

Bench:

Mr. Justice Bhishmadev Chakraborty

Civil Revision No. 1543 of 2005

Md. Abu Bakar Munshi and another  
.....petitioners

-Versus-

Md. Ijjat Ali Sheikh .....opposite party

Mr. Subrata Saha with Mr. Manabendra Roy,  
Advocates ..... for the petitioners

No one appears for the opposite party

Judgment on 15.02.2024

This Rule was issued calling upon the opposite party to show cause as to why the judgment and order dated 22.02.2005 passed by the Joint District Judge, Court No.2, Tangail in Miscellaneous Appeal No.47 of 2003 allowing the appeal reversing the judgment and order dated 11.05.2003 passed by the Senior Assistant Judge, Bhuapur, Tangail in Miscellaneous Case No.07 of 1999 rejecting the case under Order 9 Rule 13 of the Code of Civil Procedure (the Code) should not be set and/or such other or further order or orders passed to this Court may seem fit and proper.

At the time of issuing the Rule, operation of the appellate judgment and order dated 22.02.2005 was stayed for a limited period which was subsequently extended till disposal of the Rule.

Facts relevant for disposal of the Rule, in brief, are that the petitioners as plaintiffs instituted Partition Suit No.08 of 1998 in the Court of Assistant Judge, Bhuapur, Tangail against this opposite party and others praying for partition of the suit land as detailed in the

schedule to the plaint. In the suit the present opposite party was defendant 9. The plaintiffs got a compromise decree with defendants 1-7 on 07.01.1999. The decree was made final on 07.08.1999. When the decree-holder went to the suit land to take possession, defendant 9 resisted them and came to learn about the *ex parte* decree passed against him. He then filed the instant miscellaneous case under Order 9 Rule 13 of the Code taking grounds that the plaintiffs by suppressing summons upon him obtained the compromise decree behind his back. He further stated that in the suit his address was written falsely and no summons was served upon him. Therefore, the *ex parte* decree passed against him in the suit should be set aside.

The petitioners herein as opposite parties contested the case by filing written objection. They stated therein that the summons of defendant 9 was served as per law. Defendants 8, 12, 13, 15 and 16 received summonses, appeared in the suit but did not contest it. The decree-holder got possession according to final decree. The miscellaneous case, therefore, be rejected.

The trial Court framed issues. 2 PtWs and 3 OPtWs were examined on behalf of the respective parties. However, learned Assistant Judge considered the evidence and other materials on record and rejected the miscellaneous case filed under Order 9 Rule 13 of the Code. The opposite party to the miscellaneous case then preferred miscellaneous appeal before the District Judge, Tangail which was

heard on transfer by the Joint District Judge, Court No.1, Tangail. The transferee Court heard the parties and by the judgment and order under challenge allowed the appeal and set aside the judgment and order passed by the Assistant Judge and consequently the *ex parte* decree passed in partition suit was set aside. In this juncture, the petitioners approached this Court and obtained this Rule with an *interim* order of stay.

Mr. Manabendra Roy, learned Advocate for the petitioners takes us through the judgments of both the Courts below and submits that summons was duly served upon the aforesaid defendant. He admitted in evidence that he had a paternal house at Gabsara Rehaichandi where his brother resides in. Moreover, he failed to prove the cause of action of filing the case as it was not corroborated by the evidence of witnesses. Learned Assistant Judge on correct assessment of fact and law rejected the miscellaneous case for setting aside *ex parte* decree. The lower appellate Court without adverting the findings of the Assistant Judge reversed the judgment and order. In passing the impugned judgment the Court of appeal below committed error of law resulting in an error in such order occasioning failure of justice which is required to be interfered with by this Court in revision. The Rule, thereafter, should be made absolute.

No one appears for the opposite party.

I have considered the submissions of the learned Advocate for the petitioners and gone through the materials on record. It appears that the present opposite party was defendant 9 in the partition suit. It is found that the plaintiffs filed a *solemana* with defendants 1-7 and obtained the compromise decree with them and *ex parte* against the rest. In the miscellaneous case defendant 9 asserted the fact that his address was written falsely in the plaint. Actually he resided at village-Bhogalman of police station-Tarash within the district of Sirajganj but his address was shown in the suit as Village-Rehaigabsara of Bhuapur police station. The plaintiffs collusively showed service of summons upon him in the address of Bhuapur. It is found in the record that one Siraj Ali, a cousin of defendant 9 received his summons in the address mentioned in the plaint. The service of summons upon the cousin of the defendant 9 cannot be considered as good service. OPtW 2 Md. Afzal Hossain, a process server in cross-examination stated, “নোটিশে সিরাজ আলী টিপসহি দিয়ে রেখেছে। ইজ্জত আলীকে চিনিনা তার বাড়িতে আমি যাই নাই।” From the above evidence it cannot be said that notice through process server was served upon defendant 9 Ijjat Ali. On perusal of the record, I do not find that any notice through post was sent or served upon him.

Learned Assistant Judge found that defendant 9 failed to prove the cause of action of filing the miscellaneous case, *i.e.*, on which date he came to learn about the *ex parte* decree. The date of knowledge about the *ex parte* decree is immaterial here because defendant 9 filed

the miscellaneous case under Order 9 Rule 13 of the Code within the period of limitation. In a miscellaneous case filed under Order 9 Rule 13, the petitioner is to prove that no notice was served upon him as required by the law. Here defendant 9 proved that no summons was served upon him either by process server or through registered post. The onus of proving the fact that summons was served upon him lies upon the plaintiffs. But from the evidence of OtPW 2, the process server, I find that he admitted that he did not go to the house of Izzat Ali, the petitioner of the miscellaneous case. The Appellate Court correctly appreciated the evidence of the witnesses and other materials on record and allowed the appeal by setting aside the judgment passed by the Assistant Judge. I find no error in the impugned judgment and order passed by the appellate Court below. This Rule, therefore, bears no merit.

Accordingly, the Rule is discharged. However, there will be no order as to costs. The order of stay stands vacated.

The concerned Court is directed to proceed with the suit in accordance with law and dispose of it expeditiously.

Communicate this judgment and send down the lower Court records.