

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 2615 of 2024

Md. Nazrul Islam being dead his legal heirs; 1(a) Mst. Afroza Begum and others

... Petitioners

-Versus-

Md. Asadur Rahman and others

...Opposite-parties

Ms. Hosnara Begum, Advocate

...For the petitioners

Mr. Khan Ilias Sadik, Advocate

...For the opposite-party Nos. 1 and 2.

Judgment on 22th July, 2025.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party Nos.1-2 to show cause as to why the impugned judgment and order dated 14.02.2024 passed by the learned Joint District Judge, 1st Court, Rangpur in Miscellaneous Appeal No.39 of 2023 disallowing the appeal and thereby affirming the judgment and order dated 30.03.2023 passed by the learned Assistant Judge, Sadar, Rangpur in Miscellaneous Case No.57 of 2021 rejecting the case should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compass. The opposite-party Nos.1 and 2, as plaintiff, filed Other Suit No.172 of 2016 in the Court of Assistant Judge, Sadar, Rangpur against the petitioner and others, as defendants, for a decree of partition of 0.264 ajutangsha land (2.64 sataks) out of 7 sataks of land under C.S. Plot No.306 corresponding to B.S. Plot No.3120 claiming that the property belonged to Omar Ali Munshi, father of the opposite party Nos.3-9 who died leaving 8 sons, defendant Nos.1-8 in suit and 5 daughters, defendant Nos.9-13. Defendant Nos.2-5 transferred their share to the plaintiff measuring 0.264 ajutangsha vide Kabala No.7170 dated 06.09.2006. Though summon notices were served upon the defendants and they entered into appearance by filing Vokalatanama and prayed for time to file written statement, ultimately refrained themselves from contesting the suit, consequently, the trial court decreed the suit ex parte in preliminary form by judgment and order dated 06.10.2021. After passing preliminary decree when the decree-holder proceeding towards making the decree final by appointing Advocate Commissioner, present petitioners claimed that on 20.11.2021 he

came to know about ex parte decree obtained by the opposite party Nos.1 and 2 in Other Suit No.172 of 2016, when he was taking tea in a local tea stall. Thereafter, he rushed to the court concerned and after making search of the concern record came to know that the opposite party Nos.1 and 2 obtained an ex parte decree on 06.10.2021 without knowledge of the petitioner.

Thereafter, the petitioner filed Miscellaneous Case No.57 of 2021 under Order 9 Rule 13 of the Code of Civil Procedure praying for setting aside the ex parte decree on 29.01.2021 at a delay of 47 days with an application under Section 5 of the Limitation Act praying for condonation of such delay, stating that the opposite party Nos.1 and 2 instituted Other Suit No.172 of 2016, summons were not properly served upon the petitioner. As the opposite party No.9 used to reside in Rangpur and sometime the petitioner was residing outside Rangpur for the business purpose, the opposite party No.9 was entrusted by the petitioner to appear before the court and to take necessary steps including communication with the lawyer. The opposite party No.9 received costs and expenses from the petitioner

and assured that he will perform all the acts regarding Other Suit No.172 of 2016.

In the meantime on 20.11.2021 the petitioner came to know that the opposite party No.9 did not sign the Vokatnama, but took signature of his brothers and sisters including the petitioner and in collusion with the plaintiff-opposite party Nos.1 and 2 neither submitted the written statement nor took any further step in the suit.

The opposite party No.9 purchased the undivided and unspecified shares of ejmali property from other brothers and sisters and at his instance opposite party Nos.3-6 transferred the same to the opposite party Nos.1 and 2. The suit land has not been divided among the petitioner and the opposite party Nos.3-16 by metes and bound. The opposite party Nos.1 and 2 tried to close the road which was using by the petitioner for long time. The petitioner raised objection against such activities, as such, the opposite party Nos.1 and 2 with the intention to harass the petitioner in collusion with the opposite party No.9 and obtained the ex parte decree by practicing fraud upon the court hence, the same is liable to be set aside and the suit is required to be restored in its original file and number.

It is stated that on 29.05.2022 the opposite party Nos. 1 and 2 filed written objection and opposed the application of the petitioner contending that the petitioner appeared in the original suit and prayed for adjournment to file written statement and objection. But subsequently on several dates took no step, consequently, the learned court passed the ex parte decree. The petitioner instituted the miscellaneous case only to harass the opposite parties and the present application is liable to be rejected. It is stated that the petitioner deposed as P.W.1 in the Miscellaneous Case No.57 of 2021. The opposite party Nos.1 and 2 cross-examined the P.W.1, but did not examine any witness and submit any document. The Assistant Judge, Sadar, Rangpur by its judgment and order dated 30.03.2023 dismissed the same. Against the aforesaid judgment and order of dismissal dated 30.03.2023 the defendant-petitioner preferred Miscellaneous Appeal No.39 of 2023 before the learned District Judge, Rangpur. The learned District Judge, Rangpur admitted the miscellaneous appeal and transferred the same to the court of learned Joint District Judge, 1st Court, Rangpur for hearing and disposal who by its judgment and order dated 14.02.2023 dismissed the appeal and

affirmed the judgment and order dated 30.03.2023 passed by the Assistant Judge, Sadar, Rangpur holding that summons were duly served upon the defendant-petitioner and he failed to prove that the opposite party No.9 was entrusted to take necessary steps in the original suit. At this juncture, the defendant-petitioner, moved this Court by filing this application under Section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of stay.

