

District:Kishoreganj

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present

Mr. Justice Md. Zakir Hossain

Civil Revision No. 2860 of 2019

Motiur Rahman

..... Defendant-Appellant-Petitioner

-Versus-

Abdul Ali and others

..... Plaintiff-Respondent-Opposite Parties

Mr.Sharif Uddin, Advocate

..... For the petitioner

Mr. Biplab Gowsami, Advocate

..... For the opposite parties

Heard on: 29.11.2023 and 24.01.2024

Judgment on: 07.07.2024

At the instance of the petitioner, the Rule was issued with the following the terms:

“Records need not be called for.

Let a Rule be issued calling upon the opposite party Nos. 1-25 to show cause as to why the impugned judgment and order dated 14.08.2019 passed by the learned Additional District Judge, 3rd Court, Kishoreganj in Miscellaneous Appeal No. 100 of 2010 disallowing the appeal and affirming the judgment and order dated 24.05.2010 passed by the learned Assistant Judge, Pakundia, Kishoreganj in Miscellaneous Case (Chani) No. 10 of 2007 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Facts leading to the issuance of the Rule are *inter alia* that the predecessor of the petitioner filed an application under Order 9 Rule 13 of the Code of Civil Procedure, 1908, in short, the CPC for setting aside the *ex parte* decree passed in Other Class Suit No. 72 of 2002 (Partition) which was registered as Miscellaneous Case No. 10 of 2007. The contention of the petitioner is that no summons had been duly severed upon the defendant No. 11. The case of the opposite parties is that the summons duly served upon the defendant No. 11 of the original suit. Upon hearing, the learned Assistant Judge was pleased to dismiss the Miscellaneous Case. Challenging the legality and propriety of the judgment and order of the learned Assistant Judge, the petitioner preferred Miscellaneous Appeal No. 100 of 2010 before the Court of the learned District Judge, Kishoreganj. After admitting the appeal and observing all the formalities, the learned District Judge was pleased to transmit the same to the learned Additional District Judge, Third Court, Kishoreganj for disposal. Upon hearing, the learned Additional District Judge was pleased to dismiss the appeal and thereby affirmed the judgment and order of the learned Assistant Judge. Impugning the judgment and order of the learned Additional District Judge, the petitioner moved this Court and obtained the aforesaid Rule and stay therewith.

Heard the submissions advanced by the learned Advocates of the parties at length and considered the materials on record thoroughly. The

convoluted question of law embroiled in this case has meticulously been waded through in order to reach a just decision.

It is well settled that the plaintiff has to prove that the summons was duly served upon the defendant No. 11. On perusal of the evidence on record, the learned Assistant Judge came to the positive finding that the summons was duly served upon the defendant No. 11 of the original suit and the petitioner did not file miscellaneous case within stipulated period of limitation. The learned Additional District Judge after delving into the facts and considering the legal position involved in this case held to the effect that the summons was duly served upon the defendant No. 11. In the case reported in 35 DLR (AD) (1983) 162, it was held:

“Under Order IX, Rule 13 of the Code , if summons is not duly served on the defendant, that is a good ground for setting aside an ex-parte decree. On a perusal of the relevant provisions of the Civil Procedure Code it would be apparent that due service of summons is an essential condition which must be satisfied before the Court can proceed to give a judgment and under Order IX, Rule 13 if a party satisfies a Court that summons were not duly served upon him, the Court is bound to set aside an ex-parte decree. In such a case question of knowledge is not at all relevant and ex-parte decree will be set aside even if the defendant had knowledge of institution of a suit. No provision of law could be pointed out by the learned Counsel for the respondent which dispense with the necessity of proper service of summons.”

In this case, since, the summons had been duly served upon the defendant No. 11, therefore, the question of setting aside the ex parte decree passed in Partition Suit cannot be made. It is admitted that the preliminary decree has not yet been made final. It is well settled that the partition suit shall remain pending till final decree is drawn up. The petitioner may file a petition for allocating separate *saham*, if so advised. The learned Assistant Judge may allocate *saham* in favour of the petitioner, if the petitioner is entitled to get the same without infringing the *saham* allocated in favour of the plaintiff-opposite parties. The petitioner may file a separate petition for allocating separate *saham* within two months from the date of receipt of copy of the judgment to the Court of the learned Assistant Judge, failing which, the learned Assistant Judge shall proceed in accordance with law to make the preliminary decree final.

With the above observation and direction, the Rule is disposed of, however, without passing any order as to costs. The earlier order of stay granted by this Court, thus, stands recalled and vacated.

Let a copy of the judgment be transmitted to the Courts below at once.

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Md. Zakir Hossain, J