

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

Civil Revision No. 48 of 2021

IN THE MATTER OF

Md. Abdus Sobhan being dead his legal heirs-

1(a) Abdur Rashid Mondol and others

.....Applicants-Appellants-Petitioners

-Versus-

1. Md. Majibur Rahman and others

.....Respondents-Opposite parties

2. Md. Enu Fakir and others

....Pro-forma respondents-Opposite parties

Mr. Md. Nurul Amin, Senior Advocate with

Mr. Arobinda Kumar Roy, Advocate

.....For the petitioner

Mr. J.K. Paul with

Ms. Snigdha Saha, Advocates

.....For opposite party Nos. 1-9 & 11

Heard on 01.02.23, 02.02.23, 12.02.23, 12.06.23

and judgment passed on 20.06.2023

Present:

Mr. Justice Kazi Md. Ejarul Haque Akondo

Kazi Md. Ejarul Haque Akondo, J.

This Rule, under section 115(1) of the Code of Civil Procedure, 1908, was issued in the following term-

“Let a Rule be issued calling upon opposite party

Nos. 1-11 to show cause as to why the impugned judgment

and order dated 27.08.2020 passed by the learned Joint District Judge, 1st Court, Sirajganj in Miscellaneous Appeal No. 19 of 2019 dismissing the appeal and thereby affirming the judgment and order dated 28.04.2019 passed by the learned Assistant Judge, Rayganj, Sirajganj in Miscellaneous Case No. 08 of 2016 rejecting the application under Order 9 rule 13 of the Code of Civil Procedure, 1908 for setting aside the ex-parte judgment and decree dated 12.08.2014 passed by the learned Assistant Judge, Rayganj, Sirajganj in Partition Suit No. 80 of 2014 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.”

At the time of issuance of the Rule operation of the ex-parte judgment and decree dated 12.08.2014 was stayed, and the parties were directed to maintain the status quo in respect of possession and position of the suit land for 06(six) months from the date and lastly, it was extended on 16.03.2022 till disposal of the Rule.

The present opposite party Nos. 1-11 as the plaintiffs filed Partition Suit No. 160 of 2008 before the learned Senior Assistant Judge, Ullapara, Sirajganj which was renumbered as Partition Suit No. 80 of 2014. On transfer, after hearing the suit the learned Assistant Judge, Rayganj, Sirajganj decreed the suit ex-parte in preliminary form on 12.08.2014. Being aggrieved by the same the present petitioner (defendant No.12) filed Miscellaneous Case No. 08 of 2016 before the learned Assistant Judge, Rayganj, Sirajganj under Order 9 Rule 13 of the Code of Civil Procedure, 1908 praying for setting aside the ex-parte judgment and decree, and for restoration of the original suit to its original file and number on the ground that no summons was duly been served upon the defendant as per the provision of law, rather; the plaintiffs in collusion with the process server managed to obtain a false report of service of the summons and obtained an ex-parte decree from the Court. The present opposite party Nos. 1, 4-9, and 11 contested the said miscellaneous case by filing a written objection contending, inter alia, that the summons was duly served upon the defendant by the process server of the Court and he received the summons by putting his thumb impression in presence of the

witnesses but he did not contest the suit willingly. After hearing the said miscellaneous case the learned Assistant Judge, Rayganj, Sirajganj by his judgment and order dated 28.04.2019 rejected the same because summons had duly been served upon the defendant and the application was barred by limitation.

Being aggrieved by the said impugned judgment and order dated 28.04.2019 the present petitioner filed an appeal before the learned District Judge, Sirajganj, and the same was numbered as Miscellaneous Appeal No. 19 of 2019. After hearing the appeal the learned Joint District Judge, 1st Court, Sirajganj by his judgment and order dated 27.08.2020, dismissed the appeal by affirming those of the Trial Court.

Being aggrieved by and dissatisfied with the said impugned judgment and order dated 27.08.2020 the defendant as the petitioner had preferred this civil revision before this Court and obtained the instant Rule which is before us for consideration.

Mr. Md. Nurul Amin, the learned Senior Advocate appearing with Mr. Arobinda Kumar Roy and Mr. Sajal Ahmed, Advocates on behalf of the petitioner submits that the summons was not duly served upon the

petitioner, rather; it was shown to have been served fraudulently in collusion with the process server, and his thumb impression was not identified, in absence of which the alleged thumb impression cannot be said to be a thumb impression (LTI) of defendant No. 12-petitioner. He further submits that the original Partition Suit No. 160 of 2008 was filed on 11.05.2008 in the Court of learned Assistant Judge, Ullapara, Sirajganj but subsequently, it was renumbered as Partition Suit No. 80 of 2014 and transferred to the Court of learned Senior Assistant Judge, Rayganj by the order of the learned District Judge, Sirajganj dated 20.04.2014 without communicating the order of transfer to the defendant, and the learned Senior Assistant Judge, Rayganj received the case vide order No. 33 dated 27.04.2014 and fixed the next date on 19.05.2014 for ex-parte hearing which is a violation of rule 388(2) of the Civil Rules and Orders (CRO) and thus the ex-parte judgment and decree become a nullity.

