

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

Civil Revision No. 31 OF 2008.

IN THE MATTER OF:

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

IN THE MATTER OF

Ukil Uddin Bhuiya being died his heirs Haider Ali Bhuiyan and others.

... Plaintiff-Respondent -Petitioners.

-Versus-

People's Republic of Bangladesh, represented by the Deputy Commissioner, Bagerhat.

... Defendant-Appellant -Opposite Party.

Mr. Shaikh Mohammad Zakir Hoissain, Advocate.

... For the Plaintiff-Respondent -Petitioners.

Mr. Mohammad Mujibur Rahman, DAG with
Mr. Md. Jashim Uddin Khan, AAG and
Mr. Al Amin Siddiqui, AAG.

... For the Defendant-Appellant -Opposite Party.

Present:

Mr. Justice Md. Hamidur Rahman

Heard on: 02.03.2025 and 04.03.2025.

Judgment on: 10.03.2025.

This Rule under Section 115(1) of the Code of Civil Procedure
was issued on 06.01.2008 in the following terms:

“Let a Rule issue calling upon the opposite parties to show cause why the impugned judgment and order complained on the petition moved this Court to-day should not be set-aside or such other or further order or orders passed as to this Court may seem fit and proper.”

The petitioners preferred this revisional application against the judgment and order dated 04.03.2007 passed by the learned Additional District Judge, 2nd Court, Bagerhat in Miscellaneous Appeal No. 17 of 2003 setting aside the Judgment and order dated 05.03.2003 passed by the learned Joint District Judge, 1st Court, Bagerhat in Miscellaneous Case No.112 of 2002.

The facts necessary for disposal of the Rule, in short, are that the plaintiffs-respondents-petitioners filed Title Suit No. 431 of 1981 in the Court of the Subordinate Judge, Bagerhat for declaration of their title over the suit land described in the schedule to the plaint.

The summons notices etc were duly served on the principal defendants and the proforma defendant as per procedure. The principal-defendants S.A. record tenants received summons themselves and contested the suit. The Government pleader received the summons on 21.10.1983 on behalf of the proforma-defendant who appeared in the suit but finding no interest of the

Government in the suit land, did not contest the suit. The suit was heard, judgment and decree was passed by the Subordinate Judge, Bagerhat on 29.05.1994 decreeing the suit in favour of the plaintiffs-petitioners against the principal S.A. record tenants on contest and exparte against the Deputy Commissioner, Bagerhat.

Thereafter all on a sudden on 28.11.2002 the People's Republic of Bangladesh, represented by the Deputy Commissioner, Bagerhat filed Miscellaneous Case No. 112 of 2002 long after 8(eight) years and a half for restoration of Title Suit No. 431 of 1981 to its original number. Also prayed for retrial along with a petition for condonation of delay for 379 days stating a knowledge date of 25.10.2001 in the 1st Court of Joint District Judge, Bagerhat. The said restoration petition was heard by the learned Joint District Judge, 1st Court, Bagerhat and by its judgment and order dated 05.03.2003 rejected the said restoration petition.

Being aggrieved and dissatisfied with the said judgment and order dated 05.03.2003 in Miscellaneous Case No. 112 of 2002 passed by the learned Joint District Judge, 1st Court, Bagerhat the People's Republic of Bangladesh, represented by the Deputy Commissioner, Bagerhat preferred Miscellaneous Appeal No. 17 of 2003 before the District Judge, Bagerhat and after hearing allowed by the learned Additional District Judge, 2nd Court, Bagerhat vide

judgment and order dated 04.03.2007 and setting aside the said judgment and order dated 05.03.2003.

Being aggrieved by and dissatisfied with the said impugned judgment and order dated 04.03.2007 passed by the learned Additional District Judge, 2nd Court, Bagerhat in Miscellaneous Appeal No. 17 of 2003 the respondents-petitioners preferred this revisional application and obtained Rule.

Mr. Sheikh Mohammad Zakir Hossain, the learned Advocate appearing on behalf of the petitioners submits that the learned Additional District Judge, 2nd Court, Bagerhat in passing the impugned judgment and order dated 04.03.2007 in Miscellaneous Appeal No. 17 of 2003 has committed gross error of law resulting in erroneous decision occasioning failure of justice.

He next submits that the learned Additional District Judge has utterly failed to appreciate that delay was not of 379 of days but of 8 (eight) years 5 months 29 days but wrongly believed in fictitious knowledge date of the appellant-opposite-party. There is no sufficient and cogent ground of delay in filing Miscellaneous Case No. 112 of 2002.

He also submits that the learned Additional District Judge, Bagerhat committed serious error of law without considering that the instant opposite-party duly received summons and notices of

the Title Suit No. 431 of 1981 through the Government pleader who appeared in the suit and prayed for time to take steps. The Government pleader is competent to receive the summons, notices on behalf of the opposite party as per provision of Order XXVII Rule 4 of the Code of Civil Procedure. The learned Additional District Judge ought to have considered that the Government pleader of Bagerhat District had been the right authority to receive the summons on behalf of Deputy Commissioner, Bagerhat and not the Government pleader Khulna as the suit was filed in the competent Court, Bagerhat having jurisdiction both local and fiscal.

