

Present:

***MR. JUSTICE S.M. EMDADUL HOQUE***

Civil Revision No. 2099 of 2023.

IN THE MATTER OF:

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

A N D

IN THE MATTER OF:

Syed Ahsan Millad

Applicant-Appellant-petitioner

-Versus –

Syed Ahsan Jalal and another

opposite party

Mr. Mobarak Hossain, with

Mr. Purnindu Bikash Das, Advocates

..... for the Petitioner.

**Heard and Judgment on: 20.03.2024.**

On an application of the petitioner Syed Ahsan Millad under section 115(1) of the Code of Civil Procedure the Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 16.05.2023 passed by the District Judge, Dhaka in Miscellaneous Appeal No.98 of 2023 dismissing the appeal and thereby affirming the judgment and order dated 13.03.2023 passed by the Joint District Judge, 2<sup>nd</sup> Court, Dhaka in Miscellaneous Appeal No.35 of 2021 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the opposite party No.1 as plaintiff instituted Title Suit No.15 of 2020 in the Court of Joint District Judge, 2<sup>nd</sup> Court, Dhaka for declaration of title in respect of the 'Ka' schedule land and further declaration that the deed described in the schedule 'Kha' to the plaint is illegal, void and not binding upon the plaintiff.

The defendant did not appear in the suit and the matter was taken up for ex-parte hearing and accordingly the suit was decreed ex-parte on 31 August, 2021.

The petitioner after came to know the said ex-parte decree filed an application under Order IX rule 13 read with Section 151 of the Code of Civil Procedure for setting-aside the ex-parte decree and accordingly the Miscellaneous Case No.35 of 2021 was started.

The further case is that the defendant-petitioner filed the miscellaneous case through his attorney and at the time of filing the miscellaneous case his appointed attorney produced the photo copy of the power of attorney being No.7987 of 2021.

The plaintiff side raised objection against the said photo copy of the power of Attorney and then the Court directing the petitioner to submit the original copy of the same, but the defendant-petitioner failed to produce the original power of attorney.

Thereafter, the plaintiff-opposite party filed an application under Order XI rule 14 of the Code of Civil Procedure for dismissal of the case for non-compliance of the Courts order.

The next date fixed on 13.03.2022 and on the said day the attorney of the petitioner filed an application stating the facts that the originally power of attorney was lost which he made a G.D entry and submitted the said G.D entry to the Court. Furthermore, subsequently the petitioner again executed a fresh power of attorney being No.11982 of 2022 while he was staying in U.S.A and which was filed to the Court but the trial Court after consideration of the facts and circumstance of the case did not allow the said application and dismissed the miscellaneous case for want of prosecution under Order XI Rule 21 for non production of the documents by its judgment and order dated 13.03.2023.

Against which the petitioner filed Misc. Appeal No.98 of 2023 before the learned District Judge, Dhaka. The learned District Judge after hearing the parties and considering the facts and circumstance of the case dismissed the misc. appeal and thereby affirming the judgment and order of the trial Court summarily by its judgment and order dated 16.05.2023.

Being aggrieved by and dissatisfied with the impugned judgment and order of the Courts below the petitioner filed this revisional

application under Section 115 (1) of the Code of Civil Procedure and obtained the Rule.

Mr. Mobarak Hossain, the learned Advocate along with Mr. Purnindu Bikash Das, Advocate appearing on behalf of the petitioner submits that both the Court committed error in law resulting in an error in the decisions occasioning failure of justice in not considering the case properly, even did not consider the application of the petitioner wherein he annexing the photo copy of the said Power of Attorney as well as a G.D entry claiming that the original was lost. Furthermore, subsequently the petitioner again executed a fresh power of attorney and which was duly executed and stamped before by the Deputy Commissioner, Dhaka but both the Court did not consider the same.

