

Present:
Mr. Justice Md. Ruhul Quddus

Civil Revision No.933 of 1999

Shahidullah Shaik and others

...Petitioners

-Versus-

Atahar Shaik and others

...Opposite Parties

Mr. S. M. Moonir with Mr. Lokman Karim
Advocates

...for the petitioners

No one appears for the opposite parties

Judgment on 14.11.2011

This Rule, at the instance of the defendant-petitioners, was issued calling in question the legality of judgment and order dated 11.1.1999 passed by the District Judge, Gopalganj in Miscellaneous Appeal No.24 of 1998 dismissing the same and affirming those dated 20.5.1998 passed by the Assistant Judge, Moksedpur, Gopalganj in Miscellaneous Case No.17 of 1995 rejecting the same.

Facts relevant for disposal of the Rule, in short, are that opposite party Nos.1-16 and their predecessor-in-interest instituted Title Suit No.58 of 1993 on 15.5.1993 in the Court of Senior Assistant Judge, Moksedpur, Gopalganj for partition of their *ejamali* land as described in the schedule of the plaint. The defendants (herein

petitioner Nos.1-3) had appeared in the suit and took time for filling written statement. As they failed to submit any written statement and take any step in spite of several adjournments, the suit was fixed for hearing *ex parte* on 12.3.1995 and ultimately it was decreed *ex parte*.

Against the said *ex parte* decree, the defendants filed Miscellaneous Case No.17 of 1995 under Order IX rule XIII of the Code of Civil Procedure. They filed the miscellaneous case on the averments, *inter alia*, that they had appeared in the suit on 15.8.1994 and prayed for time to file written statement. The Court allowed them time and fixed 13.8.1994 for filling written statement. Subsequently the day was fixed for filling written statement on 22.1.1995, when defendant-petitioner No.2, tadbirkar of other defendants was suffering from chickenpox, for which they could not file any written statement or take any step in the suit. Ultimately the suit was fixed on 12.3.1995 for hearing *ex parte* and it was decreed *ex parte*. After recovery from illness, petitioner No.2 came to Gopalganj on 10.3.1995 and learnt about the *ex parte* decree. In that event, they filed the miscellaneous case under Order IX rule XIII of the Code.

Opposite Party No.1, Atahar Shaik contested the miscellaneous case by filling written objection contending, *inter alia*, that defendant Nos.1-3 and 6-7 made appearance in the suit on 15.8.1994 and took adjournment for filling written statement. The Court fixed 30.8.1994 and 22.9.1994 for filling written statement. In stead of filling any written statement, the defendants prayed for time on 22.9.1994, which

was allowed with cost and the Court fixed 31.10.1994 and 26.11.1994 for filling written statement. As the defendant failed to take any step, the Court fixed 22.1.1995, 22.2.1995 and 12.3.1995 for hearing *ex parte*. Still the defendants failed to file any written statement or take any step. In the result, the Court decreed the suit *ex parte* on 12.3.1995.

The defendant-petitioners examined two witnesses and the plaintiff-opposite party also examined two witnesses in support of their respective cases. After conclusion of hearing, the learned Assistant Judge rejected the miscellaneous case by his order dated 20.5.1998. Opposite Party Nos.17 and 18 preferred Miscellaneous Appeal No.24 of 1998, which the learned District Judge, Gopalganj dismissed by his judgment and order dated 11.1.1999. The petitioners moved in this Court against the said judgment and order dated 11.1.1999, obtained the Rule with an ad-interim order of stay.

Mr. S. M. Moonir, learned Advocate appearing for the petitioners submits that when the matter was taken up for hearing *ex parte*, petitioner No.2 was suffering from chickenpox, which prevented him from appearing before the Court and take any step for himself as well as for other defendants, of whom he was the tadbirker. They examined two witnesses and clearly proved the miscellaneous case, but the Courts below without proper assessment of evidence rejected the miscellaneous case and dismissed the appeal.

I have gone through the judgments of the Courts below. It appears that both the Courts below have discussed the evidence and arrived at concurrent finding of fact that the petitioners failed to prove that petitioner No.2 was suffering from chickenpox, and found that the defendants were dragging the suit. It appears from the record that the petitioners as defendants made appearance in the suit and took several adjournments. On several days they neither filed any written statement nor took any step. The evidence of P. Ws.1 and 2 are also contradictory regarding suffering of petitioner No.2 from chickenpox. Moreover, the petitioners did not prefer any appeal against the judgment and order dated 20.5.1998 passed by the Assistant Judge, Moksedpur, Gopalganj in Miscellaneous Case No.17 of 1995 and thereby impliedly accepted the same. There is no explanation in the revisional application as to what prevented them from preferring any appeal against the aforesaid order of rejection of miscellaneous case. Now they should have no reason to be aggrieved by the same. The learned District Judge considered the evidence, elaborately discussed each and every aspect of the case and dismissed the appeal. He did not commit any error of law resulting in an error in decision occasioning failure of justice.

I do not find any substance in the Rule. In the result, the Rule is discharged. The order of stay granted at the time of issuance of Rule is vacated.

Communicate a copy of the judgment.