

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

Present:

**MR. JUSTICE ABDUR RAHMAN**

Civil Revision No. 2253 of 2012

Md. Nurul Haque and others

..... Petitioners

**-Versus-**

Md. Shamsuddin Mondol and others

..... Opposite Parties

Mr. Md. Saidul Alam Khan, Advocate

..... For the petitioners

Mr. Shasti Sarker, Advocate

..... For the opposite parties

Heard on: 17.06.2026 and 18.06.2026 A.D.

Judgment on: 18.06.2026 A.D. Thursday,

[ ৪ আষাঢ় ১৪৩৩ বঙ্গাব্দ ]

**JUDGMENT**

Abdur Rahman, J:

At the instance of the petitioners, this application has been filed under section 115(1) of the Code of Civil Procedure, 1908, and the Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 20.02.2012 passed by the learned Additional District Judge, 1st Court, Kushtia, in Miscellaneous Appeal No. 46 of 2010 affirming the judgment and order No. 182 dated 20.07.2010 passed by the learned Joint District Judge, Additional Court, Kushtia, in Miscellaneous Case No. 04 of 2009 dismissing the said Miscellaneous Case, should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The relevant facts, shorn of unnecessary details, are that the petitioners as plaintiffs instituted Partition Suit No. 72 of 1994 against the opposite parties and others

seeking partition of the suit property. The suit remained pending for a considerable period and was ultimately fixed for peremptory hearing on 27.07.2009. On the said date, the plaintiffs failed to proceed with the suit; consequently, the learned trial Court dismissed it for default under Order IX Rule 8 of the Code of Civil Procedure, 1908.

Being aggrieved by the dismissal order, the plaintiffs instituted Miscellaneous Case No. 04 of 2009 seeking restoration of the suit. Their case, in brief, was that the supposed PW1 was serving as the Secretary of Kursha Union Parishad, and on the date fixed for the hearing, he could not obtain leave from his office because the Member of Parliament was scheduled to inaugurate the newly constructed Union Parishad Complex. As such, he was unable to attend Court, and sought time, thus, the suit was dismissed for default.

In support of the aforesaid plea, the plaintiffs attempted to produce a certificate issued by the Chairman of Kursha Union Parishad. However, the learned Joint

District Judge, by order No.181 dated 19.07.2010, rejected the petition filed for that purpose. Thereafter, upon hearing the parties, the learned trial Court by judgment and order dated 20.07.2010 dismissed the Miscellaneous Case.

Against the said order, the plaintiffs preferred Miscellaneous Appeal No.46 of 2010 before the learned Additional District Judge, 1st Court, Kushtia. Upon hearing the parties, the learned Appellate Court, by judgment and order dated 20.02.2012, dismissed the appeal and affirmed the order of the trial Court.

Being aggrieved thereby, the petitioners moved this Court and obtained the present Rule.

The opposite parties made appearance in the instant Rule by filing Wokalatnama on 25.02.2014, but they did not file any counter affidavit to controvert the facts whatsoever.

Mr. Md. Saidul Alam Khan, the learned Counsel appearing on behalf of the petitioners, submits that both the Courts below failed to appreciate the facts and circumstances of the case in their proper perspective. He submits that the original suit is a partition suit involving a disputed title and shares amongst numerous parties, and therefore, its disposal necessarily required substantial time. However, both the Courts below were influenced by the mere fact that the suit had remained pending for a long period and, on that basis, rejected the prayer for restoration.

The learned Counsel further submits that the plaintiffs made a *bona fide* attempt to substantiate the cause shown for their absence by adducing the Chairman of Kursha Union Parishad and relevant documentary evidence. However, the learned trial Court rejected their application for adducing such evidence and thereafter erroneously concluded that the plaintiffs had failed to prove their case. According to him, such finding is self-

contradictory and constitutes a clear misreading and non-consideration of material evidence.

He further contends that the Courts below misconstrued the scope of Order IX Rule 8 and Order XVII of the Code and failed to consider that the cause of action in a partition suit is a recurring and continuing one. Referring to the decision reported in 28 BLD (HCD) 457, he submits that dismissal of a partition suit for default does not extinguish the substantive right of a co-sharer and, therefore, a liberal approach ought to have been adopted in considering the restoration application.

