

District- Shariatpur

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

Present:

Mr Justice Md Atoar Rahman

Civil Revision No 4855 of 2014

Jahangir Alom

...defendant-appellant-petitioner

- versus-

Shamsul Haque Sarder

...plaintiff-respondent opposite party

Mr Mohammad Hossain, Advocate

....for the defendant-appellant-petitioner

Mr Md Rafiqul Islam, Advocate with

Mr Bikash Chandra Das

... for the plaintiff-respondent opposite party

**Heard on: 21.11.2023, 22.11.2023,
23.11.2023 and 28.11.2023**

Judgment on 05.12.2023

This Rule was issued on an application under section 115(1) of the Code of Civil Procedure, 1908 calling upon the opposite party No 1 to show cause as to why the judgment and order dated 01.06.2014 passed by the learned Joint District Judge, 1st Court, Shariatpur in Miscellaneous Appeal No 04 of 2010 dismissing the appeal and affirming the judgment and order dated 04.10.2009 passed by the learned Assistant Judge, Sadar Chikondi, Shariatpur in Miscellaneous Case No 15 of 2007 dismissing the miscellaneous case filed under Order IX rule 13 read with section 151 of the Code of Civil Procedure

for setting aside the exparte judgment and decree dated 20.11.2005 and 27.11.2005 respectively passed in Title Suit No 44 of 2002, should not be set aside and/or passed such other or further order or orders as to this court may seem fit and proper.

The opposite party No 1 as plaintiff instituted Title Suit No 44 of 2002 in the Court of Assistant Judge, Sadar Chikondi impleading the predecessor of the petitioner and opposite parties No 2 and 3 Abul Hashem Matbor and 31 others as defendants for partition of 1.51 acres of land described in schedule "Ka" of the plaint.

The predecessor of the petitioner Abul Hashem Matbor as defendant No 7 was contesting the suit along with others filing a joint written statement. During pendency of the suit he died and after his death all of his legal heirs including the petitioner were substituted as defendants No 7(Ka) to 7 (Jha) vide order dated 09.03.2005. Upon taking evidence and hearing the contesting parties on 20.11.2005 the trial court decreed the suit on contest against the defendants No 1, 2, 3, 4, 7 to 11 and 14 and exparte against the rests.

The petitioner and the opposite parties No 2 and 3 filed Miscellaneous Case No 15 of 2017 under Order IX rule 13 of the Code of Civil Procedure for setting aside the said exparty judgment and decree before the learned Assistant Judge, Sadar Chikondi, Shariatpur who after concluding the trial was pleased to dismiss the miscellaneous case vide judgment and order dated 04.10.2009, against which the

petitioners of the said miscellaneous case filed Miscellaneous Appeal No 04 of 2010 before the learned District Judge, Shariatpur. On transfer the appeal was heard by the learned Joint District Judge, 1st Court Shariatpur who was pleased to dismiss the same by his judgment and order dated 01.06.2014.

Being aggrieved by and dissatisfied with the above judgment and order of the appellate court the petitioner moved this court with this application under section 115(1) of the Code of Civil Procedure and obtained the present Rule.

Mr Mohammad Hossain, the learned Advocate appearing on behalf of the petitioner submitting in support of the Rule has stated that the learned appellate court in dismissing the miscellaneous appeal has committed an error of law resulting in an error in the decision occasioning failure of justice and as such, the impugned judgment and order passed by the learned Joint District Judge passed in the miscellaneous appeal is not sustainable in law and therefore, the exparte decree is liable to be set aside.

Mr Md Rafiqul Islam, the learned Advocates appearing on behalf of the opposite parties opposes the Rule

I have heard the submissions placed by the learned Advocates for both the sides and perused the record along with the impugned judgment and order and other connected papers.

On perusal of the trial court's record it transpires that after demise of the defendant No 7 his legal heirs including the present petitioner were substituted as defendants No 7(Ka) to (Jh) vide order No 44 dated 09.03.2005 and this petitioner was made as defendant No 7(Gha). Order No 46 dated 05.04.2005 shows that summonses were issued against the substituted defendants No 7(Ka) to 7(Jha) fixing 12.04.2005 for service return. In the order dated 14.05.2005 it has been stated that summonses upon the defendants No 7(Ka) to 7(Jha) have duly been served and 04.06.2005 was fixed for peremptory hearing without giving any chance them to filing written statement. However, neither of the summonses, issued to the process server and postal department, was served directly to the present petitioner. As per the process server's report all the summonses on behalf of the defendants No 7(Ka) to 7(Jha) were received by the defendant No 7(Jha) Afiya Begum also mother of the present petitioner by putting left thumb impression on 21.04.2005. In this respect previous Rule 15 under Order V of the Code of Civil Procedure, as was before amendment in 2012, is quoted bellow:

“Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation – A servant is not a member of the family within the meaning of this rule.”

There is no claim that mother of the defendant-petitioner was empowered as agent to accept service of summons on behalf of the defendant-petitioner and as such, as per the provisions of the above rule service upon female member of the family by the process server cannot be treated as valid service of the summons upon the defendant-petitioner. On the other hand, postal receipt shows that the summons issued through postal department was delivered to one Md Salam on behalf of the defendant-petitioner. Had it been proved that Md Salam was male member of the family in that case also as per the established principle of law concerned postal peon ought to have been produced before the court to prove the service allegedly served by registered post. But the plaintiff-opposite party did not take any step to examine the postal peon although in a case under Order IX rule 13 of the Code of Civil Procedure for setting aside the exparty decree the whole onus is upon the plaintiff to prove that summons was duly served upon the defendants.

In view of the foregoing discussions it is found that summons upon the present petitioner, who was substituted defendant No 7(Gha), was not duly served as per the provisions of law. But the learned Judge of the trial court wrongly found that summons upon the present

petitioner was duly served and the learned Judge of the appellate court also committed an error of law having dismissing the miscellaneous appeal by the impugned judgment and order. Accordingly, I find substance in the Rule and thereof, the same deserves to be made absolute.

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

Setting aside the impugned judgment and order dated 01.06.2014 passed by the learned Joint District Judge, 1st Court, Shariatpur in Miscellaneous Appeal No 04 of 2010 dismissing the appeal and affirming the judgment and order dated 04.10.2009 passed by the learned Assistant Judge, Sadar Chikondi, Shariatpur in Miscellaneous Case No 15 of 2007 set aside the exparte judgment and decree dated 20.11.2005 and 27.11.2005 respectively passed by the learned Assistant Judge, Sadar Chikondi, Shariatpur in Title Suit No 44 of 2002, so far as it relates to the petitioner only. The Title Suit No 44 of 2002 is reinstated in its original file and number. The trial court is directed to dispose of the title suit as early as possible giving reasonable chance to contest the same to the present defendant-petitioner only.

Let the lower courts' records along with a copy of this judgment be transmitted at once.