Bench:
Mr. Justice Md. Ali Reza

Civil Revision No. 3297 of 2022
A. Awal and others
.....petitioners
-Versus-
Md. Jaher Ullah and others
.....opposite parties

Mr. Palash Mallick, Advocate
.....for the petitioner

Mr. Golam Rabbani, Advocate
.....for opposite parties

Heard on: 30.06.2026, 05.07.2026, 20.07.2026 and 28.07.2026

Judgment on: 11.08.2026

In the instant revision Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 21.06.2022 passed by the Senior District Judge, Kurigram in Miscellaneous Appeal Number 20 of 2017 affirming the judgment and order dated 06.09.2017 passed by the Assistant Judge, Burungamari, Kurigram in Miscellaneous Case Number 14 of 2014 should not be set aside and/or such other or further order or orders be passed as to this Court may seem fit and proper.

The petitioners filed Miscellaneous Case Number 14 of 2014 on 18.08.2014 before the Court of the Assistant Judge,

Bhurungamari, Kurigram under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the exparte judgment and decree dated 05.06.1991 passed in Other Suit Number 86 of 1986.

The case of the petitioners is that the present opposite parties as plaintiffs filed Other Suit Number 86 of 1986 for partition in which the present petitioners were impleaded as defendants 57, 58, 61, 62, 63, 75, 76, 81 and 82. According to the petitioners no summons was ever served upon them. It is alleged that in collusion with the process server and the postal peon the plaintiffs procured false reports of service and thereby practised fraud upon the Court by obtaining the exparte decree dated 05.06.1991 behind their back and without their knowledge. Had they received summons they would have appeared in the suit and contested the same. The exparte decree has caused them irreparable loss and injury. They further alleged that they had no knowledge of the decree until 10.08.2014 when opposite party 1 asked them to vacate the suit land claiming title under the decree. Thereafter they made enquiries in Court and came to know about the exparte decree and filed the present miscellaneous case.

The present opposite parties contested the case by filing written objection denying all the material allegations made in

the application. Their case is that summonses upon the present petitioners were duly served in the original suit and the reports of service were duly accepted by the Court. Thereafter a preliminary decree for partition was passed on 05.06.1991. The contesting defendants preferred an appeal which was allowed. Against the appellate judgment the present opposite parties preferred a civil revision before the High Court Division and succeeded. The decree was thereby restored. The contesting defendants thereafter preferred Civil Revision for Leave to Appeal before the Appellate Division but failed. Subsequently a Commissioner effected partition by allotting separate saham to the respective parties. According to the opposite parties the present petitioners were fully aware of all these proceedings and the present miscellaneous case has been filed on false and fabricated allegations only to frustrate the decree.

The Assistant Judge framed three issues for determination. The petitioners examined two witnesses and the opposite parties also examined two witnesses. Upon consideration of the evidence on record the Assistant Judge by judgment and order dated 06.09.2017 dismissed Miscellaneous Case Number 14 of 2014.

Being aggrieved the petitioners preferred Miscellaneous Appeal Number 20 of 2017 before the District Judge, Kurigram.

By judgment and order dated 21.06.2022 the appellate Court dismissed the appeal and affirmed the judgment of the trial Court.

Challenging the concurrent findings of the Courts below petitioners 1 to 5 have preferred this revisional application and obtained the present Rule on 07.08.2022.

Mr. Palash Mallick, the learned Advocate appearing for the petitioners submits that the Courts below committed serious error of law resulting in failure of justice by dismissing the miscellaneous case upon erroneous appreciation of the evidence on record. He submits that collusion is apparent from the record itself inasmuch as plaintiff 1 of the original suit allegedly received summons on behalf of defendant 79. According to the learned Advocate the summonses were not duly served in accordance with the provisions of Order V Rules 12, 13, 17, 19 and 19A of the Code of Civil Procedure read with Rules 68. 82, 83 and 84 of the Civil Rules and Orders. Therefore the impugned judgments are illegal and liable to be set aside.

