

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

F.M.A No. 280 OF 2020.

Abu Hena Mustafa Kamal

...Appellant.

-Versus-

Md. Shakil and others

...Respondents.

Mr. M. Masud Rana, Advocate

... For the appellant

None appears

... For the respondents

Heard and Judgment on: 30.04.2024.

Md. Badruzzaman, J:

This appeal is directed against an order dated 03.11.2019 passed by learned Joint District Judge, 2nd Court, Munshigonj in Miscellaneous Case No. 14 of 2015 dismissing the case filed under Order IX rule 9 of the Code of Civil Procedure.

Facts, relevant for the purpose of disposal of this appeal, are that the appellant as plaintiff instituted Title Suit No. 147 of 2008 before learned 2nd Joint District Judge, Munshigonj and ultimately, the suit was dismissed for default on 30.03.2015 and thereafter, the plaintiff filed Miscellaneous Case No. 14 of 2015 for restoration of the suit after setting aside the order of dismissal which was, also, dismissed for default on 23.04.2019. The appellant then filed an application under Order IX rule 9(ka) read with Section 151 of the Code of Civil Procedure for restoration of the miscellaneous case and

the trial Court, upon hearing, its order dated 21.05.2019 allowed the application with the cost of Taka 2000/- and restored the miscellaneous case. After that, plaintiff deposited the cost on 27.05.2019. Thereafter, the miscellaneous case was fixed for admission hearing and the defendant-opposite party filed written objection and the trial Court vide impugned order dated 03.11.2019 set aside its earlier order dated 21.05.2019 taking the view that there was no scope to restore miscellaneous case in exercising jurisdiction under Order IX rule 9 read with section 151 of the Code of Civil Procedure and the plaintiff should have preferred appeal against the order of dismissal of the miscellaneous case under Order XLIII rule 1(c) of the Code of Civil Procedure.

Being aggrieved by said order dated 03.11.2019 the plaintiff has preferred this appeal.

None appears to contest the appeal, though as per Office Note, notice upon respondent Nos. 1-4 have been duly served.

Mr. Muhammad Masud Rana, learned Advocate appears for the appellant found it difficult to make any submission that the impugned order has been illegally passed. However, learned Advocate submits that the plaintiff should be given an opportunity to prefer appeal against order dated 23.04.2019 in view of the provision under Order 43 rule 1 of the Code of Civil Procedure.

We have heard the learned Advocate, perused the impugned order as well as other materials available on record. Admittedly, the miscellaneous case filed under Order IX rule 9 of the Code of Civil Procedure was dismissed for default on 23.04.2019. As per Order XLIII rule 1(c) of the Code of Civil Procedure the plaintiff had specific forum to prefer appeal against the order dated 23.04.2019 but upon wrong

advice of the learned Advocate for the plaintiff he filed the application for restoration of the miscellaneous case under Order IX rule 9 of the Code of Civil Procedure and the trial Court vide its earlier order allowed the application and restored the miscellaneous case though it had no jurisdiction to entertain such application. On perusal of the impugned order dated 03.11.2019, it appears that upon proper appli-ance of law, the trial Court rightly passed the impugned order by setting aside its earlier order and in doing so committed no illegality.

Accordingly, interference is not called for by this Court.

However, we are of the view that the plaintiff should be given an opportunity to challenge order dated 23.04.2019 before the appellate forum in accordance with law.

In view of the above, this appeal is disposed of.

The plaintiff-appellant will be at liberty to prefer appeal challenging the order dated 23.04.2019 within 30 days from the date of receipt of the copy of this order by the trial Court, if so advised.

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)