

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

FIRST MISCELLANEOUS APPEAL No. 218 OF 2022.

Alhaj Mozammel Hoque Bhuiya

----- Petitioner-Appellant.

-Versus-

Md. Humayun Kabir

.....Opposite Party Respondent.

Mr. Md, Salim Reza Chowdhury, Advocate

..... For the appellant.

Mr. Md. Shamsul Haque, Advocate

.....For the respondent.

Heard on: 21.04.2024, 07.05.2024.

Judgment on: 12.05 .2024.

Sashanka Shekhar Sarkar, J

This appeal is directed against the judgment and order dated 31.05.2022 passed by learned Joint District Judge, 1st Court, Dhaka dismissing Miscellaneous Case No. 16 of 2020 filed under Order IX rule 13 of the Code of Civil Procedure.

The facts, necessary for disposal of the appeal, in short, are that respondent No.1 as plaintiff instituted Title Suit No. 843 of 2011 impleading the appellant as defendant No. 1 for declaration of title in respect of the suit land, contending inter alia that the plaintiff managed to obtain a collusive exparte decree on 11.05.2014 against defendant No. 1 by suppressing

summons. Defendant No. 1 had no knowledge about the suit and ex parte decree. He for the first time came to know about the ex parte decree when he was served upon a written notice by the plaintiff for mutating his name. Thereafter, he filed the Miscellaneous Case for setting aside ex parte decree under order IX rule 13 of the Code after 18 days from the date of his knowledge.

The plaintiff contested the case by filing written objections. The learned Joint District Judge, 1st Court, Dhaka upon hearing of the parties and perusing the evidence and materials on the records dismissed the Miscellaneous case vide Judgment and order dated 31.05.2022 as against that defendant No.1 has preferred this appeal.

Mr. Salim Reza Chowdhury, the learned Advocate, appearing for the appellant submits that the plaintiff managed to obtain a collusive ex parte decree against defendant No. 1 without serving any summons and notices upon him. The summons and notices alleged to have been served upon defendant No. 1 was done in collusion with the process server. Defendant No.1 filed the Miscellaneous Case for setting aside ex parte decree under Order IX rule 13 of the Code within time of his knowledge. Mr. Salim Reza further submits that it is the

duty of the plaintiff to prove that the summons upon defendant No. 1 was duly served but he totally failed to discharge his duties as the law provides. He lastly submits that defendant No. 1 did not do any delay in filing the case under Order IX rule 13 of the Code and as such, the impugned judgment and order is liable to be set aside. In support of his submissions learned Advocate placed reliance upon the case of Hassan Din and another –Vs- Jalal Din and 2 others reported in 1991 CLC -33, whereat settled that “Application for setting aside ex-parte decree which involved decision on disputed question of facts and law ought not to have been disposed of summarily without proper inquiry by the Court.” In the case of Wazed Ali Sarder(Md)-Vs- Md. Afsanuddin Sarder and others reported in 48 DLR(AD)159 whereat settled that “Once the defendant denies service of summons upon him, whole onus shifts to the plaintiff who has to prove satisfactorily that summons was in fact duly served.” In the case of Soni Gopal Das -Vs- Mohammad Habibullah reported in 10 MLR (AD) 350 whereat settled that “ In a case where the exparte decree is challenged on the ground of non-service of summons in the suit the onus lies upon the plaintiff to prove the service of summons by cogent evidence and by examination of the

disputed signature of the recipient by comparison.” In the case of Md. Hyder Ali Mia – Vs- Razia Begum and others reported in 1 BLT (AD), Page-1, whereat settled that “ To prove the service of summons were duly served, the process server and the attesting witness should be examined if the allegation is brought by defendant that the suit was decreed *exparte* without serving summons upon the defendant.”

In the case of Md. Insan Ali –Vs- Mir Abdus Salam reported in 40 DLR(AD)-193, whereat settled that “Onus exclusively lies upon the plaintiff to prove that the summons was duly served.” In the case of Abdur Rashid and others –vs- Abdul Barik and another reported in 35 DLR (AD) 162 it is held that “ Due service of summons on the defendant being essential and when the court is satisfied that there was no due service it is bound to set aside an *exparte* decree.” In the case of Abul Khair Meah –vs- Abdul Latif Sarder reported in 32 DLR (AD) 167 it is held that “ *exparte* decree by suppressing of summons, decree fraudulently obtained is a nullity.

On the other hand, Mr. Md. Khalilur Rahman, the learner Senior Council appearing for the respondent submits that the application of defendant No. 1 for setting aside *exparte* decree under order IX rule 13 was hopelessly barred

by limitation. The plaintiff duly issued summons and served notices upon defendant No. 1 as per law by both registered post and personal service by the process server. The declaration of the process server endorsing the service of summons was done under order V rule 19(a) of the Code need not to be proved by adducing any evidence as had been done in compliance with the latest amended laws. The documentary evidence with regard to service of summons i.e. the service through registered post as well as personal service have been certified by the process server is to be considered as a fact of judicial notice which need not be proved under section 56 and 57 of the Evidence Act and has to be considered its existence under section 114 of the Evidence Act. Mr. Rahman lastly submits that the plaintiff by the above documentary evidences has proved that the service of summons upon defendant No. 1 was served following the stipulated legal procedure and the Court has decreed the suit exparte finding the service exhausted by both summons and notices upon the defendant No. 1. So to nullify the exparte decree, the burden of proving non service of summons is entirely lies upon defendant No. 1 which he failed and as such the trial court rightly dismissed the case.

