

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.5989 OF 2022

In the matter of:

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

And

Ainuddin Kha and others

.... Petitioners

-Versus-

Kulsum Begum being dead her heirs: Md.Kamrul Hassan and others

.... Opposite parties

Mr. Ashraf Ali Mollah, Advocate

.... For the petitioner.

Mr. Mohammad Mostafezur Rahman Miah, Advocate

.... For the opposite party No1.

Heard on 28.11.2024 and 03.12.2024.

Judgment on 04.12.2024.

This Rule was issued calling upon the opposite party Nos.1 to show cause as to why the impugned judgment and order dated 26.10.2021 passed by the learned Joint District Judge, 2nd Court, Gazipur in Miscellaneous Appeal No.06 of 2020 rejecting the appeal thereby affirming the judgment and order dated 15.10.2019 passed by the learned Senior Assistant Judge, Additional Court, Gazipur in Miscellaneous Case No.11 of 2016 rejecting the application under Order IX, Rule 9 read with Section 151 of the Code of Civil Procedure for restoration of Title Suit being No.141 of 2014 should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the petitioner as plaintiff instituted above suit for declaration that the judgment and decree dated 01.08.2010 passed by the learned Senior Assistant Judge in Title Suit No.229 of 2010 is collusive, fraudulent and not binding upon the plaintiff.

Above suit was fixed for recording of further evidence on 30.06.2016 and plaintiff and defendant filed hazira. But the plaintiff was found absent on repeated calls and it was further found that the plaintiff did not deposit CP cost of Taka 1,000/- which was ordered on 03.03.2016. On consideration of above materials on record the learned Assistant Judge dismissed the suit for default.

Above plaintiff as petitioner filed Miscellaneous Case No.11 of 2016 for setting aside above order of dismissal for default but the learned Assistant Judge rejected above Miscellaneous Case.

Being aggrieved by above judgment and order of the trial Court above petitioner as appellant preferred Miscellaneous Appeal No.06 of 2020 to the District Judge, Gazipur which was heard by the learned Joint District Judge, 2nd Court who dismissed the appeal and affirmed the judgment and order of the trial Court.

Being aggrieved by above judgment and order of the Court of Appeal below above appellant as petitioner moved to this Court and obtained this Rule.

Mr. Ashraf Ali Mollah, learned Advocate for the petitioner submits that on the date fixed for further hearing the plaintiff filed hazira but he went outside of the Court and during above time the case was called for

and due to his absence the suit was dismissed. But the learned Judges of the Courts below have failed to appreciate above facts and circumstances of the case and most illegally rejected the Miscellaneous Case and Miscellaneous Appeal respectively which is not tenable in law.

On the other hand Mr. Mohammad Mostafezur Rahman Miah, learned Advocate for the opposite party No.1 submits that since the plaintiff was found absent on the date fixed for hearing but defendant was present the learned Assistant Judge rightly dismissed above suit for default and on correct appreciation of materials on record the learned Joint District Judge has rightly dismissed the appeal and affirmed the lawful judgment and order of the trial Court which calls for no interference

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It turns out from the impugned order dated 30.06.2016 that the suit was fixed for further hearing. In above suit evidence of PW1 was recorded and the suit was fixed for recording of evidence of other witnesses. Since the suit was fixed not for hearing but for further hearing the learned Judge should have closed the evidence of the plaintiff and proceed with the recording of evidence of the defendants and then for conclusion of the trial in accordance with law but the learned Assistant Judge most illegally in dismissed the suit for default which is not tenable in law.

Similarly a suit cannot be dismissed for default for non payment of CP cost. There are other provisions in the Code of Civil Procedure for

making appropriate measures against a party to a civil suit for non compliance of the Courts order.

In above view of the materials on record I hold that the learned Assistant Judge dismissed above suit for default on an erroneous perception of the relevant law which is not tenable in law.

As such I find substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute. The impugned judgment and order dated 26.10.2021 passed by the learned Joint District Judge, 2nd Court, Gazipur in Miscellaneous Appeal No.06 of 2020 affirming the judgment and order dated 15.10.2019 passed by the learned Senior Assistant Judge, Additional Court, Gazipur in Miscellaneous Case No.11 of 2016 is set aside and above Miscellaneous Case is allowed on contest without costs. The learned Assistant Judge is directed to proceed with the trial of the suit expeditiously in accordance with law.

However, there is no order as to costs.

Send down the lower courts record immediately.

