

**Present:**

**Mr. Justice Md. Salim**

**CIVIL REVISION NO.3306 OF 2017**

Md. Rais Uddin

..... *Pre-emptor-Petitioner.*

-VERSUS-

Md. Taiz Uddin Ahammed Taz and  
others

..... *Opposite Parties.*

Mr. Monzoor Ul Karim Kazol, Advocate

----- For the Petitioner.

Mr. Waliul Islam Oli, D.A.G. with

Mr. Mohammed Shaif Uddin Raton,  
A.A.G.

Mr. Md. Nazrul Islam Choton, A.A.G.

Mr. Md. Nasimul Hasan, A.A.G.

----- For the State.

**Heard on 05.12.2024**

**Judgment on 17.12.2024**

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and order dated 02.07.2017 passed by the learned Additional District Judge, 1<sup>st</sup> Court, Gazipur, in Miscellaneous Appeal No.25 of 2016 dismissed the appeal and thereby affirmed the Judgment and order dated 27.06.2016 passed by the learned Assistant Judge, 3<sup>rd</sup> Court, Gazipur in Miscellaneous Case No.16 of 2014 setting aside the ex parte Judgment and order and allowed the

application under Order 9 Rule 13 of the Code of Civil Procedure should not be set aside.

Facts in brief to disposal of the Rule is that the petitioner and others as preemptor instituted Miscellaneous case No.119 of 2009 before the Assistant Judge, 3<sup>rd</sup> Court, Gazipur, for preemption of the case land against the opposite parties. Subsequently, the case was fixed on 13.10.2013 for a peremptory hearing, and for the non-appearance of the preemptor purchaser-opposite party, the preemption was allowed on 12.10.2013 ex parte by the learned Assistant Judge, 3<sup>rd</sup> Court, Gazipur.

After that, the preemptor purchaser, as petitioner, filed Miscellaneous Case No.16 of 2014 before the Assistant Judge, 3<sup>rd</sup> Court, Gazipur, under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte judgment and order dated 13.10.2013.

The petitioner, as the opposite party, contested the Miscellaneous Case by filing a written objection denying all the material allegations made in the application.

Subsequently, the learned Assistant Judge, 3<sup>rd</sup> Court, Gazipur, by the Judgment and order dated 27.06.2016, allowed the Miscellaneous Case against which the petitioner, as appellants, preferred Miscellaneous Appeal No.25 of 2016 before the District Judge, Gazipur. Eventually, the learned

Additional District Judge, 1<sup>st</sup> Court, Gazipur, dismissed the appeal and affirmed those passed by the trial Court by the Judgment and order dated 02.07.2017.

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

I have considered the submission of the learned advocate for the petitioner perused the impugned Judgment and other materials on record. In order to appropriate the submission advanced by the Bar, the relevant law may be quoted as follows:--

*"Order IX Rule 13 of the Code of Civil Procedure provided that 13-In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that where the decree is of such a nature that it cannot be set aside as against*

*such defendants only it may be set aside as against all or any of the other defendants also."*

It manifests from the above provisions that an ex parte decree can be set aside on two grounds: (I) that the summons was not duly served or (II) that any sufficient cause prevented him from appearing when the suit was called on for hearing.

In the instant case, after scanning the order sheet of the record, it manifests that the summons was not served duly upon him. Moreover, the pre-emptive opposite party was made a party in the original case as a pre-emptive seller instead of pre-emptive purchaser. However, while he knew about the case appointed the pre-emptive opposite party, No. 2 ( Mr. Abdul Shahid) his attorney, to conduct the case on his behalf. On the other hand, his attorney did not take any steps in the case; rather, he assisted the preemptor in getting the ex parte decree.

From all the materials, events, facts, circumstances, oral and documentary evidence, and the pre-emptive purchaser's conduct, it is clear that he was prevented by sufficient cause from appearing before the court.