The learned Advocate further submits that under Order 9 Rule 13 of the Code of Civil Procedure once the defendants satisfy the Court that summons was not duly served the Court is under a legal obligation to set aside the ex parte decree. In such a case the question whether the defendants had knowledge of the

institution of the suit is wholly irrelevant. He further submits that the petitioners discharged their initial burden by adducing sufficient evidence and thereafter the burden shifted to the opposite parties to prove that summonses had in fact been duly served. According to him the plaintiffs of the original suit were legally bound to prove due service of summons but both the Courts below failed to appreciate this settled principle of law. He therefore prays for making the Rule absolute.

On the other hand learned Advocate Mr. Golam Rabbani appearing for the opposite parties submits that both the Courts below concurrently found that the petitioners had been duly served with summons both through the process server and by registered post. He submits that upon proper consideration of the record and evidence both the Courts below rightly held that the summonses were duly served upon the defendants-petitioners and the allegation of fraud was not supported by any evidence adduced on behalf of the petitioners. Consequently the miscellaneous case was rightly dismissed and the Courts below committed no error of law occasioning any failure of justice.

The learned Advocate further submits that the return of service contains the declarations made by the process server in due discharge of his official duty. Therefore there was no legal requirement to examine the process server as a witness. He

further submits that some of the defendants personally received the summonses from the process server while others received the same through their family members who acknowledged receipt by signing the service return. The postal receipts were also accepted by the Court. Accordingly there was no legal impediment for the trial Court to proceed with the suit after being satisfied that the summonses were duly served in accordance with the provisions of Order V Rule 19B(2) of the Code of Civil Procedure as inserted by the amendment of 1983.

He next contends that under Sections 101-103 of the Evidence Act the burden squarely lies upon the defendants-petitioners to prove that the summonses were not duly served and a mere denial of service is wholly insufficient to discharge such burden. He further submits that under Section 114 illustration (e) of the Evidence Act the Court is entitled to presume that official and judicial acts have been regularly performed. Since the summonses were also sent by registered post and the postal acknowledgements were accepted by the Court such presumption clearly operates in favour of the validity of the service.

He lastly submits that the petitioners had knowledge of the suit and service of summons was completed under Order 5 Rule 31 of the Code of Civil Procedure and the original decree was

ultimately affirmed by the Appellate Division after exhausting all appellate remedies by the contesting defendants. In such circumstances a bare allegation that summonses had not been duly served cannot entitle the petitioners to have the exparte decree set aside. He accordingly prays for discharge of the Rule.

I have heard the learned Advocates for the parties and perused the revisional application, the written objection, the evidence adduced by the parties, the service return, the postal receipts, the orders passed in the original suit and the judgments of the Courts below.

The principal question for determination is whether the petitioners have been able to establish that summonses were not duly served upon them in Other Suit Number 86 of 1986 and whether the ex parte preliminary decree dated 05.06.1991 is liable to be set aside under Order 9 Rule 13 of the Code of Civil Procedure.

It appears from the record that the opposite parties as plaintiffs filed Other Suit Number 86 of 1986 on 26.11.1986 for partition. In the said suit defendants 16/67-74/93 contested the suit. The plaintiffs claimed title as heirs of the C.S. recorded owner whereas the contesting defendants claimed title on the basis of settlement and auction. The suit was decreed on 05.06.1991in preliminary form.

The contesting defendants thereafter preferred Other Appeal Number 77 of 1991. The appeal was allowed on 11.06.1997. Against the said judgment the plaintiffs preferred Civil Revision Number 4660 of 1997 before this Court. The Rule was made absolute by judgments dated 06.07.2009 and 07.07.2009 and the decree in the suit was maintained. Against the said judgment the defendants preferred Civil Petition for Leave to Appeal Number 2335 of 2009 before the Appellate Division and the same was dismissed on 20.04.2014. Thereafter the learned Advocate Commissioner submitted his report on 17.09.2014 and the final decree was passed on 12.10.2014. Subsequently Execution Case Number 2 of 2021 was filed on 07.02.2021 and the said execution proceeding is presently stayed by an order of this Court dated 07.08.2022.

The petitioners have invoked Order 9 Rule 13 of the Code of Civil Procedure for setting aside the exparte decree.

The provisions of Order V of the Code are relevant in this regard. Rule 18 requires the serving officer to endorse or annex to the original summons a return stating the time and manner in which the summons was served and the circumstances in which it was served.

