

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

Present:

Mr. Justice Abdur Rahman

Civil Revision Case No. 1723 of 2002

In the matter of :

Anamul Hoque and others

.....Defendants 13-16 & 19

Petitioners

-Versus-

Khayerernessa and others

.....Plaintiffs-

Petitioners

Opposite parties

No one appears

.....For the petitioners.

No one appears

...for the opposite parties.

Judgment on: 14.06.2026 A.D.

Sunday, 31 Joishthha, 1433 B.S.

JUDGMENT

Abdur Rahman, J:

This application at the instance of the petitioners invoked under section 115(1) of the Code of Civil Procedure, 1908, challenging the Order dated 29.06.2000 passed by the learned Senior Assistant Judge, Sadar, Noakhali, allowing the application under Order 9 Rule 4 of the Code of Civil Procedure, 1908, in Miscellaneous Case 48 of 2000, setting aside the judgment and order dated 07.10.1997, by restoring Title Suit No.173 of 1995, dismissed for default.

At the same time, the learned Court was pleased to stay the operation of the Title Suit No. 173 of 1995 of the Court of Senior Assistant Judge, Sadar, Noakhali, for a period of 3 months, which was subsequently extended till the disposal of the Rule.

This matter has been sent from the Section by dint of an order of the Hon'ble Chief Justice of

Bangladesh for hearing, and the same is taken up today. But, no one appears on behalf of the petitioners and the opposite parties. Although the opposite parties made appearance by filing Wokalatnama on 11.11.2002, they did not file any counter-affidavit.

However, on perusal of the record, it is found that neither the petitioner nor the opposite parties took steps after 14.02.2013 to get the matter heard. Considering the Rule as an old one, I am of the view to dispose of the Rule on merit.

The crux of facts of the case is that the opposite parties 1-9 as plaintiffs filed Title Suit 173 of 1995 before the Court of the learned Senior Assistant Judge, Patuakhali Sadar on 11.5.95 for setting aside the Preliminary Decree dated 10.3.96, passed in Title Suit No. 125/91 (earlier number was 14 of 1969) on contest and the final Decree was passed on 01.10.94 after local investigation by allotment of shares. The Title Suit 173 of 1995 was fixed for taking steps on 07.10.97, against

the dead defendants Nos. 41, 46, and 104; and, as the steps were not taken, the suit was dismissed. It is mentionable that with respect to the self same property the petitioners also filed Title Suit 157 of 1988 for declaration of title and the said suit was decreed on 23.3.90 and as against the same plaintiffs opposite parties filed Title Suit 29 of 1995 and the same was dismissed on contest and in the said suit Abu Sayed Opposite Party No. 6 and a practicing Advocate at Noakhali Bar was examined as P.W.1 on 22.9.97, 15.3.98, 2.4.98. 23.4.98, 4.5.98 and 18.8.98 and in the cross-examination, he was asked about the filing Title Suit Number 173 of 1995 and the plaint of the said suit, and the order of dismissal of the suit was filed and marked exhibit-Ja-Ja(1).

However, it appears that long after the dismissal of the said suit the plaintiff Opposite Party on 17.04.2000 filed an application under Order 9 rule 4 against an order dated 07.10.97 alleging that the

plaintiffs Opposite Parties were not aware of the date of the suit and the date of the suit was not communicated to his advocate and they came to know of the order only on 10.4.2000 upon query from the Advocate's clerk and filed the application on 17.4.2000 and also filed an application under section 5 of Limitation Act, 1908 and the said suit was restored on 29.6.2000 without any notice to the petitioners and delay of 893 days was condoned without any notice to the defendants of the suits. The petitioners, being aware of the restoration of the suit only on 14.3.2001, filed an application on 18.3.2000 alleging that the order of restoration has been obtained by acts of fraud and deliberate suppression of fact, and it is submitted that the restoration ought not have been allowed behind the back of the petitioner because a legal right has accrued to petitioner and the said application was rejected by order dated 2.4.2001. Thereby, invoking this jurisdiction, the instant Rule was obtained.

