

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice A.K. M. Zahirul Huq

First Miscellaneous Appeal No.299 of 2017

Jamuna Bank Limited Foundation and another

..... appellants

-Versus-

Moinuddin Ahmed and others respondents

with

Civil Rule No.653(FM) of 2015

Jamuna Bank Limited Foundation and another

..... petitioners

-Versus-

Moinuddin Ahmed and others opposite parties

Mr. Habibul Islam Bhuiyan, Senior Advocate with

Mr. Mohammad Mijanur Rahman, Advocate

..... for the appellants

(Appellants in the FMA and petitioner in the civil Rule)

Mr. Md. Nazmus Sakib, Advocate

..... for the respondents

(Respondents 1-7 in the FMA and opposite parties in the Rule)

Judgment on 15.05.2025

Bhishmadev Chakrabortty, J:

Since the civil rule has arisen out of the miscellaneous appeal, the parties thereto are same and common question of fact and law are involved in both, these have been heard together and are being disposed of by this judgment.

The appeal by defendants 38 and 39 is directed against the judgment and order of the Joint District Judge, Court 2, Narayanganj passed on 09.04.2015 in Miscellaneous Case No.20 of 2014 rejecting the case under Order 9 Rule 13 of the Code of Civil Procedure (the Code) for setting aside the *ex parte* judgment and decree.

Facts relevant for disposal of the appeal and the Rule, in brief, are that the plaintiffs instituted the suit in the aforesaid Court praying for partition of the suit land claiming their share to the extent of .7678 acres as described in the schedule to the plaint. During pending of the suit the plaintiffs filed an application under Order 1 Rule 10(2) of the Code for adding the proposed two as defendants 40 and 41 in the suit stating grounds therein. However, the Joint District Judge kept the said application with the record. Subsequently, the plaintiffs filed a fresh plaint incorporating the names of proposed defendants (appellants herein). The suit was later on decreed *ex parte* on 26.08.2013 and accordingly preliminary decree was prepared. The present appellants came to know about the said *ex parte* decree passed against them subsequently and then filed the aforesaid miscellaneous case under Order 9 Rule 13 of the Code praying for setting aside the *ex parte* decree. However, the Joint District Judge by the judgment and order challenged in this appeal was pleased to reject the miscellaneous case.

At the time of admission of the appeal, the appellants filed an application for stay of all further proceedings of Execution Case No.3 of 2014 and the aforesaid Rule was issued and all further proceedings of the execution case was stayed.

Mr. Habibul Islam Bhuiyan, learned Senior Advocate for the appellants taking us through the materials on record submits that it is a

fact that the application filed by the plaintiffs for adding these appellants as defendants was kept with the record by the learned Joint District Judge. But subsequently the plaintiffs filed a fresh plaint where the names of these appellants were incorporated as defendants. Accordingly the *ex parte* decree was passed against them behind their back. Since the decree against these appellants exists and they did not get any chance to contest the suit because no notice was served upon them, therefore, the *ex parte* decree is required to be set aside. The appellants as petitioners of the miscellaneous case for setting aside the decree led evidence to support their case. They produced necessary documents to that effect but the learned Judge without entering into the merit of the case simply opined that these appellants were not parties to the suit and as such they have no *locus standi* to file the miscellaneous case under Order 9 Rule 13 of the Code to set aside the *ex parte* judgment and decree. The appeal, therefore, would be allowed by setting aside the judgment and order of the miscellaneous case and the *ex parte* judgment and decree passed against the appellants in the suit.

Mr. Md. Nazmus Sakib, learned Advocate for respondents 1-7 submits that although the plaintiffs filed an application for addition of the appellants as defendants but the learned Judge kept it with the record which deemed to have been rejected or might have been heard subsequently. Mr. Sakib admits that the plaintiffs filed a fresh plaint

where the names of these appellants were incorporated as defendants. Such inclusion as defendants in the plaint was a wrong on the part of the plaintiffs. The above defendants were neither a necessary nor a proper party in the suit. The plaintiffs could have filed an application before the concerned Court to strikeout their names from the decree under section 152 of the Code. He prays for an order of this Court to take steps by them to that effect in the trial Court. He finally submits that since these appellants were not at all made parties in the suit on allowing the application for adding them as defendants, therefore, they are practically not parties to the suit. The Court below considering the materials on record correctly rejected the miscellaneous case for setting aside the *ex parte* decree which may not be interfered with by this Court in appeal. The appeal, therefore, would be dismissed and the Rule be discharged.

