

Bench:

Mr. Justice Md. Ali Reza

Civil Revision No. 38 of 2026

Haji Md. Jouynal Abedin

.....petitioner

-Versus-

Md. Shah Alam alias Shah Alom Howlader
and others

.....opposite parties

Mr. Moteen Uddin Anwar, Advocate

.....for the petitioner

Mr. Zulfiquir Ahmed with

Mr. Md. Towwfiquir Rahman Advocates

.....for opposite parties

Heard on: 16.08.2026 and 31.08.2026

Judgment on: 02.09.2026

In the instant revision Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 10.11.2025 passed by the Additional District Judge, 1st Court, Dhaka in Civil Revision Number 173 of 2024 dismissing the revision thereby affirming the judgment and order dated 29.04.2024 passed by the Senior Assistant Judge, 4th Additional Court, Dhaka in Miscellaneous Case Number 01 of 2020 allowing the miscellaneous case under Order 9 Rule 13 of the Code of Civil Procedure thereby setting aside the exparte judgment and decree dated 18.08.2019 passed by the Senior Assistant Judge, 4th

Additional Court, Dhaka in Title Suit Number 248 of 2010 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.

The petitioner as plaintiff filed Title Suit Number 239 of 2007 in the Court of the Assistant Judge, First Court, Dhaka. The suit was subsequently transferred to the Court of the Additional Assistant Judge, Fourth Court, Dhaka and was renumbered as Title Suit Number 248 of 2010. The suit was filed for a declaration that the kabala dated 08.05.1957 as described in the 'Kha' schedule to the plaint in respect of the land described in the 'Ka' schedule is false, fraudulent, collusive, inoperative, null and void and not binding upon the plaintiff. The plaintiff also sought a declaration that the R.S. record is erroneous and a decree of permanent injunction in respect of the suit property.

The suit was decreed exparte on 18.08.2019. Thereafter defendants 13-14 and 17-22 of the original suit as petitioners (hereinafter referred to as the “defendants”) filed Miscellaneous Case Number 1 of 2020 on 04.10.2020 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside of the exparte decree obtained by the present petitioner (hereinafter referred to as the “plaintiff”).

The case of the defendants in substance is that the summons purportedly issued upon defendants 13-14 of the original suit were shown to have been served upon defendants 17-22. Conversely the summons issued upon defendants 17-22 were shown to have been served upon defendants 13-14. It is further alleged that the process witnesses in whose presence the said summonses were shown to have been served did not give any evidence in support of such service. It is also alleged that the plaintiff deliberately concealed the pendency of the suit and fraudulently obtained the exparte judgment and decree with a view to taking possession of the valuable suit property.

According to the defendants the addresses upon which service of summons was shown in respect of defendants 13-14 and 17-22 were not their addresses and they never resided at those addresses. It is their further case that the process server never went to those defendants for serving the summons, notice or copies of the plaint and they had no knowledge whatsoever about the original suit. When the plaintiff subsequently started making attempts to take possession of the valuable suit property the defendants for the first time came to know about the said fraudulent exparte decree on 25.08.2020.

On the following day they applied for certified copies of the relevant records and upon obtaining the certified copy on 03.09.2020 they became fully aware of the exparte judgment and decree and thereafter filed the miscellaneous case.

The plaintiff in his written objection contended that the summons and registered postal summons were duly served upon all the defendants of the original suit. As none of the defendants took any step on the date fixed the Court proceeded to hear the suit exparte.

The plaintiff further contended that he produced his witnesses and evidence in accordance with law and the Court thereafter passed the exparte judgment and decree on 18.08.2019. It was further contended that the miscellaneous case was filed after a long delay of 413 days from the date of the exparte judgment and decree and was therefore liable to be dismissed.

Upon the pleadings of the parties the Court below framed the issues as to whether the miscellaneous case was maintainable in its present form and whether the exparte judgment dated 18.08.2019 and the exparte decree dated 21.08.2019 were liable to be set aside and the original suit restored to its file and number.

In support of the miscellaneous case defendant 2 of the original suit was examined as P.W.1. On the other hand the plaintiff did not examine any witness.

Upon consideration of the evidence and materials on record the Court below by judgment and order dated 25.04.2024 allowed the miscellaneous case. Consequently the exparte judgment and decree dated 18.08.2019 were set aside and the original suit was restored to its original file and number.

Being aggrieved by and dissatisfied with the said judgment and order of the Court below the plaintiff preferred Civil Revision Number 173 of 2024 before the District Judge, Dhaka under Section 115(2) of the Code of Civil Procedure. The said revision was subsequently transferred to the Court of the Additional District Judge, First Court, Dhaka. Upon hearing the parties the Additional District Judge by judgment and order dated 10.11.2025 dismissed the revision and affirmed the judgment and order of the Court below.

Being aggrieved by and dissatisfied with the said judgment and order of the revisional Court the plaintiff has preferred the instant civil revision under Section 115(4) of the Code of Civil Procedure. Rule was issued on 18.01.2026.

