

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

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 4894 of 2022

IN THE MATTER OF :

An application under section 115(4) of the Code of Civil Procedure

-And-

In the Matter of:

Azizul Haque

... Defendant-Petitioner

Versus

Abdul Gafur and others

... Plaintiff-Opposite parties

Mr. M.A. Mannan Mohan, Advocate with

Mr. Saleh Mahmood Naheed, Advocate

... For the petitioner

Mr. N.K.M. Nazmul Hassan, Advocate

.... For the opposite party Nos. 1-3

Judgment on: 09.09.2026

Md. Riaz Uddin Khan, J:

At the instance of the defendant Rule was issued calling upon the plaintiff-opposite party Nos.1-3 to show cause as to why the Judgment and Order dated 24.02.2022 passed by the Additional District Judge, 1st Court, Kishoregonj in Civil Revision No.71 of 2015 allowing the revision and thereby setting aside the order dated 10.08.2015 and 31.08.2015 passed by the Assistant Judge, Ashtagram (Bajitpur Chouki), Kishoregonj in Miscellaneous Case No.19 of 2014 setting aside the ex parte judgment and decree and restored the same in its file and original number shall not be set aside and or such other or further order or orders should not be passed as to this Court may deem fit and appropriate.

At the time of issuance of Rule the operation of the judgment and order dated 24.02.2022 passed by the Additional District Judge, 1st Court, Kishoregonj in Civil Revision No.71 of 2015 was stayed initially for a period of 06(six) months which was extended time to time.

Facts in a nutshell for disposal of this Rule are that the opposite party Nos. 1-3 instituted partition suit No. 65 of 2011 against the defendants including the petitioner and got ex parte preliminary decree against which the present petitioner filed Miscellaneous Case No. 19 of 2014 under Order-IX, Rule-13 of the Code of Civil Procedure. The Assistant Judge dismissed the same for default by order dated 19.05.2015. Thereafter, he filed an application under section 151 of the Code of Civil Procedure for setting aside the order of dismissal dated 19.05.2019. The learned Assistant Judge upon hearing both the parties on 10.08.2015 allowed the application with a cost of Tk.2000/- and fixed the case on 31.08.2015 for subsequent order subject to payment of the cost and opposite party on 31.08.2015 deposited the cost of taka 2000/- and on the receipt the same the trial Court set aside the ex parte decree dated 14.05.2015 and restored the suit in its original number i.e partition suit No.65 of 2011.

Challenging the order dated 31.08.2015 the plaintiff filed a revision before the court of District Judge, Kishoregonj which was ultimately heard by the Additional District Judge, 1st court who after hearing allowed the revision by his impugned judgment and order dated 24.02.2022 on the finding that when an

application for restoration is dismissed for default, an appeal lies from the order of such dismissal and remedy under section 151 of the Code of Civil Procedure for setting aside such dismissal order is not at all maintainable.

Being aggrieved by and dissatisfied with the said judgment and order dated 24.02.2022 passed by the lower revision court the defendant-petitioner moved this Court by filing civil revision under section 115(4) of the Code of Civil Procedure and obtained Rule and interim order as stated at the very outset.

Mr. MA Mannan Mohan, the learned advocate appearing for the defendant-petitioner submits that the lower revisional court committed error of law on misconceived contention referring the decision of our Appellate Division reported in 43 DLR (AD) 128 that no application under section 151 of the Code of Civil Procedure is maintainable but in that reported judgment the Appellate Division clearly observed that not in all circumstances no application under section 151 of the CPC is not maintainable. The learned advocate next submits that the present case is an exceptional case, hence the application filed under section 151 of the Code of Civil Procedure is maintainable and since the trial court allowed the application with a cost and that cost has already been deposited, the revisional court failed to consider that aspect of the case.

Per contra, Mr. NKM Nazmul Hassan, the learned advocate appearing for the plaintiff-opposite party Nos.1-3 submits that the suit property belonged to the grandfather and great-grand father of the Petitioner and the Opposite Parties, which were not partitioned

over the period of time. And none of the co-sharers ever cooperated to partition the suit land. As a matter of fact the Opposite Parties were constraint to take appropriate legal recourse by instituting Suit for Partition. Despite the fact that summons were duly served upon the Defendants none appeared in the suit, given the fact that out of 74 (seventy four) Defendants only the instant Petitioner felt aggrieved, yet he was too uncaring to pursue his cause, and hence the suit was rightly decreed ex parte and the Miscellaneous Case was restored on misconception of law which was rightly held by the lower revision court and as such the instant Rule requires to be discharged.