We have considered the submissions of both the sides and gone through the materials on record. It is admitted by the parties that the learned Joint District Judge kept the plaintiffs' application for adding these appellants as defendants with the record. In fact no order was passed on the application for addition of parties. But mysteriously the plaintiffs subsequently filed a fresh plaint incorporating the names of these appellants as defendants 38 and 39. The Court accepted the fresh plaint by order date 20.05.2013. In the fresh plaint and decree these appellants are found as defendants 38 and 39. The *ex parte* judgment

and decree was passed on 26.08.2013. The final decree has been prepared according to the preliminary decree wherein these appellants also have been shown as defendants. Therefore, it cannot be said that the judgment passed and decree drawn up against these appellants are not binding upon them. Except the application for addition of party kept with the record by the learned Judge, in everywhere these appellants are defendants but practically no notice was served upon them. In the miscellaneous case, the appellants examined a witness and their documents were produced as exhibits-1 and 2. The opposite parties to the miscellaneous case also examined witnesses but the learned Joint District Judge without entering into the merit of the case simply rejected the miscellaneous case holding that these appellants were not defendants in the original suit and that the miscellaneous case was not maintainable. The findings and observation of the learned Judge is quite wrong and beyond the materials on record. In taking such decision the Joint District Judge seriously erred in law causing miscarriage of justice which is required to be interfered with by us.

Moreover, the learned Judge passed the *ex parte* decree on 26.08.1913 in a very casual manner as under-

“নথি আদেশের জন্য লওয়া হইল। অত্র মামলার পি, ডব্লিউ-১ মোঃ সফিউদ্দিন ভুইয়া, পি, ডব্লিউ-২ ফোয়জল, পি, ডব্লিউ-৩ আব্দুল আলী মাতবর কর্তৃক প্রদত্ত জবানবন্দী, বাদীপক্ষ দাখিলী কাগজপত্র প্রদর্শনী-১ হইতে ৮ সিরিজ ও মামলার নথি পর্যালোচনা করিলাম। মামলার নথি পর্যালোচনায় বাদীপক্ষ তাহার মামলাটি প্রমান করিতে সক্ষম হইয়াছে মর্মে

প্রতীয়মান হয়। মামলাটি একতরফা শুনানীতে প্রমাণিত হইয়াছে। ফলে বাদীপক্ষ তাহার প্রার্থিত প্রতিকার পাইতে সম্পূর্ণরূপে হকদার।

প্রদত্ত কোর্ট ফি পর্যাপ্ত।

অতএব,

আদেশ হয় যে,

অত্র দেওয়ানী মামলাটি একতরফাসূত্রে সকল বিবাদীগণের বিরুদ্ধে বিনা খরচায় বন্টনের প্রাথমিক ডিক্রী হয়। বাদীপক্ষ নালিশী জমায় তাহার দাবীকৃত মতে ৭৬.৭৮ শতক জমি বাবদ ছাহাম প্রাপ্ত হইবে।”

The aforesaid decree is not a decree in the eye of law. In the case of Government of the People's Republic of Bangladesh represented by the Deputy Commissioner and others vs. Md. Abdul Jabbar Sheikh, 59 DLR (AD) 105 it has been held that even if there is no pleading from the side of the defendant about the plaintiffs' document on the basis of which they are claiming the relief in the suit, the Court has a duty in the interest of justice to scrutinise the documents the plaintiffs relied upon. The Court is quite competent to make its decision on the basis of result obtained upon scrutiny of the document. In the case of Bangladesh Vs. Israil Ali and others, 1 BLD (AD) 371 it has been held that in passing an *ex parte* decree the Court is to observe minimum legal requirement. Judgment should show application of Court's judicial mind as to whether the plaintiffs' witnesses and the papers proved the plaintiffs case. In absence of any such finding the *ex parte* decree cannot be sustained in law. In this case learned Judge passed *ex parte* judgment in a *slipshod* manner without assessing any oral evidence and examining documents.

In view of the discussion made hereinabove, we find merit in this appeal. Accordingly, the appeal is allowed. The judgment and order of the Joint District Judge, Court 2, Narayangonj passed on 09.04.2015 in Miscellaneous Case No.20 of 2014 is hereby set aside. The above miscellaneous case is, therefore, allowed. The *ex parte* judgment and decree passed in the suit is set aside and the subsequent execution case is to be treated as *non est*. The Rule issued in Civil Rule No.653 (FM) of 2015 is, therefore, disposed of. The order of stay stands vacated.

However, the concerned Court is directed to dispose of the suit expeditiously, preferably within 06 (six) months from the date of receipt of this judgment and order. In dealing with the case the concerned Court shall not allow either party any adjournment without extreme exigency.

Communicate this judgment and order.

A.K. M. Zahirul Huq, J.

I agree.