During pendency of the Rule the petitioner died and his heirs duly substituted as petitioners in his place.

Ms. Hosnara Begum, learned Advocate appearing for the petitioners submits that summon notices were not served upon the defendant No.1 in accordance with the provisions of Order 5 Rule 19 of the Code of Civil Procedure, but the summons were served by hanging and affixing copy of the summons on the door of the defendant's residence. She submits that the ex parte decree passed by the trial court suffers from minimum legal requirements under Order 20 Rules 4 and 5 of the Code of Civil Procedure and as such, the judgment and decree on the face of it liable to be set aside. It is argued that if the plaintiff failed to prove that summons upon the

defendants were not duly served an ex parte decree is liable to be set aside even if it is proved that the defendants were otherwise fully aware of filing of the suit. It is submitted that the petitioner, as defendant No.1 entrusted the task of taking step including filing of written statement in the suit on the defendant No.9 who used to live in Rangpur Sadar, he in connivance with opposite party Nos.1 and 2 though took all the expenses from the petitioner to file written statement and to take further steps in the suit, but did not take any step for filing written statement, relevant documents and deposing before the trial court and also kept the petitioner in dark, consequently, the suit was decreed ex parte.

She finally submits that had the petitioner got opportunity of filing written statement and contesting the suit he would have taken recourse to Section 4 of the Partition Act read with Section 44 of the Transfer of Property Act praying for buying up the property as the property is undivided dwelling house of the petitioner, but because of conspiracy of defendant No.9, the petitioner deprived of getting opportunity to contest the suit, on that ground also the trial court as well as the appellate court ought to have allowed the miscellaneous

case and restored the original suit in its original file, number and position by setting aside the ex parte decree and as such, both the courts below committed illegality and an error of law in the decision occasioning failure of justice.

Mr. Khan Ilias Sadik, learned Advocate appearing for the opposite-party Nos.1 and 2 submits that summon notices were duly served upon the defendants who after receipt of summons entered into appearance by filing Vokatnama, prayed for time to file written statement. The trial court allowed time as prayed for. The suit was filed on 16.06.2016 and after a long time the suit was decreed ex parte on 06.10.2021. By this time the defendants had sufficient opportunity to take step in the suit by filing written statement, deposing before the court in support of their claim, but they did not bother even took any step at least on 10th occasions. Where the defendants are not coming to contest the suit by filing written statement, the trial court had no other option but to dispose of the suit ex parte upon consideration of the evidences on record, accordingly, the trial court passed the judgment ex parte. He submits that plaint case has not been denied by the petitioner, rather,

admitted that the property measuring 7 sataks was acquired by their father Omar Ali Munshi by way of gift and purchase who died leaving 8 sons and 5 sisters, petitioner is one of the sons. As per Mohammadan Law of inheritance, the petitioner is entitled to get 1/66 ajutangsha land out of the suit plot, 4 sons of Omar Ali Munshi defendant Nos.2-5 in Other Suit No.172 of 2016 sold their share to the opposite party Nos.1 and 2 by a Registered Deed No.7170 dated 06.09.2006 in which the petitioner was identifier of the executants as their full brother, meaning thereby, the petitioner, right from transfer of the suit property to the plaintiffs was well aware about the sale. The suit was filed by the opposite party Nos.1 and 2 after 10 years of purchase of the suit land. By this time the petitioner did not take any step even refrained himself from contesting the suit after appearance before the court knowing fully well that by the decree if there be any his share will not be disturbed and he will not get any relief in the suit. Consequently, all the heirs of Omar Ali Munshi did not appear in the suit and contest the same, allowing the suit to be disposed of ex parte. After passing decree except the petitioner other heirs of Omar Ali Munshi did not come forward to challenge the decree by

filing miscellaneous case or appeal. Only defendant No.1-petitioner came with an application for setting aside the decree.

He finally argued that as per share of the defendants, in the event of contesting the suit by the petitioner there is no chance of changing the decree as the opposite party has been allotted saham in respect of share obtained by 4 sons and sold by them to the plaintiffs and as such, the trial court as well as the appellate court rightly dismissed the miscellaneous case and appeal.

Heard the learned Advocates of both the parties, have gone through the revisional application under Section 115(1) of the Code of Civil Procedure, plaint in suit, exhibits filed by the plaintiffs, petition in miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure and the judgment and order passed by both the courts below.

