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

**Present:**

**Mr. Justice Md. Badruzzaman.**

**CIVIL REVISION No. 611 OF 2022.**

**Jesmn Hosain and others** .

...Petitioners.

-Versus-

**Ayatun Nessa and others**.

....Opposite parties.

Mrs. Khalifa Shamsun Nahar, Advocate

… For the petitioners

Mr. Nurul Amin Senior Advocate with
Mr. Mashfiquir Rahman, Advocate

… For opposite party Nos. 1-3

**Heard on: 20.11.2023,17.12.2023,11.02.2024.**
**Judgment on: 18.02.2024.**

This Rule was issued calling upon opposite party Nos. 1-3 to show cause as to why judgment and order dated 06.01.2021 passed by learned District Judge, Madaripur in Civil Revision No. 11 of 2019 allowing the revision and thereby setting aside judgment and order dated 02.07.2019 passed by learned Senior Assistant Judge, Shibchar, Madaripur in Miscellaneous Case No. 4 of 2018 allowing the miscellaneous case filed under Order IX rule 13 read with section 151 of the Code of Civil Procedure and thereby setting aside *ex parte* judgment and decree dated 28.02.2017 passed in Title Suit No. 190 of 2009 should not be set aside.

Facts relevant, for the purpose of disposal of this Rule, are that the predecessor of the petitioners filed Miscellaneous Case No. 4 of 2018 in the Court of Assistant Judge, Shibchar, Madaripur under Order

IX rule 13 read with section 151 of the Code of Civil Procedure praying for setting aside *ex parte* compromise decree dated 28.02.2017 passed in Title Suit No. 190 of 2009 contending, *inter alia,* that opposite party Nos. 1-3 as plaintiffs filed Title Suit No. 190 of 2009 in the Court of Assistant Judge, Shibchar, Madaripur for a decree of partition of total 3.34 acre land in which the predecessor of the petitioners namely Alinur Begum was impleaded as defendant No.8 but upon suppression of summons and in collusion with the heirs of defendant No.6 they obtained *ex parte* compromise decree on 28.02.1997 and thereafter, got final decree and then filed Title Execution Case No.1 of 2018 behind the back of defendant No. 8. Moreover, in course of execution process the Advocate Commissioner along with police forces went to the suit property on 19.03.2018 for getting possession of the decreetal property when defendant No.8 came to learn about the *ex parte* compromise decree as well as the final decree. It has also stated that no summons or postal notice was served upon defendant No.8 and defendant No.8 has been owning and possessing the suit property by erecting dwelling house and planting various fruit bearing trees and other trees in the suit property. There is graveyard of the husband of defendant No.8 in the suit land and her property is butted and boundary by boundary wall. In such situation the Advocate Commissioner could not give delivery of possession of the allotted *saham* to the plaintiffs. Since the plaintiffs obtained the *ex parte* compromise decree by suppression of summons, defendant No.8 filed the miscellaneous case for setting aside the *ex parte* decree.

Plaintiff-opposite party Nos. 1-3 contested the miscellaneous case by filing written objection contending, *inter alia*, that the case was

barred by limitation; that the summons was duly served upon defendant No. 8 by the process server of the Court by hanging it on her house door because she was not available in her house and defendant No. 8 was aware of the suit and the *ex parte* compromise decree and accordingly, the *ex parte* decree was rightly passed and the defendant is not entitled to any relief.

Both parties adduced oral evidence to prove their respective case. The trial Court, upon consideration of the evidence and materials on record, allowed the miscellaneous case vide judgment and order dated 02.07.2019 holding that the summons was not duly served upon defendant No. 8 and thereby set aside the *ex parte* compromise decree and restored the suit to its original file and number.

Being aggrieved by said judgment and order, the plaintiff-opposite parties preferred Civil Revision No. 11 of 2019 before the leaned District Judge, Madaripur, who upon hearing both the parties vide judgment and order dated 06.01.2021 allowed the revision by reversing the judgment and order passed by the trial Court.

