

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.3831 OF 2006

Abdus Sobhan Gharami

..... *Plaintiff-Petitioner.*

-VERSUS-

Government of the Peoples Republic of
Bangladesh, represented by the Deputy
Commissioner, Patuakhali and others.

..... *Defendant-Opposite Parties.*

Ms. Chowdhury Nasima, Advocate

----- For both the Petitioner.

Mr. Waliul Islam Oli, D.A.G. with

Mr. Mohammed Shaif Uddin Raton, A.A.G

Mr. Md. Nazrul Islam Choton, A.A.G.

Mr. Md. Nasimul Hasan, A.A.G.

----- For the Opposite Parties.

Heard on 31.10.2024

Judgment on 07.11.2024

By this rule, the opposite parties were called upon to show cause as to why the impugned judgment and order dated 30.03.2006 passed by the District Judge, Patuakhali in Miscellaneous Appeal No.46 of 2005 dismissed the appeal and affirmed the judgment and order dated 31.10.2005 passed by the Joint District Judge, 2nd Court, Patuakhali in Miscellaneous Case No.16 of 2004 rejecting the case should not be set aside.

The petitioner, as plaintiff, instituted Title Suit No.35 of 1995 before the Senior Assistant Judge, Patuakhali, for a permanent injunction against the defendants. The suit was transferred to the Joint District Judge, 2nd Court, Patuakhali, and renumbered as Title Suit No.10 of 2002. Subsequently, the suit was fixed for a preemptory hearing on 11.10.2004, and on that date, the suit was dismissed for default for non-appearance of the plaintiff petitioner.

After that, the plaintiff petitioner on 09.11.2004 filed Miscellaneous Case No.16 of 2004 under Order IX, Rule 9, read with Section 151 of the Code of Civil Procedure for restoration of Title Suit No.10 of 2002 on setting aside the dismissal order for default.

The defendant-opposite party nos.1-3 contested the case by filing a written statement denying all the material allegations made in the application for restoration.

The petitioner side examined one witness to prove his claim; on the other hand, the opposite party examined none. Subsequently, the learned 2nd Joint District Judge, Patuakhali, by the judgment and order dated 31.10.2005, rejected the Miscellaneous Case.

Being aggrieved by, the plaintiff, as appellant, has preferred Miscellaneous Appeal No.46 of 2005 before the District Judge, Patuakhali. Eventually, the learned District

Judge, Patuakhali, dismissed the appeal with a cost of Tk.500/- by the judgment and order dated 30.03.2006, affirming those passed by the trial Court.

Being aggrieved by, the plaintiff-petitioner filed the present Civil Revision before this court and obtained the instant rule, with an order of status quo extended from time to time.

I have considered the submission of the learned advocate for both parties perused the impugned judgment and other materials on record. Before I advert to the contentions raised from the side of the petitioner, it will be appropriate to quote the relevant provision of Order IX Rule 9 of the Code of Civil Procedure, which runs as follows:

“9 (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

It reveals that if a suit was dismissed for non-appearance of the plaintiff at the time of the call for hearing the suit, the plaintiff applied to set aside the dismissal order of the suit then if he can satisfy the court that there was a sufficient cause for non-appearance when the suit was called for hearing. The court shall set aside the dismissal order with an order of cost.

The learned Joint District Judge, 2nd Court, Patuakhali, while rejecting the application, held that the petitioner himself was examined as P.W.1 and claimed that on the date fixed for hearing of the suit, he had jaundice and high blood pressure. Thus, he could not appear before the court. The plaintiff, though, exhibited a medical certificate and proved the sickness of the petitioner but failed to produce the doctor who issued the certificate about his sickness. Therefore, the application had no merit. While dismissing the appeal, the Appellate Court below affirmed the trial Court's order with the same grounds taken by the trial Court.

From all the materials, events, facts, circumstances, oral and documentary evidence, and the plaintiff petitioner's conduct, it became clear that he was prevented by sufficient

cause from appearing in court when the suit was called on for a peremptory hearing.

On perusal of the judgment and order of both the courts below, it seems that in deciding the Miscellaneous Case and the Miscellaneous Appeal, the learned Judges did not keep in mind the provision of Order IX Rule 9 of the Code of Civil Procedure and misdirected themselves in their approach on the matter. Moreover, the plaintiff had made out a case with sufficient cause for non-appearance before the court; thus, the application for restoration of the suit is required to be granted.

On the above facts, circumstances of the case, and discussions made herein above, I am of the firm view that the learned District Judge, Patuakhali, did not correctly appreciate and construe the documents and materials on record in accordance with the law in affirming the judgment and order of the trial court which suffers from legal infirmity and perversity and as such, the same is liable to be set aside.

Resultantly, the rule is made absolute with a cost of Tk.2000/-.

The impugned judgment and order dated 30.03.2006 passed by the learned District Judge, Patuakhali, in Miscellaneous Appeal No.46 of 2005, dismissing the appeal and affirming the order dated 31.10.2005 passed by the

learned Joint District Judge, 2nd Court, Patuakhali in
Miscellaneous Case No.16 of 2004 is hereby set aside.

Let title Suit No.10 of 2002, which was dismissed for
default, be restored to its original file and number.

Communicate this judgment and send down the record
at once.

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(MD. SALIM, J).