Learned Advocate Mr. Moteen Uddin Anwar appearing on behalf of the plaintiff-petitioner submits that the Courts below committed errors of law on important questions of law which resulted in erroneous decisions and occasioned failure of justice in allowing the miscellaneous case upon a wrongful appreciation of the materials on record.

He referring to the application dated 29.04.2024 submits with emphasis that although by the said application the plaintiff sought withdrawal of the suit from the date fixed for order so that he might take steps for examining his witnesses the Court below kept the application with the record and proceeded to pass the order. He further submits that the Court below at one stage of its judgment observed that on 29.04.2024 the plaintiff had not taken any step for examining witnesses and therefore the application for time was rejected. He submits that the said finding clearly shows that the plaintiff had deliberately refrained from adducing evidence in the miscellaneous case. He submits that the application dated 29.04.2024 itself makes it clear that the said finding is wholly erroneous. He further submits that the revisional Court also failed to give any specific finding on this material aspect of the case. Consequently the judgments of both the Courts

below are vitiated by errors of law and are liable to be set aside.

He next refers to Article 164 of the Limitation Act and submits that although the defendants filed the miscellaneous case 413 days after the *ex parte* decree they failed to file the same within the prescribed period of 30 days and also failed to establish the date on which they allegedly acquired knowledge of the decree. He further submits that the defendants did not even file any application under Section 5 of the Limitation Act seeking condonation of delay. Therefore according to him the miscellaneous case is clearly barred by limitation. He submits that both the Courts below failed to consider this important question of law which resulted in erroneous decisions and occasioned failure of justice.

Learned Advocate further submits that even P.T.W. 1 was not a party to the miscellaneous case and he was examined on behalf of the defendants without complying with the provisions of Order 3 Rule 2 of the Code of Civil Procedure. He submits that this material aspect of the case was not considered by either of the Courts below and therefore the impugned judgments are perverse and misconceived and are liable to be set aside.

He finally submits that the defendants completely failed to prove their case and the delay in filing the miscellaneous case was not satisfactorily explained. He submits that in the absence of any proof of fraud the miscellaneous case is clearly barred by limitation. At one stage however he prays for an order of remand so that the plaintiff may be afforded an opportunity to produce and examine his witnesses in support of his case.

On the other hand learned Advocate Mr. Zulfiqur Ahmed along with Mr. Md. Towwfiquir Rahman appearing on behalf of the defendants referring to Order Number 142 dated 10.10.2023 submits that the original defendant 2 namely Aminul Haque was examined as P.T.W. 1 in support of the case of the defendants. He submits that the contention of the plaintiff that P.T.W. 1 was not a party to the miscellaneous case is based on a misapprehension of the record.

He next submits that the question of fraud as raised by the plaintiff does not arise in the manner contended by him. Rather the summonses were not duly served upon the defendants and the service returns themselves disclose the irregularity in such service. He submits that both the Courts below upon consideration of the service returns and other

materials on record concurrently found that the summonses had not been duly and lawfully served upon the defendants. He further submits that where the defendants had no knowledge of the suit because of non-service of summons the question of limitation cannot be considered in the manner suggested by the plaintiff.

Learned Advocate Mr. Zulfiquir further submits with emphasis that defendants 13-14 and defendants 17-22 do not reside in the same mess or at the same place. None of the defendants was authorised or empowered by law to receive summons on behalf of any other defendant. Therefore showing service of summons upon one set of defendants as service upon another set of defendants constitutes a clear violation of the mandatory requirement of lawful service and a serious irregularity in the service process. He submits that both the Courts below correctly found that the summonses were not duly and lawfully served upon the defendants and the *ex parte* decree was rightly set aside.

He finally refers to the order sheet of the miscellaneous case and submits that the contention of the plaintiff that he was not afforded an opportunity to examine witnesses in support of his case is entirely misconceived. He submits that

the plaintiff did not take any effective step for producing or examining his witnesses in accordance with law. Therefore no prejudice was caused to him by the order of the Court below.

He lastly submits that both the Courts below upon proper appreciation of the evidence and the materials on record concurrently found that the summonses had not been duly served upon the defendants. Such concurrent findings of fact do not call for interference by this Court in its revisional jurisdiction under Section 115(4) of the Code of Civil Procedure. He therefore prays that the Rule be discharged.

I have heard the learned Advocates for both sides and perused the materials on record.

The case of the plaintiff is that the summons and the postal summons were duly served upon all the defendants of Title Suit Number 248 of 2010. The specific case of the defendants however is that the summonses issued in the names of defendants 13-14 were shown to have been served upon defendants 17-22 and the summonses issued in the names of defendants 17-22 were shown to have been served upon defendants 13-14.

On perusal of the judgments of both the Courts below and the materials on record I find that the case of the

defendants in this regard is supported by the record. The postal receipts relating to the summons issued in the names of the concerned defendants are not available on record. The return relating to the summons shows that a person named Russel who is defendant 20 received the summons. But there is no satisfactory explanation from the plaintiff as to why the summonses issued in the names of defendants 13-14 were shown to have been served upon defendants 17-22 and why the summonses issued in the names of defendants 17-22 were shown to have been served upon defendants 13-14.

