

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.2941 OF 2023

Nasir Uddin @ Md. Nasir Uddin
.....Plaintiff-Petitioners.

-VERSUS-

Amin Ullah and others
.....Defendant-Opposite Parties.

Mr. Md. Abul Kashem, Advocate
----- For the petitioners.
Mr. Md. Parvez Chowdhury, Advocate
----- For the opposite parties 3-7.

Heard on 09.01.2025, 16.01.2025, 23.01.2025

Judgment on 30.01.2025.

By this Rule, opposite parties were called upon to show cause as to why the Judgment and order dated 24.05.2023 passed by the learned District Judge, Feni, in Civil Revision No.07 of 2022 rejecting the revisional application after affirming the Judgment and order dated 04.07.2022 passed by the learned Joint District Judge, 1st Court, Feni in Title Suit No.303 of 1981 rejecting the application under Order IX Rule 4 of the Code of Civil Procedure should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The petitioners, as plaintiffs, instituted Title Suit No. 388 of 1980 before the Sub Judge, Feni, for partition of the suit

properties. Subsequently, the suit was renumbered as Title Suit No. 303 of 1981. Eventually, the suit was decreed ex parte on 02.07.1990. Defendant No.12(Ka) filed Miscellaneous Case No.48 of 1990 on 11.07.1990 for setting aside the ex parte decree., which was dismissed for default on 01.07.1991. Against that order dated 01.07.1991, defendant No.12(Ka) filed Miscellaneous Appeal No.14 of 1991 before District Judge, Feni, which was dismissed on 10.06.1993. Thereafter, defendant No.12(Ka) filed Civil Revision No.170 of 1994 before the High Court Division. On 02.01.1994, the Rule was made absolute, and Miscellaneous Case No.48 of 1990 was restored in its original file and number.

Subsequently, the learned Joint District Judge, 1st Court, Feni, by the Judgment and order dated 01.10.2018, allowed the Miscellaneous case by setting aside the ex parte decree, and Title Suit No.303 of 1981 was restored in its original file and number.

Thereafter, on 30.01.2019, the advocate for the defendants and 22.01.2019, the advocate for the plaintiffs were informed about the restoration of the case, and they made signatures beside the order of restoration, but consecutively on the following three fixed dates, both the parties did not appear or take any steps in the suit and thus

on 19.05.2019 the suit was dismissed for absence of both the parties under Order IX Rule 3 of the code of civil procedure.

Thereafter, the present petitioners, as the applicant on 21.03.2022, filed an application under Order IX Rule 4 of the Code of Civil Procedure for restoration of suit with an application for condonation of delay of 1037 days. However, the learned Joint District Judge, 1st Court, Feni, rejected the application by the order dated 04.07.2022 on the ground of limitation.

Being Aggrieved, the plaintiffs as petitioners preferred Civil Revision No.07 of 2022 before the District Judge, Feni, who, by the Judgment and order dated 24.05.2023, disallowed the Civil Revision with grounds that the application is not maintainable in its present form and barred by limitation.

Being aggrieved, the plaintiff petitioner filed the present Civil Revision before this court and obtained the instant Rule, with an order of stay extended from time to time.

I have considered the submission of the learned advocate for both parties and perused the impugned Judgment and other materials on record. It reveals that if a suit was dismissed for non-appearance of both parties under Order XI Rule 3 of the code of civil procedure at the time of the call for hearing the suit, the plaintiff applied to set aside the dismissal order of the suit under XI Rule 4 of the code of civil procedure,

then if he can satisfy the court that there was a sufficient cause for non-appearance when the suit was called for hearing. The court shall set aside the dismissal order with an order of a cost. Instead, the revisional court below rejected the revisional application on the grounds that the application under Order IX Rule 4 of the Code of Civil Procedure is not maintainable when the suit is dismissed under Order XI Rule 3 of the Code of Civil Procedure, the petitioner have to come under Order 22 Rule 3 of the code by referring the decision reported in 36 DLR 309, and the suit is barred by limitation.

It manifests that the petitioner in the application for condonation of delay stated that the Tadbirkar of the plaintiff side, who was also the plaintiff No.1(Kha) of the suit, died on 07.11.2006, so the engaged lawyer of the plaintiffs' side could not inform the plaintiffs about the above-fixed date of the suit. Therefore, the plaintiff could not take any steps when the suit was called on for a hearing.

Considering the above, it appears that the trial court and the revisional court failed to consider the settled principle of law decided in the case of Sonali Bank Vs. Nurul Kader and another reported in 46 DLR(HCD)21, wherein it was held that:-

“It seems to me that the suit was dismissed for default on the date fixed not for hearing the suit but for showing cause as to why delay was caused

in putting in the requisites out of time granted by the court. A close reading of the rules of Order 9 CPC indicates that none of the rules empowers a court to dismiss a suit on a date not fixed for hearing. That being the position the order of dismissal of the suit was not under any of the rules of Order 9 of the Code. All the rules of Order 9 CPC refer to the date fixed for hearing the suit and as such the court, in my opinion, should not have rejected the application on the ground of limitation as application under Order 9 rule 4 CPC is not attracted to the facts of the present case. In the light of the decision in Brojendra Lal Roy I am of the opinion that the learned Munsif ought to have treated the application as being one made under section 151 CPC to which no period of limitation applies. This is certainly an important question of law. In that view of the matter, the contention of the learned Advocate that the suit should have been restored and heard seems to be of substance. Accordingly, I set aside the order rejecting the application filed under Order 9, rule 4 CPC and treat the same as one under section 151 CPC. Being of this view, in the facts and circumstances

of the case, I set aside the order of dismissal of the suit made on 30.6.82 by the learned Munsif and restore the suit to its file and number in exercise of my power under section 115 CPC. The learned Munsif is directed to proceed with the suit in accordance with law.”

From all the materials, events, facts, circumstances, oral and documentary evidence, and the plaintiff petitioner’s conduct, it became clear that he was prevented by sufficient cause from appearing in court when the suit was called on for a peremptory hearing.

Considering the above, it manifests that in deciding the application under Order IX Rule 4 of the Code of Civil Procedure for restoration of the suit, both courts below did not keep in mind the provision of Order IX Rule 4 of the Code of Civil Procedure and misdirected themselves in their approach on the matter. Moreover, the plaintiff had made out a case with sufficient cause for non-appearance before the court, and for reasons of delay, it appears to be satisfactory; thus, the application for restoration of the suit is required to be granted.

On the above facts, circumstances of the case, and discussions made herein above, I am of the firm view that the learned Joint District Judge, 1st Court, Feni did not correctly appreciate and construe the documents and materials on

record in accordance with the law in affirming the Judgment and order of the trial court which suffers from legal infirmity and perversity and as such, the same is liable to be set aside.

Resultantly, the Rule is made absolute with a cost of Tk.10,000/-.

The impugned Judgment and order dated 24.05.2023 passed by the learned District Judge, Feni, in Civil Revision No.07 of 2022 rejecting the revisional application and affirming the Judgment and order dated 04.07.2022 passed by the learned Joint District Judge, 1st Court, Feni in Title Suit No.303 of 1981 is hereby set aside.

Let Title Suit No.303 of 1981, which was dismissed for default, be restored to its original file and number.

Communicate this Judgment and send down the lower court records at once.

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(MD. SALIM, J).