On the other hand, Mr Shasti Sarker, the learned Counsel appearing on behalf of the opposite parties, supports the impugned judgments and submits that the plaintiffs failed to establish sufficient cause for their absence on the date fixed for hearing and, as such, the Courts below rightly dismissed the Miscellaneous Case and the appeal.

Learned Counsel further submits that earlier on several occasions, the petitioners showed such manipulated pretexts that restored the suit, and they are harassing the opposite parties for an indefinite time; consequently, the instant Rule is liable to be discharged with exemplary costs.

I have heard the learned Counsel for both sides and perused the Rule, the impugned judgments, and the materials on record.

On perusal of the judgment of the learned Trial Court, it is found that it observed in the following way:

“কিন্তু তার দাবী প্রমানের নিমিত্তে তিনি যে ছুটির দরখাস্ত দিয়েছিলেন ও তার উক্ত ছুটির দরখাস্ত নামঞ্জুর হয় তা প্রমানের নিমিত্তে তার ইউনিয়ন পরিষদ কার্যালয়ের অফিসে থাকা উক্ত ছুটির দরখাস্তের কপি দালিলিক প্রমানাদী হিসেবে আদালতে দাখিল করেননি। আবার দাবীর সমর্থনে তিনি ইউনিয়ন পরিষদের চেয়ারম্যানকে সাক্ষী হিসেবে পরীক্ষা না করে পরবর্তীতে উভয় পক্ষের সাক্ষ্যগ্রহন সমাপ্ত অন্তে যুক্তিতর্ক শুনানীর জন্য ০৪.৭.১০ তারিখে দিন ধার্য করা হলে উক্ত তারিখেও চেয়ারম্যানকে সাক্ষী হিসেবে হাজির না করে যুক্তিতর্ক শুনানীর জন্য সময়ের প্রার্থনা করলে সময়ের প্রার্থনা মঞ্জুর অন্তে ইং ১৫.৭.১০

তারিখ যুক্তিতর্ক শুনানীর জন্য দিন ধার্য করা হয় এবং ১৫.৭.১০ ইং তারিখে উভয়পক্ষের যুক্তিতর্ক শ্রবনান্তে ২০.৭.১০ইং তারিখ রায় প্রকাশের জন্য দিন ধার্য করা হয়। এইরূপ অবস্থার প্রেক্ষিতে ১৯.৭.১০ ইং তারিখে দরখাস্তকারীপক্ষ কুর্শা ইউনিয়ন পরিষদের চেয়ারম্যানের সাক্ষ্য গ্রহণের প্রার্থনা করলে ছানী মামলার সার্বিক অবস্থা বিবেচনায় দরখাস্তটি নামঞ্জুর করা হয়। দরখাস্তকারী তার ছানীর দরখাস্তে আনীত বক্তব্য প্রমান করার সকল প্রকার সুযোগ থাকা সত্ত্বেও যথাসময়ে তা গ্রহণ করেনি মর্মে এক্ষেত্রেও প্রমান পাওয়া যায়। তাছাড়া মাননীয় সংসদ সদস্য উক্ত কুর্শা ইউনিয়ন পরিষদের নতুন ভবন ধার্য ইং ২৭.৭.০৯ তারিখে উদ্বোধন করলে সেইসংক্রান্তে চিঠিও সংশ্লিষ্ট ইউনিয়ন পরিষদ কার্যালয়ে রয়েছে। কিন্তু দরখাস্তকারীপক্ষের ১নং সাক্ষী কুর্শা ইউনিয়ন পরিষদের সচিব হওয়া সত্ত্বেও উক্ত চিঠির কোন কপিই আদালতে দাখিল করে প্রমান করেননি যে, মূল মোকদমার ধার্য ইং ২৭.৭.০৯ তারিখে কুর্শা ইউনিয়ন পরিষদের নতুন ভবন স্থানীয় মাননীয় সংসদ সদস্য উদ্বোধন করবেন। সেকারণে সার্বিক বিবেচনায় দরখাস্তকারীর দাবীকৃত এই বক্তব্যের কোন ভিত্তি খুঁজে পাওয়া যায় না।”

