

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

CIVIL REVISION No. 1562 OF 2019.

ShafiqurRahman Chowdhury

...Petitioner.

-Versus-

Liakat Ali Chowdhury .

....Opposite party.

Mr. Mohammad Mujibur Rahman, Advocate

... For the petitioner.

Mr. Lokman Karim, Advocate

... For the opposite party.

Heard on: 10.03.2024.

Judgment on: 13.03.2024,

Md. Badruzzaman, J:

This Rule was issued calling upon opposite party to show cause as to why order No. 110 dated 15.11.2018 passed by learned Joint District Judge, Bashkhali, Chattogram in Miscellaneous Case No. 3 of 2016 rejecting an application for recalling P.W.1 for further examination-in-chief under Order 18, rule 17 of the Code of Civil Procedure should not be set aside.

At the time of issuance of Rule this Court vide order dated 19.05.2019 stayed all further proceedings of Miscellaneous Case No. 3 of 2016 for a period of 6 (six) months which was, subsequently, extended till disposal of the Rule

Facts relevant, for the purpose of disposal of this Rule, are that the petitioner filed Miscellaneous Case No. 3 of 2016 against the opposite party and others under Order IX rule 13 read with section 151

of the Code of Civil Procedure for setting aside *ex-parte* judgment and decree dated 22.07.2015 (decree signed on 30.07.2015) passed in Title Suit No.124 of 2015 , contending, *inter alia*, that in said title suit which was filed in 2006 being Title Suit No. 71 of 2006 (thereafter, renumbered as Title Suit No. 345 of 2012 and 124 of 2015) the summons upon the defendant-petitioner was not served and the plaintiff-opposite party by fraudulent means and suppression of summons collusively obtained the *ex-parte* decree. The present opposite party filed written objection against the miscellaneous case contending, *inter alia*, that in the original suit this petitioner was defendant No. 3 who entered appearance by filing Voklatnama and thereafter, on 18.01.2009 filed application for adjournment for filing written statement but thereafter, did not contest the suit and finally the suit was decreed *ex-parte* vide judgment and decree dated 22.07.2015 and as such, the miscellaneous case should be dismissed.

In course of trial of the miscellaneous case the present petitioner adduced his Attorney Md. Arif on 26.08.2018 as P.W 1 who was examined and cross-examined and his evidence was closed. Thereafter, the petitioner filed an application under Order 18, rule 17 of the Code of Civil Procedure for recalling P.W.1 for re-examination and the learned Judge of the trial Court, after hearing, vide impugned order dated 15.11.2018 rejected the application on the ground that in the meantime, the examination of witness was almost completed and there was no scope under law to give any opportunity to re-examine P.W.1.

Mr. Mohammad Mujibur Rahman, learned Advocate appearing for the petitioner submits that there is scope under Order 18, rule 17 of the Code of Civil Procedure to recall any witness at any stage of the proceeding to prove the case of any party and in the instant case

though P.W.1, as Attorney of the petitioner, was examined but due to lack of preparation on the part of the learned Advocate the whole fact could not bring before the Court and as such, recall of P.W.1 was necessary for the purpose of proper disposal of the case but the trial Court without considering above aspect of the matter illegally rejected the application without any valid reason.

Mr. Lokman Karim, learned Advocate appearing for the opposite party submits that Order 18, rule 17 of the Code of Civil Procedure does not permit any party in suit to examine any witness after he has been discharged on his examination and cross-examination and this provision allows the Court to examine any witness on recall by itself by putting such question as it things fit. In support of his submission learned Advocate has referred to the case of Nurul Islam vs. Md. Abdur Rashid and others 37 DLR (AD) 32, the case of Md. Hanif Ali vs. Hajera Khatun & others 22 BLD 217 and the case of Mariam Nessa & others vs. Nazrul Islam & others 10 BLT 311.

We have heard the learned Advocates, perused the application, the impugned order and other materials available on record.

On perusal of the application filed by the petitioner for recalling P.W.1 (Annexure-E) it appears that the petitioner sought to recall the P.W.1 on the ground that before his examination the concerned lawyer could not prepare the witness and as such, the P.W.1 could not state all facts related to the case and as such, the recall was necessary for ends of justice. On perusal of the impugned order dated 15.11.2018, it appears that the trial Court while rejecting the application opined that the examination of witness came to an end and as such, there was no scope under law to recall the witness and thereafter fixed the next date on 10.02.2019 for F.H.

It appears from the record that the petitioner filed the instant miscellaneous case for setting aside *ex-parte* judgment and decree passed in another suit claiming that by suppression of summons and fraudulent means the opposite party collusively obtained the *ex-parte* decree. On the other hand, the opposite party claimed that the summons of the suit was duly served upon the defendant-petitioner and he entered appearance in the suit and also filed application for time for filing written statement but thereafter, did not contest the suit. The petitioner adduced P.W.1, Md. Arif, as his constituted attorney to depose on his behalf. While deposing as P.W.1, Md. Arif stated that he had no personal knowledge about the case and he did not know for which land the case was filed. There is nothing on record to show that the petitioner in his pleadings stated anything that this P.W.1 was aware of the proceeding of the suit. Since the P.W.1 specifically stated that he knew nothing about the litigations between the parties there is nothing to be gained from him on the part of the petitioner on recall. However, the petitioner has scope to adduce supportive witness(s) to prove that the summons was not duly served upon him.

In *Nurul Islam and Abdur Rashid* 37 DLR (AD) 32 the Appellate Division held, "the power conferred by Order 18, rule 17 C.P.C. is an enabling power and very wide power had been conferred for adjudication of the dispute and this power is only available for giving justice inasmuch as the enabling power conferred upon the Court to put such question "to him as he thinks fit".The power of the court to act under Order 18, rule 17 are very wide. Thus, if the Court while considering the judgment finds that there is any ambiguity on the face of the record or an omission which wants clearing up, the Court

can in a proper case, recall a witness, who had given evidence for that purpose.”

The learned Advocate for the petitioner could not show that there was any ambiguity in the statement of the P.W.1 which warrants clearing up on his recall or which is necessary for pronouncement of proper judgment. So, under the settled proposition of law the application which has been filed under Order 18, rule 17 of the Code of Civil Procedure was misconceived and as such, the trial Court committed no illegality in rejecting the application.

In that view of the matter we find no merit in this Rule.

In the result, the Rule is discharged however, without any order as to costs.

The order of stay granted earlier is hereby recalled and vacated.

The trial Court is directed to dispose of the case in accordance with law by giving the petitioner an opportunity to adduce further witness, if any.

Communicate a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)