

District- Cumilla

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

Present:

Mr Justice Md Atoar Rahman

Civil Revision No. 5817 of 2022

Md. Arshad alias Md. Arshad Hossain

... defendant appellant petitioner

- versus-

Md. Abdul Salam

... plaintiff opposite party

Mr. Mantu Chandra Ghosh, Advocate

...for the defendant appellant petitioner

Ms. Salina Akter Chowdhury, Advocate

... for the plaintiff opposite party

Heard on: 20.02.2024. and 27.02.2024

Judgment on: 07.03.2024

This Rule was issued on an application under section 115(1) of the Code of Civil Procedure, 1908 calling upon the opposite party to show cause as to why the impugned judgment and order dated 21.04.2022 passed by the learned Additional District Judge, 1st Court, Cumilla in Miscellaneous Appeal No. 28 of 2021 dismissing the appeal and thereby affirming the judgment and order dated 28.02.2021 passed by the learned Assistant Judge, Muradnagar, Cumilla in Miscellaneous Case No. 23 of 2019 should not be set aside and/or passed such other or further order(s) as to this court may seem fit and proper.

The facts for the purpose of disposal of the Rule, in short, are that the present opposite party Md. Abdus Salam being plaintiff instituted a Title Suit being No. 16 of 2018 for declaration of title and recovery of khash possession against the present petitioner Md. Arshad @ Md. Arshad Hussain and others in the Court of Senior Assistant Judge, Muradnagar, Cumilla. The defendant-petitioner appeared in the court and filed an application seeking time through his engaged lawyer for filing written statement. Thereafter on the date fixed for submission of written statement the defendant-petitioner did not submit the same and thereafter 6 dates were fixed for filing written statement. But the present petitioner could not appear in the court and ultimately on 16.09.2019 the suit was decreed *exparte*. Thereafter on 21.11.2019 the defendant petitioner filed a miscellaneous case being Miscellaneous Case No. 23 of 2019 under Order IX rule 13 of the Code of Civil Procedure for setting aside the *exparte* decree and for restoration of the original suit in its file and number stating *inter-alia* that on the date fixed for submission of written statement the defendant petitioner could not attend the court due to his illness.

The plaintiff opposite party contested the miscellaneous case by filing written objection and learned Assistant Judge considering the evidence and facts and circumstances rejected the miscellaneous case on 28.02.2021 against which the defendant petitioner filed miscellaneous appeal being Miscellaneous Appeal No. 28 of 2021 in

the Court of District Judge, Cumilla. On transfer the miscellaneous appeal was heard by the learned Additional District Judge, 1st Court, Cumilla who by his judgment and order dated 21.04.2022 dismissed the miscellaneous appeal on contest.

Being aggrieved by and dissatisfied with the above judgment and order passed by the appellate court the defendant-petitioner-appellant moved this court under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

Mr. Mantu Chandra Ghosh, the learned Advocate appearing on behalf of the petitioner has pressed the Rule on the grounds stated in the revisional application. But I do not find any material substance in the revisional application.

Ms. Salina Akter Chowdhury, the learned Advocate appearing on behalf of the respondent opposite party opposing the Rule has submitted that considering the facts and circumstances and material evidence on record both the courts below concurrently found that the defendant petitioner hopelessly failed to prove that on the date fixed for hearing on 16.09.2009 he was ill and due to illness he could not appear before the court and, as such, the Rule does not have any merit and accordingly the same is liable to be discharged.

I have heard the submissions placed by the learned Advocates for both the parties and perused the application along with relevant papers on record including the impugned judgment and order.

In the application the present petitioner has stated that having appeared the court he prayed for time for submitting written statement which was allowed. Thereafter on the date fixed for submission of written statement the defendant-petitioner did not submit the same and thereafter 6 dates were fixed for filing written statement, but he could not appear in the court and ultimately on 16.09.2019 was fixed for ex parte hearing the suit, but on that day he could not appear before the court due to his illness and the ex parte judgment and decree was passed against him. It appears that during cross examination the defendant petitioner as P.W. 1 admitted that,

“আমি সালামের বিরুদ্ধে ৩টা ফৌজদারী মামলা করেছি, সত্য। ঐ সকল ফৌজদারী মামলায় ২০১৯ইং সালে আমি মাঝে মাঝে হাজিরা দিয়েছি, মাঝে মাঝে সময় চেয়েছি।”

It appears that P.W. 2 also in his cross examination stated that in the criminal cases the defendant petitioner appeared in the court along with him and he (petitioner) performed his regular works even he used to go to hat-bazar and moved normally. Moreover, while the present petitioner was given suggestion to the effect that, on 16.09.2019 he was not ill and voluntarily did not contest the suit, he did not give any answer and kept him mum. Apart from this, before 16.09.2019 seven dates were fixed for submitting written statement, but the petitioner did

not submit written statement and no explanation has been given in this respect.

In view of the above discussions, I am of the opinion that the defendant petitioner could not succeed in proving that on 16.09.2021 he was prevented by any sufficient cause from appearing when the suit was called on for hearing. Thus, the learned Judge of the trial court rightly dismissed the miscellaneous case and the learned judge of the appellate court in dismissing the appeal did not commit any error of law resulting in an error in his decision occasioning failure of justice. As such, I do not find any substance in the Rule and accordingly, the same is liable to be discharged.

In the result, the Rule is discharged without any order as to cost. The impugned judgment and order is hereby affirmed.

Let a copy of this judgment be transmitted at once.