IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISI0N
(CIVIL REVISIONAL JURISDICTION)

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 2880 OF 2013

Md. Saifuzzaman alias Sumon and others
....Defendants-Appellants-Petitioner
-Versus-
Md. Abul Khair, Advocate and others
.... Plaintiff-Respondent-Opposite Parties

Mr. Ranjan Chakravorty
..... For the Petitioner
Mr. Md. Shahidul Islam with
Mr. Mohammad Riaz Hossain Sikder and
Mr. Naharin Begum
.... For the Opposite Parties

Heard on: 07.05.2017.
Judgment on: 16.05.2017.

At the instance of the present defendants- appellants petitioner, Md. Saifuzzaman alias Sumon and others, this Rule has been issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 17.10.2012, passed by the learned District Judge, Laxmipur in Miscellaneous Appeal No. 22 of 2011 rejecting the appeal and affirming the order No. 73 dated 20.05.2008 passed by the learned Joint District Judge, 2nd Court, Laxmipur in Miscellaneous Case No. 03 of 2006 (arising out of Title Appeal No. 11 of 2002) should not be set aside.

The relevant facts for disposal of this Rule, inter-alia, are that, the present opposite party No.1 as the plaintiff filed the Title Suit No. 104 of 2000 in the Court of the learned Assistant Judge, Raipur Court, Laxmipur for a decree of partition of the suit land described in the schedule of the plaint measuring $0.99^{2}/_{3}$ acres situated in D. S. Khatian Nos. 269 and 64 in Mouza Piarapur under District Laxmipur. The plaint case is that the land measuring 07.01 in D. S. Khatian No. 269 was originally belonged to Ismail Mia, Mohammad Mia, Abdur Rahman, Abdul Mazid, Ayub Ali, Mati Mia and others. The present plaintiff opposite parties and others and the present defendant petitioners became owners of the suit land along with other land by way of purchase and also by inherence. In Khatian No. 64 the present plaintiff opposite party, Advocate Md. Abul Khair, also purchased land from the successor of the recorded owners namely Monu Mia, Mohammadullah, Asia Khatun and others land measuring 0.07 $^{2}/_{3}$ acres of land. Accordingly, the plaintiff opposite parties sought a decree for partition of the total land measuring $0.99^{2}/_{3}$ acres.

The predecessors of the petitioner as the defendant No. 1 and 2 and 35 contested the suit by filing written statement denying all material statement made in the plaint and also contending that the Moti Miah was an owner of land measuring 0.75 acres in Khatian No.

269 who died leaving behind Ali Miah Munshi. Subsequently the successors in interest sold the land to the petitioner-defendant No. 1 and 2 in Khatian No. 269. In D.S. Khatian No. 64 the present petitioner also claimed ownership of the land measuring .69 acres.

It is to be mentioned here that some of the defendants in the Title Suit No. 104 of 2000 entered into a compromise agreement with the present plaintiff opposite parties to get a decree for their respective land from the total land measuring 7.01 acres.

After hearing the parties the learned Assistant Judge, Raipur Court, Laxmipur decreed the suit in the preliminary form by allotting sahams of land measuring $0.99^{2}/_{3}$ acres and on the basis of compromise the defendant Nos. 7, 23-29, 42-46, 41,5,8,10,6,13,47-48,4,14,17, 21-22, 36 got their respective sahams. The present defendant petitioners were given only 0.14 acres of land. Being aggrieved the present petitioners as the appellants preferred the Title Appeal No. 11 of 2002 in the court of the learned District Judge, Laxmipur which was heard by the learned Joint District Judge, Court No. 2, Laxmipur in absence of the present petitioners as the appellants, therefore, the appeal was dismissed for default by the order number 46 dated 19.04.2006. Being aggrieved by the said order the present petitioners filed the Miscellaneous Case No. 03 of 2006 in the

Court of the learned Joint District Judge, 2nd Court, Laxmipur under Order 41 rule 19 of the Code of Civil Procedure for readmission of the appeal.

When the said application was taken up for hearing by the court, the present petitioners filed an application for presenting the Misc. Case in person but in fact no one appeared to present the said application, whereas the present opposite parties as the respondents filed Hajira. As no one appeared to present the application the learned Court rejected the application by the order number 73 dated 20.05.2008. Being aggrieved the present petitioner filed the Civil Revision No. 10 of 2008 in the Court of learned District Judge, Laxmipur but the learned Advocate for the petitioners denied to conduct the case of the petitioners as the present opposite party No. 1 is an well known Advocate. However, the petitioners filed an application for converting the application into an appeal which was allowed by the learned District Judge, Laxmipur and the same was renumbered as the Miscellaneous Appeal No. 22 of 2011. After hearing the parties and considering the evidence the learned District Judge dismissed the appeal by the impugned judgment and order dated 17.10.2012. This revisional application has been filed challenging the said impugned judgment and the present Rule has been issued .000thereupon.

