

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Ali Reza

Civil Revision No. 375 of 2018

Ratna Aktar and others ..... petitioners

-Versus-

Zakia Sultana Chitra and two others

.....opposite parties

Mr. Md. SK Jalal Uddin with

Ms. Sayeda Shoukat Ara Advocates

..... for the petitioners

Mr. Meah Mohammad Kausar Alam, Advocate

..... for opposite party No.1

Judgment on 31.10.2022

Bhishmadev Chakrabortty, J:

At the instance of the 3<sup>rd</sup> wife and two minor issues of sole defendant No.1, this Rule was issued calling upon opposite party No.1 to show cause as to why the judgment and decree of the Additional District and Sessions Judge, Court No.7, Dhaka passed on 19.07.2017 in Family Appeal No.183 of 2016 dismissing the appeal by affirming the judgment and decree in a modified form passed by the Additional Assistant and Family Court No.3, in Family Suit No.634 of 2010 decreeing the suit should not be set aside and/or pass such other or further order or orders to this court may seem fit and proper.

Facts relevant for disposal of the Rule, in brief, are that opposite party No.1 herein, Zakia Sultana Chitra instituted Family Suit No.634 of 2010 in the aforesaid Court praying for claiming dower money and maintenance amounting to Taka 3,61,00,000/- and

further praying for maintenance of Taka 2 lac per month till realization. In the plaint it is stated that she was given in marriage with Tawfiqul Islam Chowdhury (since) on 18.07.2006 fixing dower money of Taka 3,55,00,000/-. He used to reside in the USA. Subsequently, in 2007 the relation with her husband deteriorated due to unacceptable behavior of the husband. She used to torture her physically and mentally. She came to learn that her husband married again without her consent. When she asked for him about his 3<sup>rd</sup> marriage, he assaulted her physically. Consequently she was compelled to make two GD Entries with Badda police station. Subsequently, there was a compromise on a stamp paper on Taka 150/- on 13.06.2019 but ultimately she left to her father's house and filed the suit claiming maintenance and dower money as aforesaid.

The sole defendant appeared in the suit and filed written statement on 21.01.2011 denying the statements of the plaint. In the written statement it was further contended that the plaintiff was helpless with her two issues after the death of her 1<sup>st</sup> husband and then he entered into the marriage tie fixing dower money of Taka 3 crore 55 lac. In the kabinnama 50% of the dower money was shown as prompt it was paid then and there. The defendant had a house in Florida at USA and the plaintiff was taking rent of monthly Taka 25,000/- thereform. On different dates he paid her total Taka 71 lac as dower money. In total she received Taka 3,48,00,000/-. Subsequently

she secretly took Taka 23,48,000/- from his house for which the defendant lodged a GD with Badda police station on 08.09.2009. In this way the plaintiff took more money than that of the dower money as stipulated in the kabinnama. In the aforesaid premises the suit would be dismissed.

After submission of the written statement sole defendant died on 04.04.2014. Then the plaintiff filed an application for adding the heirs of defendant Towfiqul Islam Chowdhury and accordingly the said application was allowed and his two sons of his 1<sup>st</sup> wife Ekramul Islam Chowdhury and Rafiqul Islam Chowdhury were added as defendants 1(Ka) and 1(Kha) in the suit. But they did not appear to contest the suit and subsequently the plaintiff after examining two witnesses decreed the suit on 19.01.2016 for Taka 2 crore *i.e.*, Taka 1,77,50,000/- as dower money and Taka 22,50,000/- as maintenance. Accordingly, the plaintiff filed Execution Case No.96 of 2016 before the Family Court for execution of the decree. On an application, the plaintiff went to entire into the flat situated at House No.91 (4<sup>th</sup> Floor), Road No.14, Block-G, Bashundhara Residential area, Police Station Badda of District-Dhaka. The petitioners about *ex parte* judgment and decree against Ekramul Haque Chowdhury and Rafiqul Islam Chowdhury passed in the suit. The petitioners then filed an application in the execution case for adding them as parties and subsequently preferred Family Appeal No.183 of 2016 before the

District Judge. The appeal was heard on transferred by the Additional District Judge, Court No.7, Dhaka. The transferee Court by the judgment and decree under challenge dismissed the appeal by reducing the maintenance in the above modified form affirmed the judgment and decree passed by the family Court.

