

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

**CIVIL REVISION NO. 797 OF 2024**

In the matter of:

An application under Section 115(1) of the Code of Civil  
Procedure.

AND

In the matter of:

Syeda Sarwat Hossan

.... Petitioner

-Versus-

Ataur Rahman

....Opposite-party

Mr. Md. Lutfor Rahman , Advocate

... For the petitioner

Mr. Md. Rafiqul Islam Faruque with

Mr.Md. Ziaur Rashid Tipu, Advocates

....For the opposite party

**Heard and Judgment on 10.07.2024**

**Present:**

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

**Md. Mozibur Rahman Miah, J:**

At the instance of the plaintiff in Title Suit No. 390 of 2016 and that  
of the opposite party in Miscellaneous Case No. 09 of 2023 (Filed under  
Order 9 Rule 13 of the Code of Civil Procedure), this rule was issued  
calling upon the opposite-party to show cause as to why the judgment and  
order dated 24.09.2023 passed by the learned Joint District Judge, 1<sup>st</sup> Court,

Dhaka in Miscellaneous Case No. 09 of 2023 allowing the same and setting aside the judgment and decree dated 16.03.2022 (decree signed on 22.03.2022) passed by the learned Joint District Judge, 1<sup>st</sup> Court, Dhaka in Title Suit No. 390 of 2016 decreeing the suit ex parte should not be set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, this court also stayed the operation of the impugned judgment and order till disposal of the rule.

The short facts leading to issuance of the instant rule are:

The present petitioner as plaintiff filed the aforesaid title suit seeking following reliefs:

- (ক) আরজীর মর্ম মতে বাদিনীকে নালিশী সম্পত্তিতে নিরংকুশ (absolute) মালিক স্বত্বাধিকারিনী ঘোষনাকুমে এক ডিক্রি প্রচার করিতে;
- (খ) সিটি জরিপ খতিয়ান নং-৩৪৫১ ভুল মর্মে ঘোষনামূলক ডিক্রী দি-ত;
- (গ) নালিশী সম্পত্তি সম্পর্কে বাদিনীর স্বপক্ষে এবং বিবাদীর বিরুদ্ধে খাসদখল পুনরুদ্ধারের এক ডিক্রী প্রচার করিতে;
- (ঘ) সর্বপ্রকার বাধাবিঘ্ন অপসারণক্রমে আদালত মাধ্যমে নালিশী সম্পত্তির খাসদখল বাদিনী বরাবরে উদ্ধার করিয়া দিতে;
- (ঙ) ময় আদালত ব্যয় বাদিনীর সপক্ষে এবং বিবাদীর বিরুদ্ধে ডিক্রি দি-ত;
- (চ) আইন, ন্যায়নীতি এবং ন্যায় বিচা-র বাদিনী আর যে সকল প্রতিকারাদি পাইবার হকদার বলিয়া বি-বচিত হন সেই সকল প্রতিকারাদিও বাদিনী বরাব-র মঞ্জুর করি-ত; হুজু-রর মর্জি হয়।

After serving summons upon the sole defendant since he did not appear, the learned judge of the trial court then took up the matter for

hearing and vide judgment dated 16.03.2022 decreed the suit ex parte. After that, the sole defendant filed a Miscellaneous Case under Order 9 Rule 13 of the Code of Civil Procedure on 17.04.2023 for setting aside the said ex parte decree stating inter alia that, he came to learn about the said ex parte decree only on 08.04.2023 when his representative namely, Md. Tajul Islam Bepary went to the Assistant Commissioner, revenue for mutating his name in the khatian and after obtaining the certified copy of the said judgment, he filed the Miscellaneous Case on 17.04.2023, Against the Miscellaneous case, the plaintiff also filed written objection on 15.06.2023 denying all the material averment so made in the petition filed under Order 9 Rule 13 of the Code of Civil Procedure stating inter alia that, the summons upon the sole defendant no. 1 had duly been served in both his permanent and present address having no scope to allege that summons had not been served upon the said defendant and the date of knowledge asserted in the application filed under Order 9 Rule 13 is incorrect and therefore the Miscellaneous Case is liable to be dismissed.

In support of their respective assertion, the defendant-petitioner and the plaintiff-opposite party adduced single witness. The learned judge upon considering the materials and evidence on record then vide impugned judgment and order dated 24.09.2023 allowed the Miscellaneous Case holding that, for ends of justice the suit should be disposed of on merit and on contest stating that “এমতাবস্থায়, সার্বিক বি-বচনায় ও ন্যায় বিচা-রর স্বা-র্থ এবং পক্ষগণের মধ্যে মূল মোকদ্দমার বিরোধীয় বিষয় দ্রুত নিষ্পত্তির স্বার্থে দরখাস্ত কারীপক্ষের দরখাস্ত মম্জু-রর সিদ্ধান্ত গৃহীত হ-লা।”

It is at that stage, the plaintiff as petitioner came before this court and obtained the instant rule and order of stay as stated herein above.

Mr. Md. Lutfor Rahman, the learned counsel appearing for the petitioner upon taking us to the impugned judgment and order at the very outset submits that, the learned judge committed an error of law in not considering the evidence and materials on record while passing the impugned order and thus the same cannot be sustained in law. The learned counsel by referring to the provision of Order 5 Rule 17 and 19 of the Code of Civil Procedure further submits that, since the defendant refused to receive the summons when it was tendered by the process server then the process server had no other option but to server the summon by hanging it on the front door of the house of the defendant and that very service is regarded a good service under those very provisions of law and since the process server made a declaration to that effect so that declaration will be considered as evidence in support of serving summons upon the defendant and therefore the learned judge of the trial court has rightly passed the judgment and decree ex parte having no scope to interfere with the same.

The learned counsel further submits that, since the suit was decreed on 16.03.2022 and it has been alleged by the defendant that, he came to learn about the said decree on 08.04.2023 so heavy burden lies upon the said defendant to prove the date of said knowledge by adducing and producing evidence but since the defendant has failed to produce any evidence so the Miscellaneous case was absolutely barred by limitation but that very point has not been taken into consideration while allowing the Miscellaneous Case filed under Order 9 Rule 13 of the Code of Civil Procedure. However, in support of his two legal submissions, the learned counsel has placed his reliance in the decision so reported in 36 DLR AD 248 as well as BCR 2006 AD 2009.

On the contrary, Md. Rafiqul Islam Faruque, the learned counsel appearing for the defendant-opposite party very robustly opposes the contention so taken by the learned counsel for the petitioner and by referring the provision of Order 5 Rule 19A of the Code of Civil Procedure submits that, there mentioned no name of the process server in the “service return” and in absence of any particular of the process server and of any declaration in accordance with the form so provided in form no. 11 in the appendix of the Code of Civil Procedure so, there has been no scope to consider service of summons upon the defendant and though the learned judge of the trial court allowed the Miscellaneous Case but he did not discuss or observe anything to that effect yet the impugned judgment and order is liable to be sustained.

The learned counsel further contends that, since it is the assertion of the plaintiff-petitioner that, the summons has rightly been served upon the defendant so onus lies upon the plaintiff to adduce the process server to assert the service of summons but since the plaintiff failed to adduce that vital witnesses which alternatively proves that, the summons has not been served upon the defendant as per provision of Order 5 Rule 7 of the Code of Civil Procedure. On those two legal counts the learned counsel finally prays for discharging the rule and vacating the order of stay.

We have considered the submission so advanced by the learned counsel for the parties and perused the revisional application and the decisions so cited at the bar.

There has been no gainsaying the facts that in support of the case and the counter-case stemmed from the application filed under Order 9 Rule 13 of the Code of Civil Procedure, both the defendant opposite party as well as

the plaintiff-petitioner adduced a single witness. It is the case of the defendant-opposite party that he had no knowledge about the judgment and decree passed ex parte on 16.03.2023 and it is only on 08.04.2023 he came to know about the said judgment and decree when he sent his representative to mutate his name in the khatian and soon enough he applied for the certified copy and within two days of the date of knowledge that is, on 10.04.2023 and within 03 days of obtaining the certified copy of the impugned judgment he filed the Miscellaneous case and thus the said Miscellaneous case was filed within the very statutory period of limitation that is well within 30 days of his date of knowledge as per Article 164 of the Limitation Act and therefore the learned judge of the trial court has very rightly allowed the Miscellaneous case having no reason to interfere with the same. However, on going through the judgment under challenge we find that, not a single sentence has been written by the learned judge with regard to the evidence adduced either by the plaintiff-petitioner or by the defendant-opposite party. Though it is the pertinent question so raised by the defendant-opposite party that they have got no knowledge about filing of the suit let alone service of summons upon him so certainly onus lies upon the plaintiff-petitioner to disprove that very assertion at least by adducing the process server in the Miscellaneous case. On the contrary, though it is the assertion of the defendant-opposite party that, he came to learn about the said ex parte decree only on 08.04.2023 through one Md. Tajul Islam but curiously enough, he has not been adduced before the court by the defendant-opposite party to prove the said assertion about the date of knowledge rather adduced a witness named, Md. Shakil Ahmed-claimed to be an attorney of the defendant even though that Md. Shakil Ahmed had no

information about the date of knowledge other than Md. Tajul Islam. Since both the parties to the case adduced single witness for proving their respective cases and the learned judge of the trial court has not touched upon any evidence vis-a-vis assertion so made by the plaintiff-petitioner and defendant-opposite party with regard to the service of summons in the entire judgment impugned so we are of the view that, the said judgment cannot be sustained in law, because the same has been passed in a very slipshod manner going beyond the principle followed in disposing of a Miscellaneous case. In the above backdrop, we view that, justice would be best served, if the Miscellaneous case is sent back to the learned judge of the trial court to dispose of the same afresh by discussing evidence so adduced by the parties concerned to the Miscellaneous case and then pass the judgment

Accordingly, the rule is disposed-of.

The learned judge of the trial court is hereby directed to dispose of the Miscellaneous case No. 09 of 2023 in accordance with law and in the light of above discussion and observation.

The order of stay grated at the time of issuance of the rule is thus recalled and vacated.

However, the learned judge of the trial court is hereby directed to dispose of the Miscellaneous case within a period of 02(two) months from the date of receipt of the copy of this order and till that date the further proceeding of Title Suit No. 390 of 2016 will be stayed.

Let a copy of this order be communicated to the court concerned forthwith.

**Md. Bashir Ullah, J:**

I agree.

Kawsar /A.B.O