

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

Present:

**Mr. Justice Md. Moinul Islam Chowdhury**

**CIVIL REVISION NO. 2796 OF 2006**

Ayen Uddin being dead his heirs Lotufa  
Begum and others

----- Plaintiff-Appellant-Petitioners

=Versus=

Mohsin Ali and another

----- Defendant-Respondent-Opposite Parties

Mr. Abdul Quayum with  
Mr. Md. Mizanur Rahman and  
Mrs. Ferdousi Akter, Advocates

----- For the Petitioners

Mr. Moshfiquddin Bakhtair

----- For the Opposite Party No. 1

Heard on: 08.11.2017

**Judgment on: 23.11.2017**

At the instance of the present plaintiff-appellant-petitioners, Ayen Uddin being dead his heirs Lotufa Begum and others, this Rule has been issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 04.05.2006 passed by the learned Joint District Judge, Arbitration Adalat, Dhaka dismissing the appeal affirming those Order No. 81 dated 25.07.2000 passed by the learned Assistant Judge, Court No. 1, Dhaka in Title suit No. 86 of 2000 allowing the application under Section 151 of the Code of Civil Procedure to withdraw the suit should not be set aside.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present petitioners as the plaintiffs filed the Title Suit No. 39 of 1992 for

Specific Performance of Contract in the Court of the learned Assistant Judge, Court No. 1, Dhaka. The suit was decreed ex-parte on 27.04.1993 and the decree was put on execution by filing the execution Case No. 20 of 1993, which was finally decided by order of the learned trial court. A sale deed was executed and registered through the court on 23.02.1994 at the Mirpur, Sub-registry Office vide the Register Deed No. 1121. Later on, the present opposite party No. 1, Monoshn Ali filed the Miscellaneous Case No. 54 of 1996 under Order 9 Rule 13 of the Code of Civil Procedure against the ex-parte decree dated 27.04.1993 contending that the summons of the suit was never served upon the opposite party and the present plaintiff petitioners in collusion with the process servers shown the summons were served thus the decree was liable to be set aside. The learned trial court by his judgment and order dated 26.11.1998 allowed the application by setting aside the ex-parte decree thereby restored the Title Suit No. 39 of 1992 to its original file and number.

However, the present petitioners filed an application for withdrawal of the suit under Section 151 of the Code of Civil Procedure in the Title Suit No. 86 of 2000, (which was renumbered from the Title Suit No. 39 of 1992 on transfer of the suit). The Court of learned Additional Assistant Judge, Court No. 1, Dhaka allowed the application to withdraw the suit under Order 23 Rule 1 of the Code of Civil Procedure by the order No. 81 dated 25.07.2000. The petitioners thereafter filed a review application under Order 47 Rule 1 contending

that the application of withdrawal was made under Section 151 of the Code of Civil Procedure but the learned Court allowed the withdrawal application under Order 23 Rule 1 which is a serious mistake and which has prejudiced interest of the petitioners, thus filed the Misc. (review) Case No. 33 of 2000 (arising from Title Suit No. 86 of 2000). The said review application was rejected by the learned trial court on 19.11.2002. Being aggrieved the present petitioners preferred the Title Appeal No. 137 of 2003 in the court of learned District Judge which was heard by the learned Joint District Judge, Arbitration Court, Dhaka who by his impugned judgment and order dated 04.05.2006 dismissed the appeal. This revisional application has been filed challenging the legality of the said impugned judgment and order and the Rule was issued thereupon.

Mr. Abdul Quayum, the learned senior counsel, appearing along with the learned Advocates Mr. Md. Mizanur Rahman and Mrs. Ferdousi Akter, appearing on behalf of the petitioners submitted that the present petitioners obtained an ex-parte decree in the suit for Specific Performance of Contract and a registered sale deed was executed in favour of the present petitioners but the present opposite party filed a Misc. Case under Order 9 Rule 13 for setting aside the ex-parte decree without contesting the title suit evenafter receiving sufficient summons. However the learned trial court committed an error of law by allowing the application filed under Order 9 Rule 13 of the Code of Civil Procedure. The impugned judgment and order unlawfully dismissed the Title Appeal No. 137 of 2003 without considering the necessity of the

review application for the mistake committed by the learned Court therefore the Rule should be made absolute.

He further submits that the petitioners filed an application under Section 151 of the Code of Civil Procedure for withdrawal of the suit and the learned trial court allowed the application under the wrong law and the appellate court dismissed the appeal and thereby affirmed the judgment and order of the trial court, as such, committed an error of law in passing such erroneous judgment, as such, the courts below committed error in law resulting in an error in decision occasioning failure of justice and same judgment and order is liable to be set aside.