Mr. Monzor Ul Karim Kazal, the learned advocate appearing on behalf of the petitioner, referred to the case of Akbar Hossain Khan (Md) and another Vs. Md. Awlad Hossain

Khan and another report in 49 DLR 561 submitted that the application under Order 9 Rule 13 is barred under Article 64 of the Limitation Act.

Akbar Hossain Khan's (supra) it was held that-

*“In this case it is an undisputed fact that summons was duly served upon the defendants whereupon they entered appearance in the suit and filed written statements. It is also clear from the evidence on record that subsequently defendant opposite party No. 2 failed to appear after 12.06.88 and took no further step following which the suit was decreed on 28.09.89 on contest against defendant No. 1 and ex parte against defendant No. 2. It is also an admitted fact that the application under Order 9 rule 13 CPC, which gave rise to Miscellaneous Case No. 106 of 1989, was filed on 16.11.89. From this it is apparent that this application for setting aside the ex parte decree was filed after 49 days from the date of passing the impugned decree. Article 164 of the Limitation Act provides that an application for setting aside an ex parte decree shall have to be filed within 30 days from the date of the decree where summons was duly served and within 30 days from the date of knowledge when summons was not duly served. In our case under review there is no denial of the fact of due service of summons. So, evidently this case is governed by Article 164 of the*

*Limitation Act, which provides that the application for setting aside the ex parte decree is required to be filed within 30 days from the date of decree impugned. The application under Order 9 rule 13 CPC having not been filed within 30 days from the date of decree, it is evidently barred by limitation. But, unfortunately, the learned Assistant Judge has allowed the Miscellaneous Case under Order 9 rule 13 CPC completely ignoring this vital aspect of the case and the law bearing on the subject. Since, on the face of the record it is evident that the application under Order 9 rule 13 CPC is barred by limitation under Article 164 of the Limitation Act and the Court has not lawfully condoned the said delay on cogent grounds, the learned Assistant Judge clearly erred in law in passing the impugned order.*

*It is well settled that once a party receives an intimation of an action in a Court, it is for him to pursue it diligently and to keep himself in touch with the proceedings, either personally or through his Counsel, and the consequences flowing from his failure to keep pace with the developments must be borne by him. In the instant case, the defendant opposite party No. 2 Sher Mohammad admittedly received summons, duly filed written statement in the suit and obtained a number of adjournments and, as such, it was incumbent upon them to pursue the proceedings of the suit with due*

*diligence. It is evident from the impugned order that defendant opposite party No. 2 Sher Mohammad did not take any step in the suit since 12.06.88 and the impugned decree was passed on 28.09.89. Under such circumstances, he must bear the whole brunt of the ominous consequences that naturally flow from his failure to keep pace with the developments of the suit, unless the failure is lawfully condoned on convincing grounds but, unfortunately, for him nothing has been done in this regard to salvage him from the inevitable legal impediments.”*

I fully agree with the above-cited case, but it is to be noted that each case has its own merit, facts, and circumstances. In the present case, I have already noticed that the summons was not served upon the preemte purchaser. Moreover, he was made a party in the original case as a pre-empte saler instead of a pre-empte purchaser. So, he was admittedly prevented from appearing in court proceedings. On the other hand, both courts below found that the preemptor obtained the ex parte decree by practicing fraud. Therefore, I do not find substance in the submission of Mr. Monzor Ul Karim Kazal.

Notably, on perusal of the Judgment and order of both the courts below, it seems that in deciding the Miscellaneous Case and the Miscellaneous Appeal, the learned Judges rightly

and justifiedly allowed the application under Order IX Rule 13 of the Code of Civil Procedure. Therefore, I do not find any illegality in the impugned Judgment and order calling for any interference under Section 115 of the Code of Civil Procedure.

Resultantly, the Rule is discharged with costs.

The order of stay granted at the time of issuance of Rule by this court stands vacated.

Communicate the Judgment at once.

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**(MD. SALIM, J).**