

*Present:*

*Mr. Justice A.K.M. Asaduzzaman*

*Civil Revision No.1910 of 2019*

*Md. Mojaffar Shekh alias Mojaffar  
Rahman Shekh.*

*.....Petitioner.*

*-Versus-*

*Advocate Abdus Samad Munshi*

*(Kajol) and others.*

*.....Opposite parties.*

*Mr. Zainul Abedin, Advocate. with*

*Mr. Md. Aziz Taufique, Advocate.*

*.....For the petitioner.*

*Mr. Md. Belal Hossain, Advocate*

*.....For the Opposite parties.*

*Heard and Judgment on 06.03.2024.*

A.K.M.Asaduzzaman,J.

Leave was granted to examine the legality and propriety of the order complained herein, which is passed by District Judge, Bogura on 20.03.2019 in Civil Revision No. 02 of 2017 reversing the Order No. 116 dated 27.03.2016 passed by the Joint District Judge, 1<sup>st</sup> Court, Bogura in Miscellaneous Case No. 48 of 2011 setting aside the final decree dated 17.06.2010 passed in partition suit No. 68 of 2004.

On 18.09.2004 opposite Party as plaintiff filed Partition Suit No. 68 of 2004. The said suit was decreed on 17.07.2007 on compromise with defendant nos. 1, 31-33, 34 (ka)-34(cha), 35, 48 and ex-parte against the rest. The said preliminary decree was made final on 05.07.2010. Thereafter on different dates 03 miscellaneous cases were filed, challenging the said judgment and decree of the partition suit. Petitioner as defendant no. 41 along with defendant nos. 42 and 43, filed miscellaneous Case No. 48 of 2011 on 23.05.2011 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree passed against them.

In the said miscellaneous case, it has been stated that Nosir Udidn Shekh, the predecessor of the petitioner during his lifetime on 17.01.1948 purchased 9 decimals of land in C.S. khatian No. 587 from Rahmatullah Pramanik and got mutation on 02.09.1958 in Mutation Case No. 322(IX-1)/57-58 and paid rent and erected pucca house and semi-pucca tin shed dwelling house and used to live thereon peacefully with family and the other parties but suppressing the summons, upon creating a solenama, the ex-parte decree was obtained by the plaintiff in partition suit and thereafter on 15.05.2011, when they went to demolish the applicant's

dwelling house, he came to know about the ex-parte decree and then filed this miscellaneous case for setting aside the same.

The said miscellaneous case was heard by the Joint District Judge, 1<sup>st</sup> Court, Bogura, who by the order dated 27.03.2016 allowed the miscellaneous case and after setting aside the judgment and order dated 17.06.2010 restored the suit to its original file and number.

Challenging the said order, plaintiff filed Civil Revision No. 02 of 2017 before the Court of District Judge, Bogura, who by the impugned judgment and order allowed the revision on contest with cost and after setting aside the order dated 27.03.2016 passed by the Joint District Judge in Miscellaneous Case No. 48 of 2011 directed the Joint District Judge to disposed of the miscellaneous case as per law.

Challenging the said judgment and order, defendant no. 41-petitioner alone preferred this application for leave under section 115(4) of the Code of Civil Procedure and obtained the leave on 01.07.2019.

Mr. Md. Aziz Taufique, the learned advocate appearing for the petitioner drawing my attention to the impugned order submits that the trial court when found the summons of the original suit

was not been served properly upon the defendant petitioner and accordingly set aside the ex-parte decree under Order 9 Rule 13 of the Code of Civil Procedure, the Revisional Court most illegally allowed the revision. The impugned judgment is thus not sustainable in law, which is liable to be set aside.

Mr. Md. Belal Hossain, the learned advocate appearing for the opposite parties on the other hand submits that learned District Judge while allowing the miscellaneous case committed no illegality in allowing the revision case on assessing the provision as laid down under Order 5 Rule 17 of the Code of Civil Procedure regarding the service of summons. The impugned judgment is thus may not be interfered with and leave may be dismissed.

Heard the learned Advocate of both the parties and perused the documents annexed to the application and the impugned order.

The instant matter arises out of a miscellaneous case, which was filed under Order 9 Rule 13 of the Code of Civil Procedure, against the judgment and decree passed in a partition suit ex-parte. In the miscellaneous case main contention was that summons was not been served upon the defendants, against whom ex-parte judgment was passed including the petitioner, who was defendant no. 41 in the suit. Trial Court allowed the miscellaneous case

holding that summons of the suit was not been served properly. Revision Court while reversing the said order, has noticed that the above findings on service of notice was obtained without at all discussing the evidence on record. Service of summons is a matter to be decided upon evidence both oral and documentary. In order to comply the provision regarding service of summons as being endorsed under Order 5 Rule 17 of the Code of Civil Procedure, it is required to be assessed the evidences. The Revisional Court has thus rightly pointed out the same and set aside the arbitrary order passed by the Joint District Judge and directed to proceed with the miscellaneous case as per law. In fact the trial court was directed to decide the matter on service of summons after taking evidences, giving an opportunity to both the parties together with calling the process server to depose regarding the service by him, which is the legal assense to determine the issues contains in the miscellaneous case. The District Judge thus apparently committed no illegality in giving a direction upon the Joint District Judge to decide the matter on merit as per law in the light of the above observations correctly.

In the premises, I do not find any illegality as being committed by the District Judge in allowing the revision and giving direction to the Joint District Judge to disposed of the

miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure on merits.

Accordingly leave petition contains no merits, which is hereby disposed of.

However, the learned Joint District Judge is hereby directed to disposed of the miscellaneous case as per law expeditiously as early as possible preferring within the 06 months after receiving this order.

The order of stay granted earlier by this court is hereby recalled and vacated.

Communicate the judgment to the court below at once.