Being aggrieved by the petitioner approached this Court and obtained this Rule with an order of stay of the execution case for a limited period which was subsequently extended till disposal of the Rule.

Ms. Sayeda Shoukat Ara, learned Advocate for the petitioners submits that petitioner No.1 is the wife of the sole defendant late Towfiqul Islam Chowdhury and petitioners 2 and 3 are his minor heirs. But opposite party No.1 herein without serving any notice upon opposite parties 2 and 3 who were the issues of 1<sup>st</sup> wife of late Towfiqul Islam Chowdhury and without making the present petitioners as defendants very secretly obtained the *ex parte* decree and went for its execution obtaining order of attachment of the property where petitioners have been residing. She takes us through the orders of the family Court and drawing our attention to order 30 and 35 submits that although the summonses upon opposite parties 2 and 3 was not served because of mentioning their wrong decrees but subsequently the plaintiff managed to show the service upon them on the same address and obtained the decree. The decree of dower money

and maintenance will be effected whole the property left by late Towfiqul Islam Chowdhury but opposite party No.1 collusively showing the service of summons upon his two heirs only and not impleading the present petitioners as parties has obtained. Although the fact of non service of summons upon opposite parties 2 and 3 and not making the present petitioners as parties which were brought in the memorandum appeal as well as in the submission but appellate Court did not consider it and thus committed error of law resulting in an error in the decision occasioning failure of justice. Therefore, the impugned judgment and decree should be set aside and the case would be sent to the family Court for retrial giving a chance to the petitioners of cross-examination of the witnesses of the plaintiff as well as to ensure to the appearance of opposite parties 2 and 3 in the suit.

Mr. Meah Mohammad Kausar Alam, learned Advocate for opposite party No.1 on the other hand opposes the Rule and submits that there is a little scope of this Court in a revision filed under section 115(1) of the Code to interfere with the judgment and decree passed by the Courts below. He then submits that the case should not be sent on remand to fill up the lacuna. He then submits that all the facts and question of law agitated by learned Advocate for the petitioners were brought before the appellate Court and after considering all materials on record the appellate Court dismissed the appeal and affirmed the judgment and decree passed by the trial Court in a modified form.

This Court under revision has no authority to enter into the fact decided by the Court of appeal below and in view of the *ratio* and in the case reported in 53 DLR (AD) 110. There is no scope to send back the case on remand. The Rule having no merit would be discharged.

We have considered the submissions of both the sides and gone through the judgments passed by the Courts, the grounds taken in the revisional application and pressed the lower Court's record in support of the grounds taken in the revisional application.

It appears that opposite party No.1 as plaintiff instituted the suit against her husband the sole defendant praying for dower money and maintenance as per plaint. The sole defendant submitted written statement in the suit denying the claim of the plaintiff but he admitted the status and amount of dower stipulated in the kabinnama. It is admitted position of fact that before starting trial of the case sole defendant Towfiqul Islam Chowdhury died on 04.04.2014 and the dispute arose thereafter. In the record of the family Court we find that the plaintiff brought to the record the two sons of the 1<sup>st</sup> wife of the deceased and their address was shown in the plaint House No.91 (4<sup>th</sup> Floor), Road No.14, Block-G, Bashundhara Residential area, Police Station, Badda of District-Dhaka *i.e.*, the address of the deceased defendant. The family Court allowed the application of the plaintiff on 09.11.2014 for adding opposite parties 2 and 3 as defendants 1(Ka) and 1(Kha) and took the case for taking steps on 13.11.2014.