He further submits that for non compliance of the Courts order the suit should not be dismissed provided under Order XI rule 21 of the Code. In support of his argument the learned Advocate cited the decisions of the case of *S.P.S.R. Suramania Ayyar Vs. C. Bomer Cooty Haji reported in AIR-1933 Madras-870* and submits that the principle set up that:

Non-compliance with an order under this Rule does not justify summary dismissal of the suit similarly striking out of the defence.

The learned Advocate further submits that the defendant-petitioner himself present before this Court and he produced his

original Passport and disclose that he will stay in Dhaka for a few days and submits that if requires he may present in the Court.

I have examined the Passport produced before this Court, it appears that in the Year of 2023 the petitioner first arrived this Country or 06 February, 2023 from USA and thereafter again came to the Country on 19 December, 2023 and still present in Bangladesh and has appeared before this Court.

The suit which has been challenged by the petitioner was decreed ex-parte. The opposite party instituted the suit against the present petitioner who is the brother (siblings) of the plaintiff. The plaintiff executed a deed in favour of the present petitioner and petitioner now permanently resided in U.S.A and made him as defendant he filed the suit for cancellation of the registered deed of the petitioner. It appears that the said suit was decreed ex-parte. In such a case the Court should strictly consider whether the summons was duly served upon him in his present place i.e. in U.S.A. It appears that the petitioner filed application under Order IX Rule 13 of the Code of Civil Procedure on the ground that summons was not duly served. In such circumstance of the facts the disposal of the said case on technical point is not justifiable and it is presumed that the case has disposed of unheard.

The provision of Order XI rule 21 of the Code of Civil Procedure as under:

*“Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.”*

I have considered the provision as well the subsequent decisions. It appears that the case cited by the learned Advocate of the petitioner is very much applicable in the instant case. In the Indian case reported in AIR 1933 Madras-370 the principle set up that non-compliance with an order passed under Order XI rule 14 of the Code for the production of certain documents by the plaintiff does not warrant dismissal of the suit for want of prosecution under Order XI rule 21 of the Code and the Court took view that: “I therefore think that there was no such contumacious disobedient on the part of the plaintiff.”

In the instant case it is found that the petitioner though filed the photo copy of the original power of attorney but stating the facts in the

application that the said original power of attorney was lost and accordingly he made a G.D entry and which was also annexed. In such a case the Court ought to have considered the same that the petitioner has no willful disobedient of the Courts order since the documents which was directed to produce was lost in such a case the parties has no other option but to file an application for consideration of the same even the petitioner made a G.D entry in support of his case.

It also appears that the petitioner again filed a fresh power of attorney 'Annexure-F1' being No.11982 of 2022 and on perusal of the same it appears that which was duly authenticated by the consular of Welfare, Ministry of Foreign Affairs, Dhaka and the same was registered and duly stamped by the Deputy Commissioner, Dhaka.

In such a case the Court should consider the same or may direct the executant of the power of Attorney to appear before the Court. But the trial Court without considering the material facts of the case erroneously passed the order dismissing the misc. case.

The appellate Court also did not consider the entire material facts of the case and dismissed the misc. appeal on technical point.

Considering the facts of the case it is my view that since the petitioner himself has appeared before this Court and is available in the Country and since the earlier power of attorney was lost and he again executed another power of attorney while he was staying in U.S.A and which was duly authenticated by the concerned authority and duly

stamped in such a case the Court should accept the subsequent power of attorney being No.11982 of 2022 and accordingly dispose of the case on merit considering the facts that whether the summons was duly served or not in accordance with law.

Having considered the facts and circumstances of the case I find merit in the Rule.

In the result, the Rule is made absolute. The impugned judgment and order dated 16.05.2023 passed by the District Judge, Dhaka in Miscellaneous Appeal No.98 of 2023 dismissing the appeal and thereby affirming the judgment and order dated 13.03.2023 passed by the Joint District Judge, 2<sup>nd</sup> Court, Dhaka in Miscellaneous Appeal No.35 of 2021 are hereby set-aside.

However, the trial Court is directed to dispose of the miscellaneous case as early as possible preferably within 06 (six) months from the date of receipt of this order in accordance with law and the observations as made above.

Communicate the order at once.