On the other hand, the learned Appellate Court observed that:

“সর্বোপরি ১ নং বাদী যে ধার্য তারিখে ছুটি পাননি এ মর্মে কোন বক্তব্য বাদী পক্ষ বিজ্ঞ নিম্ন আদালতে প্রমাণের চেষ্টা করেননি। কাজেই নতুন করে তাকে সুযোগ দেয়ার কোন কারণ দেখা যায় না।

এমতাবস্হায় ধার্য তারিখে বাদী পক্ষের সাক্ষীগণের উপস্থিতি না হওয়াটার কারণ সন্তোষজনক নয়। এ ছাড়া মূল মামলার বিভিন্ন স্তরের ইতপূর্বের কর্মকান্ড দৃষ্টে আদালতের নিকট প্রতীয়মান হয়েছে যে, এই মামলার বাদী পক্ষ অত্র মামলা পরিচালনার আগ্রহ হারিয়ে ফেলেছেন অহেতুক বিবাদী রেসপন্ডেন্ট পক্ষকে হয়রানী করার জন্য মামলাটি জিইয়ে রেখেছেন।”

From the aforesaid observations of the learned Trial Court, it is evident that the petitioners tried to produce the Chairmen of the Kursha Union Parishad to prove the substance of his time petition and the learned trial Court did not consider the said petition and the learned Appellate Court also misconceive to the said facts and thereby the Appellate Court committed error on the face of the record as to non-consideration of the facts thereby occasioned failure of justice.

However, it appears from the record that the original suit was fixed for hearing on 27.07.2009. On that date, the plaintiffs filed an application seeking adjournment on the ground that the person who would be PW1, being the

Secretary of Kursha Union Parishad, could not obtain leave from his office owing to the scheduled inauguration of the Union Parishad Complex by the Member of Parliament. The application having been rejected, the suit was dismissed for default.

Now, to take a clear legal standing of the instance case approved in Order IX Rule 8, and Order XVII Rules 1 & 3 respectively, of the Code of Civil Procedure, 1908, runs as follows:

"Procedure where the defendant only appears:

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder."

And

The provisions of Order 17 Rule 1 and 3, which run as follows:

"The Court may grant time and adjourn the hearing.

(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) ---

(3) Notwithstanding anything contained in sub-rules (1) and (2), the Court shall not grant more than six adjournments in a suit before peremptory hearing at the instance of either party to the suit, and any adjournment granted to a party beyond the aforesaid limit shall make such party liable to pay a cost of not less than two hundred taka and not more than one thousand taka to the other party, within

time to be specified by it; noncompliance with which, by the plaintiff shall render the suit liable to be dismissed and, by the defendant shall render the suit liable to be disposed of ex parte:

Provided that the Court shall not grant more than the adjournments to a party, even with costs under this rule."

From the plain reading of the aforesaid provision of the law, it is manifest that both the Subordinate Courts were misconceived that the plaintiffs were appeared through time petition, but their witnesses were absent, and thereby caused omission to follow due process of law as contained in the aforesaid provisions.

However, the decision of Harmuj Sikder and others - Vs- Ayub Ali Sikder and others as contained in 28 BLD(HCD)457, where their Lordships opined that:

*"Section 12 of the Code has put a bar on a plaintiff from instituting a further suit with respect to any*

*particular cause of action in court to which the Code applies where he precluded by any rules thereof from saluting such suit. Rule 9(1) of Order 9 of Code has clearly provided that where 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. So, the core question to be determined is whether a plaintiff should be allowed to bring a fresh suit, and whether the fresh suit is instituted on the same cause of action on which the previous suit, dismissed for default under Rule 8 of Order 9 of the Code, was brought. Naturally, the question that follows is whether the cause of action to bring a suit for partition subsists even after the dismissal of the earlier suit for default under Rule 8 of Order 9 of the Code. It is an admitted legal position that there is no limitation for filing a suit for partition, and unless there is a total ouster of the right of a co-sharer from the ejmali property, he shall be deemed to be in ejmali possession of*

*the properties sought to be partitioned, if not partitioned earlier by metes and bounds. ---(6)."*

The cause of action for a partition suit being a recurring one, dismissal of a partition suit for default does not bar a subsequent suit for partition. Moreover, it is very clear that the petitioner filed the miscellaneous case, being No. 4 of 2009, within one month, availing the earliest opportunity at the relevant time, but the learned Subordinate courts failed to assess the *bona fide* intention of the petitioner.