The Rule has been opposed by the present opposite party No. 1.

Mr. Moshfiquddin Bakhtair , the learned Advocate, appearing on behalf of the opposite party No. 1, submits that the present petitioners filed the Title Suit No. 39 of 1992 for Specific performance of Contract (bainama) for the purchase of land 14 decimals which was barred by limitation, moreover, no summons were served upon the opposite parties thus the ex-parte decree was obtained by practicing fraud upon the court, as such, the Rule should be discharged. The learned Advocate further submits that the present opposite parties filed a Misc. Case under Order 9 Rule 13 for setting aside the ex-parte decree which was allowed and the suit was restored to its original field and numbers. But the present petitioners in order mislead the court filed the subsequent application for withdrawal of the suit and an application for review and an appeal in order to frustrate the order passed in the Misc. case for

restoration of the original suit and the impugned judgment and order passed by the learned appellate court below clearly mentioned about setting aside the ex-parte decree and cancellation of the deed executed by the court on 23.02.1994, as such, this Rule is liable to be discharged.

Considering the above submissions made by the learned Advocates and also considering the revisional application filed under Section 151 (1) of the Code of Civil Procedure along with the annexures therein, in particular the impugned judgment and order and also perusing the materials in the lower court records, it appears to me that the present petitioners as the plaintiff filed a title suit for Specific Performance of Contract claiming a contract to have executed on 25.05.1976 and an ex-parte decree was passed thereupon. The decree was put on execution and the court executed a sale deed in favour of the present petitioners. The present opposite parties claimed that the matter of ex-parte decree and the execution of a sale deed were not at all known to them as no summons were served required under the provisions of law. After hearing both the parties, the learned Court allowed the application under Order 9 Rule 13 and set aside the ex-parte decree on 26.11.1998 thereby the original Title Suit No. 39 of 1992 was renumbered as the Title Suit No. 86 of 2000.

In the above given factual aspects, the suit should have been proceeded to be decided on merit after giving opportunities of hearing both the parties. However, the present petitioners made some subsequent unnecessary and undesired actions by filing, firstly, an application for

withdrawal of the suit under Section 151 of the Code of Civil Procedure and the learned trial court wrongly allowed the withdrawal by application of the wrong provision of law being Order 23 Rule 1 allowed the withdrawal application on 25.07.2000 which was after the order to set aside the decree and restoration of the title suit was allowed in the Misc. Case No. 54 of 1996. In this unusual steps taken by the present petitioners complicated the proceeding upon the wrong advice of the learned Advocate and a proceeding is pending in the Bangladesh Bar Council. The Bar Council is to take appropriate action for causing sufferings of the ordinary litigant as well as causing loss of time of the courts by way of giving a wrong advice which is unprofessional and unethical.

Secondly, beside the above matter, the present Rule is based upon further unnecessary and undesirable steps taken by the present petitioners which was an application for review of the order of withdrawal of the suit and thereafter the title appeal upon which the impugned judgment and order has been passed. I have carefully examined the annexures given with the revisional application and also the lower court records and I am of the view that these all proceedings from the steps of the withdrawal of the suit thereafter review and also this appeal are not valid legal proceeding as the court has already set aside the decree passed in the Title Suit No. 39 of 1992 and renumbered as Title Suit No. 83 of 2000. However, the impugned order clearly contains that as soon as the Miscellaneous Case under Order 9

Rule 13 was allowed by the Court, therefore, the sale deed No. 1121 dated 23.02.1994 executed by the court in favour of the present petitioners became invalid and inoperative. Therefore, I am of the view that the Title Suit No. 86 of 2000 should be decided on merit after giving opportunities for hearing to the parties and also after considering the relevant documentary and oral evidence by way of deposition as early as possible. I am therefore not inclined to interfere into the judgment and order as the Rule does not merit any further considerations.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is discharged.

The order of withdrawal passed by the learned trial court on 25.07.2000 is hereby set aside.

The learned Assistant Judge, Court No.1, Dhaka is hereby directed to continue with the Title Suit No. 86 of 2000 (earlier Title Suit No. 39 of 1992) without issuing any summons as the learned Advocate for the defendant opposite party has taken the responsibility to take part in the hearing on behalf of the defendant and also by giving opportunities of hearing to both the parties for adducing and producing evidence in support of their respective cases. The learned trial court is directed to conclude the hearing of the suit and to decide within 6(six) months from the date of receipt of this judgment and order without allowing any unnecessary adjournment on the prayer of either of the parties.

The interim order of direction to maintain status-quo granted at the time of issuance of this Rule is hereby recalled and vacated.

The Section is directed to communicate this judgment and order to the concern court immediately and the Section is also directed to send down the lower court records at once.