Being aggrieved by said judgment and order dated 06.01.2021 the heirs of defendant No. 8 as petitioners have preferred this application under section 115(4) of the Code of Civil Procedure and obtained the instant Rule and order of *status quo* till disposal of the Rule.

Plaintiff-opposite party Nos. 1-3 have entered appearance by filing Voklatnama to contest the Rule.

Ms. Khalifa Shamsun Nahar, learned Advocate appearing for the petitioners submitted that the Court of revision committed an important question of law by holding that the summons was duly

served merely on the basis of service return which was not verified by an affidavit of the serving officer under rule 19 of Order V of the Code of Civil Procedure; that the process server was not examined on oath and service of summons upon defendant No. 8 was not proved; that the process server only submitted a report showing service of summons by hanging under rule 17 of Order V of the Code of Civil Procedure which is not sufficient service as per rule 19 of Order V of the Code of Civil Procedure; that there is no evidence on record showing that the summons was served defendant No. 8 by registered post though, as per rule 19B of Order V of the Code of Civil Procedure, such service process is simultaneous one; that the trial Court upon proper assessment of the evidence found that the summons upon defendant No. 8 was not duly served but the Court of revision upon misconstruction and misinterpretation of the service return wrongly concluded that the summons upon defendant No. 8 was served and the miscellaneous case was barred by limitation, without considering the specific case of the defendant that the plaintiffs by fraudulent means obtained the *ex parte* compromise decree and the predecessor of the petitioners filed the miscellaneous case within thirty days from the date of her knowledge. Learned Advocate finally submitted that the Court of revision, upon misreading and non-consideration of the evidence and misconception of law, illegally set aside the order of the trial Court by the impugned judgment and as such, interference is called for by this Court.

In opposing the submissions of the learned Advocate for the petitioners, Mr. Md. Nurul Amin, learned Senior Advocate appearing for plaintiff-opposite party Nos. 1-3 submitted that the miscellaneous case was barred by limitation and defendant No. 8 could not prove the date

of knowledge of the *ex parte* decree by sufficient evidence; that the Court of revision found that the summons was duly served through process server as well as registered post and rightly allowed the revision; that the attorney of defendant No. 8 deposed as Pt.W.1 to prove the date of knowledge of defendant No. 8 against the settled principle of law that an attorney cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal of which the principal alone has personal knowledge and as such, the evidence of Pt.W.1 cannot be taken into consideration to support the case of defendant No. 8. Learned Advocate further submitted that though initial burden was upon the plaintiffs to prove that the summons was duly served but the said burden has been shifted upon the defendant because of the fact that the trial Court in the original suit found that the summons was duly served and as such the burden to prove that summons was not duly served upon defendant No. 8 which she failed and as such, the Court of revision rightly held that the summons was duly served and rightly set aside the judgment and order of the trial Court. Learned Advocate further submitted that the *ex parte* compromise decree was passed in respect of the plaintiffs and the heirs of defendant No. 6 and the plaintiffs got an area of .90 acre land out of 3.34 acre suit land in their *saham* and there is huge land remained out of the decree and if it is found that the summons was not duly served the *ex parte* decree may be set aside by keeping the *saham* of the plaintiffs as it is. In support of his contention learned Advocate has referred to the case of Man Kaur (Dead) By Lrs. Vs. Hartar Singh Sangha of the Indian Supreme Court (judgment pronounced on 05.10.2010 in Civil Appeal Nos. 147-148 of

2001, Online Version), the case of Abdul Jalil Bhuiyan and others vs. Majibar Nessa Bibi and others 12 DLR 581 and the case of Md. Insan Ali vs. Mir Abdus Salam 40 DLR (AD) 193.

I have heard the submissions of the learned Advocates, scrutinized and gone through the pleadings of the parties, evidence adduced by them and the judgments of the Courts below as well as relevant provisions of law to come to a proper decision.

