

Bench:

Mr. Justice Md. Ali Reza

Civil Revision No. 5149 of 2024

Md. Shahidullah (Sikder) Molla and others
.....petitioners

-Versus-

Ezam Mollah and others
.....opposite parties

Mr. Sadananda Rana with
Mr. Md. Wahiduzzaman Sohel and
Mr. Md. Tawfiqul Islam, Advocates
.....for the petitioners

Mr. Muhammad Hemayet Kabir Khan, Advocate
.....for the opposite parties

**Heard on: 29.10.2025, 10.11.2025 and
16.11.2025**

Judgment on: 17.11.2025

In the instant revision Rule was issued on 04.11.2024 calling upon the opposite parties 1-2 to show cause as to why the judgment and order dated 21.10.2024 passed by the learned Senior District Judge, Bagerhat in Miscellaneous Appeal Number 28 of 2022 allowing the appeal and thereby setting aside the order dated 28.06.2022 passed by the learned Assistant Judge, Bagerhat in Miscellaneous Case Number 05 of 2021 rejecting the application under Order IX Rule 13 of the Code of Civil Procedure should not be set aside and/or

such other of further order or orders passed as to this Court may seem fit and proper.

The present petitioners 1-3 and the father of petitioners 4-7 as plaintiffs filed Title Suit 35 of 1999 for partition claiming saham of 2.82 acres of land against the present opposite parties.

The present opposite parties being defendants 13 and 27 in the original suit did not contest the suit for which the Assistant Judge decreed the suit *ex parte* by judgment and decree dated 05.05.2002.

Against the said *ex parte* decree the present opposite parties 1 and 2 filed Miscellaneous Case 05 of 2021 under order 9 rule 13 of the Code of Civil Procedure on 12.09.2021 contending that opposite parties 1-3 and father of opposite parties 4-7 including the process server had collusively shown that summonses were duly served but in fact no summons was ever served upon them and they had no notice of the *ex parte* decree and only on 05.09.2021 when the present petitioners allegedly attempted to take possession of the suit land they came to know of the *ex parte* decree and then filed the instant miscellaneous case.

The present petitioners being opposite parties 1-7 in the miscellaneous case contested the case by filing a written objection contending that the present opposite parties were defendants 13 and 27 in Title Suit 35 of 1999. Summonses were duly served through post with acknowledgment due and also through court and the original suit was within their knowledge. Hence the application under order 9 rule 13 is liable to be rejected.

The trial Court upon hearing both parties rejected the miscellaneous case by judgment and order dated 28.06.2022.

As against the same present opposite parties 1 and 2 preferred Miscellaneous Appeal 28 of 2022 before the Senior District Judge, Bagerhat who upon hearing allowed the appeal by judgment and order dated 21.10.2024 and set aside the order passed by the trial court.

It further appears that earlier some of the defendants of the original suit had filed Title Suit 27 of 2003 on 17.06.2003 challenging the *ex parte* decree passed in Title Suit 35 of 1999 in which the present opposite parties were also defendants and consequently the suit was dismissed for default on 17.06.2007.

Being aggrieved by and dissatisfied with the judgment dated 21.10.2024 passed by the appellate court the present

petitioners who are the plaintiffs of the original suit preferred this civil revision and obtained rule on 04.11.2024.

Mr. Sadananda Rana, learned Advocate along with Mr. Md. Wahiduzzaman Sohel and Mr. Md. Tawfiqul Islam, learned Advocates appearing on behalf of the petitioners submits that the trial court upon proper appreciation of evidence correctly rejected the miscellaneous case but the appellate court without reversing the material finding of the trial court and in violation of order 41 rule 31 of the Code of Civil Procedure has mechanically allowed the appeal. He contends that the opposite parties had full knowledge of the original suit but intentionally avoided contesting it. He further submits that since some of the defendants of earlier suit filed Title Suit 27 of 2003 in which the present opposite parties were defendants they had knowledge of the *ex parte* decree at least from 2003 and thus the miscellaneous case is barred by limitation under article 164 of the Limitation Act. He empathically contends that summonses were duly served and once due service is shown defendants cannot subsequently deny service. He finally submits that the appellate court committed error of law resulting in an error in such order occasioning failure of justice in allowing the miscellaneous

case upon fanciful consideration and without reversing the material finding of the trial court as to service of summons this impugned judgment is bad in law. He finally prays that the rule be made absolute.

Mr. Muhammad Hemayet Kabir Khan, learned Advocate appearing on behalf of the opposite parties submits that the appellate court properly reversed the finding of the trial court in accordance with order 41 rule 31 of the Code of Civil Procedure and the judgment passed by the appellate court is a well-reasoned judgment of reversal. He argues that appellate court did not commit any error of law resulting in an error in such order occasioning failure of justice inasmuch as the appellate court considered all evidence, scrutinized the reasoning of the trial court and recorded its own findings and therefore the judgment is immune from interference by this court in revision. He further submits that rejection of the miscellaneous case would cause serious complications among co-sharers and led them to multiplicity of proceedings and therefore for ends of justice and equity and for maintenance of peaceful social order the miscellaneous case is required to be allowed. He finally prays that the rule be discharged.

Heard the learned Advocates for both sides and gone through the judgment of the courts below and perused the materials on record as well as the revisional application with the documents appended thereto.

