

Present

Mr. Justice Mohammad Ullah

Civil Revision No. 3825 of 2022

Md. Meher Jamal and others  
... Defendant-appellant-petitioners

-Versus-

Most. Nur Jahan Begum  
... Plaintiff-respondent-opposite party

Mr. Md. Saidul Alam Khan, with  
Mr. Md. Mosaddek Billah, Advocates  
...For the petitioners

Mr. Md. Ashraful Karim, Advocate  
... For the opposite party No.1

Heard on: 09.01.2024

**Judgment on: 14.01.2024 and 15.01.2024**

On an application under section 115(1) of the Code of Civil Procedure, at the instance of the defendant-appellant-petitioners, this Court, by order dated 25.08.2022, issued the Rule calling upon the opposite parties to show cause as to why the impugned judgment and order dated 12.04.2022 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram, in Miscellaneous Appeal No.21 of 2019 dismissing the appeal affirming the judgment and order dated

09.07.2019 passed by the learned Senior Assistant Judge, Ulipur, Kurigram in Miscellaneous Case No. 02 of 2018 rejecting the miscellaneous case filed under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree dated 13.11.2017 passed by the learned Senior Assistant Judge, Ulipur, Kurigram, in Other Suit No.80 of 2008 should not be set aside and/or why such other or further order or orders as to this Court may seem fit and proper shall not be passed.

At the time of issuance of the Rule, operation of the judgment and order dated 13.11.2017 passed by the learned Senior Assistant Judge, Ulipur, Kurigram in Other Suit No.80 of 2008 has been stayed.

The relevant facts for the disposal of the Rule are as follows:

The opposite party, as the plaintiff, instituted Other Suit No.80 of 2008 against the petitioner and others for partitioning the suit land as described in the schedule

to the plaint. The suit was decreed ex-parte on 13.11.2017 against the defendants.

The Trial Court allotted saham to the plaintiffs as prayed for.

The defendant filed Miscellaneous Case No.32 of 2016 for setting aside the ex-parte decree, which was allowed with a cost of taka 500/- and the suit was restored to its original filed and number.

Subsequently, the Trial has been proceeded. This time, the defendant did not turn up to the Court, and as such, the Trial Court, having considered the materials on record, decreed the suit ex-parte against the defendant.

Against which the defendant filed Miscellaneous Case No.02 of 2018 under order IX rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree.

The Trial Court, having considered the evidence on record, disallowed the miscellaneous case on the contest against the opposite party No.1.

The Trial Court held that having set aside the ex-parte decree, though the petitioners were allowed to contest the original suit, they willingly did not turn up to contest the suit, and as such, the suit was decreed ex-parte against them. So, the Trial Court refused to restore the suit.

The appellate Court, having not found any illegality in the judgment and order of the trial court, dismissed the appeal and thereby affirmed the trial court's order.

I have heard the learned Advocate from both parties and considered the materials on record, wherefrom it transpires that the suit was initially decreed ex-parte against the petitioner and others and the plaintiff got saham as prayed for. It appears that the contesting defendant filed Miscellaneous Case No.32 of 2016 for setting aside the ex-parte decree and restoring the suit to its file and number.

The Trial Court allowed the miscellaneous case with a cost of taka 500/- allowing the defendant to contest the suit

by filing a written statement. When the defendant consecutively did not turn up to the Court to file a written statement and contest the suit, the trial court again decreed the suit ex-parte.

The Trial Court, having considered the evidence on record, again decreed the suit ex-parte against the defendant and allotted saham as prayed for in favour of the plaintiff.

Against this, the contesting defendant filed Miscellaneous Case No.2 of 2018 for setting aside the ex-parte decree and restoring the suit to its file and number.

The petitioner made a plea that the tadbirkar became ill during the suit hearing, and as such, he could not appear in Court when the suit was called on for a hearing.

The Trial Court found that tadbirkar Md. Meher Jamal gave a contradictory statement stating that he did not take steps due to the death of his brother.

The P.T.W. 1 failed to say when he became ill and recovered from jaundice. This P.T.W. 1 further deposed that he was admitted to Prime Hospital in Rangpur for treatment and stayed three days therein.

At the time of hearing the miscellaneous, he could not substantiate the claim of his illness and admission to the hospital, having not produced any documentary evidence such as a doctor's prescription or hospital documents.

However, on recall, P.T.W.1 produced two prescriptions, which had been marked as Exhibit 1.