The petitioner in his application under Order 9 Rule 13 of the Code of Civil Procedure admitted that he along with other brothers, as defendants in suit after receipt of summons entrusted defendant No.9, one of his full brothers to take step in the suit by filing written

statement. Accordingly, defendant No.1-petitioner entered into appearance by filing Vokatnama and prayed for time to file written objection against application for injunction and written statement. The court allowed prayer by its order dated 06.10.2016 fixing 03.01.2017 for filing written statement and written objection. On 03.01.2017 the defendant No.1 again prayed for time which was allowed fixing 07.02.2017. On 07.02.2017 again prayed for time, the court allowed and fixed 08.03.2017. On 08.03.2017 again prayed for time, time was allowed. Similarly, the defendants were allowed time upto 20.02.2018. Thereafter, the defendants did not take any step in the suit either by filing written statement or written objection. Consequently, the trial court on several dates fixed the suit for ex parte hearing. Finally, the trial court took the suit for ex parte hearing, examined P.W.1 and marked the documents as Exhibits No.1-12 and passed ex parte decree on 06.10.2021. The petitioner claimed that he used to live in the village and busy with his own business. On the other hand, his full brother defendant No.9 used to live in Sadar who was entrusted with the task of taking all steps in the suit. But the record show that the defendant No.1 independently

appeared in the suit by filing Vokatnama not jointly and he took step upto 08.03.2017 and thereafter, did not take any step in suit. When the petitioner deposing he could not substantiate his claim that he entrusted the task of taking step in the suit upon defendant No.9. Order sheets show that summon notices, in fact, was not returned after service, the suit was proceeding treating the summons served upon the defendants under Order 5 Rule 19 of the Code of Civil Procedure. However, the defendants entered into appearance by filing Vokatnama, therefore, question of service of summons upon them properly has no basis.

Next question is whether by the ex parte decree the petitioner has suffered any loss or injury at all.

To appreciate the ground taken by the petitioner, I have gone through the ex parte decree passed by the trial court, application under Order 9 Rule 13 of the Code of Civil Procedure, documents marked as exhibits by the trial court along with plaint in suit. In the plaint the plaintiffs categorically stated that the property acquired by one Omar Ali Munshi who died leaving 8 sons and 5 daughters. As per law of inheritance each son inherited 1/666 ajutangsha and each

daughter inherited .333 ajutangsha out of total property measuring 7 sataks. The plaintiff in suit purchased share of defendant Nos.2-5 i.e. 4 brothers measuring 0264 ajutangsha, defendant No.8, another brother of petitioner purchased the share of other 2 brothers and 5 sisters measuring 0297 ajutangsha leaving share of petitioner measuring .666 ajutangsha. The plaintiff got a decree for their purchased land measuring 0264 ajutangsha (2.64 sataks). The petitioner in his application for setting aside ex parte decree did not state a positive case how, in the event of maintaining ex parte decree he will be prejudiced or whether, his share will be increased or the share of the plaintiffs will be decreased.

Admittedly, the plaintiffs purchased the share of defendant Nos.2-5 not more than their entitlement. From perusal of decree passed by the trial court, it appears that the court keeping in mind convenience and inconveniences of the parties directed the Advocate Commissioner to effect partition maintaining their respective possession and enjoyment so far it is practicable. Therefore, by the decree, I find no reason how the petitioner will be prejudiced and

what inconveniences will cause to the petitioner if the decree is executed giving saham to the plaintiffs.

It is true that the ex parte decree passed by the trial court is lacking requirement of Order 20 Rules 4 and 5, but the decree has caused no injustice to the petitioner as the share of plaintiffs has not been denied by the petitioner. In the event of restoring the suit in its original number and position by setting aside the decree allowing the petitioner (defendant No.1) to contest the suit, I find that, there is no chance of changing the decree in any way passed by the trial court ex parte.

In view of the above, where the decree passed ex parte has not caused any injustice to the petitioner and not beyond the entitlement of the plaintiffs, I find no reason for setting aside the decree giving an undue advantage to the petitioner for mere asking of it.

Learned Advocate for the petitioner tried to impress upon the court that the defendants in a suit for partition can take recourse to provisions of Section 4 of the Partition Act as the suit property is dwelling house and the plaintiffs are stranger purchasers from the co-

sharer. Because of not getting chance to contest the suit the petitioner has been deprived of taking advantage of Section 4 of the Partition Act. In the instant case, record shows that the petitioner himself was identifier of the executants in the deed of the year 2006 and fully aware of selling the property to the plaintiffs. However, he had opportunity to file application under Section 4 of the Partition Act in suit when he was well aware about transfer of the property and filing of the partition suit by the stranger purchaser but he did not take any step. For gross negligence of the petitioner the law does not permit to give undue advantage to a person to contest the suit by setting aside a decree legally passed by the trial court not giving excess saham to the plaintiffs. It is settled principle of law that law acts in aid of the vigilant not for the indolent. From very conduct of the petitioner, it appears that he was very much indolent and willfully refrained from taking recourse to law by filing written statement or application under Section 4 of the Partition Act to get relief in time.

Therefore, I find no merit in the Rule and illegality or error of law in the judgment and order passed by both the courts below calling for interference by this Court.

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

Order of *stay* granted at the time of issuance of the Rule stand vacated.0

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.