

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION No. 63 OF 2023.

**Md. Mahmudul Haque Patowary and
others**

...Petitioners.

-Versus-

**Samin Yeasar Haque Patowary and
others.**

....Opposite parties.

Mr. Md. Tahid Uddin Shepon with
Ms. Bethe Debnath, Advocates

...For the petitioners

Mr. Md. Nasir Sikder, Advocate

...For the opposite parties

Heard on: 28.10.24, 03.11.2024 and 11.11.24.

Judgment on: 12.11.2024.

Present:

Mr. Justice Md. Badruzzaman;

This Rule was issued calling upon the opposite parties to show cause as to why judgment and order dated 13.11.2022 passed by learned District Judge, Dhaka in Civil Miscellaneous Appeal No. 237 of 2022 dismissing the appeal summarily and thereby affirming judgment and order dated 20.06.2022 passed by learned Joint District Judge, 4th Court, Dhaka in Miscellaneous Case No. 13 of 2015 allowing the case filed under Order IX rule 13 of the Code of Civil Procedure should not be set aside.

During issuance of Rule further proceedings of Title Suit No. 218 of 2004 was stayed for a period of 06 (six) months which was subsequently, extended time to time.

Facts, relevant, for the purpose of disposal of this Rule, are that opposite party Nos. 1-3 filed Miscellaneous Case No. 13 of 2015 against

the petitioners under Order IX rule 13 of the Code of Civil Procedure praying for setting aside *ex parte* judgment and decree dated 01.12.2014 (decree signed on 08.01.2015) passed in Title Suit No. 218 of 2004 contending, *inter alia*, that they were defendants in Title Suit No. 218 of 2004 and filed written statements to contest the suit but their learned engaged Advocate did not contract with them and avoiding to keep relationship with them. Accordingly, they engaged Mr. A.B.M Arif Ullah as their Advocate who collected information from the Court on 22.04.2015 and came to learn that Title Suit No. 218 of 2004 was decreed *ex parte* vide judgment and decree dated 01.12.2014. The suit was decreed *ex parte* due to negligence on the part of the learned engaged Advocate for the defendants and as such, the *ex parte* decree should be set aside and the suit be restored. The plaintiff opposite party Nos. 2, 5-12 filed written objection to contest the case contending, *inter alia*, that the predecessor of the defendants collusively got *ex parte* judgment and decree on 05.11.1998 in Title Suit No. 227 of 1992 which was challenged by the plaintiffs in Title Suit No. 218 of 2004 praying for a decree of declaration that the *ex parte* judgment and decree was collusive, ineffective and not binding upon the plaintiffs. The predecessor of the defendants entered appearance in the suit on 30.01.2005 and filed an application for rejection of the plaint under Order VII rule 11(d) of the Code of Civil Procedure which was rejected by order dated 12.03.2005 against which he filed Civil Revision No. 128 of 2005 before the learned District Judge and which upon transfer was heard by learned Additional District Judge, 1st Court, Dhaka who, upon hearing the parties, dismissed the revision by judgment dated 05.06.2006. Thereafter, the substituted heirs of the original defendant challenged said judgment and order before the High Court

Division in Civil Revision No. 3323 of 2006 and the Rule issued therein was discharged by the High Court Division. Thereafter, the trial Court proceeded with Title Suit No. 128 of 2004 fixed the suit for *ex parte* hearing on 24.06.2012 and the defendant-opposite parties filed written statement on 30.07.2012 which was accepted by the trial Court. The trial Court framed issues and thereafter fixed the suit for peremptory hearing on 10.04.2014 and 30.06.2014 but the defendants did not appear in the suit and P.Ws 1, 2 and 3 were examined and the next date was on 24.09.2014 for examination of the witness of the defendants but they did not take any steps and the trial Court after fixing many dates finally decreed the suit *ex parte* vide judgment and decree dated 01.12.2014. The defendants though filed written statements in the suit but thereafter did not contest. The miscellaneous case was barred by limitation as was filed after two years and four months from the date of *ex parte* judgment and decree. The defendants filed the miscellaneous case only for harassing the plaintiffs and as such, the same was liable to be dismissed.