Mr. Md. Khalilur Rahman in support of his submissions has placed reliance upon the following decisions. The case of Abdur Rob Mollah –Vs- Shahabuddin Ahmed and others reported in 13 MLR (AD)-319 whereat settled that, “Summons or notice sent to the defendant under Order V rule 19B(2) by registered post with acknowledgement due slip when received back with endorsement of postal peon as “refused” is held to be due and proper service. The said summons or notices or letter sent to the person at his correct address by registered post and returned with the endorsement of the postal peon as “refused” has presumption of due service of the same.”

On hearing of both the parties, perusing the impugned judgment and order and considering the settled principles referred to above in the case decisions, it is observed that as defendant No. 1 agitated that the plaintiff managed to obtain an exparte decree without serving any summons and notice upon him and the papers so produced in the name of good service are all created in collusion with the office bearer and process server of the court which the plaintiff claimed to be genuine and proper and was done in compliance with law as prescribed under order V rule 19(B) of the Code of Civil

Procedure, the burden of proving the service of summons was first of all heavily lies upon the plaintiff. The defendants allegation is that the plaintiff managed to obtain exparte decree without serving summons which the plaintiff has to prove false by evidence. Record shows that the plaintiff did not take such steps to prove that proper service was done in the suit. When the allegation of the defendant is that no service of summon was done then it was the duty of the plaintiff to discharge first that the allegation of non-service of summons was false by adducing evidence but practically the plaintiff did not adduce any evidence to discharge the primary duty as the law shifts upon him. The process server and attesting witnesses should have been examined to prove that the service was duly done but since the plaintiff did not do so, the defendant's obligation to prove the summons were not served dis not arise.

In course of hearing Mr. Rahman imparted that in the mean time, the exparte decree debtor has transferred the property to others and the transferee and decree holder have filed suit and counter suit against each other. These are all practically disputed questions of facts and cannot be resolved without evidences. It is settled principle of law that the right to

challenge the ex parte decree cannot be extinguished even after transfer of property. The judgment debtor is entitled to apply even though he sold the property to the third person held ; in the case of Bayjit –vs- Monnu AIR 159 All India 251. So the arguments led by Mr. Rahman that the right of the appellant on the suit property has already been extinguished by way of transfer to others and he has no right to challenge the ex parte decree is not sustainable in law.

In this particular case two questions are mooted :

The primary burden lies upon whom when the allegation is no service done; since the defendant alleged that the plaintiff obtained ex parte decree without serving any summons, the primary duty cast upon the plaintiff to discharge that the summons were duly served. The case record shows that the plaintiffs did not at all take any steps to discharge his primary duties. So the burden of proving that the summons were not served must not lie upon the defendants. “Where due service of summons is challenged, the onus is upon the plaintiff to prove that the summons were duly served” -1 BLC (AD) 179. “Proper service of summons is a pre-requisites of sustainability of ex parte decree”-2 MLR 383,

To what extent the question of limitation in adjudicating a Miscellaneous Case for setting aside ex parte decree under Order IX rule 13 is relevant;

Application has to be filed within 30 days from the date of ex parte decree, or where the summons has not been duly served, 30 days from the date when the defendant came to know about the ex parte decree.

The facts remains that defendant No.1 filed Miscellaneous Case for setting aside ex parte decree 18 days after his knowledge which within the period of limitation as provided under Article 164 of the Limitation Act.

It has been settled in the case of Bangladesh –vs- Mashin Rahman reported in 50 DLR (AD) 205 that “The bar of limitation will not be applicable when some elements of fraud in obtaining the ex parte decree are found.”

So, on considering the facts and the decisions discussed above we unhesitantly come to the conclusion that the plaintiff could not prove that summons upon defendant No. 1 was duly served and as such, the trial court committed illegality in dismissing the miscellaneous case. Accordingly, the ex parte decree is liable to be set aside.

So, we find merit in the appeal.

In the result, the appeal is allowed. The impugned judgment and order dated 31.05.2022 passed by learned Joint District Judge, 1st Court, Dhaka are set aside. Miscellaneous case No. 16 of 2020 filed under order IX rule 13 of the Code of Civil Procedure is allowed. The exparte judgment and decree dated 11.05.2024 are set aside. The suit is restored to its original file and the number and the trial court is directed to dispose of the suit expeditiously, in accordance with law.

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

Communicate at once.

(Mr. Justice Sashanka Shekhar Sarkar)

I agree.

(Justice Md. Badruzzaman)