

Present:

MR. JUSTICE S.M. EMDADUL HOQUE

CIVIL REVISION NO.1618 OF 2010.

IN THE MATTER OF:

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

- AND -

IN THE MATTER OF:

Shafia Khatun

..... Defendant No.7 appellant Petitioner.

-Versus-

Banesa Khatun being died her husband heirs:

(1) Mohammad Ali and others

..... Opposite parties.

Mr. Md. Abdul Hai, Advocate

..... For the petitioner.

Mr. Md. Golam Mostafa, Advocates

.... For the opposite parties.

Heard on: 09.01.2024,22.01.2024,11.02.2024
and Judgment on: 20.03.2024.

On an application of the petitioner Shafia Khatun under section 115 (1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party Nos.1-7 to show cause as to why the judgment and order dated 09.03.2010 passed by the learned Additional District Judge, 2nd Court, Kishoreganj in Miscellaneous Appeal No.24 of 2002 affirming that order dated 05.02.2002 passed by the Senior Assistant Judge, Karimganj, Kishoreganj in Miscellaneous Case No.46 of 2000 should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the predecessor of the opposite party No.1 instituted Title Suit No.4 of 1998 (partition) before the Senior Assistant Judge, Karimganj, Kishoreganj for partition of the suit land.

The suit was decreed ex-parte on 14.06.2000 and decree signed on 21.06.2000. The defendant No.7 came to know the aforesaid decree when the Advocate commissioner went to the schedule property for commission then and thereafter file the Miscellaneous Case No.46 of 2000 under Order IX rule 13 of the Code of Civil Procedure for setting-aside the ex-parte decree.

The opposite party also contested the same and the trial Court after hearing the parties and considering the facts and circumstance of the case dismissed the said miscellaneous case by its judgment and order dated 05.02.2002 taking view that the summons was duly served.

Against the said order the defendant-petitioner filed Miscellaneous Appeal No.24 of 2002 before the learned District Judge, Kishoreganj. The said appeal was heard and dispose of by the Additional District Judge, 2nd Court, Kishoreganj who after hearing the parties and considering the facts and circumstance of the case dismissed the appeal and thereby affirming the judgment of the trial Court by its judgment and order dated 09.03.2010.

Being aggrieved by and dissatisfied with the impugned judgment and order of the Courts below the petitioner filed this revisional

application under Section 115(1) of the Code of Civil Procedure and obtained the Rule.

It appears that though in the Rule issuing order the record of the case has not been called for but unfortunately the concerned Court after receiving the notice sent the L.C record to this Court.

Mr. Md. Golam Mostafa, the learned Advocate enter appeared on behalf of the opposite party Nos.2-7 through vokalatanama to oppose the Rule.

Mr. Md. Abdul Hai, the learned Advocate appearing on behalf of the petitioner submits that both the Court erroneously passed the impugned order without considering the provision of Order IX rule 13 of the Code of Civil Procedure taking view that summons was duly served whereas it is found from the report that the summons of the defendant Nos.6 and 7 received by the defendant No.4 the brother of the present petitioner. He submits that the defendant No.7 the present petitioner being a married woman permanently resided in her husbands house, not in the house of her father so no question that the summons was duly served provided under law. In support of his submission the learned Advocate cited the decision of the case of *Abdur Rashid and another Vs. Abdul Barik and another reported in 35 DLR (AD)-162*. He prayed for making the Rule absolute.

Mr. Md. Golam Mostafa, the learned Advocate appearing on behalf of the opposite party submits that this is a partition suit and in

partition suit the parties has option to get their share for allotment of saham out of the land on payment of proper Court fees and our Apex Court decided that without setting-aside the ex-parte decree the parties may claim their saham by paying sufficient Court fees. In support of his argument the learned Advocate cited two decisions one is the case of *Alekjan Bewa and others Vs. Arefa Bewa and others reported in 7 ADC (AD)-593* and the another is the case of *Aziz Ahmed and another Vs. Khorsheda Begum alias Monwara Begum and others reported in 7 MLR (AD)-25*.

In reply Mr. Md. Abdul Hai, the learned Advocate submits that the aforesaid two decisions is not applicable in the instant case since in the said case the opposite party are the contesting party but in the instant case the present petitioner did not contest the suit even the summons were not duly served upon her and no final decree has yet been drawn up, and the plaintiffs got possession in their respective saham in the earlier two cases but in the instant case the plaintiff did not obtain her saham or possession in the suit land.

At the time of hearing I have examined the record and found that the Court drawn up final decree on 04.04.2010.

Considering the aforesaid facts since the final decree was drawn up thus it is my view that without going to merit of the case, it is better to direct the petitioner to prefer appeal against the final decree and in such a case the question of limitation is immaterial since the petition filed case in

the year 2000 and moved upto this Court but in the meantime the final decree was drawn up on 04.04.2010. Even the petitioner has no knowledge about the final decree and it is revealed by this Court at the time of pronouncement of the judgment. And in such a case Section 14 of the limitation Act should be governed.

Considering the aforesaid facts it is my view that it is better to dispose of the civil revision directing the petitioner to prefer appeal against the final decree on the following terms:

The petitioner is directed to prefer appeal as early as possible preferably within 03 (three) months from the date of receipt of this order.

The learned District Judge is directed to register the appeal if presented before him, if so advised;

Then the appellate Court should consider and dispose of the appeal providing under Section 107 of the Code of Civil Procedure and in accordance with law .

The petitioner will get benefit of Section 14 of the limitation Act in filing the appeal.

Considering the aforesaid facts and circumstance of the case, the Rule is hereby disposed of with the above observations.

In the result, the Rule is disposed of.

Send down the lower Court records along with the judgment and order at once.

B.O. Obayedur