

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

Civil Revision No. 13 of 2024

In the matter of:

Laila Arjuman Banu (Laila).

...Petitioner.

-Vs-

Md.Rafiur Rahman Khan (Saikat) and others.

....Opposite parties.

Present
Mr. Justice Mamnoon Rahman

Mr. A.M. Masum, Sr. Adv. with

Mr. Md. Nasir Shikder, Adv.

...For the petitioner.

Mr. Chanchal Kumar Biswas, Adv. with

Mr. Bivuti Tarofder, Adv.

...For the opposite party No. 1.

Heard on: **27.01.2025**

And

Judgment on: **The 5th February, 2025**

Mamnoon Rahman,J:

In an application under section 115(1) of the Code of Civil Procedure, 1908 rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 19.11.2023 passed by the learned District Judge, Mymensingh in Miscellaneous Case No. 19 of 2023 arising out of Title Appeal No. 48 of 2022 allowing the Miscellaneous Case and thereby readmit the Title Appeal No. 48 of 2022 to its original number and register, should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The short facts relevant for the disposal of the instant rule, is that, the present petitioner as plaintiff instituted other Suit No. 12 of

2017 in court of Joint District Judge, 1st Court, Mymensingh impleading the opposite parties as defendants for declaration of title as well as recovery of khash possession. The present opposite parties who are the defendants contested the suit by filing written statement denying all the material allegations made in the plaint. The trial court proceeded with the suit and framed Issues wherein the parties adduced evidence both oral and documentary. The trial court after hearing the parties and considering the facts and circumstances, evidence both oral and documentary, decreed the suit. Being aggrieved by and dissatisfied with the aforesaid judgment and decree passed by the trial court the defendants-opposite parties preferred Title Appeal being No. 48 of 2022 before the District Judge, Mymensingh. Subsequently, the lower appellate court proceeded with the appeal on 13.02.2023 dismissed the appeal for default as the learned Advocate for the appellant failed to take necessary steps. After dismissal of the appeal the defendant-appellant preferred Miscellaneous Case being No. 19 of 2023 under Order 41 rule 19 of the Code of Civil Procedure, 1908 for readmission of appeal wherein the present petitioner contested the same by filing written objection. The court below examined two witnesses and vide judgment and order dated 19.11.2023 allowed the miscellaneous case with a cost of Tk. 5000/- and thereby readmitted the appeal. Being aggrieved by and dissatisfied with the same the petitioner moved before this court and obtained the present rule.

Mr. A.M. Masum, the learned senior counsel appearing on behalf of the petitioner submits that the court below without applying its

judicial mind and without considering the facts and circumstances most illegally and in an arbitrary manner passed the impugned judgment and order re-admitting the appeal which requires interference by this court. He submits that in the present case in hand there were intentional laches and negligence on the part of the opposite party-appellants in pursuing the appeal as much as the opposite party-appellant miserably failed to explain the delay in an appropriate manner and for the laches and negligence on the opposite party-appellants there are not entitled to get any benefit. He further submits that in the present case in hand the application for condonation of delay is not satisfactory as much as the court below misread the facts and circumstances and erred in law in allowing the application for re-admission. In support of his contention the learned counsel referred the decision reported in 52 DLR450. To this context he submits that admittedly an application under Order 41 rule 19 of the Code of Civil Procedure, 1908 has to be filed within 90 days which has not been done in the present case in hand.

Mr. Chanchal Kumar Biswas, the learned counsel appearing on behalf of the opposite party No. 1 appellant vehemently opposes the rule. He submits that the court below after proper appreciation of the facts and circumstances, provisions of law as well as taking evidence has rightly allowed the application for re-admission which requires no interference by this court. The learned counsel submits that in the present case in hand the opposite party No. 1 appellant proved with evidence and materials that they were sufficiently prevented from taking steps in the appeal as much as the learned counsel was not

present and if the appeal is not re-admitted the opposite party No. 1 appellant will be non-suited as they contested the decree in the trial court also.

I have heard the learned Advocates for the petitioner as well as opposite party No. 1. I have perused the impugned judgment and order, revisional application, ground taken thereon as well as necessary papers and documents annexed herewith, application for stay filed by the opposite party as well as provisions of law.

