

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 3493 OF 2004

IN THE MATTER OF:

An application under section 115(1) of the Code of Civil Procedure.

-And-

IN THE MATTER OF:

Rezia Begum died leaving behind her legal heirs: 1(a)-1(e)

--- Defendant-Appellant-Petitioner(s).

-Versus-

Md. Ramiz Uddin Kazi died leaving behind his legal heirs: 1(a)-1(g) and others

---Plaintiff-Opposite Parties.

Mr. Abdul Barek Chowdhury, Advocate

--- For the Defendant-Appellant-Petitioner(s).

Mr. Md. Reza-E-Morshed Kamal, Advocate

---For the Plaintiff-Opposite Parties.

**Heard on: 08.02.2023, 12.02.2023,
07.05.2023 and 08.05.2023.**

Judgment on: 07.05.2023 and 08.05.2023.

At the instance of the present defendant-appellant-petitioner, Rezia Begum (now deceased and substituted), this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party No. 1 (now deceased and substituted) only to show cause as to why the judgment and order dated 14.06.2004 passed by the

learned Additional District Judge, Court No. 3, Dhaka in the Miscellaneous Appeal No. 293 of 2003 disallowing the appeal and thereby affirming the judgment and order dated 23.08.2003 passed by the learned Senior Assistant Judge, Dohar, Dhaka in the Miscellaneous Case No. 33 of 2002 rejecting the petition under Order 9 Rule 13 of the Code of Civil Procedure arising out of the Title Suit No. 59 of 1996 of the learned court of Senior Assistant Judge, Dohar, Dhaka should not be *set aside*.

The relevant and important facts for disposal of this Rule, *inter-alia*, are that the present opposite party as the plaintiff filed the Title Suit No. 59 of 1996 in the court of the learned Senior Assistant Judge, Dohar, Dhaka against the husband of the petitioner, namely, Abdul Khaleque and others. In the said suit no summon was received by her husband. During the pendency of her husband Abdul Khaleque died on 29.04.1998 leaving behind his wife, 2 sons and 3 daughters who were substituted but no notices were served upon them because his heirs had been living in different places. On 19.09.2002, the Process Server went to the present petitioner's house with a notice for ejectment and she could know that the opposite party No. 1 Riazuddin obtained a decree for the scheduled property and filed the

Execution Case for rejection. She thereafter searched and obtained a certified copy on 01.10.2002 that the present opposite party obtained an ex-parte judgment and decree dated 24.08.2000 and the execution case was initiated being Execution Case No. 01. Of 2001 without serving any notice upon the husband of the petitioner.

The present opposite party No. 1 contested the suit by filing a written objection denying all the allegations made in the plaint and contending that the said Abdul Khaleque was impleaded as the defendant No. 3 in the said suit and notices were issued upon them after being duly served. Despite serving notice no one appears to contest the suit. The daughter of the petitioner Rehand Khatun received the summons but no one appeared to contest the suit and did not file any written objection in the Miscellaneous Case No. 33 of 2002 which was filed after 2 (two) years of the ex-parte decree. The Miscellaneous Case was filed against the above decree which is liable to be rejected. The miscellaneous case was heard by the learned Senior Assistant Judge, Dohar, Dhaka which was filed under Order 9 rule 13 of the Code of Civil Procedure who after hearing the parties rejected the Miscellaneous Case by his judgment and order dated

23.08.2003. Being aggrieved the present petitioner preferred the Miscellaneous Appeal No. 293 of 2003 which was heard by the learned Additional District Judge, Court No. 3, Dhaka who after hearing the parties rejected the appeal by affirming the judgment and order passed by the learned trial court.

This matter has been pending in the daily cause list of this court for a long period of time and the learned Advocate Mr. Abdul Barek Chowdhury appears today in this court to substitute the petitioner No. 1 which was heard and ordered by this court earlier.

Mr. Md. Abdul Barek Chowdhury, the learned Advocate appears today and also submits that the learned courts below failed to consider that the notices were not properly served before passing the ex parte impugned judgment and decree which was challenged by filing a miscellaneous case and the learned courts below wrongly decided the miscellaneous case under Order 9 rule 13 of the Code of Civil Procedure. He also submits that the learned appellate court also made wrong observation to the effect that summons were duly served upon the heirs of Abdul Khaleque as defendant No. 3(Ka)-3(Cha) which is absolutely out of record as it appears that the Process

Server submitted his report showing service of summons upon her daughter who alleged to have received the summons on behalf of others although it is categorically stated that the daughter of the petitioner also did not receive the summons and as per Order 5, rule 15 of the Code of Civil Procedure service of summons may be made only upon any male adult members of the family of the defendant who was residing with him but in the instant case service of summons have neither been made upon any agent nor any adult male members of the defendant, as such, as a matter of fact, no service of summons were made as per provision of law but the learned courts below failed to appreciate the same, as such, came to a wrongful finding occasioning failure of justice.

The Rule has been opposed by the present plaintiff-opposite party No. 1 (now deceased and substituted as opposite party Nos. 1(a)-1(g), namely, Md. Motaleb Kazi and others).

Mr. Md. Reza-E-Morshed Kamal, the learned Advocate, appearing on behalf of the opposite party No. 1 submits that the original title suit was filed claiming title upon the suit land but in a long period of time the defendant in the said suit failed to appear and contest the suit, as such, the suit was decreed

exparte and the appeal therefrom also dismissed by the competent court of law, as such, the miscellaneous case filed against the exparte decree which was dismissed and the appeal preferred against the said judgment which was also dismissed by the learned appellate court below, as such, no need to interfere upon the impugned judgment and order passed by the learned appellate court below and the Rule is liable to be discharged.

