

**Present:**

**Mr. Justice Md. Salim**

**CIVIL REVISION NO. 3891 OF 2010.**

Md. Enayet Karim and others

..... Plaintiffs-Petitioners

-VERSUS-

Amiruzzaman and others

..... Defendant-Opposite party

Mr. Md. Selim Reja Chowdhury, with

Mr. Md. Nasir Uddin, Advocat

-----For the petitioners

Mr. Md. Modersher Ali Khan, Advocate

..... For the opposite party.

**Heard on 08.05.2025 and 10.07.2025**

**Judgment on 17.07.2025**

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and order dated 18.03.2009 passed by learned Joint District Judge, 1<sup>st</sup> Court, Barishal in Miscellaneous Case No. 47 of 2003 under order 9 Rule 13 of the Code of Civil Procedure restored the suit in allowing the Miscellaneous Case and thereby setting aside the compromise decree of Partition Suit No. 66 of 2002 both preliminary and final order dated

05.05.2010 in directing the defendants to file written statement again and or pass such other or further orders should not be set aside.

The facts in a nutshell for the disposal of the Rule are that the petitioners herein, as plaintiffs, instituted Title Suit No. 66 of 2002 before the Joint District Judge, 1<sup>st</sup> Court, Barishal, for partition.

The defendants contested the suit by filing a written statement. Subsequently, the suit was decreed on compromise with defendant No. 1-9, 11, 13, 14, 15, 17, 18, 21, 24, 27. Thereafter, the compromising defendant No. 13 preferred instant Miscellaneous Case No. 47 of 2003 under Order 9 Rule 13 along with section 151(1) of the Code of Civil Procedure.

The plaintiff of that suit, as the opposite party, contested the same by filing a written objection denying all the material allegations.

Subsequently, the learned Joint District Judge, 1<sup>st</sup> Court, Barishal, by the Judgment and order dated 18.03.2009, allowed the Miscellaneous Case and restored the suit in its original file and number.

Being aggrieved by and dissatisfied with the above Judgment and order, the plaintiff-opposite party as petitioner preferred this Civil Revision under section 115(1) of the Code of Civil Procedure before this court and obtained the instant Rule and an order of stay.

Mr. Md. Selim Reja Chowdhury, the learned advocate appearing on behalf of the petitioners, submits that the compromise decree should be set aside only by instituting a separate suit, rather than the court below committed erred in law in considering the application under Order 9 Rule 13 of the Code of Civil Procedure, restoring the suit.

On the contrary, Mr. Md. Modersher Ali Khan, the learned advocate appearing on behalf of the opposite party, submits that the court below judiciously considered the matter and restored the suit as section 151 of the Code of Civil Procedure also included with the application under Order 9 Rule 13.

It appears that for setting aside the ex parte decree against defendant:- In any case in which a decree is passed ex parte against a defendant, he may apply to the court under Order 9 Rule 13 of the code of civil procedure by

which the decree was passed for an order to set aside; and if he satisfies the court that the summons was not duly served, or that any sufficient cause prevented him from appearing when the suit was called on for hearing. The court shall make an order setting aside the decree as against him upon such terms as to cost, payment into court or otherwise, as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided further that no court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation:- Where there has been an appeal against a decree passed ex parte under this Rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this Rule for setting aside that ex parte decree.

In the instant case, the petitioner herein, as plaintiff, instituted the instant suit for partition, and subsequently the suit was decreed on compromise along with the opposite party. Thereafter, the compromising defendant No. 13 preferred the instant Miscellaneous Case under Order 9 Rule 13 along with section 151(1) of the Code of Civil Procedure for setting aside the above Judgment and decree.

It transpired from the record that the said suit was decreed only based on the compromise petition filed by both parties. Describing the word used in Order 23 Rule 3. It can be safely held that a compromise petition was filed with the consent of the parties. Earlier, the position was different. Even if the Advocates signed a compromise memo, it has been recognized that it is binding on the parties.

The words 'in writing and signed by the parties' were inserted in Order 23 Rule 3 of the Code of Civil Procedure, necessarily mean and include a duly authorized representative and counsel. So long as the system of judicial administration. A compromise decree is passed under Order 23 Rule 3 of the Code of Civil Procedure when

parties settle their dispute and inform the court that it is not an ex parte decree, it is based on the agreement or consent of both parties.

In the instant case, admittedly, the suit was decreed under Order 23 Rule 3 of the Code of Civil Procedure. However, the defendant-opposite party claims that he did not sign the compromise deed and that the compromised decree was obtained through fraud against him. Therefore, the particulars of fraud must be pleaded, and without pleading as such, the question of fraud will not arise at all. Consequently, he is required to file a separate Suit. Unfortunately, the learned Joint District Judge of the 1st court of Barishal has decided that the case has not been considered or taken note of Order 9 Rule 13 of the Code of Civil Procedure or under Order 23 Rule 3 of the Code of Civil Procedure.

Considering the above facts, circumstances of the case, and discussions made herein, I am of the firm view that the court below in passing the impugned Judgment and order committed an error of law resulting in an error in

the decision occasioning failure of justice. So I find merit in the Rule.

Resultantly, the Rule is made absolute without any order as to cost.

The impugned Judgment and order dated 18.03.2009 passed by the learned Joint District Judge, 1<sup>st</sup> Court, Barisal in Miscellaneous Case No.47 of 2003 allowed the Miscellaneous Case restored the suit in setting aside the compromise decree of Partition Suit No. 66 of 2002 both preliminary and final order dated 05.05.2010, is hereby set aside.

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

Communicate the Judgment at once.

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