On perusal of the same, it transpires that both the parties in the present revisional application contested a suit for declaration of title as well as recovery of khash possession. It further transpires that both the parties adduced evidences both oral and documentary before the trial court and the trial court after conclusion of the trial decreed the suit in favour of the present petitioner-plaintiff. It further transpires that the opposite party-defendant preferred appeal before the District Judge, Mymensingh and the same was duly admitted by the lower appellate court and the lower appellate court proceeded with the appeal. It further transpires that the lower appellate court fixed 13.02.2023 for taking necessary steps to issuance of summons upon the non-contesting/pro-forma defendants. On that day since the Tadbirker was absent as much as the learned counsel appointed for the appellant was busy in different court consequently none was appeared and the court below dismissed the appeal for default. The present opposite party-appellants thereafter invoked the provisions as laid down in Order 41 rule 19 read with section 151 of the Code of Civil Procedure, 1908 for re-admission of

the appeal along with an application for condonation of delay. The court below registered the case as miscellaneous case and proceeded wherein the present petitioner filed written objection. In course of hearing the court below also examined two witnesses and ultimately the court below vide the impugned judgment and order allowed the miscellaneous case and thereby re-admitted the appeal to its original file and number after setting aside the order of dismissed for default.

On meticulous perusal of the papers and documents, it transpires that the application was preferred under Order 41 rule 19 of the Code of Civil Procedure, 1908. As per the said provisions of law if an appeal is being dismissed the appellant may file an application for re-admission if the appellant can prove that the non-appearance was prevented by sufficient cause. In the present case in hand it transpires that on the date when the appeal was dismissed the Tadbirker was sick and the lawyer failed to appear because of the pre-occupancy in other court.

Admittedly this court as well as our apex court in numerous decisions came to a conclusion that such order for re-admission cannot be passed automatically except in the provisions of Order 41 rule 19A of the Code of Civil Procedure, 1908 and in such circumstances the applicant has to satisfy the court about non-appearance and the delay. The provisions of Order 41 rule 19 of the Code of Civil Procedure, 1908 stipulated that an application is to be filed within 30 days and after that period the limitation will apply. However, after inclusion of rule 19A it transpires that if an application is being filed within 30 days the court will admit the case directly without any evidence or any

efforts by the appellant in any manner. However, in the present case in hand it transpires that the date was fixed for taking steps and the appeal is a new one though the trial court did not discuss the oral evidence adduced in the miscellaneous case but came to a conclusion that the Tadbirker was sick as much as the learned counsel failed to appear before the court of law. It is to be noted in mind that the appeal arising out of a suit regarding declaration of title and recovery of possession and admittedly the appellant contested the same by adducing evidence. It further transpires that in the case reported in 52 DLR450 the High Court Division came to a conclusion that it is the duty of the court of law to record of a finding of satisfaction of the court regarding the existence of sufficient cause which is an admitted position each and every cases under Order 41 rule 19 of the Code of Civil Procedure, 1908. In the present case in hand it clearly transpires that the lawyer was not present in the court when the appeal was taken up for hearing. In the case of LAJPAT RAI and others reported in AIR 1981 the Indian Supreme Court came to a conclusion that where an appeal was dismissed for default due to the absence of the counsel of the appellant a party who as per the present adversary legal system, has selected his Advocates, briefed him and paid his fees can remain supremely confident that his lawyer will look after his interest and such an innocent party who has done everything in his power and expected of him, should not suffer the inaction, deliberate omission or misdemeanor of his counsel. Apart from that the trial court came to a conclusion that physically and because of sickness the concerned Tadbirker also not in

a position to take necessary steps and the trial court came to a conclusion that this is a sufficient reason for non-appearance.

Considering the facts and circumstances, provisions and decisions of law I am of the view that the court below committed no error which requires interference by this court. Accordingly, the instant rule is discharged and the interim order passed by this court is hereby vacated. The impugned judgment and order passed by the court below is hereby affirmed and the lower appellate court is directed to hear and dispose of the appeal expeditiously, as possible, not later than 4(four) months from the date of receipt of the instant judgment without fail. The opposite parties are at liberty to press the application for stay of the execution proceeding in the exact court at the earliest. Till filing of the application the parties are directed to maintain status-quo in respect of possession and position of the suit property.

The office is directed to communicate the order to the concerned court below with a copy of the judgment, at once.

(Mamnoon Rahman,J:)

Emdad.B.O.