He lastly submits that according to Order 9 Rule 13A of the Code of Civil Procedure, 1908, ex-parte judgment and decree can be directly set aside and the application under this provision has to be made within 30 days from the date of ex-parte decree for the defendant who

appeared and filed written statement, but the defendant upon whom summons was not served, has to make the application within 30 days from the date of the knowledge of the ex-parte decree. In the instant case, the petitioner filed the application well within 30 days from the date of knowledge of the ex-parte decree.

In support of his above submissions the learned Advocate referred to the decision in the case of MA Wahab –Vs- Abul Kalam and another reported in 44 DLR (AD)(1992) 13, Para-6 it was held that-

“The suit in question was transferred from one Court to another by virtue of a Gazette notification. The transfer was given effect on an off-date. It was incumbent upon the Court to inform the parties or their Advocates of the transfer. Proceedings continued in the new Court to the prejudice of one of the parties and in his ignorance of the order of transfer is not valid (see Rahela Khatun Vs. Seraj Sarker, 35 DLR, 345). An order of the Court affecting one of the pillars of the suit, namely, place of trial, cannot be meant for communication to the Pleader Commissioner only. It was meant for communication to all the parties

involved. Since the Court's order was not communicated and the course of the suit took an adverse turn to the prejudice of the defendant behind his back and without his knowledge, the suit was rightly restored by the High Court Division on terms and we find no ground for interference (Para-6)."

He also referred to the decision in the case of Kashaituli Jame Mosque Waqf Estate –Vs- Md. Abdus Salam Bepari and others reported in 1 LM (AD)(2016) 239 in para-10 it was spelled out that-

"The learned Judge of the Single Bench in setting aside the order of the learned Subordinate Judge did not at all advert his finding that after suggesting issue by defendant No. 7, the suit was transferred twice; first to the Subordinate Judge and Commercial Court No. 2, Dhaka from the Court of Subordinate Judge, 3rd Court, Dhaka and then again was re-transferred to the said Court, i.e. the Subordinate Judge, 3rd Court, Dhaka from the Court of Subordinate Judge and second Commercial Court, Dhaka, but the defendant was not at all intimated about the said

fact of transfer. The learned Judge of the High Court Division only went by the fact that the application under Order IX, rule 13 of the Code was barred by limitation as the same was filed long after 30 days from the date of the ex parte decree. The learned Judge approached the case absolutely mechanically and did not consider the pertinent broad fact involved in the suit that the fact of transfer of the suit was not communicated to the defendant. In the context, the learned Judge also failed to consider rule 388(2) and Note I thereto of the Civil Rules and Order which has mandated that the fact of transfer of a case from one Court to another Court on an off date must be communicated either to the party concerned or to his advocate (see the case of M.A Wahab and another -Vs- Abul Kalam and another 44 DLR(AD)-13) {Para-10}.”

Conversely, Mr. J.K. Paul, the learned Advocate appearing with Ms. Snigdha Saha, Advocate on behalf of opposite party Nos. 1-9 & 11 submits that rule 388(2) of the CRO deals with the order sheet maintained by the learned Trial Court, this CRO is used for the

functions of the Trial Court but in the instant case, transfer was made by order No. 32 dated 22.04.2014 of the learned District Judge, Sirajganj and notice of which was served upon the defendant accordingly. He further submits that the plaintiffs and the defendants are members of the same family and have been living side by side, and since none of the defendants opposes the impugned judgment and decree, defendant No. 12 filed the instant civil revision purposely. He next submits that a concurrent finding about the thumb impression has not properly been controverted by the petitioner with the expert opinion of the thumb impression.

I heard the learned Advocates of the contending parties and have perused the materials on record. On going through the above-cited decisions it appears that the ratio so decided therein is squarely applicable in the case in hand as the very fact of transfer of the instant suit from one Court to another was not communicated to the defendant. In the premises, I find substance in the submissions made by the learned Advocate for the petitioner. Accordingly, the Rule succeeds.

As a result, the Rule is made absolute without cost.

Stay and status quo are, thereby, vacated.

The impugned judgment and order dated 27.08.2020 passed by the learned Joint District Judge, 1st Court, Sirajganj in Miscellaneous Appeal No. 19 of 2019 dismissing the appeal and thereby affirming the judgment and order dated 28.04.2019 passed by the learned Assistant Judge, Rayganj, Sirajganj in Miscellaneous Case No. 08 of 2016 rejecting the application under Order 9 Rule 13 of the Code of Civil Procedure, 1908 is set-aside. Miscellaneous Case No.08 of 2016 filed under Order 9 Rule 13 of the Code of Civil Procedure, 1908 is allowed, and the ex-parte judgment and decree dated 12.08.2014 passed in Partition Suit No.80 of 2014 is hereby set aside. The original Partition Suit No.80 of 2014 is hereby restored to its original file and number.

Send a copy of this judgment along with the LCR to the Court below at once.

(TUHIN BO)