

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Miscellaneous Appeal No. 346 of 2023

In the matter of:

Mahmuda Noor (Khuki)

... Appellant

-Versus-

Shahnaj Begum being dead now her heirs

1(a) Marium Akhtar Merry and others

... Respondents

Mr. Md. Ozi Ullah, Senior Advocate with

Mr. Azimuddin Patwary, Advocate

...For the appellant

None appears

....For the respondents

Heard and Judgment on 11.03.2025

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

This appeal is directed against the judgment and order dated 26.04.2022 passed by the learned Joint District Judge, 3rd Court, Dhaka in Title Suit No. 280 of 2014 dismissing the application filed by the present appellant as plaintiff under order IX rule (9)A read with section 151 of the Code of Civil Procedure for restoration of the suit to its original file and number which was dismissed for default on 04.10.2021.

The salient facts leading to preferring this appeal are:

The present appellant as plaintiff originally filed the aforesaid suit for partition in the suit property before the learned Joint District Judge, 3rd court, Dhaka. When the suit was at the stage of taking steps, the plaintiff failed to turn up in the suit resulting in, the suit was dismissed for default.

After about 4 months of dismissal of the suit, the plaintiff on 25.04.2022 filed an application under order IX rule (9)A read with section 151 of the Code of Civil Procedure for setting aside the said order of dismissal for default stating *inter alia* that on the date, the learned Advocate conducting the said case for the plaintiff was in-disposed of and had been admitted to “National Medical Institute Hospital” and ultimately he became paralyzed and incapable of doing his law practice for which he did not take any step in the suit on the date fixed for it. However, the application was taken up for hearing by the learned judge of the trial court and vide impugned order rejected the same holding that the application has not been filed within the time frame so provided in order IX rule (9)A of the Code of Civil Procedure. It is at that stage the plaintiff as appellant preferred this appeal.

Mr. Md. Ozi Ullah, the learned senior counsel appearing for the appellant upon taking us to the memo of appeal in particular, ground no. 5 thereof at the very outset submits that explaining the inability of the learned Advocate conducting the case for the plaintiff before the trial court, the application has been filed under the provision of order IX rule (9)A of the Code of Civil Procedure mistakenly in place of order IX rule (9) of the Code of Civil Procedure and therefore this court may consider the said application filed under order IX rule (9)A as an application as under order IX rule (9) of the Code of Civil Procedure and ask the trial court to proceed with the same by registering a Miscellaneous Case and then dispose of the same. When we pose a question to the learned counsel for the appellant how the said application even if it is filed under order IX rule (9) of the Code of Civil Procedure, will be maintained since it has not

been filed within the time limit as provided in Article 163 of Limitation Act, the learned counsel then contends that it is also a mistake committed by the learned Advocate for not filing any application under section 5 of the Limitation Act and then submits that yet an observation may kindly be given by this Hon'ble court, so that the plaintiff can file a fresh application under order IX rule (9) of the Code of Civil Procedure accompanied by an application for condonation of delay. With those submission, the learned counsel finally prays for allowing the appeal.

Record shows that none represented the respondents in the appeal

However, we have perused the memorandum of appeal and considered the submission so placed by the learned senior counsel for the appellant. On going through the application so filed under order IX rule (9)A of the Code of Civil Procedure, even we do not find any date has ever been mentioned as to when the plaintiff came to learn about the dismissal of the suit enabling to reckon the date of knowledge about the dismissal of the suit. Moreover, order IX rule (9)A of the Code of Civil Procedure stipulates that from the date of dismissal of a suit for default, if the plaintiff files an application under order IX rule (9)A of the Code of Civil Procedure, the court reserves no option but to restore the suit to its original file and number. Further, if we consider the said application to be under order IX rule (9) of the Code of Civil Procedure yet in the said application there has been no date of knowledge about knowing the said dismissal order by the plaintiff when Article 163 of the Limitation Act provides that the plaintiff has to file application under order IX rule (9) of the Code of Civil Procedure from the date of dismissal. So the

submission so placed by the learned senior counsel for the appellant to consider the said application filed under order IX rule (9)A of the Code of Civil Procedure as under order IX, rule (9) of the Code of Civil Procedure is also misconceived one. All in all, we don't find any illegality in the impugned judgment and order that warrants any interference.

Resultantly, the appeal is dismissed however without any order as to costs.

However, the appellant is at liberty to file a separate application under order IX rule (9) of the Code of Civil Procedure if so advised.

Let a copy of this order be communicated to the respondents and the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.