On sifting the petitioner's application, it is found that the petitioner took several grounds mainly on: (i) the learned Senior Assistant Judge committed a grave error of law in condoning the delay of 893 days without issuing any notice to the petitioner; (ii) the learned Senior Assistant Judge committed grave error on law in condoning delay of 893 days although the delay was not explained according to law and pleaded ignorance about the course of litigation of their suit; (iii) the learned trial Court ought to have found that the order of restoration was illegal, and was obtained by fraud and thus committed an error of law which occasioned failure of justice; (iv) the Court below did not appreciate that right has accrued in favour of the petitioners because of lapse of time the suit ought not have been restored since no explanation was given as to inordinate delay; (v) the Court below did not appreciate that the suit had abated and the application under order 9 rule 4 was misconceived, and (vi) the

Court below ought to have considered that nobody is entitled to take advantage of his negligence by fraudulent device and petitioner have been denied of their right vested in them by operation of law.

Upon a careful examination of the grounds stated in the instant application together with the documents annexed thereto, it transpires that the present matter has remained pending for an inordinately long period, arising out of a comparatively simple order passed by the learned Senior Assistant Judge, Sadar, Noakhali. It further appears that the impugned proceedings have their genesis in the judgment and decree passed in Partition Suit No. 125 of 1991, corresponding to Title Suit No. 14 of 1969. The said judgment and decree, having attained finality, gave rise to rights and obligations which were required to be effectuated through execution and implementation of the partition decree.

However, despite the lapse of a considerable period of time, the fruits of the decree have neither been enjoyed by the decree-holders nor has the partition decree been fully executed and materialized in accordance with the law. The records reveal that the execution and effective implementation of the decree have remained stalled and frustrated owing to the pendency of the present Rule. Consequently, a dispute arising from a partition suit instituted several decades ago has lingered without reaching its logical conclusion, thereby depriving the parties of the benefits flowing from the decree lawfully obtained in their favour.

In such circumstances, it appears that the continuation of the present proceedings has had the effect of impeding the execution process and obstructing the realization of the rights determined by the competent civil Court in the aforesaid partition suit. As a result, the decree passed in Partition Suit No.

125 of 1991, corresponding to Title Suit No. 14 of 1969, has remained incapable of effective enforcement and practical implementation solely by reason of the subsistence of the instant Rule.

On perusal of the impugned order dated 29.06.2000, it is seen that the learned Senior Assistant Judge passed the following order:

“প্রার্থীপক্ষের বক্তব্য শুনলাম। তামাদি আইনের ৫ ধারার দরখাস্ত, ছানী মামলার দরখাস্ত এবং মূল মামলার নথি দেখিলাম। প্রার্থীপক্ষকে আর একবার ভাগ্য পরীক্ষার সুযোগ দেওয়া যাইতে পারে।

অতএব,

আদেশ হইল যে,

অত্র ছানী মামলা একতরফা সূত্রে মঞ্জুর করা হইল। মূল মামলার বিগত ৭/১০/৯৭ ইং তারিখের খারিজ আদেশ রদ ও রহিত ক্রমে মূল মামলা পূর্বের নথীতে পুনঃ বহাল করা হইল।”

From the aforesaid order it is manifested that the learned Court was please to pass the said order on ex-party hearing without examining any witness, and the Annexure-A revealed that the present petitioners were

the opposite party No. 1-9 of the Miscellaneous case being No. 48 of 2000 under order 9 Rule 115(1) of the Code of Civil Procedure, 1908 and the copies of the said Miscellaneous case and the application of delay for 893 days against the dismissal order of the Title Suit 173 of 1995, had not been provided to the opposite parties. The impugned order also demonstrates that the learned Senior Assistant Judge, without taking any evidence in Miscellaneous case 48 of 2000 and without explaining the delay and the unsatisfactory reasons, allowed the said Miscellaneous case without affording any opportunity to the opposite parties. In this regard, it is worthwhile to mention that the Code of Civil Procedure (Amendment) Act, 2012, has given an opportunity to the plaintiff to file an application within 30 days of the order of dismissal, where there is no necessity to adduce any evidence in support of the application under Order 9 Rule 4 of the Code of Civil Procedure, 1908, and no option was

available before 2012 amendment except in the case of admission of the opposite party.