The learned advocate next submits that application under Section 151 of the Code of Civil Procedure for setting aside an order of dismissal for default seeking restoration of Miscellaneous Case under Order-IX, Rule-13 is not maintainable, as it is an appealable order under Order-43, rule-1(d) of the CPC. The Petitioner filed the application for restoration of the Miscellaneous Case after 82 days which should have been rejected by the trial court, rightly held by the lower revision court. In the instant case, the plaintiffs, although were present in every dates but in allowing the application of the Petitioner under Section 151 of the CPC, was not afforded any chance of being heard, rather straight way the trial court restored the Miscellaneous Case and set aside the ex parte decree, which is out and out illegal.

The learned advocate lastly submits that there having no error of important question of law involved in the present revision under section 115(4) of the CPC

against allowing the Revision by the Additional District Judge, the Rule is liable to be discharged.

I have heard the learned Advocates for both the parties, perused the application, counter affidavit along with the annexures. I have carefully examined the order passed by the trial court as well as the judgment and order passed by the lower revision court.

It appears from record that the suit was once decreed ex parte against which the defendant-petitioner filed Miscellaneous Case under Order-IX, Rule-13 of the Code of Civil Procedure but when it was taken up for hearing he did not appear for which it was dismissed for default. Thereafter, he filed an application for restoration under section 151 of the Code of Civil Procedure which was allowed by the trial court with cost and then the trial court directly restored the original suit by setting aside the ex parte decree. On revision the Additional District Judge allowed the revision on the finding that the application under section 151 of the CPC was not maintainable as it was an appealable order.

In this regard the Supreme Court, Appellate Division in the case of Abdul Kader Chowdhury Vs. Nurul Islam and Others [43 DLR (AD) 128] held: *“The effect of an order of dismissal of the miscellaneous case for default is one of rejecting an application to set aside a decree passed ex parte. It is not an order passed on merit, but ex parte. Appeal lies in both cases under Order 43, rule-1(d), CPC. The view taken by the High Court Division that appeal lies in both cases is correct. The defendant-petitioner, therefore, had a remedy by way of appeal under Order 43, rule-1(d), CPC*

which he did not avail of. This is not to say that the application under Section 151 CPC is barred under all circumstances. Since the application u/s. 151 in the present case was filed 7 days after dismissal of the miscellaneous case for default without any explanation for the delay, such application could not be justified.” It appears that the apex Court held that since it is an appealable order usually no application under section 151 of CPC is maintainable. However, the apex Court did not shut down the scope for filing an application under section 151 of the Code of Civil Procedure in all circumstances meaning thereby there is a very rarest of the rare case when it can be invoked by the court. In the instant case we find no reason to invoke the inherent power under section 151 of the Code of Civil Procedure as the defendant-petitioner was indolent in pursuing his cause and failed to submit cost in time and failed to appear before the court when the matter was taken up for hearing. The petitioner has failed to make out a case of special circumstances to entertain an application under section 151 of the CPC.

In interfering with a decision passed by a lower revision court by this Court under section 115(4) of the CPC in the case of Sheikh Abdul Mazed Vs. Md. Shomrej Ali Mandal and others [12 BLC (AD) 173] the Appellate Division held: *"It seems from the provision of Section 115(4) of the Code of Civil Procedure that revision can be preferred before the High Court Division against an order of the Court of District Judge or Additional District Judge passed under Section 115(2) of 115 (3) of the Code of Civil Procedure when aforesaid Courts committed an error in respect of an*

important question of law resulting in erroneous decision occasioning failure of justice." In that view of the matter the present rule has also no substance to interfere by this Court.

In the facts and circumstances and the position of law as discussed above I do not find any merit in the instant Rule which is destined to fail.

In the result the Rule is **discharged**. However, without any order as to cost.

The interim order passed earlier by this Court stands vacated.

Communicate the judgment and order at once.