

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

Present:

**Mr. Justice Md. Aminul Islam.**

**Civil Revision No.1837 of 2022.**

Nazrul Islam

.....Petitioner.

Vs.

Md. Moksed Ali and others

..... Opposite-Parties.

Mr. Md. Tarikul Islam, Advocate.

..... for the petitioner.

Mr. Ali Imam Khaled Rahim, with

Mr. Md. Mashiur Rahman, Advocate.

..... for the opposite party No.1-5.

**Heard and judgment on: 19.07.2023.**

This Rule was issued calling upon the opposite-parties to show cause as to why the impugned judgment and order dated 12.01.2022 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Jhenaidah in Miscellaneous Appeal No.56 of 2014 dismissing the appeal and thereby affirming the order dated 26.10.2014 passed by the learned Senior Assistant Judge, Jhenaidah Sadar Court, Jhenaidah in Miscellaneous Case No.32 of 2014 rejecting the application filed by the petitioner under Order IX Rule 13A read with section 151 of the Code of Civil Procedure for setting aside the ex-parte decree passed by the learned Senior Assistant Judge, Jhenaidah Sadar Court, Jhenaidah in Title Suit No.237 of 2004, 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 leading to the issuance of the Rule in a nutshell can be stated that on 30.11.2004 the opposite-parties as plaintiffs instituted a Title Suit being No.237 of 2004 before the Court of learned Senior Assistant Judge, Jhenaidah Sadar Court, Jhenaidah for partition in the schedule land against the present petitioner along with others. Subsequently, the aforesaid suit was ex-parte decree on 18.04.2004 but that was not in the knowledge of the petitioner as because the summons was not duly served upon the defendants of the case. Thereafter, being informed about ex-parte decree on 16.07.2006 the petitioner filed a Miscellaneous Case No.45 of 2006 under Order IX Rule 13 read with section 151 of the Code of Civil Procedure with a prayer for setting aside the ex-parte decree dated 18.04.2004 on the ground that the summons was not duly served upon the defendants and after hearing the aforesaid ex-parte decree setting aside on 17.09.2012 and the original suit was restored for filing written statements. The suit was fixed for submitting written statements by the defendants but the defendant failed to submit written statements then the suit was fixed for ex-parte hearing on 11.06.2014. On the same date the suit was fixed for ex-parte hearing but the defendant failed to submit written statements on the basis of wanting necessary documents and prayed for adjournment for last time, though the learned trial Court rejected the same, ultimately the suit was decree on ex-

parte without taking any evidence on the basis of the previously recorded the evidences. Hence, the case.

The petitioner filed a Miscellaneous Case No.32 of 2014 under Order IX Rule 13A read with section 151 of the Code of Civil Procedure with a prayer for setting aside the ex-parte decree. On conclusion of trial the learned Judge of the trial Court rejected the application for setting aside the ex-parte decree by his judgment and order dated 26.10.2014.

Being aggrieved by and dissatisfied with the aforesaid judgment and order the petitioner filed a Miscellaneous Appeal No. 56 of 2014 before the learned District Judge, Jhenaidah and the same was transferred to the learned Joint District Judge, 2<sup>nd</sup> Court, Jhenaidah for hearing and who after hearing both parties the learned Judge dismissing the appeal by his judgment and order dated 12.01.2022.

Feeling aggrieved by and dissatisfied with the impugned judgment and order dated 12.01.2022 the defendant as petitioner preferred this Revisional application under section 115(1) of the Code of Civil Procedure before this Court and obtained the instant Rule.

