

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

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 6125 of 2023

IN THE MATTER OF :

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

-And-

In the Matter of:

Md. Rezaul Karim Sarder and others

... Plaintiff-Petitioners

Versus

Mst. Laily Munnujan Nesabanu and others

...Defendant-Opposite parties

Mr. Md. Nurul Huda, Advocate with

Mr. Md. Rafiqul Islam, Advocate

... For the petitioners

Mr. Md. Yousub Ali, Advocate

... For the Opposite Party Nos. 1-3

Judgment on: 13.07.2026

Md. Riaz Uddin Khan, J:

At the instance of the heirs of the defendant No.4 Rule was issued calling upon the opposite party Nos.1-3 (plaintiffs) to show cause as to why the impugned judgment and order dated 03.08.2023 passed by the District Judge, Pabna in Miscellaneous Appeal No.13 of 2021 dismissing the appeal and thereby affirming the order dated 23.02.2022 passed by the Senior Assistant Judge, (in Charge), Iswardi, Pabna in Miscellaneous Case No.69 of 2021 should 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 decree dated 06.08.2014 passed by the Joint District Judge, 2nd Court, Pabna in Partition Suit

No.290 of 2008 was stayed initially for a period of 06(six) months which was extended time to time.

Facts for disposal of this Rule, in brief, are that this Civil Revision petition has been filed before this Court challenging the Judgment and Order dated 03.08.2023 passed by the District Judge, Pabna in Misc. Appeal No.13 of 2022 (wrongly written as Misc Appeal no.13 of 2021) disallowing the Misc Appeal and thereby affirming the order dated 23.02.2022 passed by the Senior Assistant Judge (In Charge), Iswardi, Pabna in Misc Case No.69 of 2021 (Previously Misc Case No.09 of 2020) rejecting the application for restoration of Miscellaneous Case no.13 of 2015. The opposite party nos.1-3 as plaintiffs filed Partition Suit No.290 of 2008 in the court of 2nd Joint District Judge, Pabna against the predecessor of the petitioners (Afil Uddin Sarder, defendant no.4) and others, claiming partition of the suit land. The defendant No.4, Afil Uddin Sarder entered appearance and filed written statement denying all the material allegations of the plaint. However, as the defendants did not contest the suit by adducing witness hence the suit was decreed *ex parte* by the judgment and decree dated 06.08.2014.

That after coming to know about the *ex parte* judgment and decree dated 06.08.2014 of the 2nd Joint District Judge, Pabna, the defendant no.4 filed Miscellaneous Case No.13 of 2015 for setting aside the *ex parte* decree dated 06.08.2014 under Order-IX, Rule-13 of the Code of Civil Procedure. The trial court registering the case fixed it for taking steps. In the mean time the petitioner of the Misc Case (defendant no.4) died but the court was not informed about the death of the defendant no.4. However, the court on 15.01.2020 dismissed the Miscellaneous Case No.13 of 2015 for default. After knowing about it the present petitioners, the successors of defendant No.4, filed Miscellaneous Case No.09 of 2020

under Order-IX Rule-4 read with section 151 of the Code of Civil Procedure before the 2nd Joint District Judge, Pabna, for restoration of Misc Case No.13 of 2015 by setting aside the order of dismissal dated 15.01.2020, which was transferred to the Court of Senior Assistant Judge, Iswardi, Pabna and was re-numbered as Miscellaneous Case No.69 of 2021 who upon hearing the parties rejected the said Misc. Case by order dated 23.02.2022.

Against that order dated 23.02.2022 the petitioners filed Miscellaneous Appeal No.13 of 2022 (wrongly written as 2021) before the learned District Judge, Pabna who upon hearing the appeal dismissed the same by her impugned judgment and order dated 03.08.2023 upholding the order passed by the trial court.

Being aggrieved by and dissatisfied with the said judgment and order dated 03.08.2023 passed by the District Judge the petitioners moved this Court and obtained the Rule and order of stay as stated at the very outset.

Mr. Md. Nurul Huda, learned advocate appearing for the petitioners submits that the predecessor of the present petitioners Afil Uddin Sarder was the defendant No.4 of the original Partition Suit No.290 of 2008. In that suit the defendant No.4 filed written statement denying the claim of the plaintiffs and further claimed title and possession of the suit land. However, the partition suit was decreed *ex parte* by judgment and decree dated 06.08.2014 (decree signed on 07.08.2014). The learned advocate then submits that when the matter was fixed for *ex parte* decree the predecessor of the present petitioner (defendant No.4) was seriously ill and could not attend the court for which he filed Miscellaneous Case No.13 of 2015 under Order IX Rule 13 of the Code of Civil Procedure for setting aside the *ex parte* decree and restoration of the original suit.

The learned advocate by placing the order sheets submits that the miscellaneous case was registered and admitted for hearing on 26.05.2015 by the trial court who fixed 26.10.2015 as next date but in the mean time, the defendant no.4 died on 07.07.2015 for which there was no scope to appear before the court. After came to know about the dismissal of the said Miscellaneous Case the present petitioners as the heirs of the defendant No.4 filed an application for restoration of that Miscellaneous Case No.13 of 2015. After hearing both the parties the trial court rejected that application with the finding that the petitioners took dilly dally tactic and filed cases one after another but did not appear and the court of appeal below also dismissed the appeal on the same finding. The learned advocate submits that the finding of the trial court as well as the court of appeal below is totally wrong and beyond the record. The learned advocate submits that since the predecessor of the present petitioners (defendant No.4, Afil Uddin) died on 07.07.2015 and long after more than two years of his death, the Miscellaneous Case was dismissed for default and the petitioners after came to know about the said dismissal of Miscellaneous Case filed the instant application for restoration and the petitioners did not have any laches or negligence to pursue their cause.

The learned advocate further submits that the petitioners have fair chance of success in the original partition suit no.290 of 2008 as the predecessor of petitioners (defendant no.4) earlier filed Partition Suit No.59 of 1994 for partitioning the self same suit land and obtained a decree on compromise by judgment and decree dated 16.03.1998. The present plaintiff-opposite party Nos.1-3 obtained *ex parte* decree on 16.08.2014 on the self same suit land which was decreed earlier on 16.03.1998.

The learned advocate finally submits that for ends of justice this application for restoration should be allowed giving the petitioners a chance to place their case before the trial court to prove what prevented the predecessor of the petitioner (defendant no.4) from appearing before the court at the time when the partition suit was taken up for hearing and the application filed by the petitioners should be treated as an application for restoration under section 151 of the Code of Civil Procedure not under Order-IX, Rule-4 of the Code.

On the other hand Mr. Md. Yousub Ali, the learned advocate appearing for the plaintiff-opposite parties submits that the predecessor of the petitioners though filed written statement before the trial court in the original partition suit but did not contest the suit for which the suit was fixed for ex-parte hearing and ultimately *ex parte* decree was passed. The predecessor of the petitioners then filed the Miscellaneous Case but in that case also the petitioners did not appear and long after the elapse of more than two years the petitioners with an application for condonation of delay of 213 days came before the court with this application for restoration and meanwhile right accrued in favour of the plaintiff-opposite parties and this application should not be allowed and this Rule should be discharged.

I have heard the submissions of both the parties, perused the application, counter affidavit, supplementary affidavit along with all the annexures. I have examined the order passed by the trial court as well as the impugned judgment and order passed by the learned District Judge.

It appears that the predecessor of the present petitioners appeared in original partition suit No.290 of 2008 by filing written statement but did not contest the suit for which an *ex parte* decree was passed. He filed an application under Order IX Rule 13 of the Code of Civil

Procedure for setting aside the *ex parte* decree stating that he was seriously ill and even his lawyer was also ill for which no step was taken on behalf of the defendant no.4 and he could not appear before the court when it was fixed for *ex parte* hearing. Unfortunately, this petitioner (defendant no.4) died before the case attained its maturity but the information of his death was not apprised to the court for which the court fixed dates after dates for long periods and thereafter ultimately the case was dismissed for default. The present petitioners as heirs of the defendant no.4 filed the instant application under Order IX Rule 4 read with section 151 of the Code of Civil Procedure stating all the facts along with an application for condonation of delay under section 5 of the Limitation Act stating the facts that they did not know about the case and their father died long before. It appears from the order of the trial court that it held that it is a dilly dally tactic and the petitioners filed cases one after another without taking step for hearing. This finding of the trial court was affirmed by the appellate court but the record shows that these findings of the courts below are beyond the record. The predecessor of the petitioners died long before the date of order of dismissal for default, hence it was impossible for him to be present before the court when the miscellaneous case was taken up for hearing. In that view of the matter, the application for restoration merits consideration. The petitioners should be afforded an opportunity to give evidence to prove what prevented their predecessor (defendant No.4) from appearing before the court when the original partition suit was decreed *ex parte*.

From record it appears that there were some procedural mistakes on behalf of both the learned advocate for the defendant no.4 and the trial court. When an order is passed rejecting an application filed under Order IX,

Rule-13 of the Code of Civil Procedure, it is an appealable order. Even if it is dismissed for default of appearance, it is an order passed under this Rule-13 of Order-IX of the Code of Civil Procedure. It is the general rule that when an order is appealable, no application under section 151 of the Code of Civil Procedure is maintainable. However, in a very exceptional case an application under section 151 of the Code of Civil Procedure may be entertained, if an application for restoration of that Miscellaneous Case filed under Order-IX, Rule-13 is filed with sufficient explanation. But in that case there is no scope for registering it as separate Miscellaneous Case. Because, in that case there is no reason for the court to take evidence unlike the miscellaneous case filed under Order-IX, Rule-13 of the Code of Civil Procedure. The present petitioners filed application for restoration of Miscellaneous Case under Order-IX, Rule-4 read with section 151 of the Code of Civil Procedure. Clearly, the application was filed under wrong provision of law. The petition for restoration of miscellaneous case should have been filed either under section 151 of the Code of Civil Procedure before the court who passed order of dismissal for default or the petitioners could have filed miscellaneous appeal before the appropriate court, i.e the court of District Judge. In the present case the application for restoration should not have been registered as separate Miscellaneous Case by the trial court. The explanation for non-appearance of their predecessor, defendant no.4 as stated was satisfactory as stated by the petitioners and in that view, the courts below should have restored the Miscellaneous Case No.13 of 2015 by allowing the application. In the present case I consider the application as filed under section 151 of the Code of Civil Procedure only and not under Order-IX, Rule-4 of the Code, because it is well settled principle that wrong quotation of law cannot be the ultimate barrier in

getting justice by the litigant public. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a wrong quotation of law. If this application for restoration is allowed, the plaintiff-opposite parties will not be prejudiced, rather the petitioners would be in obligation to satisfy the court by adducing evidence regarding cause of absence of the defendant no.4 when the suit was taken up for *ex parte* hearing. It must be remembered that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Be that as it may, consideration the above facts and circumstances of the case, I am inclined to allow this revesional application as the Rule merits consideration.

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

The impugned judgment and order dated 03.08.2023 passed by the District Judge, Pabna in Miscellaneous Appeal No.13 of 2022 (wrongly written as 13 of 2021) dismissing the appeal and thereby affirming the order dated 23.02.2022 passed by the Senior Assistant Judge, (in Charge), Iswardi, Pabna in Miscellaneous Case No.69 of 2021 is hereby set aside. The Miscellaneous Case No.69 of 2021 filed under section 151 of the Code of Civil Procedure is hereby allowed and the Miscellaneous Case No.13 of 2015 (renumbered as Misc. Case No.42 of 2016) is restored in its original file and number.

The trial court is directed to hear the Miscellaneous Case No.13 of 2015 after taking evidence and dispose of the same on merit expeditiously.

Communicate the judgment and order at once.