Turning now to the legality, propriety and correctness of the impugned order challenged in the present Civil Revision, I am constrained to hold that the learned Senior Assistant Judge acted wholly without lawful authority in allowing the Miscellaneous Case. A careful scrutiny of the record reveals that the learned Court below allowed the application filed under Order IX, Rule 4 of the Code of Civil Procedure, 1908, merely on the basis of the averments made in the petition itself, without assigning any cogent reason or recording any finding supported by evidence. It further appears that no witness was examined, nor was any documentary evidence adduced, in support of the claim advanced by the plaintiffs-opposite parties. In the absence of any evidentiary foundation and without undertaking a judicial inquiry into the facts

and circumstances of the case, the learned Judge mechanically allowed the Miscellaneous Case.

It is a settled principle of law that a judicial order must be founded upon reasons and supported by materials available on record. An order passed without assigning reasons and without consideration of the relevant facts and evidence is not only arbitrary but also unsustainable in law. The impugned order, therefore, suffers from patent illegality, manifest perversity, non-application of judicial mind and a serious error of law apparent on the face of the record. Such erroneous exercise of jurisdiction has resulted in a clear miscarriage of justice and has substantially prejudiced the rights and interests of the present petitioners, thereby warranting interference by this Court in its revisional jurisdiction.

Before parting with the matter, I consider it necessary to place on record my strong disapproval of the manner in which the plaintiffs-opposite parties

sought to obtain adjudication of their claim. The record unmistakably demonstrates that Miscellaneous (Chhani) Case 48 of 2000, instituted under Order IX, Rule 4 of the Code, was founded upon suppression of material facts relating to the earlier suits [including Title Suit 29 of 1995 and its Exhibits Ja-Ja (1)] and proceedings between the parties. Such conduct strikes at the very root of the administration of justice. A litigant approaching a Court of law is under a solemn obligation to disclose all material facts candidly and fairly. Any attempt to secure a favourable order by concealing relevant facts or by presenting a distorted picture of the dispute amounts to an abuse of the process of the Court.

The justice delivery system cannot be permitted to be manipulated at the whims of litigants seeking to secure orders in a manner convenient to them. Access to justice is a constitutional and legal right, but such a right cannot be converted into a licence for instituting

misconceived, frivolous, vexatious or *mala fide* proceedings. Courts are duty-bound to safeguard the sanctity of judicial proceedings and to prevent abuse of their process. Petitions lacking *bona fides* or founded upon suppression of material facts deserve to be rejected at the threshold so as to preserve public confidence in the administration of justice and to prevent unnecessary wastage of valuable judicial time.

In view of the discussions made hereinbefore and considering the facts and circumstances of the case in their entirety, I find substantial merit in the Rule. The Rule, therefore, succeeds.

Accordingly, the Rule is made absolute.

The impugned order dated 29.06.2000 passed in Miscellaneous Case 48 of 2000 under Order IX, Rule 4 of the Code of Civil Procedure, 1908, is hereby set aside and quashed.

Consequently, Miscellaneous Case No. 48 of 2000 stands rejected.

The order of stay granted by this Court at the time of issuance of the Rule and subsequently extended from time to time, and lastly extended until disposal of the Rule, is hereby recalled and vacated forthwith.

There shall, however, be no order as to costs.

The office is directed to send a copy of the judgment and communicate the order to the Subordinate Court concerned forthwith.