Rule 16 of Order V of the Code of Civil Procedure provides the procedure of personal service of summons in usual course and rule 18 provides the procedure of endorsement of time and manner of service under rule 16. Rule 17 of Order V of the Code of Civil Procedure provides procedure of service of summons when the defendant refuses to accept the service or cannot be found while rule 19 provides provisions of examination of the serving officer when the summons was served under rule17. Rule 19A of Order V of the Code of Civil Procedure states evidential value of declaration made by the serving officer and rule 19B provides provisions of simultaneous issue of summons for service by post in addition to personal service.

In the instant case, the predecessor of the petitioners was defendant No. 8 of the original suit. She took the plea that upon suppression of summons and in collusion with the heirs of defendant No. 6 the plaintiffs obtained *ex parte* compromise decree on 28.02.1997 in Title Suit No. 190 of 2009 and thereafter, got final decree and then filed Title Execution Case No.1 of 2018 behind her back and in course of execution process the Advocate Commissioner along with police forces went to the suit property on 19.03.2018 for getting possession of the decreetal property when she came to learn about the *ex parte*

compromise decree. To prove her case she adduced her attorney as Pt.W. 1 and the plaintiff-opposite parties also adduced only one witness to prove their case. Upon examining the service return, the trial Court found that 'in the service return the process server made a report that he went to the defendant's house with the summons along with local witnesses but the latter was found absent on call whereupon he served the copies of the summons by affixing in the outer gate of defendant No.8 in presence of witnesses but the witnesses refused to sign in the service return'. Neither process server nor any mokabila witness was adduced to prove the service of summons upon defendant No. 8 . The trial Court held that before service of summons by hanging the process server did not use any due and reasonable diligence to find out defendant No. 8 and finally came to the conclusion that the summons upon defendant No.8 was not duly served and the plaintiffs could not prove that the summons was duly served upon defendant No.8 and finally allowed the miscellaneous case and set aside the *ex parte* compromise decree.

Evidently, the summons was served under provision of rule 17 of Order V of the Code of Civil Procedure and the process server returned the original summons with a report stating his mode of service as stated above.

Now question arises whether given the facts of the case, such service can be considered as due service of summons upon defendant No.8 (the predecessor of the petitioners).

In Santosh Kumar Chakraborti and others vs. M.A Motaleb Hossain and other 36 DLR (AD) 248 questions arose whether the provisions as to inquiry, as contemplated in rule 19 of Order V of the

Code of Civil Procedure, are mandatory in all cases, such as, where there is a declaration by the serving officer that the summons was duly served by him under rule 17 of the said Order, and whether the learned Judges of the High Court Division have correctly held that the trial Court made a declaration under rule 19, that summons was duly served. The Appellate Division while answering those questions held as follows:

> "Two classes of cases are contemplated in rule 19, that in one class of cases, examination of the process server is mandatory, and in another class of cases it is discretionary. Where the serving officer has returned the summons and has also made a declaration to the effect that he served the summons by affixation under rule 17, then, examination of the process server as a witness in Court is not mandatory particularly when the proviso to this rule shows that a declaration of the serving officer shall be received as evidence of the facts as to the service or admitted service of the summons. In this case, admittedly the serving officer made a declaration that he went to the defendants' house with the summons but the letter refused to receive the summons whereupon he served it by having it on the defendants' door in presence of witness. But where there is no such declaration of the serving officer, examination of the serving officer as a witness is mandatory."