The learned trial Court, while dismissing the restoration case, observed that although the plaintiffs claimed to have submitted a leave application and relied upon official records of the Union Parishad, they failed to produce copies of such documents and also failed to examine the Chairman of the Union Parishad in support of their case. But Annexure-B reveals that the petitioners

finally sought to adduce the Chairman before the Court, and the application was rejected.

Thereafter, the learned Appellate Court concurred with the above findings and held that the plaintiffs failed to prove that the person who would be PW1 could not obtain leave on the relevant date and that no further opportunity should be granted to them.

Upon careful scrutiny of the record, however, it appears that the plaintiffs subsequently filed an application praying for examination of the Chairman of Kursha Union Parishad and for production of relevant documents in support of their plea. The said application was rejected by the learned trial Court vide order No. 181 dated 19.07.2010. Thus, after refusing the plaintiffs an opportunity to adduce the very evidence they sought to rely upon, the Courts below held that the plaintiffs had failed to substantiate their claim.

In the facts and circumstances of the case, I am constrained to hold that the record demonstrates that the plaintiffs made a *bona fide* attempt to prove the cause assigned for their witness's absence. Once such an opportunity was denied, it was not proper for the Courts below to draw an adverse inference against them for non-production of the same evidence.

However, it is worth noting that the original suit is admittedly a long-pending partition suit. The cause of action in a partition suit is a recurring and continuing one, and dismissal of a partition suit for default does not operate as a bar to a subsequent suit for partition. If so, the petitioners would be bound to file a new suit at the demise of the instant suit. Then, both parties must undertake all necessary steps and formalities to bring the suit to the stage of peremptory hearing. Those processes also create complications for the litigant parties; therefore, applications for restoration in such matters should ordinarily be considered with a view to advancing

substantial justice rather than defeating it on technical grounds.

It further appears that the petitioners instituted Miscellaneous Case No.04 of 2009 within the prescribed period and approached the Court at the earliest opportunity. Such conduct is indicative of their *bona fide* intention to pursue the suit and cannot reasonably be construed as abandonment of the litigation. Thus, there are palpable substances in the arguments of the learned Counsel for the opposite parties in respect of the fact that, on several earlier occasions, the petitioners raised such concomitant pretexts that restored the suit, and they are harassing the opposite parties for an indefinite time; consequently, the petitioners should not be spared without costs to avail the restoration of the original suit.

Having considered the facts and circumstances of the case, the evidence on record, the findings of the Subordinate Courts and the principles laid down in the aforesaid decision, I am of the view that both the Courts

below misdirected themselves in law by failing to consider material aspects of the case and by refusing to appreciate the *bona fide* conduct of the petitioners. Consequently, the impugned judgments suffer from misreading and non-consideration of material evidence, resulting in an error in the decision, occasioning failure of justice.

Accordingly, I find essence in the Rule, and thereby, the Rule is made absolute with costs to the tune of BDT 10,000/=(Taka ten thousand) only.

However, the judgment and order dated 20.02.2012 passed by the learned Additional District Judge, 1st Court, Kushtia, in Miscellaneous Appeal No.46 of 2010, and the judgment and order dated 20.07.2010 passed by the learned Joint District Judge, Additional Court, Kushtia, in Miscellaneous Case No.04 of 2009 are hereby set aside.

The Miscellaneous Case No.04 of 2009 is allowed. Consequently, Partition Suit No.72 of 1994 is restored to its original file and number.

The petitioners are hereby directed to deposit the aforesaid costs amount before the learned Trial Court on its 1<sup>st</sup> date of hearing, and the opposite parties shall be entitled to receive the said money at their own initiative.

The learned trial Court is directed to proceed with the suit, notifying the parties, considering it as an old one, and disposing of the same expeditiously in accordance with law, giving no adjournment, except for substantial needs of the parties.

Let a copy of this judgment be transmitted to the Court concerned forthwith.

*(Abdur Rahman, J)*