prays for allowing the appeal setting-aside the judgment of the learned District Judge dated 05.07.2022.

The learned Advocates of both the parties filed the said Solenama. But ultimately submits that it is better to file the Solenama before the concerned Court of appeal after restoration of the original appeal since no existence of the appeal and the Court may pass the judgment considering the Solenama if the terms and condition just and proper and presumed to be in accordance with law.

Considering the aforesaid facts and circumstances of the case since both the sides agreed to resolve the dispute on the advice of their well wishers and the elite of the area and accordingly they executed a Solenama in such a case it is better to allow the appeal setting-aside the impugned judgment of the appellate Court.

Considering the facts and circumstance of the case and the submission of the learned Advocate of both the sides I am inclined to allow the appeal.

In the result, the appeal is allowed. The order No.44 dated 05.07.2022 passed by the learned District Judge, Chandpur in Miscellaneous Case No.01 of 2016 is hereby set-aside. The miscellaneous case to be restored to its original file and number.

The appellate Court is directed to dispose of the appeal as early as possible preferably within 03 (three) months from the date of receipt of this order and both the sides are directed to take initiative to dispose of the miscellaneous case.

However, since both the parties agreed to settle the dispute among them thus executed a Solenama, but it is better to file the same before the appellate Court after restoration of the Miscellaneous Case.

Accordingly, the Solenama is returned back. The parties are at liberty to place the same at the time of hearing of the appeal.

Communicate the order at once.