

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)**

Present:

**Mr. Justice Md. Riaz Uddin Khan
Civil Revision No. 3354 of 2017**

IN THE MATTER OF :

An application under Section 115(4) of the Code of Civil Procedure.

-And-

In the Matter of:

Md. Masud Miah alias Masud Karim and others
..... Petitioners.

Versus

Shoilanda Chandra Mudak
.....Opposite party.

Mr. Mohammed Ali Azam with
Mr. Ali Ahsan Mullah, Advocates
.... For the petitioners.

Mr. Md. Hamidur Rahman, Advocate
..... For the Opposite party.

Heard and Judgment on: 06.01.2019.

Md. Riaz Uddin Khan, J-

By this rule the opposite party no. 1 was asked to show cause as to why the impugned judgment and order dated 05.07.2017 passed by the learned Additional District Judge, 3rd Court, Kishoreganj in Civil Revision No. 68 of 2016 allowing the revision and thereby setting aside the order No. 27 dated 19.09.2016 passed by the learned Senior Assistant Judge, Sadar, Kishoreganj in Title Suit No. 358 of 2015 (Partition) allowing the application under Rule 13A of Order IX of the Code of Civil Procedure filed by the petitioners should not be set-aside.

At the time of issuance of rule the operation of the judgment and decree dated 21.08.2016 (decree signed on 22.08.2016) passed by the learned Senior Assistant Judge, Sadar, Kishoreganj in Title Suit No. 358 of 2015 (Partition) was stayed and the parties were directed to maintain status quo in respect of possession of the suit land.

The short facts for disposal of this Revisional Application in brief is that the Opposite Party No.1 as plaintiff instituted Title Suit

No. 358 of 2015 (Partition) in the Court of learned Senior Assistant Judge, Sadar, Kishoreganj against the father of the present petitioners and the Opposite Party No. 6 as Defendant No. 1 and the Opposite Parties Nos. 2-5 as Defendant Nos. 2-5 for partition of the suit land.

It is admitted position that the Defendant Nos. 1 and 2 did not appear before the trial court and only Defendant No. 5, the Government appeared and by filing written statement contested the suit. The learned trial court after hearing the plaintiff and the Defendant No. 5 decreed the suit by its judgment and decree dated 21.08.2016 (decree signed on 22.08.2016). Thereafter being informed about the said decree the present petitioners as the legal heirs of Defendant No. 1 filed an application under Rule 13A of Order IX of the Code of Civil Procedure for setting aside the ex-party decree passed against them and to restore the original Title Suit. After hearing the parties the learned trial court allowed the application by its order dated 19.09.2016 on condition to pay taka 3,000/- (three thousand) as cost. Against that order dated 19.09.2016 the plaintiff filed Revisional Application before the District Judge, Kishoreganj, which was ultimately heard by the learned Additional District Judge, 3rd Court, Kishoreganj. After hearing both the parties the learned Additional District Judge, by his impugned judgment and order dated 05.07.2017 allowed the Revisional application on the finding that the trial court was wrong in allowing the application filed under Rule 13A of Order IX of the Code of Civil Procedure as it was admitted position that the predecessor of the applicants did not appear before the trial court by filing Vokalatnama or did not file written statement.

Mr. Mohammed Ali Azam, the learned advocate appearing on behalf of the petitioners submits that the petitioners filled the application for setting aside the ex-parte decree within 30 (thirty) days of the passing of the said decree supported by an affidavit and they are also ready to pay the cost imposed by the trial court. So the trial court properly considered the provision of rule 13A of order IX

of the Code of Civil Procedure. But the learned Additional District Judge committed an error of law resulting an error in decision occasioning failure of justice in allowing the Revision. In such circumstances the learned advocate for the petitioners prays for making the rule absolute. On the second thought the learned advocate for the petitioners submits that it is the wrong done by the learned advocate of the petitioners who was required to file an application under Rule 13 of Order IX of the Code of Civil Procedure before the trial court but mistakenly he has filed an application under rule 13A of Order IX of the Code. He submits that in such situation if this rule is discharged the petitioner may be given an opportunity to take the other remedies available under the Code of Civil Procedure.

On the other hand Mr. Md. Hamidur Rahman, the learned advocate appeared on behalf of the Opposite Party No. 1 and filed counter affidavit. He submits that the trial court did not at all apply his judicial mind and he failed to consider that the application filed by the petitioners were not supported by any affidavit rather there was verification. He next submits that under rule 13A of order IX there is no scope for any defendants who did not appear before the court and filed written statement to file any application for setting aside the ex-parte decree and for restoration of the original suit. In the instant case it is admitted position that the petitioners or their predecessor did not appear and file written statement in the trial court. Allowing the application filed under rule 13A of order IX the trial court committed serious error of law and the lower Revisional Court correctly allowed the Revision on consideration of legal point. Any non-appearing defendants may have other remedies available in the Code of Civil Procedure but not under rule 13A of order IX of the Code of Civil Procedure. The learned Advocate for the opposite party prays for discharging the rule with cost.

I have heard both the Advocates, perused the Revisional application as well as the counter affidavit filed by the Opposite Party No. 1 and considered the submissions of the learned advocates

for the parties. It is the admitted position that the petitioners or their predecessor did not appear or file written statement before the trial court. Now let us see the relevant provision of law.

Rule 13A.(1) of Order IX of the Code of Civil Procedure reads as follows:-

“13A.(1) Notwithstanding anything contained in rule 13 or any other law, the Court may, in order to avoid delay and expedite disposal, directly set aside the decree without requiring the defendant to adduce evidence to satisfy it about sufficient causes as required under rule 13, but requiring him to pay such cost not exceeding three thousand taka as it may deem appropriate and determine:

Provided that the decree under this rule shall not be set aside unless an application, supported by affidavit, praying for setting aside the decree is made to the Court within thirty days of the date on which the decree is passed by the defendant who appeared and filed written statement:

Provided further that no decree shall be set aside more than once under this rule at the instance of the same defendant.”

So after going through the above quoted provision of law we find that rule 13A of order IX clearly mandates that only the defendants who have appeared and filed written statements can file application under this rule after paying cost imposed by the trial court within 30 (thirty) days of the passing of decree. The application so filed be supported by affidavit. In the case in hand the petitioners who were the applicants before the trial court filed the application for restoration under rule 13A of order IX of the Code without any affidavit. But the most importantly neither the petitioners nor their predecessor filed any written statement before the trial court and even did not appear by filing Vokatnama before the trial court. So

the trial court was wrong in allowing the application for setting aside the ex-parte decree under rule 13A of order IX and I do not find any error committed by the lower revisional court which warranted interference by this court. Considering the submissions and the legal position I find that there is no substance in the instant rule.

In the result the rule is discharged without any order as to cost. However, the petitioners may avail the remedies available under the Code of Civil Procedure.

The order of stay and status-quo passed at the time of issuance of rule is hereby re-called and vacated.

Communicate the judgment and order at once.