

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

**Present:**

**Mr. Justice Md. Bashir Ullah**

**Civil Revision No. 2409 of 2020**

In the matter of:

An application under Section 115(4) of the  
Code of Civil Procedure, 1908

And

In the matter of:

Md. Abdul Gani and others

---Plaintiffs-Opposite parties-Petitioners.

-Versus-

Jobair Alam @ Arman and others

---Defendants-Petitioners-Opposite parties.

Mr. Md. Shahidul Islam, Advocate

---- For the Petitioners.

Mr. Mohammad Ali, Advocate

--- For the Opposite Parties.

**Heard on: 15.11.2023**

**Judgment on: 16.11.2023**

This Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 16.09.2020 passed by the Additional District Judge, First Court, Tangail in Civil Revision No. 28 of 2014 rejecting the revisional application and thereby affirming the judgment and order dated 02.06.2014 passed by the Senior Assistant Judge, Sadar Court, Tangail in Miscellaneous Case No. 72 of 2004 allowing the application under Order 9 Rule 13 of the Code of Civil Procedure and set

aside the preliminary decree dated 12.08.2002 and final decree dated 28.04.2003 passed in Title Suit No.251 of 1994 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The facts, relevant for the disposal of the Rule, in brief, is that the predecessors of the petitioners as plaintiffs instituted Title Suit No.14 of 1982 in the Court of the then Sub-ordinate Judge, Second Court, Tangail for partition of land described in the schedules to the plaint, praying for their saham of 5.62½ decimels of land out of 26.66 decimels. Subsequently, the suit was transferred to the court of the Senior Assistant Judge, Sadar Court, Tangail and renumbered as Title Suit No. 251 of 1994. The suit was ready for hearing but none of the defendants appeared before the Court. So, the learned Senior Assistant Judge, Sadar Court, Tangail decreed the suit *ex parte* in preliminary form on 12.08.2002. Thereafter the plaintiff filed Decree Execution case No. 9 of 2003 and the final *ex parte* decree was delivered on 28.04.2003. The defendant Nos. 140,156 and 157 of the partition suit came to know about the *ex parte* decree on 09.08.2004 and filed Miscellaneous Case No. 72 of 2004 on 25.08.2004 before the Senior Assistant Judge, Sadar Court, Tangail under Order 9, Rule 13 of the Code of Civil

Procedure praying for setting aside the preliminary and final *ex parte* decree dated 12.08.2002 and 28.04.2003 respectively passed in Title Suit No. 251 of 1994 alleging *inter alia* that the summons of the suit was not served upon them. They were not aware of the judgment and decree. The plaintiffs as opposite party Nos. 1, 3 and 4 contested the Miscellaneous Case by filing a written objection stating that the petitioners-defendants were aware of the judgment and decree and they received the summons through his full brother, but they did not contest the suit. The Senior Assistant Judge, Sadar Court, Tangail framed as many as two issues for the determination of the dispute between the parties. The petitioners examined as many as three witnesses and opposite parties also examined three witnesses to prove their respective cases. Upon hearing both the parties, considering the evidence on record the Senior Assistant Judge, Sadar Court, Tangail allowed the Miscellaneous Case on 02.06.2014.

Challenging the impugned judgment and order passed by the Senior Assistant Judge, Sadar Court, Tangail in Miscellaneous Case No.72 of 2004, the plaintiffs as petitioners preferred Civil Revision No. 28 of 2014 before the District Judge, Tangail. Subsequently, the Civil Revision was transferred to the Additional District Judge, First Court, Tangail. Upon hearing the

parties the Additional District Judge, First Court, Tangail rejected the Civil Revision and upheld the order dated 02.06.2014 passed by the Senior Assistant Judge, Sadar Court, Tangail in Miscellaneous Case No. 72 of 2004.

Being aggrieved by and dissatisfied with the judgment and order passed by the learned Additional District Judge, First Court, Tangail, the plaintiffs as petitioners filed the instant revisional application before this Court and upon hearing this Court granted leave and issued this Rule.

Mr. Md. Shahidul Islam, learned Advocate appearing on behalf of the petitioners submits that the defendants as petitioners filed Miscellaneous Case No. 72 of 2004 to harass the plaintiffs though they have no right, title or interest in the suit land. He further submits that the summons was duly served upon the defendants following the provision of Order 5 Rule 15 of the Code of Civil Procedure. He next submits that it is clearly mentioned in the Limitation Act that under Order 9 Rule 13 of the Code of Civil Procedure, a Miscellaneous case is to be filed within 30 days from the date of *ex parte* decree or date of knowledge. *Ex parte* decree was passed on 12.08.2002 and final decree was passed on 28.04.2003 and the opposite parties got knowledge about the *ex parte* decree on 20.07.2004 from Abdur

Rashid (Pt.W-2) but the Miscellaneous case was filed on 25.08.2004 that is after 05 days out of time and thus the Miscellaneous Case was barred by limitation.