Subsequently, on 09.02.2013 the plaintiff took steps for service of summonses upon the added defendants and fixed its date to 19.03.2015 for service return. On that day the Court was not satisfied with the service return upon the above added defendants and amongst other passed the order- “সমনাদি পর্যালোচনায় জারী কারকের রিপোর্ট অনুযায়ী দেখা যায় যে, বিবাদীগণ উক্ত ঠিকানায় অবস্থান করেন না। এমতাবস্থায় আরজিতে বর্ণিত তাহাদের ঠিকানা সঠিক নয় মর্মে প্রতীয়মান হয়। ফলে লটকাইয়া সমন জারীর প্রার্থনা নামঞ্জুর। আগামী ১৭.০৫.২০১৫ ইং তারিখ সঠিক ঠিকানা দাখিল করে সমন জারীর তদীয় গ্রহন করা হোক।” In the order dated 17.06.2015 it is found that the family Court was satisfied with the service of summonses upon opposite parties 2 and 3 and the suit was fixed for submitting written statement. On perusal of the record it transpires that although the application for substituted service was rejected by the family Court and the plaintiff was directed to submit summonses in the fresh correct address of defendants 1(Ka) and 1(Kha) but the record shows that the plaintiff without taking any steps to that effect sent summonses upon them again on the previous address which was shown to have been served upon them as per report of the process server. Subsequently the trial Court proceed with the suit and after examining two PWs decree the suit *ex parte*.

From the aforesaid discussion we hold that the summonses were not served upon opposite parties 2 and 3. As per the provision of section 7 of the Family Court’s Ordinance, 1985 the provisions of Rules 9, 10, 11, 16, 17, 18, 19A, 20, 21, 22, 23, 24, 26, 27, 28 and 29

of Order V of the Code of Civil Procedure (the Code) is applicable to the cases filed before the family Court under the Ordinance, 1985. It is seen from the record that in the execution case the plaintiff included the property only situated at House No.91 (4<sup>th</sup> Floor), Road No.14, Block-G, Bashundhara Residential area, Police Station, Badda which is the address of the sole defendant as well as the address of the present petitioners to take its possession. The present petitioners in the memorandum of appeal specifically taken grounds about non service of summonses upon opposite parties 1 and 2 and that they (petitioners) were not made parties to the suit. If they were made parties they could have contested the case and taking the defence by late Mr. Rafiqul Islam Chowdhury, whether the amount claimed by the plaintiff as dower money and maintenance and objection raised by late Towfiqul Islam Chowdhury about adjustment was correct.

As per the provisions of Muslim Law dower money is payable to the wife from the property of the late husband on his death. And it should be recoverable from the property proportionately from the left by the deceased enjoying the heirs. Here, from the written statement we find that the two sons of the defendant resides in the USA and they had homestead there. So the presence of opposite parties 2 and 3 as defendants 1(Ka) and (Kha) was necessary in the suit for its effective disposal. For non service of summonses upon defendants 1(Ka) and (Kha) and not impleading the above petitioners as defendants, we hold



that opposite party No.1 suppressed the summonses upon defendants 1 and 2 and did not make party to the petitioners for illegal gain *i.e.*, she wanted to take over the contract the property of the flat of defendant No.1 situated in the aforesaid address. Although the record of the family suit was before the lower appellate Court and specific grounds were taken in the appeal, it did not consider those and the orders passed by the family Court.

Since the presence of opposite parties 1 and 2 was not ensured in the family suit so instead of sending the case on remand the appellate Court, we think that it would be just and proper to send it on remand to the family Court for fresh trial giving this petitioner opportunity of cross-examination of the witnesses in support of the defence case. Because the appellate Court here is the civil suit, and the trial Court is the family and those the provisions of Ordinance shall apply. However, the parties will be at liberty to file written statement, if desired. The plaintiff will take steps for attendance of defendant Nos.1(Ka) and 1(Kha), *i.e.*, opposite parties 2 and 3 herein for their attendance in the Court by send notices upon them in their present address as per the provisions of section 7 of the ordinance.

In view of the discussion made hereinabove, we find substance in the submission of the petitioners and this Rule merits consideration. Accordingly, the Rule is made absolute. The judgment and decree passed by both the Court below is hereby set aside and the suit is sent

on remand to the Family Court No.3, Dhaka for trial afresh in light of the discussion made hereinabove.

The proceeding of Family Execution Case No.96 of 2016 is hereby set aside. However, the plaintiff is at liberty to file a fresh execution case if the suit is decreed again. The Family Court, Dhaka is directed to dispose of the suit expeditiously, preferably within 06(six) months from the date of receipt of this judgment and order.

Communicate the judgment and send down the lower Court records.

Md. Ali Reza, J:

I agree.