On perusal of Exhibit 1, it has been found that P.T.W.1 consulted with the Doctor on 01.06.2018 and 31.08.2018, about seven months after passing the ex-parte decree.

Having consulted with the order sheet of the suit, the Trial Court found that the suit was fixed several times for filing a written statement. But the defendant did not turn up to the Court to file a written

statement or say something otherwise and kept silent inexplicably.

So, the Trial Court, having considered the oral and documentary evidence on the record submitted by the plaintiff, decreed the suit and allotted saham to the plaintiff for 1.16 acres of land.

The Trial Court was unable to believe that the P.T.W.1 was suffering from fever or jaundice for five months. The Trial Court further held that except for the tadbirkar, several defendants could have taken steps to obtain time for filing written statements but kept silent inexplicably and did not turn up to the Court.

In such facts and circumstances, the Trial Court rejected the miscellaneous case and did not restore the suit.

More elaborately, the appellate Court, having discussed the evidence on record and the law involved in this regard, dismissed the miscellaneous appeal and passed the impugned judgment and order.

During the hearing, the learned Advocate for the plaintiff-opposite party submits that by the ex-parte judgment and decree, the contesting defendant shall not be prejudiced in any way.

Mr. Md. Saidul Alam Khan, the learned Advocate for the petitioner, submits that Md. Nazib Uddin, the predecessor of the plaintiff, transferred 58 decimal of land in favour of the defendant Nos.17-25 out of the suit land through 3 registered deeds bearing No.1614 dated 03.02.1958, 11658 dated 13.10.1972 and 4096 dated 23.02.1974. But the plaintiff nowhere in the plaint disclosed such fact of transfer to defendant Nos.17-25, and as such, if the suit is not restored to its filed and number and the defendants can not contest the suit, they will be prejudiced seriously.

On the other hand, Mr. Md. Ashraful Karim, the learned Advocate for the plaintiff-opposite party No.1, submits that according to the preliminary decree, an advocate commission was appointed who gave

saham to the plaintiff for 1.6 decimal of land and the preliminary decree made final. The learned Advocate submits further that the contesting defendants will not be prejudiced since no property of the alleged three deeds has been allocated to the plaintiff by the advocate commission. The learned Advocate again submits that the revisional Court cannot consider new facts to defeat the fruit of the litigation ended pursuant to a final decree.

I have already found that the suit was decreed ex-parte first in 2014, and the same was set aside at the instance of the contesting defendants, whereby the defendants were provided opportunities to file written statements for contesting the suit.

From the impugned judgment and decree of the courts below, it appears that the suit was fixed for an ex-parte hearing several times, but the defendant did not turn up to the Court.

However, a second miscellaneous case was filed with a false assertion that the tadbirkar became ill. As such, both the courts below, considering the evidence on record, rejected the application to restore the suit to its file and number.

The remedy against an ex-parte decree is provided under Rule XIII and XIII(A) of order IX.

Under Rule XIII, a defendant may file a miscellaneous case for setting aside the ex-parte decree if he satisfies the Court:

(1) That summons was not duly served upon him.

(2) He was prevented by sufficient cause from appearing in Court when the suit was called on for hearing.

Suppose the defendant files the miscellaneous case for setting aside the ex-parte decree on the ground that he was prevented by sufficient cause from appearing when the suit was called on for hearing. In that case, the onus will entirely lie upon him to prove the cause that prevented him

from appearing in Court when the suit was called on for hearing. If he claims he was ill on the hearing date and was in a hospital or clinic for treatment, he must prove his illness by filing the prescription, medical certificate, etc. The relevant Doctor is also to be examined in support of a prescription or certificate. Reference may be made 8 B.L.C. (A.D.)160.

In the instant case, the defendant failed to prove that he was prevented by sufficient cause from appearing in the Court when the suit was called on for an ex-parte hearing.

The appellate Court, while disposing of the miscellaneous appeal, elaborately discussed the reasons for not allowing the appeal, and it affirmed the trial court's decision, which disallowed the miscellaneous case for restoration of the suit.

The concurrent finding of facts arrived at by the courts below need not be interfered with if those findings are not perverse or otherwise shaken.

In the instant case, I do not find any perversity in the findings of facts arrived at by both the courts below.

Accordingly, the Rule bears no merit and is liable to be discharged.

As a result, the Rule is discharged.

However, there will be no order regarding cost.

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

Let a copy of this judgment and the lower court records (L.C.R.) be transmitted to the Court concerned.