Record shows that Title Suit 35 of 1999 was filed on 19.09.1999. Order Number 42 dated 05.05.2002 annexure-B shows substitution of the heirs of deceased plaintiff 1 and recording of the deposition of PW 2 was taken on 31.03.2002. From the documents exhibits-1, 3-4 and 2 series the trial court found that the plaintiffs' predecessor had valid title and interest and accordingly allotted 2.82 acres of land and passed the preliminary decree.

The opposite parties pleaded in the miscellaneous case that although they were arrayed as defendants 13 and 27 respectively in the original suit but no summons or notice was ever issued or served upon them. They further alleged that the father of the plaintiffs named Salam Sikder had in a highly clandestine manner showed fictitious service of summons and obtained the ex parte decree against the applicants. They also asserted that no step has yet been taken for preparation of the final decree. Since the preliminary decree was passed in their absence and without their knowledge and when the plaintiffs

attempted to take the possession of the land which the applicants have been possessing in their own right they suffered irreparable loss. For these reasons they prayed that in the interest of justice the preliminary decree dated 05.05.2002 passed in Title Suit 35 of 1999 be set aside and the original suit be restored to its original file and number allowing the applicants the opportunity to contest the suit by filing written statement.

Under order 9 rule 13 of the Code of Civil Procedure the court may set aside the *ex parte* decree if it is satisfied that summons was not duly served or the defendant was prevented by sufficient cause from appearing.

Proper service of summons is a condition precedent for the sustainability of an *ex parte* decree. Courts consistently hold that an *ex parte* decree must be set aside where service is fraudulent or defective or unproved or where service returns are unavailable, unsatisfactory or inconsistent.

In the instant case petitioners referred to annexure-E2 which is the service return. It shows that procedure under order 5 rule 17 of the Code of Civil Procedure was followed and under rule 19A of the same Code the process server made a declaration of service.

It is the settled principle of law that the onus of proof that summons is duly served upon the defendant is on the plaintiff of the original suit. When the plaintiff of the original suit discharged his onus by proving that the process server submitted his report along with a declaration that he served the summons by hanging it on the front gate of the defendant or in a conspicuous place when the latter refused to accept it. The examination of the process server is not mandatory under rule 19A of order 5 of the Code of Civil Procedure. But his examination is mandatory when he has simply submitted his report about the service of summons without any verification or declaration that he has served the summons upon the defendant. In such situation the onus shifts to the defendant to show that the summons was not served upon him. At one stage of submission the learned Advocate for the opposite parties contends that the examination of the process server was mandatory but in the instant case since he was not examined the *ex parte* decree must fall through under order 9 rule 13 of the Code of Civil Procedure but from reading of annexure-E2 it appears that the process server submitted the report with declaration maintaining provisions of order 5 rule 19A of the Code of Civil Procedure. He referring to the *ratio* laid down in

Dhamai Tea Estate Vs. Arjun Kurmi, reported in 35 DLR(AD) 162 contends that due service of summons on the defendant being essential and when the court is satisfied that there was no due service it is bound to set aside an *ex parte* decree. But as discussed above in the instant case I found from perusal of the record that summonses were duly served upon the opposite parties.

This view finds support from the decision of Md. Insan Ali Vs. Mir Abdus Salam, reported in 40 DLR(AD) 193 and Santosh Kumar Vs. Motaleb Hossain, reported in 36 DLR(AD) 248 as referred to by the learned Advocate for the petitioners wherein both decisions hold that examination of process server is not mandatory when return contains a valid declaration and indicates service or refusal.

The trial court considered the petition filed under order 9 rule 13 and the written objection and depositions as well and held that summonses were duly served. Court also found that acknowledgement of postal receipts were found on record. The trial court concluded that defendants were aware of the decree from the beginning and thus rejected the miscellaneous case.

It is significant that miscellaneous case of 2021 challenging a decree of 2002 after a lapse of 19 years is far beyond the limitation prescribed in article 164 of the Limitation Act unless fraud or non service is proved.

The appellate court allowed the miscellaneous case on the finding that trial court relied mainly on the testimony of PW 1 Ezaz Mollah and such reliance was insufficient to conclude proper service of summons. But the appellate court did not reverse the finding of fact arrived at by the trial court regarding service nor did it examine or dislodge the service returns or postal acknowledgment or procedural compliance under order 5 rule 17 and 19A of the Code of Civil Procedure.

The appellate court also held that denial of opportunity to contest before final decree is contrary to natural justice. But it appears that the decree challenged is a preliminary decree and the same is lawful unless service is found to dissatisfaction. Thus it is evident that the appellate court committed error of law resulting in an error in such order occasioning failure of justice in allowing the miscellaneous case without reversing the finding of the trial court.

For the reasons stated above the impugned judgment and order dated 21.10.2024 passed by the Senior District Judge,

Bagerhat in Miscellaneous Appeal 28 of 2022 is hereby set aside. The judgment and order dated 28.06.2022 passed by the Assistant Judge, Bagerhat in Miscellaneous Case 05 of 2021 is hereby affirmed.

I therefore find merit in this rule. Accordingly, the rule is made absolute.

The order of stay passed by this Court stands vacated.

Communicate this judgment to the concerned Court at once.

Md. Ali Reza, J: