

**Present:**

Mr. Justice Md. Salim

**FIRST MISCELLANEOUS APPEAL NO. 14 OF 2001**

Md. Abdul Quddus Sarker and others

..... Plaintiff-Appellants.

**-VERSUS-**

Most. Rasna Begum and others

..... Defendant-Respondents.

Mr. Bhabesh Chandra Mustafi, with

Ms. Shamsun Nahar, Advocate

..... For the Appellants.

Mr. Abdur Rouf Akanda, Advocate

..... For the Respondents.

**Judgment on 28.11.2024.**

This miscellaneous appeal at the instance of the plaintiffs as appellants has been brought, challenging the impugned judgment and order dated 09.08.2000 passed by the learned District Judge, Gaibandha in Miscellaneous Appeal No. 27 of 1997 (under Order 41 Rule 19 of the Code of Civil Procedure) arising out of an order dated 20.02.1997 passed by the learned Assistant Judge, Polashbari in Miscellaneous Case No. 44 of 1993 (Under Order 9 Rule 9 of

the Code of Civil Procedure) brought against an order of dismissed of Title Suit No. 79 of 1988 for default.

Facts, in a nutshell, relevant for the purpose of disposal of this appeal, is that on 28.09.1988, the appellants as plaintiffs filed Other Suit No. 79 of 1988 before the Munsiff now Senior Assistant Judge, Palashbari, Gaibandha for a declaration that deed numbers 6697 and 6698 dated 04.05.1976, registered and executed by one Din Moe in favor of the defendant-respondents 1 and 2 at Palashbari Sub-Register Office, Gaibandha, was a fraud, collusive and ineffective. Subsequently, on 18.08.1993, when the matter was called on for a peremptory hearing, the plaintiffs did not take any steps and were found absent on repeated calls. The suit was brought for hearing and dismissed the suit for default by the learned Senior Assistant Judge, Palashbari, Gaibandha.

Being aggrieved, the plaintiff-appellants filed Miscellaneous Case no. 44 of 1993 under Order 9 Rule 9 read with section 151 of the Code of Civil Procedure Senior Assistant Judge Palashbari, Gaibandha, for restoration of the

suit, which was rejected by the judgment and order dated 20.02.1997 on contest.

Being aggrieved, the plaintiffs-appellants preferred Miscellaneous Appeal No. 27 of 1997 before District Judge Gaibanda. Subsequently, on 11.06.1998, when the matter was called on for hearing, the plaintiff-appellant's engaged lawyer was found absent on repeated calls, so the appeal was brought for hearing and dismissed for default.

Being aggrieved, the plaintiff-appellant preferred Miscellaneous Appeal before the District Judge, Gaibanda, under Order 41 Rule 19 read with section 151 of the Code of Civil Procedure, for setting aside the disposal order of the appeal. Eventually, the learned District Judge, Gaibanda, dismissed the Miscellaneous Appeal by the judgment and order on 09.08.2000 with a cost of Tk. 1,000/-.

Being aggrieved, the plaintiffs-appellants preferred the instant Miscellaneous Appeal before this court, and the appeal was admitted on 06.02.2001.

Ms. Shamsun Nahar, the learned Advocate appearing on behalf of the plaintiffs-appellants, submits that the learned District Judge erred in law in failing to take into consideration

the fact that the appeal was dismissed for default, not for the fault of the appellants but for the fault of their engagement learned Advocate. As such, the appeal may be allowed at the ends of justice.

On the contrary, Mr. Md. Abdur Rouf Akanda, the learned Advocate appearing on behalf of the defendant-respondents by filing a counter affidavit, opposes the contention so made by the learned Advocate for the appellants and submits that the plaintiffs-appellant filed the instant suit in the year of 1988 for setting aside the registration deeds in the year of 1967 only to causing harassment and adopted a technique of default of the suit again and again.

I have anxiously considered the submission of the learned Advocate for both parties and perused the judgment of the courts below and other materials on record. In order to come under the purview of Order 41 Rule 19 of the Code of Civil Procedure, the plaintiffs-appellants were to satisfy the court that there was sufficient cause for non-appearance when the appeal was called on for hearing. The learned District Judge, while rejecting the Miscellaneous Appeal, says

that when the T.S No. 79/88 was fixed for P.H. Plaintiff - appellant- petitioners took eight adjournments without having any rhyme and reason. It appears that on 18. 8. 93, they were found absent, and the suit was dismissed for default. After such dismissal, they filed a Miscellaneous Case, No. 44/93, under order 9 rule 9 C.P.C. on 6.9.93, and they intentionally caused the delay in the disposal of that Miscellaneous Case after taking adjournments. The Case was disposed of on 20.2.97, and on the disposal, the Case had been rejected on the contest, and against that rejection order, the Miscellaneous Appeal No. 27/97 had been filed on 30.3.97. In the appeal, the adjournment petition filed by the appellant- petitioners had been allowed as a last chance on 4.6.96 to fix the date on 11.6.98 for hearing the appeal on 11.6.98, but they were found absent. The appeal was dismissed for default with cost, and against that dismissal order, the Miscellaneous Case under Order 41 Rule 19 Code of Civil Procedure has been filed. In the miscellaneous Case, the petitioner, Md. Abdul Kuddus was examined before the court. In his statement,

he stated that 11.6.98 was fixed for the hearing of this appeal, and his learned lawyer, Mr. Abu Sufian, was engaged in a hearing in a case pending in the court of Assistant Judge Palashbari. It has been stated in the petition that on 11.6.98, the appellant-petitioners were present in the court by filing mere hazira in the appeal, but it is found that on that date, they did not appear before the court. No Hazira had been filed by them in that appeal. The evidence presented by the appellant petitioner is not at all believable regarding the conduct and behavior shown in the mentioned conduct of T.S. No. 788, Miscellaneous Case No. 44/93, Miscellaneous Appeal No. 27/97, and Miscellaneous Case No. 12/98. The record indicates that appellant-petitioners, to cause harassment to the defendant-respondent, from filling of the T.S. No. 79/ 1988, took delay-tory tactics to delay the disposal of the suit and Case after taking adjournments without cogent reason. The plaintiff-appellant-petitioner stated that his learned lawyer was engaged in a case before the Senior Assistant Judge, Palashbari, could not appear to hear this appeal on 11.6.98. There are settled

principles that the learned lawyer's engagement in conducting a case in another court is not a good ground for setting aside the dismissal order. If the learned lawyer for the appellant-petitioners were interested in hearing the case, he would have filed a hariza, but no hazira would have been filed. It was not possible for the appellant petitioner to say that his learned lawyer was engaged in hearing the case in the court of Assistant Judge Palashbari as he was found absent on repeated calls. The order dated 11. 6. 98 says he was absent on repeated calls. The delay-tory tactics that the plaintiffs-appellants adopted are detrimental to the disposal of the case. The record shows that his detrimental policy, suit, and case have been delayed for disposal for years. That should be stopped. No indulgence should be given to them.

From all the materials, events, facts, circumstances, and the conduct of the appellant, it became evidently clear that all the efforts of the appellants were directed to cause a deliberate delay in the disposal of the suit as well

as the Miscellaneous Case and to cause unnecessary harassment to the defendant-respondent. Therefore, it became clear that the plaintiff-appellant had chosen not to cooperate with the court proceeding. Having adopted such a stand towards the court, the plaintiff-appellant had no right to ask for its indulgence.

Notably, the instant Miscellaneous Appeal was instituted before this court in 2001, but the appellants did not take any steps to hear the appeal, though it was fixed several times at the instance of the defendant-respondent but became out of the list for non-appearance of the plaintiffs-appellants. Moreover, the plaintiff failed to bring any necessary papers to dispose of the appeal by filing any supplementary affidavit when the matter was taken up for hearing except the impugned order.

On the above facts, circumstances of the case, and discussions made herein above, I am of the view that the learned District Judge, Gaibandha, correctly appreciated and construed the documents and materials on record in



accordance with the law and rejected the miscellaneous appeal, which suffers from no legal infirmity and perversity.

Resultantly, the appeal is dismissed with a cost of Tk.2000/-.

Communicate this judgment and the lower courts record to the court concerned immediately.

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**(MD. SALIM, J).**

Rakib/ABO