Rule 19 empowers the Court to examine the serving officer where necessary and to make such further inquiry as may be required. Rule 19A further provides that a declaration made and subscribed by the serving officer shall be received as evidence of the facts as to the service or attempted service of summons. Thus the law does not make the examination of the process server an indispensable requirement in every case where a duly recorded declaration of service is available on the record.

It appears from the service return dated 29.12.1987 that the process server recorded the declaration in the return in accordance with law. The return further shows that summonses upon contesting defendants 67-74 were served upon their brothers defendants 68 and 70 who were found on their behalf. It also appears that summons upon present petitioner 58 namely defendant Abdur Rashid was served upon present petitioner 57 namely defendant Abdul Awal. Likewise summons upon present petitioner 81 namely defendant Danez Ali was served upon present petitioner 82 namely defendant Lal Mia. It shows that the concerned defendants were not strangers to the litigation and summonses were received on their behalf by persons connected with them. The petitioners have not been able to discredit the said return by any reliable evidence.

The learned Advocate for the petitioners has relied upon the same service return and submits that collusion is apparent because plaintiff 1 of the original suit himself received summons on behalf of defendant 79. In my view the said circumstance may be relied upon to question the regularity of service upon defendant 79. But it does not by itself establish collusion or fraud.

It is particularly significant that defendant 79 was the mother of plaintiff 1 of the original suit. Therefore the mere fact that plaintiff 1 received summons on behalf of his mother cannot without further evidence establish that the plaintiffs in collusion with the process server practised fraud upon the Court. The learned Advocate may legitimately question whether service upon defendant 79 was affected in strict compliance with the procedural requirements. But the said circumstance standing alone cannot establish the allegation of conspiracy or fraudulent manipulation of the judicial process.

Fraud and collusion are serious allegations and must be established by cogent evidence. In the present case the petitioners have not adduced any independent or convincing evidence showing that the plaintiffs or the process server or the postal authorities acted in collusion or deliberately placed false service reports before the Court.

There is another important aspect of the matter. The record contains postal receipts bearing Numbers 993, 978, 982, 983, 979, 992 and 990 showing that summonses were sent through the postal authorities to defendants 57 Abdul Awal, 58 Abdur Rashid, 61 Lablu. 62 Jahangir, 63 Rezia, 76 Mujibor and 75 Sarbesh respectively. Therefore the record does not merely contain the process server's return. It also contains contemporaneous postal materials showing that summonses were sent to the concerned defendants by post.

Order V Rule 19B contemplates service of summons by registered post with acknowledgment due in addition to the ordinary mode of service. Where the acknowledgment purporting to bear the signature of the defendant or his agent is received or the postal article is returned with an endorsement of refusal the Court may declare that the summons has been duly served. The Rule further provides for a declaration of due service in the circumstances specified therein even where the acknowledgment has not been received within the prescribed period despite proper addressing with prepayment and dispatch by registered post.

In the present case the postal receipts coupled with the orders passed by the original Court materially support the case of due service. The petitioners have not produced any evidence

to establish that the postal records are fabricated or summonses were never dispatched.

It is also significant that in Order Number 30 dated 21.10.1989 passed in the original partition suit the Court recorded that summonses upon defendants 1-14/16-58/60-91 had been duly served. Thus the service return as well as the postal records and the order of the Court in the original suit when considered together form a consistent body of documentary evidence supporting due service.

Section 114 illustration (e) of the Evidence Act also permits the Court to presume that judicial and official acts have been regularly performed. The petitioners have not adduced sufficient evidence to rebut the presumption arising from the official records in the present case. The plaintiffs have duly discharged their initial onus under Sections 101-103 of the Evidence Act.

In examination-in-chief P.W.-1 stated that he knew nothing regarding service of summons and the petitioners had no prior knowledge of the exparte decree. He further stated that they came to know of the matter in about October 2014 when the Commissioner told them that the opposite parties had obtained land and asked them to vacate the same.

But in cross-examination PW-1 stated that they had knowledge of the original suit earlier. He further stated that he came to know of the decree after the Commissioner went to his house at about noon. This evidence is materially inconsistent with the statements made in paragraphs 2 and 3 of the application under Order 9 Rule 13. In the application the petitioners stated that they came to know of the decree from opposite party 1 on 10.08.2014 when opposite party 1 disclosed the decree and asked them to vacate the suit land.