The learned Advocate further submits that no question of a male member of the petitioner who will receive the learned court notices but as per Order 5 rule 15 of the Code of Civil Procedure any adult member of the petitioner who is residing with the petitioner's residence is sufficient to receive the notices and besides that the adult daughter is also a party of the suit hence it is proved that the said notices have been duly served by the Process Server, as such, the Rule obtained by the petitioner by misleading the court, therefore, the Rule should be discharged.

Considering the above submissions made by the learned Advocates appearing on behalf of the respective parties and also considering the revisional application filed by the present defendant-appellant-petitioner under section 115(1) of the Code of Civil Procedure along with the annexures therein, in

particular, the impugned judgment and order passed by the learned appellate court below disallowing the appeal and thereby affirming the judgment and order of the learned trial court and also perusing the relevant and required documents available in the lower courts records, it appears to me that the present opposite party No. 1 as the plaintiff filed the Title Suit No. 59 of 1996 under Order 9 rule 13 which was ex parte judgment and decree dated 24.08.2000. Therefore, an Execution Case No. 01 was filed. Therefore, a Miscellaneous Case being Miscellaneous Case No. 33 of 2002 was filed under Order 9 rule 13 of the Code of Civil Procedure after 2 (two) years and 2 (two) months of the judgment and decree of the original suit which was rejected by the learned Senior Assistant Judge, Dohar, Dhaka on 23.08.2003. Against the said order of rejection dated 23.08.2003 the defendant-petitioner as the appellant preferred Miscellaneous Appeal No. 293 of 2003 which was heard by the learned Additional District Judge, Court No. 3, Dhaka rejected the appeal and thereby affirming the order dated 23.08.2003 passed by the learned Senior Assistant Judge, Dohar, Dhaka in the Miscellaneous Case No. 33 of 2002 by his impugned order dated 14.06.2004 on the ground of service of required notices upon the

defendant-petitioner which was served after a long period of time pending the suit.

Against the said order of rejection dated 23.08.2003 passed by the learned Senior Assistant Judge, Dohar, Dhaka an appeal was preferred by the defendant-petitioner being the Miscellaneous Appeal No. 293 of 2003 who disallowed the appeal and thereby affirming the order dated 23.08.2003 in the Miscellaneous Case No. 33 of 2002 dated 14.06.2004 on the ground that the miscellaneous case was barred by limitation which was filed 2 (two) years and 2 (two) months later than the limitation period of time. An appeal was preferred which was also dismissed by the learned appellate court below. Challenging the above judgment and order this revisional application has been filed under section 115(1) of the Code of Civil Procedure and this Rule was issued thereupon.

I have carefully examined the submissions of the learned Advocates and also the evidence adduced and produced by the parties. It appears to me that the original title suit was filed by the opposite party No. 1 as the plaintiff for claiming title and recovery of khas (খাস) possession of the suit land described in the plaint. The required notices were served by the court which was

received by the daughter of the present petitioner and she also a party by herself in the said suit. The Process Server served the notices upon her and she took the notices of all others under the provision of the Code of Civil Procedure.

The learned Advocate for the present petitioner(s) again submits that Order 5 rules 3, 13 and 15 of the Code of Civil Procedure on the ground that the notices were required to be served upon a male member of the family of the defendant. It appears from the lower courts records that notices were served and received by Rehana Khatun who was the party in the original suit and on behalf of the others notices were received by Rehana Khatun and given her signature in the service return. As such, the requirement of service of notices has been complied with, thus, the learned trial court considered the matter of service of notices. Moreover, the miscellaneous case was filed after 2 (two) years and 2 (two) months of the limitation period for filing a miscellaneous case under Order 9 rule 13 of the Code of Civil Procedure, thus, both the learned appellate court below and the learned trial court disallowed the miscellaneous case and the miscellaneous appeal and on the basis of the limitation period.

I have carefully considered the findings of the learned courts below and I found that there is no illegality or non-consideration of any evidence adduced and produced by the parties or misreading of the applicable laws, thus, I am not inclined to interfere upon the impugned judgment and order passed by the learned courts below by passing the concurrent findings for disallowing the appeal and thereby affirming the judgment and order of the learned trial court.

In view of the above, I do not consider that this is an appropriate case for interference from this court and I do not consider that this Rule requires any further consideration.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

The judgment and order dated 14.06.2004 passed by the learned Additional District Judge, Court No. 3, Dhaka in the Miscellaneous Appeal No. 293 of 2003 disallowing the appeal and thereby affirming the judgment and order dated 23.08.2003 passed by the learned Senior Assistant Judge, Dohar, Dhaka in the Miscellaneous Case No. 33 of 2002 rejecting the petition under Order 9 rule 13 of the Code of Civil Procedure arising out

of the Title Suit No. 59 of 1996 of the learned court of Senior Assistant Judge, Dohar, Dhaka is hereby affirmed and upheld.

The interim order passed at the time of issuance of the Rule staying the further proceeding of the Execution Case No. 01 of 2001 arising out of the Title Suit No. 59 of 1996 of the learned Senior Assistant Judge, Dohar, Dhaka and subsequently the same was extended are hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower courts' records along with a copy of this judgment and order to the learned courts below immediately.