On the other hand, Mr. Mohammad Mujibur Rahman, learned Deputy Attorney General appearing on behalf of the Government/ opposite party submits that the plaintiffs obtained collusive decree against the Government which is not sustainable in law and liable to be set aside. He also refers to us Annexure-C of the Supplementary Affidavit Form No.228 in order to show that notice was served to DC, Khulna.

The relevant portion is quoted below:

“১১৬। গনপ্রজাতন্ত্রী বাংলাদেশ সরকার পক্ষে ডি/সি, খুলনা তৎপক্ষে স্থানীয় সরকারী এ্যাডভোকেট।”

He also refers to us Annexure-C3 page 63 to the Supplementary Affidavit wherein the service of summons

served upon the clerk of the Government pleader, Bagerhat. He further submits that the procedure for service of summons which was not duly followed and the plaintiffs collusively made the party DC, Bagerhat representing by the Government pleader, Bagerhat and the service of summons was not sent to the DC office.

Learned DAG also submits that the suit property is vested property and the plaintiffs collusively obtained decree against the Government of Bangladesh was made in the Suit as pro-forma defendant which is bad in law and the learned appellate Court on proper appreciation of law and evidence set aside the ex-parte decree.

Learned DAG next submits that in the application dated 28.11.2002 for setting aside ex-parte decree clearly explained the matter [(Annexure-D) to the supplementary affidavit page-69] and the appellate Court proper appreciation of evidence made the decision which is liable to confirm by this Court.

On perusal of the application dated 28.12.2002 it appears that the plaintiffs manage to obtain collusive decree and exparte decree against the Government by suppressing summons. Defendant No.116 has no knowledge about the suit and ex-parte decree. The Deputy Commissioner, Bagerhat for the first time came to know about the ex-parte decree when he

was served upon a written notice by the plaintiffs for mutating their names. Thereafter, he filed the Miscellaneous Case under Order IX Rule 13 of the Code after 374 days from the date of his knowledge.

Rule 4 of Order XXVII of the Code of Civil Procedure provides that the Government pleader in any Court shall be the agent of the Government for the purpose of receiving process against the Government issued by such Court and in view of the service of summons on the Government pleader is good service on the Government. But in the instance case defendant No. 116 Government of Bangladesh represented by DC Khulna and the summons were served to Bagerhat Government pleader. On that day Bagerhat Government pleader has no authority to receive the summons on behalf of DC Khulna, in the impugned judgment dated 04.03.2007 it was observed that in 1982-83 Bagerhat was established as different District from Khulna, but the plaintiffs did not amend the plaint to make DC, Bagerhat as necessary party. The plaintiffs are claiming that the summons were serve to Government pleader of Bagerhat under Order XXVII Rule 4 of the Code. But instant case it is distinguishable that Bagerhat pleader was not proper person to receive service of summons.

In the case of Wazed Ali Sarder (Md.) Vs. Md. Afsaruddin Sarder and others reported in 48 DLR (AD) 159 wherein it is settled principle that “ Once the defendants denies service of summons upon him, whole onus shifts to the plaintiff who has to prove satisfactorily that summons was in fact duly served. In the case of Soni Gopal Das Vs. Mohammed Habibullah reported in 10 MLR(AD) 350 wherein it has settled that “ In a case where the exparte decree is challenged on the ground of non-service of summons in the suit the onus lies upon the plaintiff to prove the service of summons by cogent evidence and by examination of the recipient by comparison.

So, procedure in the name of good services are all created in collusion with the office based and process server of the Court which the plaintiffs claimed to be genuine and proper and was done in compliance with law as prescribed under Order XXVII Rule 4 of the Code of Civil Procedure the burden of proving the service of summons was first of all heavily lies upon the plaintiffs. The defendant’s allegation is that the plaintiff managed to obtain ex-parte decree without serving summons where the plaintiff has to prove false by evidence. From the supplementary affidavit it appears that the disputed land is vested property and recorded in khas khatian No.1. So the Government, represented by the DC, Khulna has

to be made as defendant No.1. The appellate Court on proper appreciation of law and facts overrated the reasons that the summons was not duly served to the Government pleader of Khulna and later on 1984 the Bagerhat was independent District by virtue of Government decision. The plaintiffs did not take any steps to discharge their duties. So, the burden of proves the summons were not served must not lies upon the defendants.

The question of limitation in adjudicating a miscellaneous case for setting aside ex-parte decree under Order IX Rule 13 is relevant.

Application has to be filed within 30 days from the date of ex-parte decree, or where the summons has not been duly served, 30 days from the date when the defendant came to know about the exparte decree. The fact remains that defendant No. 116 filed miscellaneous case for setting aside ex-parte decree 379 days after his knowledge. It has been settled in the case of Bangladesh Vs. Mashir Rahman reported in 50 DLR (AD) 205 that the bar of limitation will not be applicable when some elements of fraud in obtaining the ex-parte decree as found.

It has been also settled in the case of Bangladesh represented by the DC, Netrokona Vs. Md. Abdul Jalil and

other reported in 17 SCDB (AD) 74 that “ The delay was made due to exhausting of the official formalities which was beyond the control of the Government and it was not an in ordinate delay, which could be condoned. Consequently, Appellate Division condoned the delay made by the Government.

So, considering the above facts and decisions discussed above, I am of view that the judgment of the appellate Court has no infirmity to interfere. In view of the above the rule is discharged.

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

The order of stay granted earlier by this court is hereby vacated.

(Md. Hamidur Rahman, J:)