On the other hand, Mr. Mohammad Ali, learned Advocate appearing on behalf of the opposite parties submits that Md. Sekandar Ali was defendant No.140, S.M. Jahid Alam alias Pintu Miah was defendant No. 157 and Mosammat Jarina Khatun was defendant No.156. The summons was not served upon them. The process server (OPW-2) served the summons of the defendant Nos.140, 156 and 157 on S.M. Shafikul Islam. The said defendants did not reside in a common house with S.M.Shafikul Islam at the time of serving of summons. S.M.Shafikul Islam was not authorized agent to receive the summons. Since the summons was not duly served upon the defendant Nos. 140,156 and 157 there is no illegality in the order dated 02.06.2014 passed by the Senior Assistant Judge, Sadar Court, Tangail in Miscellaneous case No.72 of 2004 as well as in the judgment and order dated 16.09.2020 passed by the Additional District Judge, 1<sup>st</sup> Court, Tangail.

He further submits that Shafikul Islam is a vital witness but he was not examined by the plaintiffs-opposite parties-petitioners.

Heard the learned Advocates for both sides, perused the Civil Revision, judgment and order and other materials on record.

Pt.W 1, Md. Sikander Ali stated in his deposition, “২৫১/৯৪ নং বাটোয়ারা মোকদ্দমায় আমাদের নামীয় সমন আমার ছোট ভাই এ.এস.এম.শফিকুল আলম স্বাক্ষর দিয়া রাখে, আমাদের উপর সমন সঠিক ভাবে জারী করা হয় নাই। আমার ছোট ভাই এ.এস.এম.শফিকুল আলমের সহিত দীর্ঘ দিন যাবত আমার শত্রুতা আছে। ইং ২০/০৭/২০০৪ তারিখ সকাল অনুমান ৮.০০ টার সময় আসিয়া আমার বর্গাদার আব্দুর রশিদ আমার বাসায় আসিয়া জানান যে, আমাদের স্বত্ব দখলীয় সম্পত্তিতে প্রতিপক্ষ ইন্স ছ আলী জমির দখল নিবে বলিয়া প্রকাশ করিয়াছে। অতঃপর ২২/০৭/২০০৪ ইং তারিখে আমি আদালতে আসিয়া তালাস অনুসন্ধান করিয়া ০৯/০৮/২০০৪ ইং তারিখে রায় ও ডিক্রির জাবেদা নকল প্রাপ্ত হইয়া রায় ও ডিক্রি সম্পর্কে অবগত হই। আমি উক্ত ২৫১/৯৪ নং বাটোয়ারা মোকদ্দমা সম্পর্কে ইতোপূর্বে জানিতে পারি নাই। উক্ত ২৫১/৯৪ নং বাটোয়ারা মোকদ্দমার বাদীপক্ষ আমার বাসস্থানের ঠিকানা জানিত কিন্তু তাহা সত্ত্বেও আমার বাসস্থানের ঠিকানায় সমন জারী না করিয়া আমার পৈত্রিক বাড়ীর ঠিকানায় আমাদের অজ্ঞাতে অসাক্ষাতে আমার ছোট ভাইয়ের মাধ্যমে সমন জারীর কথা উল্লেখ করিয়াছেন। আমাদের উপর সমন জারী করা হইলে আমরা উক্ত ২৫১/৯৪ নং বাটোয়ারা মোকদ্দমায় প্রতিদ্বন্দ্বিতা করিতাম।”

OPW-2, Abul Kashem, the process server in his deposition stated that বাটোয়ারা মোকদ্দমার বিবাদী সেকান্দার আলীর নাম ১৪০ নং বিবাদী হিসেবে উল্লেখ আছে। ১৫৭ নং বিবাদী হিসেবে এস.এম. জাহিদ আলম, ১৫৬ নং বিবাদী হিসেবে মোছাঃ জরিলা খাতুনের নাম উল্লেখ আছে। তারা এ মামলার ১-৩ নং প্রার্থী। ১৪০ ও ১৫৭ নং বিবাদীর যথাক্রমে ভাই ও চাচা সমন গ্রহণ করেন। ১৪১ নং বিবাদী

সেকান্দরের ভাই। ১৫৬ নং বিবাদীর সমন তার দেবর ১৪১ নং বিবাদী গ্রহণ করেন। এইভাবে আমি জারী করি। সে সমনে জারী কারক হিসেবে আমার সই আছে। In cross-examination the process server deposed that ১৪০,১৫৬ ও ১৫৭ নং বিবাদীর উপর সমন ব্যক্তিগতভাবে জারী করিনি। ১৪১ নং বিবাদী শফিকুলের কাছে দিয়া আসি। আমি জিজ্ঞাসা করলে বাড়িতে নাই বলে।

OPW-1, Md.Abdul Gani in cross-examination admitted that সত্য যে তাদের নামে ব্যক্তিগতভাবে নোটিশ পায়নি। প্রার্থীর ভাই পায়। প্রার্থীর ভাই শফিকুলকে সাক্ষী হিসেবে আনিনি।

