

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

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 792 of 2023

Mohammad Musa Sawdagar and another
..... Petitioners

-Versus-

Mohammad Alamgir Parvez and others
.... Opposite parties

Mr. Binod Kumar, Advocate
..... For petitioners

Mr. Mohammad Mehdi Hasan, Advocate
.... For opposite party Nos. 1 and 2

Heard and Judgment on: 25.08.2024

In the instant revisional application filed under Section 115(1) of the Code of Civil Procedure at the instance of the plaintiff-petitioners, this Court on 13.03.2023 issued a Rule calling upon the opposite party Nos. 1 and 2 to show cause as to why the impugned judgment and order dated 09.02.2023 passed by the learned District Judge, Chattogram in Miscellaneous Appeal No. 50 of 2023 dismissing the appeal and thereby affirming those dated 11.01.2023 passed by the Joint District Judge, Chattogram in Miscellaneous Case No. 40 of 2015 arising out of Other Class Suit No. 155 of 2021 allowing the application filed under Order 9 rule 13 read with Section 151 of the Code of Civil Procedure should not be set aside.

The opposite party Nos. 1 and 2 have entered appearance in the Rule.

The present petitioners as plaintiffs filed suit for declaration of title being Other Suit No. 572 of 2008 in the Court of 3rd Joint District Judge, Chattogram impleading the present opposite parties as defendants. The suit was decreed ex parte against all the defendants on 31.07.2013. Having learnt about the said ex parte decree, the defendant Nos. 7 and 8 (present opposite party Nos. 1 and 2) filed Miscellaneous Case No. 40 of 2015 under Order 9 rule 13 read with Section 151 of the Code of Civil Procedure (CPC) before the Court of 3rd Joint District Judge, Chattogram for setting aside the ex parte judgment and decree. The miscellaneous case was contested by the decree holder plaintiffs. Eventually, the Court below, vide judgment and order dated 11.01.2023 allowed the miscellaneous case, set aside the ex parte judgment and decree and restored the Other Suit No. 572 of 2008 to its original file and number. Challenging the said judgment and order, the plaintiffs filed Miscellaneous Appeal No. 50 of 2023 before the Court of District Judge, Chattogram, who, vide judgment and order No. 1 dated 09.02.2023 rejected the miscellaneous appeal and hence, the instant civil revisional application at the instance of the plaintiffs.

I have heard the learned Advocates of both sides and perused the materials on record.

The miscellaneous case filed under Order 9 rule 13 of the CPC was contested by the decree holder-plaintiffs. Both sides adduced documentary evidence before the Court. Moreover, both sides examined one witness each who were cross-examined. The Court below examined both oral and documentary evidence and categorically observed, “অর্থাৎ প্রার্থীকগণের উপর যে সমন যথারীতি জারী হয় তা সমন প্রতিবেদন ও প্রার্থীকের জবানবন্দী ও জেরা পর্যালোচনায় প্রতীয়মান হয় না। সমনে উল্লেখিত ব্যক্তিদের পরিচয় নিশ্চিত হওয়া যায়নি। তারা যে প্রার্থীকের একান্নবর্তী পরিবারের সদস্য তা প্রমাণ হয় না। প্রার্থীকের (প্রদর্শনী-২) পর্যালোচনায় পশ্চিম ধলই নগর নামে কোন ইউনিয়নের পরিচয় পাওয়া যায় না। প্রার্থীকগণ ইচ্ছাকৃতভাবে মোকদ্দমায় প্রতিদ্বন্দ্বিতা করেননি তার কোন প্রমাণ পরিলক্ষিত হয় না। এমতাবস্থায়, প্রার্থীক/বিবাদীগণের প্রতি ডাক ও নেজারত সমন আইনের বিধান মতে যথারীতি জারী হয়েছিল মর্মে প্রমাণিত হয়নি। সমন জারীর দায়িত্ব বাদীর উপর বর্তায়। যেহেতু প্রার্থীকগণের প্রতি মূল মোকদ্দমার সমনাদি যথারীতি জারী হয়নি এবং তর্কিত একতরফা রায়-ডিএনী সম্পর্কে জানার পর মিছ দরখাস্ত দাখিল করেছেন এবং যেহেতু প্রার্থীকগণের অত্র মিছ দরখাস্তখানা আইনতঃ আকারে ও প্রকারে রক্ষণীয় সেহেতু প্রার্থীকগণের মিছ দরখাস্তখানা মঞ্জুরের পর্যাপ্ত কারণ রয়েছে মর্মে আদালতের নিকট প্রতীয়মান হয়।”

Mr. Binod Kumar, the learned Advocate appearing for the present petitioners submits that the ex parte judgment and decree was passed on 31.07.2013 (decree signed on 07.08.2013) but the miscellaneous case under Order 9 rule 13 was filed on 17.06.2015 *i.e.* after expiry of the prescribe period of limitation of 30 days as provided in Article 164 of the First Schedule of the Limitation Act, 1908 and as such, the said miscellaneous case is liable to be rejected

as being barred by limitation. Under Article 164 of the Limitation Act the period of limitation of 30 days begins from the date of ex parte decree or where the summons was not duly served, when the applicant has knowledge of the decree. In paragraph No. 2 of the application filed under Order 9 rule 13, the defendants categorically set out the reasons for delay in filing the case. Moreover, it appears from the judgment and order dated 11.01.2023 passed in the miscellaneous case that the question of limitation was not raised before the Court and no issue was framed on point of limitation. Therefore, the question of limitation cannot be raised at this stage of the proceeding.

I have already quoted the relevant portions of the findings of the Court below. Those were upheld by the lower Appellate Court. The findings are based on evidence. The learned Advocate appearing for the petitioners could not lay his hands on the finding of facts arrived at by the Court below. Hence, I find no merit in the Rule.

In the results, the Rule is discharged.