By endorsing above view, the Appellate Division in Md. Insan Ali vs. Mir Abdus Salam 40 DLR (AD) 193 held as follows:

> "There is no dispute that the onus to prove that the summons was duly served upon the defendant is on the plaintiff. In this case the onus is found to have

> been fully discharged as the process server submitted his report, along with a declaration, that he has served the summons by hanging it on the gate of the defendant when the latter refused to accept it and thereafter the plaintiff appeared in the Court and deposed on oath that the summons was duly served. Thereupon the onus shifted upon the defendant to prove that the summons was not served as claimed by the plaintiff…….
>
> The process-server was, of course, not examined as a witness as his examination is not mandatory in view of provision of rule 19A of Order V, Civil P.C. Examination of process server is mandatory when he has simply submitted his report about service of summons without any verification or declaration that he had served the summons, but when he made a declaration to this effect then his examination as a witness is not mandatory, although the Court may at its discretion call him as a witness." (emphasis supplied)

The provision that 'a declaration of the serving officer shall be received as evidence of the facts as to the service or admitted service of summons' was available in the proviso to rule 19 of Order V of the Code of Civil Procedure before 'The Code of Civil Procedure (Amendment) Ordinance, 1983 (Ordinance No. XLVIII of 1983)' came into force. Said amendment introduced similar provisions by inserting rule 19A in Order V of the Code. According to this amendment 'declaration made by a serving officer shall be received as evidence of the facts as to the service or attempted service of summons'. This view also finds support in the case of Khurshid Anwar & another vs. Jamil Akhter 6 BLD (AD) 83

wherein the Appellate Division held that 'the purport of the amended rule is that examination of the process server is not mandatory when he has made a declaration but it is mandatory when he has not made such declaration'. Same view has been expressed by the Appellate Division in Shamsun Nahar Begum vs. Salauddin Ahmed and others 4 BLC (AD) 285.

In the instant case, it appears that the service return in respect of defendant No. 8 is not available with the LCR. The trial Court, as well as the Court of revision, did not give any finding whether the process server submitted his report about service of summons with/without any verification or declaration that he had served the summons, in the manner stated in his service return. The revisional Court, it appears that, overlooked this vital issue of process server's verification or declaration and upon assumption and presumption came to the conclusion that the summons was duly served upon defendant No.8 and reversed the finding of the trial Court that the summons upon defendant No. 8 was not duly served. The learned Advocate for the plaintiff-opposite parties could not impress me that the process-server made any declaration or affidavit in respect of the service of summons under rule 17 of Order V of the Code of Civil Procedure stating that he went to the defendant's house with the summons with witnesses but she could not be found, then he served those by hanging on the defendant's main door in presence of the witnesses. In fact no mokabela witness has been examined in this case. The trial Court, upon examination of the process server's report found that he could not collect any signature of the mokabela witnesses in the service return. In view of the above provisions of law as well as the reported decisions of

our Apex Court, the examination of the process server, in this case, was mandatory and the burden was upon the plaintiffs to prove that the summons was duly served upon defendant No.8 which they miserably failed. There is no material on record o show that the process server made declaration or verification in respect of service of summons upon defendant No. 8 under rule 17 of Order V of the Code of Civil Procedure and as such, the report of the process server cannot be received as evidence of the fact as to service of summons upon defendant No. 8 as per rule 19A of Order V of the Code. But the Court of revision without considering above factual aspect of the case and upon misconception of law, as discussed above, came to a wrong finding and conclusion that the summons was duly served upon defendant No.8.

It is to be noted that rule 19B of Order V of the Code of Civil Procedure provides provisions of simultaneous service of summons upon the defendant by registered post. In the present case, it has claimed by plaintiffs that the summons was sent by registered post with acknowledge due to the defendants under rule 19B of Order V of the Code of Civil Procedure. The Court of revision observed that the plaintiffs upon service of summons through usual course and registered post got compromise decree. But there is no material on record to show that the summons was served through registered post. No postal receipt is available with the L.C.R. Moreover, from the order sheet of the original suit it appears that the Acknowledgement Due (AD) was not returned. Accordingly, it cannot be said that the summons was served through registered post upon defendant No.8.