Mr. Md. Tarikul Islam, the learned Advocate appearing for the petitioner has placed the Revisional application, judgment and order of the Courts below and submits that the trial Court committed a serious error of law in rejecting the application for restoration without assigning any legal ground as well as the appellate Court below without applying his judicial

mind dismissed the appeal. He further submits that the petitioner filed an application for adjournment which was rejected and on the same date without examining the P.Ws. but on the basis of the oral evidence previously recorded at the time of first ex-parte hearing and without examining the documentary evidences the suit was decree on ex-parte which is not tenable in the eye of law. He further submits that the petitioner has no negligence and laches for filing the written statements as because the petitioners could not collect the necessary documents, the petitioner was not able to prepare the written statements. He further submits that the original suit was a suit for partition and the opposite party with the collusion of the Court peons concealing the summons obtained the ex-parte decree and after restoring the suit which the petitioner trying to collect the necessary documents the plaintiff-opposite parties made impediment as a result the petitioner failed to collect the necessary papers and also was not able to submit the written statements. He lastly submits that at the time of filing the Miscellaneous Case No.32 of 2014 for restoration of the original suit, the petitioner inadvertently mistaken put verification with that application instead of swearing an affidavit before the affidavit commissioner of the trial Court. Now with the permission of the Hon'ble High Court Division is obliged to submit the required affidavit before the Hon'ble Court and as such he prayed for to make the Rule absolute with a direction to restore the original suit and to dispose of the same within shortest possible time.

Mr. Ali Imam Khaled Rahim, the learned Advocate appearing for the opposite-parties oppose the Rule and submits that the learned Judge of both the Courts below considering the evidences and relevant provisions of law rightly rejected the application for restoration and there is no committed error of law by the Courts below and as such the Rule is liable to be discharged.

In order to appreciate the submissions made by the learned Advocates for the parties, I have gone through the Revisional application, judgment and order of the Courts below very carefully.

Now the point for determination is, whether the learned Courts below committed any error of law in passing the impugned judgment and order resulting in an error in the decision occasioning failure of justice and whether the petitioner is entitled to get relief as prayed for.

On perusal of the record, it appears that the opposite-parties as plaintiffs instituted a Title Suit being No.237 of 2004 before the Court of learned Senior Assistant Judge, Jhenaidah Sadar Court, Jhenaidah for partition in the schedule land against the present petitioner along with others. Subsequently, the aforesaid suit was decree on ex-parte dated 18.04.2004 but that was not within the knowledge of the petitioner as because the summons was not duly served upon the defendants of the case. Thereafter, on 16.07.2006 the petitioner got information about ex-parte decree, then the petitioner filed a Miscellaneous Case No.45 of 2006 under Order IX Rule 13

read with section 151 of the Code of Civil Procedure with a prayer for setting aside the ex-parte decree dated 18.04.2004, on the ground that the summons was not duly served upon the defendants and after hearing setting aside the aforesaid ex-parte decree on 17.09.2012 and the original suit was restored for filing written statements. Thereafter, the suit was fixed for submitting written statements by the defendants but he did not submit the written statements and the suit was fixed for ex-parte hearing on 11.06.2014, ultimately the suit was decree on ex-parte.

In this case the question of service of summons does not arise as the defendant appeared himself and contested the suit. Now the only question to be determined is whether the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant has to show sufficient cause in order to succeed in this case. The expression “sufficient cause” has not been defined anywhere in the Code. The Court has a very wide discretion in ascertaining sufficient cause but such discretion however, must be exercised reasonably and judicially and not arbitrarily or capriciously. Under order IX Rule 13 of the Code of Civil Procedure contains that a Court has an authority for setting aside on ex-parte decree on the ground of non service of summons upon the defendant under the required provisions of law. Alternatively, an ex-parte decree can also be set aside by a Court if a sufficient cause can be shown by the defendant that he or she could not appear in the Court when a suit has been taken up for