Mr. Ranjan Chakraborty, the learned Advocate, appearing for the present petitioners, submits that, earlier the Title Appeal No. 11 of 2002 was dismissed for default on 23.3.2003 due to admission of the engaged lawyer in to Laxmipur Central hospital for his serious illness where the court of learned District Judge after proper assessing the fact, materials by applying the provision of law as provided under order 41 Rule 19A of C.P.C. directly re-admit the appeal without taking evidence, but subsequent order of dismissal dated 19.04.2006 has not been occurred on the similar ground where the court of learned district Judge without proper appreciating the principle of law, rejected the appeal by ascertaining the provision of law as a bar for restoration of a dismissal order over and again which committed error of law resulting in error in the decision occasioning failure of justice.

The learned Advocate also submits that since the plaintiff-opposite party is an Advocate of local bar who obtained decree in preliminary form on the basis of compromise with other defendants and in such a manner the engaged lawyer of the appellant-petitioners was not so interested to conduct the case result of which a circumstance also demanded to submit an application for time. But the subsequent steps were not taken by the engaged lawyer and so it is crystal clear that there was no latches or negligence on the part of the appellant-

petitioners at all where the fault was occurred by the engaged lawyer and in such situation without considering the vital aspect of the case, both courts below came to decision which committed error of law.

The Rule has been opposed by the present opposite party No.1 by filing a counter affidavit contending, inter-alia, that the revisional application was not maintainable in law because the Title Appeal No. 11 of 2002 while pending before the learned District Judge, Laxmipur, he delegated the power to Joint District Judge, 2nd Court, Laxmipur. The learned Joint District Judge pleased to dismiss the appeal for default, against which appellant-petitioners filed Miscellaneous Case No. 3 of 2006, and the said Miscellaneous Case was rejected by the Joint District Judge. Thereafter defendant petitioners filed the Civil Revision under Section 115(2) of the Code of Civil Procedure in the Court of District judge, Laxmipur which was out of jurisdiction and also beyond the law. Subsequently said revisional application was converted as the Miscellaneous Appeal No. 22 of 2011 but the District Judge had no jurisdiction to accept or hear the Miscellaneous Appeal because it is an absolute jurisdiction of the High Court Division as such the rule is liable to be discharged for the securing ends of justice.

Mr. Md. Shahidul Islam, the learned Advocate along with the learned Advocate Mr. Mohammad Riaz Hossain Sikder and the

learned Advocate Ms. Naharin Begum, appearing for the opposite parties submits that, the present petitioners as the appellants filed the Title Appeal No. 11 of 2002 which was dismissed for default and thereafter filed Miscellaneous Case No. 03 of 2006 was also dismissed for default and the Miscellaneous Appeal preferred by the petitioner was rejected after hearing the parties as such the appeal has not been admitted under the provisions of law therefore the judgment and the preliminary decree passed by the learned trial court in the Partition Suit No. 104 of 2000 remains operative and the present Rule has been obtained by misleading the court.

The learned Advocate also submits that under Order 41 rule 19 and 19A of the Code of Civil Procedure an appeal can be readmitted only once, not more than one time after the amendment of the C.P.C. In the instant case the present petitioners appeal was readmitted by the learned Joint District Judge by its order dated 25.05.2003 which was dismissed by the Appellate Court below therefore the further prayer for readmission of the appeal by filing the Misc. Case and Misc. Appeal are not maintainable, as such, the impugned order was passed lawfully rejecting the Misc. Appeal by the order dated 17.10.2012, as such, this Rule is liable to be discharged.

Considering the above submissions made by the learned Advocates and also considering the present revisional application filed under Section 115(1) of the Code of Civil Procedure along with its annexures, in particular, the impugned judgment and order dated 17.10-2012 and also considering the materials in the lower court records, it appears to me that the present opposite party No. 1, Advocate Md. Abul Khair as the plaintiff filed a partition suit claiming saham of .99$^{2}/_{3}$ acres of land out of total land measuring 07.01 acres. In the said suit a hues member of defendants appeared and claimed their respective sahams by entering the compromise agreement with the plaintiff, accordingly, the learned Court decreed the suit in preliminary form in favour of plaintiff and the defendants. It further appears that the predecessor of the present petitioners was also given a saham of land measuring 0.14 acres which caused them to be aggrieved by the present petitioners. Accordingly, the Title Appeal No. 11 of 2002 was preferred by the present petitioners which was dismissed for default by the order No. 46 dated 19.04.2006 and the present petitioners as the appellants failed to take any necessary steps to present the appeal on the relevant time. However, after a short period of time i.e. on 14.05.2006 the present petitioners filed the Miscellaneous Case No. 03 of 2006 under Order 41 rule 19 and 19A

of the Code of Civil Procedure, here again the petitioner failed to take any necessary step to present the application filed by way of a Miscellaneous Case for the admission of the appeal. The petitioners themselves desired to appear in person as the learned Advocate engaged on behalf of the petitioner refused to conduct the case but when the case was taken up for hearing no one was in the court as such the Misc. Case was rejected on 20.05.2008. The present petitioner thereafter filed the Civil Revision No. 10 of 2008 challenging the said rejection order dated 20.05.2008. Here again the learned Advocate refused to conduct the case at the beginning of the revision filed under Section 115(2) of the C.P.C. and the said revisional application was thereafter converted into an appeal being the Miscellaneous Appeal No. 22 of 2011 which was dismissed by the impugned judgment and order dated 17.10.2012.