To prove the miscellaneous case the defendants adduced one oral witness and the plaintiff adduced one oral witness and the trial Court upon considering the evidence and materials on record, allowed the miscellaneous case by judgment and order dated 20.06.2022 and set aside *ex parte* judgment and decree dated 01.12.2014. Being aggrieved by said judgment and order of the trial Court, the plaintiffs preferred Civil Miscellaneous Appeal No. 237 of 2022 before the learned District Judge, Dhaka who, upon hearing, dismissed the appeal summarily by judgment and order dated 13.11.2022. Challenging the legality of said judgment and order dated 13.11.2022, the plaintiffs

have preferred this revisional application under section 115 (1) of the Code of Civil Procedure and obtained the instant Rule.

Mr. Md. Tahid Uddin Shepon, learned Advocate appearing for the petitioners submits that since the miscellaneous case was filed beyond the period of limitation and the defendant-opposite parties failed to establish their date of knowledge about the *ex parte* decree the, Court of appeal should have allowed the appeal by setting aside the judgment and order of the trial Court. Learned Advocate further submits that the defendants adduced their attorney to establish their date of knowledge about the *ex parte* decree but he knew nothing about the date of knowledge and that the defendants did not adduce any other oral or documentary evidence to prove the date of knowledge. Learned Advocate further submits that the defendants filed written statement to contest the suit after long delay of filing of the suit and they had negligence to contest the suit and accordingly, they are not entitled to the relief prayed for under Order IX rule 13 of the Code of Civil Procedure. Learned Advocate further submits that gross negligence on the part of the defendants should stand in the way of getting relief under Order IX rule 13 of the Code of Civil Procedure. In support of his contention learned Advocate has referred to the cases of Sudhir Kumar Das and another vs. Abdul Malek and others 12 BLC (AD) 1 and Motiur Rahman vs. A.K.M Shamsul Alamin and another 62 DLR 449.

Mr. Md. Nasir Sikder, learned Advocate appearing for the defendant opposite parties submits that though the defendant submitted written statement to contest the suit but due to the fault of their engaged learned Advocate the *ex parte* judgment and decree was passed beyond their knowledge and for the fault of the learned engaged Advocate the defendants should not be suffered and as such,

the Court of appeal committed no error of law in dismissing the appeal by affirming the order of the trial court. In support of his contention the learned Advocate has referred to the cases of Sethshivattan G. Mohata and another vs. Messers Mohammadi Stram Ship Company Limited 17 DLR (SC) 487 and Daraj Uddin Kazi and others vs. Hafiz Uddin Kazi and others 18 DLR 481.

I have heard the learned Advocates and perused the judgments of the courts below, the order sheet of Title Suit No. 218 of 2004 and other documents available on record from which it appears that Title Suit No. 218 of 2004 was filed by the petitioners herein challenging *ex parte* judgment and decree dated 10.11.1998 passed in favour of the predecessor of the opposite parties in Title Suit No. 227 of 1992. The predecessor of the present opposite parties filed application under Order VII rule 11 of the Code of Civil Procedure for rejection of the plaint of Title Suit No. 218 of 2004 and the opposite parties lost up to the High Court Division. Then the proceeding of the suit was started in 2011. Since the substituted defendants did not appear upon service of notice, the trial Court fixed the suit for *ex parte* hearing and thereafter, the present opposite parties as substituted defendants appeared in the suit on 24.06.2012 and filed written statement on 30.07.2012 and upon their prayer, the trial Court accepted the written statement and withdrawn the suit from *ex parte* hearing. It appears that after filing written statement on 30.06.2012 the defendants did not take any steps in the suit and the trial Court again fixed the suit for *ex parte* hearing on several dates and thereafter, on 10.04.2014, 08.05.2014 and 30.06.2014 recorded evidence of Pt.Ws. 1, 2 and 3 but the defendants did not cross-examine them and the trial Court fixed so many dates in

2014 for hearing and lastly on 01.12.2014 passed *ex parte* judgment and decree.

