

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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 325 OF 2009

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Mosammat Mohoki Begum and others

--- Plaintiff-Respondent-Petitioners.

-Versus-

Md. Lokman Ali and others

---Defendant-Opposite Parties.

Mr. Md. Shahadat Tanveer Amin, Advocate

--- For the Plaintiff-Respondent-Petitioners.

Mr. Md. Bazlul Kabir, Advocate

---For the Defendant-Opposite Parties.

Heard on: 29.03.2023, 03.05.2023,
17.05.2023 and 31.05.2023.

Judgment on: 31.05.2023.

At the instance of the present plaintiff-respondent-petitioners, Mosammat Mohoki Begum and others, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party Nos. 1-9 to show cause as to why the impugned judgment and order complained of in the petition moved in this court should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the predecessor of the present petitioners as the plaintiffs filed the Title Suit No. 27 of 1992 against the predecessor of the defendant-opposite parties who are applicants of the Miscellaneous Case No. 45 of 1993 claiming that the Sumons of the Title Suit No. 27 of 1992 was duly served upon the defendant No. 1, namely, Mosammat Umezannesa on 28.07.1992 but since then the defendant No. 1 did not appear to contest the suit and the suit was decreed *exparte* on 16.11.1992 by the then Subordinate Judge (now Joint District Judge), Court No. 1, Chapai Nawabganj. In the Miscellaneous Case No. 45 of 1993 the present opposite parties claimed that no notice was served upon them, as such, they could not appear in the court to contest the case, therefore, an *exparte* decree was passed against the present opposite parties. Challenging the said *exparte* decree passed by the then Subordinate Judge, Court No. 1, Chapai Nawabganj they filed the Miscellaneous Case No. 45 of 1993 under Order 9 rule 13 of the Code of Civil Procedure which was heard by the learned Subordinate Judge (now Joint District Judge), Court No. 1, Chapai Nawabganj in presence of the present plaintiff-petitioners who passed an order in the

miscellaneous case by his judgment and order dated 24.09.2003 by rejecting the application filed under Order 9 rule 13 of the Code of Civil Procedure.

Being aggrieved the present defendant-opposite parties preferred an appeal being the Miscellaneous Appeal No. 41 of 2003 in the court of the learned District Judge, Chapai Nawabganj which was heard by the learned Additional District Judge, Chapai Nawabganj who allowed the appeal and thereby reversed the judgment and order dated 25.09.2008. Challenging the said judgment and order passed in the Miscellaneous Appeal No. 41 of 2003 this revisional application was filed and this Rule was issued thereupon.

Mr. Md. Shahadat Tanveer Amin, the learned Advocate, appearing for the plaintiff-petitioners submits that the Summons of the Title Suit No. 27 of 1992 was duly served upon the defendant No. 1 Mosammat Umezannesa on 28.07.1992 at the presence of her sons, namely, Md. Lokman Ali (PW.1) and Md. Hashimuddin (PW.3) and the defendant No. 1 and her two sons gave their signatures upon the report of service of Summons.

The Rule has been opposed by the present defendant-opposite parties.

Mr. Md. Bazlul Kabir, the learned Advocate, appearing on behalf of the defendant-opposite parties submits that the Title Suit No. 27 of 1992 was filed before the learned trial court by the present petitioners as the plaintiffs but during the hearing of that suit no notice was served upon the defendant-opposite parties, as such, the suit was decreed *ex parte* without giving any opportunity to contest the suit by the defendant-opposite parties, as such, the opposite parties as the defendants have been deprived of their right of the suit which caused occasioning failure of justice, therefore, the Rule is liable to be discharged.