It is divulged from the above mentioned evidence that although S.M.Shafiqul Islam is a brother of Sikandar Ali, they resided separately. They were not living in a common house when receiving the summons. It transpires that there was enmity between Sikandar Ali and S.M. Shafiqul Islam. So, it is apparent that S.M. Shafiqul Islam was not an authorized agent empowered to accept service of the summons on behalf of defendants No. 140,156 and 157 with any document showing such authorization under Order 3 Rule 2 of the Code of Civil Procedure. OPW-2, the process server admitted in his evidence that he served the summons of defendants No.140, 156 and 157 on S.M. Shafiqul Islam. Hence, it is evident that the service of summons to S.M. Shafiqul Islam was not a due service to bind the defendants. Thus, the plaintiffs-petitioners failed to prove that summonses

were duly served upon Sikandar Ali (defendant No.140), S.M.Jahid Alam alias Pintu Miah (defendant No.157) and Mosammat Jarina Khatun (defendant No.156). Since it has been found that the provision contained in Order 5, Rule 15 of the Code of Civil Procedure has no application to the facts and circumstances of the case, no relief can be claimed by the plaintiff-opposite parties-petitioners relying on that provision. In ***Osir Uddin Mandal and others vs. Azizur Rahman***, reported in 39 DLR (1987) 403, this Court observed that law in this regard enjoins that service of summons on the defendant is to be proved strictly according to law and, if proof is lacking in this regard, mercy or plea of ends of justice cannot come in rescue of the aggrieved party.

Having considered materials on record, facts, circumstances and legal and factual aspects of the matter, I am of the opinion that the Senior Assistant Judge, Sadar Court, Tangail and the Additional District Judge, 1<sup>st</sup> Court, Tangail rightly held that service of summons was not duly served upon the defendants in accordance with law and hence, they legally set aside the *ex parte* decree following the provisions of Order 9, Rule 13 of the Code of Civil Procedure.



I get strong support from the decision passed in *Abdur Rashid and another Vs. Abdul Barik and another*, reported in 35 DLR (AD) (1983) 162, the Apex Court held:

"Under Order IX, Rule 13 of the Code, if the summons is not duly served on the defendant, that is a good ground for setting aside on *ex parte* decree. On a perusal of the relevant provisions of the Code of Civil Procedure it would be apparent, that the due service of summons is an essential condition, which must be satisfied before the court can proceed to give a judgment and order 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 an *ex parte* decree will be set aside even if the defendant had knowledge of the institution of a suit. "

It appears from the evidence of Pt.W 1, Md. Sikandar Ali that bargadar Abdur Rashid communicated to him on 20.07.2004 that Innash Ali had got a decree and he would take possession of the suit land. Pt.W-2, Abdur Rashid corroborated the evidence adduced by Pt.W.1. Upon receipt of the information the defendant-petitioner-opposite parties went to the Court on 22.07.2004 and obtained the certified copy on 09.08.2004 and filed the application under Order 9 Rule 13 on 25.08.2004.

It is evident that the defendant got definite knowledge of the *ex parte* decree on 09.08.2004 after obtaining certified copy, thereafter he filed the Miscellaneous Case on 25.08.2004 under Order 9 Rule 13 of the Code of Civil Procedure within 30 days from the date of knowledge of the *ex parte* decree as per provision of Article 164 of the Limitation Act. To appreciate this point it would be better if the said Article is quoted below. It runs as follows:

Description of suit	Period of limitation	Time from which period begins to run.
164. By a defendant, for an order to set aside a decree passed <i>ex parte</i> .	Thirty days	The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree.

It is evident that, Article 164 of the Limitation Act provides that if the summons is not served then limitation will run from the date of knowledge.

My considered view is that the Miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure was filed within 30 days of the date of knowledge and the same is not barred by limitation. Considering this aspect of the matter I am unable to accept the contention of the learned Advocate for the petitioner.

In my view, the Senior Assistant Judge, Sadar Court, Tangail has rightly and legally arrived at the finding that the service of summons could not be proved by the plaintiffs to maintain the *ex parte* decree and the Additional District Judge, 1<sup>st</sup> Court, Tangail rightly rejected the civil revision affirming the judgment and order dated 02.06.2014 passed in Miscellaneous case No. 72 of 2004.

I find no merit and substance in the instant Civil Revision.

So, the Rule is discharged.

There is no order as to costs.

Title suit No. 251 of 1994, pending in the learned Senior Assistant Judge, Sadar Court, Tangail is hereby restored to its file and number setting aside the *ex parte* decree to decide the dispute on merit which can only meet the real justice. The Court is also directed to dispose of the suit expeditiously.

Let a copy of the judgment and order along with Lower Court Records be transmitted to the Court concerned forthwith.

**(Justice Md. Bashir Ullah)**

*Aziz/abo*