Thus the petitioners have taken inconsistent positions regarding the source and date of their alleged knowledge. Such contradiction is not a minor discrepancy. It goes to the root of their plea that they had no knowledge of the decree until 10.08.2014.

More importantly PW-1 admitted that they had knowledge of the original suit earlier. Such admission is wholly inconsistent with the broad assertion that the petitioners remained completely unaware of the proceeding until 2014.

The petitioners have also not explained why they did not take any step to ascertain the progress of the litigation despite the service materials dating back to 1987 and despite the fact that the original partition suit was actively contested by other

defendants and subsequently travelled through the appellate process up to the Appellate Division.

It is also noteworthy that the petitioners admittedly belong to the same locality and shared a common interest with the contesting defendants in respect of the subject matter of the original partition suit. This circumstance by itself may not establish knowledge. But when considered together with the service return, the postal records, the order dated 21.10.1989 and the admission of PW-1 it becomes a relevant surrounding circumstance which further weakens the plea of complete ignorance.

As regards petitioner 2 namely Rezaul Karim I have not been able to ascertain from the record placed before me whether he was a party to the original suit. Therefore no definite finding regarding his service in the original suit can safely be recorded. This circumstance however does not affect the position of the other petitioners whose status as defendants and whose service are supported by the materials on record.

The distinction between an allegation of irregular service and an allegation of fraud must also be maintained. Even assuming that some aspect of service upon a particular defendant could be questioned but such circumstance would not by itself prove that the decree was obtained by fraud or

collusion. The latter allegation requires cogent evidence which is absent in the present case.

I therefore find that the principal factual foundation of the application under Order 9 Rule 13 is contradicted by the official records and the petitioners' own evidence. The allegation of non-service has not been established.

The question of limitation may also be considered as an additional ground. Article 164 of the Limitation Act prescribes 30 days for an application to set aside an ex parte decree. Where summons was duly served the period runs from the date of the decree. Where summons was not duly served the relevant period runs from the date of knowledge of the decree.

In the present case the petitioners pleaded that they came to know of the decree on 10.08.2014 and filed the Miscellaneous Case on 18.08.2014. Therefore if that plea were accepted as correct the application could not be held barred merely on the basis of those two dates. But the evidence on record does not support that plea. Rather the service return and the other documentary evidence show knowledge of the original proceeding much earlier. PW-1 also admitted earlier knowledge of the suit.

Although no separate issue on limitation was framed by the trial Court the question arises from the materials already on

record and is closely connected with the petitioners' own plea regarding the date of knowledge. It involves both questions of law and fact. Nevertheless I consider it unnecessary to make limitation the sole basis for disposal of the Rule because the petitioners have already failed to establish non-service of summons and fraud. The question of limitation therefore constitutes an additional circumstance against the petitioners.

The original partition suit was filed in 1986. The contesting defendants actively litigated the matter and the dispute ultimately travelled to the Appellate Division. The present petitioners had an opportunity to contest the suit if they had wished to do so. The documentary materials indicate service and knowledge of the proceeding. Yet they did not contest the suit and waited until 2014 to invoke Order 9 Rule 13. Their explanation for such prolonged inaction is not supported by reliable evidence.

Upon consideration of the entire materials on record it is found that the concurrent findings are based on evidence and do not suffer from any perversity or error of law warranting interference by this Court in its revisional jurisdiction.

The submission that the Courts below committed error of law occasioning failure of justice therefore fails.

Accordingly the Rule is discharged.

The judgment and order dated 21.06.2022 passed by the District Judge, Kurigram in Miscellaneous Appeal Number 20 of 2017 affirming the judgment and order dated 06.09.2017 passed by the Assistant Judge, Bhurungamari, Kurigram in Miscellaneous Case Number 14 of 2014 is hereby affirmed.

The order of stay passed by this Court stands vacated.

Let a copy of this judgment be communicated to the Courts below forthwith and the Lower Courts' Records be sent down at once.

Md. Ali Reza, J:

Naher-B.O