

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

Present:

Mr. Justice S M Kuddus Zaman

And

Ms. Justice Tamanna Rahman Khalidi

First Miscellaneous Appeal No.316 of 1976

Atul Chandra Kabiraj

.... Appellant

-Versus-

Ful Chand Dhali and others

.... Respondents

None appears

.... For both the sides.

Heard and Judgment on 14.05.2026.

S M Kuddus Zaman, J:

This First Miscellaneous Appeal is directed against the impugned order dated 16.06.1975 passed by the learned Sub-ordinate Judge, Khulna in Misc. Case No.333 of 1974 (Under Order 9 Rule 13 of the Code of Civil Procedure, 1908) dismissing the same.

Facts in short are that the respondent as plaintiff instituted Title Suit No.340 of 1959 in the Court of the Sub-ordinate Judge, Khulna and petitioner was impleaded as defendant No.3(Ka). No summon of above suit was served upon the plaintiff nor he had no knowledge about above suit which was decreed ex-parte on 26.03.1973. The petitioner came to know about above judgment and decree on 12.11.1974 and filed above case on 31.12.1974.

Opposite party entered appearance in above case and filed written objection denying all claims and allegations made in the petition and stated that the summons of above suit was served upon defendant No.3(Ka). A Criminal Case under Section 144 of the Code of Criminal Procedure arose out of above property and defendant No.3(Ka) appeared in above Criminal Case and appointed Mr. Amzad Hossain as an Advocate. Thus the petitioner was fully aware as to above ex-parte judgment and decree and above case was barred by limitation.

At trial plaintiff examined two witnesses and opposite party examined one.

On consideration of the facts and circumstances of the case and evidence on record the learned Sub-ordinate Judge dismissed above case holding that the case was barred by limitation.

Being aggrieved by and dissatisfied by with above judgment and order of the trial Court above defendant as appellant moved to this Court and preferred this First Miscellaneous Appeal.

No one appears for the appellant or the respondents when the First Miscellaneous Appeal was taken up for hearing although the matter appeared in the list for hearing. As such the First Miscellaneous Appeal was taken up for pronouncement of judgment under Order 41 Rule 30(2) of the Code of Civil Procedure, 1908.

We have carefully examined the impugned judgment and order dated 16.06.1975 and all other materials on record.

As mentioned above appellant was defendant No.3(Ka) of Title Suit No.340 of 1969 which was decreed ex-parte on 26.03.1973. Above defendant as petitioner filed above case under Order 9 Rule 13 of the Code of Civil Procedure, 1908 for setting aside above ex-parte judgment and decree on the ground that no summons of above suit was served upon him.

In support of above claim petitioner himself gave evidence as PW1 and in his evidence reiterated above claims and stated above that no summons of Title Suit No.340 of 1969 was served upon him. Above witness was subjected to extensive cross examination by the opposite party but his above evidence that summon of above suit was not served upon him remained unshaken and credence inspiring.

As soon as a defendant against whom a judgment and decree has been passed ex-parte appears in the witness box and on taking oath gives evidence that no summons of above suit was served upon him the onus shifts upon the plaintiff to prove that summon of above suit was served upon the defendants.

The opposite party has merely stated in his evidence as OPW No.1 that summon of above suit was served upon the petitioner but they did not make any specific mention as to the mode and date of service of above summon. Nor the opposite party called for relevant record from the Court and produce the service return of the summons to prove lawful service of summon upon the defendant. The opposite party did not call the relevant process server of the Court as a witness

and examine him in Court in support of proper service of above summon.

On consideration of the facts and circumstances of the case and evidence on record we hold that the opposite party could not prove by legal evidence that the summon of Title Suit No.340 of 1969 was properly served upon the defendant.

In a case under Order 9 Rule 13 of the Code of Civil Procedure, 1908 for setting aside an ex-parte judgment and decree the only point for determination is whether the summon was served upon the defendant or not and if the Court is satisfied that summon was not served upon the defendant it shall set aside the ex-parte judgment and decree and the question if the defendant had knowledge from any other source as to the above suit is irrelevant. As far as the question of limitation is concerned fraud vitiates everything and if the summon of the defendant was fraudulently suppressed and falsely shown as served properly the Court is under a duty to set aside such an ex-parte decree ignoring the fact that the plaintiff could not come before the Court within the stipulated time.

The learned Sub-ordinate Judge totally failed to appreciate above facts and circumstances of the case and evidence on record and most illegally dismissed above case which is not tenable in law.

In above view of the facts and circumstances of the case and materials on record we find substance in this First Miscellaneous Appeal which deserves to be allowed.

In the result, the First Miscellaneous Appeal is allowed. The ex-parte judgment and decree dated 26.03.1973 passed by the learned Sub-Judge, Khulan on 26.03.1973 in Title Suit No.340 of 1969 is set aside and above suit is restored to its original file and number.

However, there will be no order as to cost.

Send down the lower Court record immediately.

Tamanna Rahman Khalidi, J:

I agree.

MD. MASUDUR RAHMAN
BENCH OFFICER