Considering the above submissions made by the learned Advocates appearing on behalf of the respective parties and also considering the revisional application filed by the present plaintiff-petitioners under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and order passed by the learned appellate court below allowing the appeal and thereby reversing the judgment and order of the learned trial court, it appears to this court that the present petitioners as the plaintiffs originally filed the Title Suit No. 27 of 1992 praying for a title upon the suit land measuring 17.17 acres situated at Mouza- Omritapur, Settlement

Khatian No. 1-4, S. A. Khatian No. 50, Present Khatian No. 11, Present Dag Nos. 5 and others, Police Station- Nachol, District- Chapai Nawabganj.

Under the required position of law, the Summons of the title suit is to be served upon the present defendant-opposite parties. There are some disputes between the parties as to the title appearing in the said title suit. The court sent/served the Summon notice to the defendant-opposite party, namely, Mosammat Umezannesa on 28.07.1992 but she did not get/receive any Summons. The learned Advocate for the present plaintiff-petitioners submitted that notices were properly served upon the defendants and the learned trial court took the matter for hearing *exparte* on the basis of the notice was served, on the other hand, the defendant-opposite parties tried to prove in the court that the notices were not served which has been caused the opposite parties to take part hearing of the title suit. The learned trial court being satisfied continued the case on the basis that the defendants properly received the notice which has been proved by the depositions and the documents filed in the court, as such, the *exparte* decree was passed on 16.11.1992. As per the record the notice was properly served.

Being aggrieved the present defendant-opposite parties preferred the Miscellaneous Appeal No. 41 of 2003 challenging the judgment and order passed by the learned trial in such a situation in the absence of the present opposite parties. Being aggrieved the present defendant-opposite parties filed a Miscellaneous Appeal No. 41 of 2003 challenging the legality of the judgment and order passed exparte by the learned trial court. The learned Additional District Judge, Chapai Nawabganj heard the appeal and decreed the appeal in favour of the present opposite parties by allowing the appeal and thereby reversing the judgment and order dated 24.09.2003 by passing the judgment and decree dated 25.09.2008 and ordering to continue with the Title Suit No. 27 of 1992 by the learned trial court.

Being aggrieved the present plaintiff-petitioners filed this revisional application under section 115(1) of the Code of Civil Procedure and obtained the Rule thereupon.

It is to be mentioned that the learned appellate court below allowed the appeal and decreed the suit on the ground that Summon was served duly in the Title Suit No. 27 of 1992 to the defendant No. 1 Mosammat Umezannesa on 28.07.1992 at the presence of her sons Md. Lokman Ali (PW-2 and Md.

Hashimudding (PW-3) since appeal has been preferred within 30 (thirty) days, as such, the case is not barred by law. The present plaintiff-petitioners obtained the Rule by impugning the judgment and order passed by the learned appellate court below.

This court has to take a decision whether the decree is valid or not. In order to take a decision I have examined the judgment and order passed by the learned appellate court below. I consider that there are conflicting submissions and the depositions by the witnesses. This court has to take a decision that the appeal was filed by the present plaintiffs as the petitioners obtained the exparte decree against the defendants. The settled principle is that once a suit is filed the court must ensure the service of notice upon the defendants in order to adjudicate the case in the presence of both the parties. I also consider that the plaintiffs and the defendants are some in disputes about the service of notice was served to the defendant-opposite parties or not. This issues must be decided by the courts below after considering the evidence documentary and oral obtained from both the parties. In the instant case one PW deposed as PW-1 only and the learned court took a decision to pass the decree exparte. As such, the defendant-opposite parties

filed this miscellaneous case but the learned trial court after hearing the parties the miscellaneous case was rejected on the basis of the following findings:

...“বি-বচ্য বিষয় নং- ৩ এর আ-লাচনায় প্রার্থীর প্রতি ২৮.০৭.১৯৯২ ইং তারিখে অঃ প্রঃ ২৭/৯২ নং মোকদ্দমায় যথারীতি সমন জারী হই-ত দেখিয়াছি। মোকদ্দমাটি ১৬.১১.১৯৯২ ইং তারিখে একতরফা সূত্রে ডিক্রী হওয়ার পর প্রার্থী ২২.০৬.১৯৯৩ ইং তারিখে ২১৬ দিন পর অত্র ছানি মোকদ্দমা দায়ের করিয়াছেন। স্পষ্টতঃ ছানি দরখাস্তটি তামাদি-ত বারিত। এমতাবস্থায়, আমার অভিমত হইল, মোকদ্দমাটি তামাদিতে বারিত এবং প্রার্থী তাহার মোকদ্দমা প্রমাণ করিতে ব্যর্থ হইয়াছেন। ফলে, মোকদ্দমাটি বর্তমান আকা-র রক্ষণীয় ন-হ এবং প্রার্থী প্রার্থিত ম-ত প্রতিকার পাই-ত পা-র না।”...

On the other hand, the learned appellate court below took a decision to allow the appeal after hearing both parties on the basis of the following findings:

...“সমন রীতিমত জারী না হওয়ায় একতরফা ডিক্রীর বিষয় জানার তারিখ ১৭.০৬.১৯৯৩ ইং হ-ত ৩০ (ত্রিশ) দিনের মধ্যে (২২.০৬.১৯৯৩) ইং তারিখ মামলাটি দা-য়র করায় তামাদি আই-নর প্রথম তপশী-লর ১৬৪ অনু-চ্ছেদ অনুযায়ী নির্ধারিত ৩০ দি-নর ম-ধ্য মামলাটি আনীত হওয়ায় তা তামাদি বারিত নয়। ফলে বিজ্ঞ যুগ্ম জেলা জজ কর্তৃক প্রদত্ত তর্কিত আ-দশ রদরহিত যোগ্য। বি-বচ্য বিষয়সমূহ আপীলকারী প-ক্ষ নিস্পত্তি করা গেলো।”...

On the basis of these 2 (two) conflicting findings and decisions by the learned courts below this court has to take a

decision whether the trial court passed a decree in the Title Suit No. 27 of 1992.

In this regard, I have carefully examined the decision taken in the Title Suit No. 27 of 1992 to ensure whether the notices were served upon the defendant-opposite parties before passing an *exparte* decree which caused the defendant-opposite parties to file a miscellaneous case under the provisions of Order 13 of the Code of Civil Procedure which gives a court to a decision as to *setting aside* the decree passed *exparte*.

This provision of law empowers a court to *set aside* an *exparte* decree when there is a question of service of notice for any sufficient cause which prevented a party to appear in the suit. In the instant case, the defendant-opposite parties could produce some evidence as to the non-service of notice upon the party. However, the present plaintiff-opposite parties contradicted the submission made by the learned appellate court below which allowed the title appeal by reversing the judgment of the learned trial court. In such a situation, the learned appellate court below took a proper decision by imposing a fine of Tk. 3,000/- and allowing the appeal. As such, I am not inclined to interfere into the judgment and order passed by the learned appellate court

below by passing the impugned judgment and order. I, therefore, of an opinion that this is not a proper case for interference from this court.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

The interim order passed by this court at the time of issuance of this Rule staying the operation of the impugned judgment and order passed by the learned appellate court below and subsequently the same was extended till disposal of this Rule are hereby recalled and vacated.

The learned Joint District Judge, Court No. 1, Chapai Nawabganj as the trial court is hereby directed to allow the parties to hear and also to produce evidence in respect of both the plaintiffs and the defendant-opposite parties in order to come to a lawful conclusion and decision.

Accordingly, the learned trial court being the then Subordinate Judge, Court No. 1, Chapai Nawabganj is hereby directed to continue and conclude the hearing of the Title Suit No. 27 of 1992 within 8 (eight) months from the date of receipt of this judgment and order without serving any notice upon the parties as both the learned Advocates and the parties have taken

responsibility from this court to appear at the time of the hearing of this case in the trial court in order to take a decision on merit. The learned trial court also hereby directed not to allow any unnecessary adjournment from either of the parties.

The concerned section of this court is hereby directed to communicate this judgment and order to the learned trial court immediately.