hearing as he was prevented. In the instant case the present petitioner filed an application on the ground that “ছায়েল বিবাদী হিসেবে জবাব দেওয়ার জন্য কয়েকবার সময় নেওয়ার পরেও প্রয়োজনীয় কাগজপত্র সংগ্রহ করিতে না পারায় ও গত ১১/০৬/১৪ ইং তারিখে পুনরায় সময়ের দরখাস্ত দেন। ..... ছায়েল পক্ষ ইচ্ছাকৃত ত্রুটি করে নাই। জবাব দেওয়ার জন্য আর একবার সময় পাইলে অবশ্যই জবাব দিয়া কনটেন্ট করিতেন। শুধুমাত্র কাগজপত্র ঠিক সময়ে সংগ্রহ করিতে না পারায় জবাব প্রস্তুত করিতে পারেন নাই।” But the learned trial Court on 11.06.2014 rejected the aforesaid application and let the suit be decreed on ex-parte against the defendant as petitioner as such under the Provision of the Order IX Rule 13A of the Code of Civil Procedure the application was filed on 01.07.2014 within 30(thirty) days for setting aside the ex-parte decree. Both the Courts below failed to consider the facts and circumstances of the case and he did not apply his judicial mind. It appears that under Order IX Rule 13A of the Code of Civil Procedure and the legislators intended to expedite the disposal of the dispute arising from an ex-parte decree. Under the literal interpretation, the Rule 13A has given a wider discretion upon a Court to set aside any decree, even without calling for any evidence for set aside, by only payment of the maximum of Tk.3,000/-(three thousand), therefore, this provision has been named as “directly setting aside the ex-parte decree”.

The said Rule 13A has also a proviso, the proviso contains that a decree shall not be set aside without an application by swearing an affidavit to be made within 30(thirty) days from the date of the decree passed who

appear and file a written statement. The settled principle of law is that proviso of any provision of law is subject to the principle law of that provision which was not mandatory but it is a directory.

In the instant case, the learned Advocate filed a supplementary affidavit on the grounds that the petitioner inadvertently mistaken put verification with that application instead of swearing an affidavit before the affidavit commissioner of the trial Court and he submitted a supplementary affidavit with an affidavit is to be treated as part of the original application under Order IX Rule 13A of the Code of Civil Procedure. The facts and circumstances of the case also demand exercise of discretionary power by this Court. I find valid reason for considering this matter under these circumstances. Restoration of suit in exercise of Court's inherent power under Section 151 of the Code of Civil Procedure is not also unjustified in contain cases. It is a fit case for exercise of any discretion as a party cannot be debarred from getting justice, Revisional power is discretionary. It is to be exercised to secure the ends of justice.

Therefore, I am of the opinion that the Rule 13A Sub(1) has given a wide description upon the Court to set aside ex-parte decree after being satisfied and only by paying an amount not more than 3,000(three thousand) Taka. The proviso, however, contains the manner of any prayer for directly setting aside ex-parte decree, such as, an application, application filed after swearing an affidavit, the application to be filed within 30(thirty) days if an



ex-parte decree passed against the defendant who appears and files a written statement before the suit was decree ex-parte. In view of above, I find the legislators have a clear and transparent intention for expeditious disposal of any dispute arising from any ex-parte decree.

In the light of the above mentioned facts and circumstances of the case having regard to the materials on record, it appears to me that the defendant-petitioner has succeeded in proving the cogent and convincing reason that the defendant-petitioner was prevented by sufficient cause from appearing before the Court when the suit was taken up for hearing.

In view of the above findings and discussion, I am of the opinion that the learned Courts below committed an error of law resulting in an error in the decision occasioning failure of justice.

I therefore, consider that the impugned judgment and order dated 12.01.2022 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Jhenaidah in Miscellaneous Appeal No.56 of 2014 dismissing the appeal and thereby affirming the judgment and order dated 26.10.2014 passed by the learned Senior Assistant Judge, Jhenaidha Sadar Court, Jhenaidah in Miscellaneous Case No.32 of 2014 is set aside and the original Suit No.237 of 2004 pending in the Court of learned Senior Assistant Judge, Jhenaidha Sadar Court, Jhenaidha is hereby restored to its original file and number.

I am therefore, inclined to interfere into the judgment and order passed by the Courts below. Accordingly, I find merit in this Rule.

In the result, the Rule is made absolute.

However, the defendant-petitioner is directed to pay as to costs at Tk.2000/-(two thousand) before the trial court within 60(sixty) days from the date of receipt of this judgment and order.

The defendant-petitioner is directed to file a written statement within 60(sixty) days from the date of receipt of this judgment and order.

The learned trial Court is also directed to dispose of the suit within 1(one) year from the date of receipt of this judgment and order positively.

Let a copy of the judgment and order be sent to the Court concerned at once.

Md. Abadul Haque/ Bench Officer.