It is settled principle of law that once a defendant appears in the suit and filed written statement and thereafter, refrained from contesting the suit the judgment and decree would amount to a contesting judgment and decree against which an appeal is maintainable and an application under Order IX rule 13 of the Code of Civil Procedure to set aside the said decree is not maintainable.

In this case, the defendants on 30.7.2012 filed written statement to contest the suit and thereafter, did not appear and then *ex parte* judgment and decree was passed on 1.12.2014. Accordingly, the *ex parte* judgment and decree would amount to contesting judgment and decree against which an appeal was maintainable. The application under Order IX rule 13 of the Code which gave rise to Miscellaneous Case No. 13 of 2015 was filed after more than two years of the date of decree. Even if, it is considered that the decree was an *ex-parte* decree in that case Article 164 of the Limitation Act will come to play in counting limitation in filing the miscellaneous case which provides that an application for setting aside an *ex-parte* decree shall have to be filed within 30 days from the date of the decree where summons were duly served and within 30 days from the date of knowledge when summons was not duly served (Ref: Akbar Hossain Khan vs. Awlad Hossain Khan, 49 DLR 561). So the defendants would get 30 days time from the date of passing *ex-parte* decree. But they filed the application under Order IX rule 13 of the Code of Civil Procedure after 30 days from the date of *ex-parte* decree and it was clearly barred by limitation.

Once a party receives an intimation of an action in a Court, it is for him to pursue it diligently and to keep himself in touch with the

proceedings, either personally or through his Counsel, and the consequences flowing from his failure to keep pace with the developments of the suit must be borne by him but the defendants herein filed written statement and thereafter, did not contest the suit and as such, it is to be considered that they were not diligent with the proceeding of the suit. Under such circumstances they must bear the whole brunt of the ominous consequences that naturally flow from their failure to keep pace with the developments of the suit.

The defendants contended that after filing the written statement on 30.07.2012 the engaged Advocate did not communicate with them and thereafter, they engaged a new lawyer for collecting information. None of the defendants appeared as witness before the trial Court and they adduced one Md. Zahirul Islam as their attorney appointed by a power of attorney dated 07.02.2017 to depose on their behalf as Pt. W. 1 who in his deposition stated that he learnt about the *ex parte* judgment and decree on 22.04.2015. In cross-examination he stated that he knew nothing about the title suit or any matter about the suit and he had no personal knowledge about the suit or *ex parte* decree. The defendants did not adduce any further witness to prove their date of knowledge about the *ex parte* decree.

An “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. This view finds support in the cases of Janki Vashdeo vs. Industrial Bank limited 2005 (2) SCC 217, Shambhu Shastri vs. State of Rajasthan, 1989 2 WLN 713 (Raj), Ram Prasad vs. Hari Narain AIR 1998 (Raj) 185, Shankar Finance & Investments vs. State of AP (2008) 8 SCC

536 and Mankour (Dead) by Lrs. vs. Hartar Singh Sangha (passed in Civil Appeal Nos. 147-148 of 2001, online version).

In the instant case the Attorney of the defendants had no personal knowledge about the date of knowledge of the *ex parte* judgment and decree and as such, his testimony became valueless and inadmissible evidence.

It appears that the Court of appeal upon misconception of law and non-consideration of evidence dismissed the appeal summarily by the impugned judgment and illegally affirmed the judgment and order of the trial Court for giving gratuitous relief to the defendants and as such, committed an error 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 judgment and order dated 13.11.2022 passed by learned District Judge, Dhaka in Civil Miscellaneous Appeal No. 237 of 2022 dismissing the appeal summarily and affirming judgment and order dated 20.06.2022 passed by learned Joint District Judge, 4th Court, Dhaka in Miscellaneous Case No. 13 of 2015 are set aside. Miscellaneous Case No. 13 of 2015 filed by the defendants under Order IX rule 13 of the Code of Civil Procedure is dismissed.

The order of stay granted earlier is hereby vacated.

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

(Justice Md. Badruzzaman)