In the above mentioned legal proceedings continued for a long period of time in order to readmit an appeal which was dismissed for default by the Appellate Court below due to failure to take any necessary steps for a long period of time. The relevant provision of law under Order 41 rule 19 is an important provision in order to take decision by this Court. Accordingly, Order 41 rule 19 and 19A of the Code of Civil Procedure is hereby reproduced below:

> "19.(1) Where an appeal is dismissed under rule 11, sub-rule (2), or rule 15A or rule 17 or rule 18, the appellant may apply to the Appellant Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit
> (2) Provisions of section 5 of the Limitation Act, 1908 shall apply to applications under sub-rule(1).
> [19A.(1) Notwithstanding anything contained in rule 19 or any other law, the Court may, in order to a void delay and expedite disposal, directly re-admit without requiring the appellant to adduce evidence to satisfy it about sufficient causes as required under rule 19:
> Provided that the appeal under this rule shall not be re-admitted unless an application, supported by affidavit, praying for such re-admission is made to the Court within thirty days of the date on which the appeal is dismissed for default:
> Provided further that no appeal shall be re-admitted more than once under this rule.
> (2) As soon as an order under sub-rule (1) is made to re-admit an appeal, the Court shall cause notice thereof to be served at the cost of the appellant upon the respondent who appeared in the appeal.]"

From the above provisions of law it appears that before amendment it has been for readmission of any appeal which was dismissed for default on the ground that any person was prevented by sufficient cause from appearing in the court when the appeal was called for hearing. The above rule has been amended by inserting Rule 19A by the Code of Civil Procedure (Amendment) Act, 2006 (Act No. VIII of 2006, Section 6) which provides for a direct readmission of

any appeal if it was dismissed for default in order to avoid any delay and also for an expedite disposal and the said sub-rule also contains a proviso stating that an application must be supported by an affidavit to be filed within 30 days from the date of dismissal of appeal for default. The said sub-rule 19A contains that no appeal shall be readmitted more than once.

In view of the above amended provision of Order 41 rule 19 of the C.P.C. it has given a discretion to an appellate court for readmission on some relaxed conditions, however, this Sub-rule does not allowed an automatic readmission of any appeal because an appeal should be readmitted after compliance of certain conditions. In the instant case, I have carefully examined the judgment and order passed by the courts below in the Title Appeal (partition), Miscellaneous Case under Order 41 rule 19 and the revisional application under Section 115(2) of the C.P.C. and also the Miscellaneous Appeal and I found that the present petitioners faced serious difficulty to engage a lawyer in their favour because the present plaintiff opposite party is himself an Advocate of the Laxmipur Bar. I found it very interesting that the present petitioner’s Advocate failed to attend in all stages of this cases but the present petitioners found sufficient lawyers to prepare and to file new cases in order to the represent them.

Therefore, it means that the petitioners have some kind of ignorance or negligence or in indifference in conducting their cases for getting only their entitle shaham in a partition suit. As we have seen earlier the predecessors of the present petitioners could prove his entitlement upon the land which have been scheduled in the plaint of the partition Title Suit No. 104 of 2000 therefore the court decreed in the preliminary form allocating 0.14 acres of land, whereas the petitioners claimed much more measurement of land.

Regarding the above matter, I am of the view that the learned trial court passed only a preliminary decree in the partition suit but if the present petitioner could prove their entitlement upon more than 14 decimals of land by adducing an producing document they can get the decree amended in order to award there appropriate saham on the basis of the evidence and after the amendment of the decree of the said partition suit before it shall be made final by obtaining a report from an Advocate Commissioner who will have the opportunity to examine the document of the respective parties and possession thereof.

In view of the above, the impugned judgment and order passed by the learned District Judge, Laxmipur dated 17.10.2012 which contains in the following terms:

> "From the above discussing it appears that the appellant avail the opportunity under Order 41 rule 19A of the C.P.C for several times on the same ground. That in that case under Order 41 rule 19A of C.P.C. is a bar for restoration of a dismissal order over and gain. So, the impugned order passed by the learned Joint District Judge is not liable to be set-aside."

After examining the above impugned judgment and order, I do not find any illegality or infirmity in the impugned judgment and order, therefore, no error of law has been committed by the learned Appellate Court below. I am, therefore, not inclined to interfere into the above judgment of the learned Appellate Court below.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is discharged.

The Section is directed to communicate this judgment and order to the concern Court and also directed to send down the lower court record immediately.