The revisional Court also came to the conclusion that the miscellaneous case was barred by limitation observing that the

defendant could not satisfactorily explained the cause of delay in filing the miscellaneous case. Since the summons was not duly served and the *ex parte* decree was obtained by suppression of summons, question of limitation in filing the miscellaneous case does not arise at all because of the fact that fraud vitiates everything .

Learned Advocate for the plaintiff-opposite parties contended that Pt. W 1, as attorney of defendant No.8, had no personal knowledge about the service of summons or the date of knowledge about the *ex parte* decree and as such, he cannot depose for the acts done by the principal and his evidence is inadmissible. On this point learned Advocate for the opposite parties has referred to Man Kaur (Dead) By Lrs vs. Hartar Singh Sangha (*supra*). In that case the Indian Supreme Court upon considering its earlier decisions of the cases of Janki Vashdeo Bhojwani vs. Indusind Bank Limited 2005 (2) SCC 217; Shambhu Shastri vs. State of Rajasthan, 1989 2 WLN 713(Raj); Ram Prasad v. Hari Narain AIR 1998 (Raj) 185 and Shankar Finance & Investments vs. State of AP (2008) 8 SCC 536 and relevant provisions of law came to the following findings:

> (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
>
> (b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions

and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction had been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a

> purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

Though the above ratio of the Supreme Court of India is not binding upon this Court but I find no reason to disagree with the view taken by it.

In this case, Pt.W. 1 deposed as attorney of defendant No. 8 who had no personal knowledge about the service of summons upon defendant No. 8 or date of knowledge about the *ex parte* decree. Accordingly, the testimony of Pt.W. 1, who was an attorney of defendant No. 8, cannot be considered as evidence to support the case of defendant No. 8. But this lacking of defendant No. 8 cannot help the plaintiffs because of the fact that from the materials on record, it has revealed that the plaintiffs could not prove service of summons upon defendant No. 8. Accordingly, the decision of Man Kaur (Dead) By Lrs vs. Hartar Singh Sangha (*supra*) cannot also help the plaintiff-opposite parties to prove that the summons was duly served upon defendant No. 8.

Relying upon the case of Abdul Jalil Bhuiyan and others 12 DLR 581, the learned Advocate for the plaintiff-opposite parties has tried to impress upon this Court that the *saham* which has already allotted to the plaintiffs should be kept intact if this Court set aside the *ex parte* decree. In that reported case, defendant No. 7, who sought for setting aside the *ex parte* decree, submitted written statement claiming one third share of suit plot No.2255 and the entitlement of defendant No.7 was not disputed by other parties to the suit. High Court Division set aside the *ex parte* decree and restored the suit so far other defendants are concerned against whom the *ex parte* decree was passed. But in the instant case defendant No.8 could not file any written statement and her share has not been ascertained in the suit and none of the parties to the suit admitted the share of defendant No. 8. Accordingly, I find no reason to consider the contention of the learned Advocate for the opposite parties.

It appears that the Court of revision while setting aside the judgment and order of the trial Court opined that defendant No.8 would not prejudice if the plaintiffs get a *saham* by the *ex parte* compromise decree. This finding of the Court of revision is totally misconceived because of the fact that without ascertaining the share of defendant No.8 it cannot be said that the *saham* which has been allotted to the plaintiffs will not prejudice the right of defendant No.8. It appears that the revisional Court, upon misconception of law and misreading of the evidence, came to wrong findings and decision and accordingly, committed an error of important question of law resulting in an error in the decision occasioning failure of justice.

In view of the above, I find merit in this Rule.

In the result, the Rule is made absolute however, without any order as to costs.

The impugned judgment and order of the Court of revision are set aside and those of the trial Court are restored.

The learned Senior Assistant Judge, Shibchar, Madaripur is directed to proceed with Title Suit No. 190 of 2009 by notifying the contesting parties in accordance with law.

Send down the L.C.R along with a copy of this judgment to the Courts below at once.

**(Justice Md. Badruzzaman)**

**Md. Nurul Islam**