There is also no clear explanation in the service return as to under what circumstances the summonses issued in the names of defendants 13, 14, 17, 18, 19, 20, 21 and 22 were shown to have been served upon a person named Russel. The record does not show that Russel was authorised to receive summons on behalf of any of those defendants. The plaintiff has failed to explain this important defect in the alleged service of summons.

It is therefore clear from the record that the defendants were not duly served with summons in accordance with law. It is well settled that the burden lies upon the plaintiff of the original suit to prove that the summons was duly served upon

the defendant against whom an ex parte decree was passed. In the present case the plaintiff has failed to discharge that burden.

The order sheet of the miscellaneous case also requires consideration. Order Numbers 158 and 159 both dated 24.01.2024, Order Numbers 160 and 161 both dated 14.02.2024 and Order Numbers 162 and 163 both dated 29.02.2024 show that dates were fixed for examination of the plaintiff's witnesses. However on none of those dates did the plaintiff produce any witness before the Court.

Order Numbers 164 and 165 both dated 22.04.2024 show that the plaintiff filed applications seeking time and those applications were kept with the record. Thereafter on 29.04.2024 by Order Number 166 the plaintiff prayed for withdrawal of the case from the date fixed for order for the purpose of examining his witnesses. That application was also kept with the record. Thus even on 29.04.2024 the plaintiff did not produce any witness before the Court.

There is a prescribed procedure for producing witnesses before the Court. Rule 135 of the Civil Rules and Orders provides that the parties shall file their lists of witnesses who are in attendance to give evidence on their behalf. Note 1 to

the said Rule further provides that the advocate filing the list should satisfy himself that the witnesses named therein are actually present in Court. The Court may also have the list verified by one of its officers if necessary.

Therefore if the plaintiff had actually brought his witnesses to Court for examination the order sheet should have reflected such presence in accordance with the prescribed procedure. But the order sheet does not show the presence of any witness of the plaintiff. The conduct of the plaintiff therefore does not support his contention that he was ready to examine his witnesses.

Both the Courts below also found that the postal receipts relating to the alleged service of postal summons upon the defendants were not available on record. The plaintiff did not examine the concerned process server or Abdul Ismail and Bellal who were allegedly connected with the service of the summons. Their signatures are also not available on the service return. The disputed service returns were not proved through any competent witness and were not properly exhibited.

In such circumstances the alleged service of summons cannot be accepted as lawful service. The plaintiff has failed

to prove by reliable evidence that the defendants were duly served. Rather the circumstances appearing from the record show that the summonses were shown to have been served in a manner which was not authorised by law. The manner of service therefore appears to be fraudulent.

The provisions in respect of service of summons are also clear. Under Order 5 Rule 12 of the Code of Civil Procedure summons should wherever practicable be served personally upon the defendant. Rule 69 of the Civil Rules and Orders also provides that in an *ex parte* case the Court should not act upon anything short of personal service until it is satisfied that personal service could not reasonably be effected.

Note 1 to the said Rule further provides that personal service includes service upon the person concerned or upon his agent empowered to accept service on his behalf. It also includes the cases contemplated under Order 5 Rules 13, 14 and 15 of the Code of Civil Procedure.

In the present case there is no evidence that defendants 13-14 were agents of defendants 17-22. There is also no evidence that defendants 17-22 were agents of defendants 13-14. There is further no case of the plaintiff that the said defendants were residing together at the same address or in the

same mess. Therefore service upon one set of defendants cannot be treated as service upon the other set of defendants under Order 5 Rule 12 of the Code of Civil Procedure.

The record thus shows that there was no direct personal service of summons upon the concerned defendants. In the absence of lawful service the defendants cannot be treated as having been duly served in the original suit. The *exparte* judgment and decree were therefore passed without proper service of summons upon those defendants.

It has already been noticed that although several dates were fixed for examination of the plaintiff's witnesses the plaintiff repeatedly sought time instead of producing his witnesses. Even on 29.04.2024 he did not produce any witness and instead prayed for withdrawal of the case from the date fixed for order. The record therefore does not support his contention that he was prevented from producing evidence.

The question of limitation raised by the learned Advocate for the plaintiff also requires consideration. It is true that Article 164 of the Limitation Act prescribes a period of 30 days for an application to set aside an *exparte* decree. In the present case however the defendants' specific case is that they first came to know about the *exparte* decree on 25.08.2020 and

thereafter obtained the certified copy. The certified copy was obtained on 03.09.2020 and the miscellaneous case was filed on 04.10.2020.

Thus taking 03.09.2020 as the date on which the defendants obtained the certified copy and became fully aware of the ex parte decree the miscellaneous case was filed within the prescribed period. In any event the materials on record disclose apparent fraud in the service of summons.

In this connection the case of Bangladesh Vs. Moshir Rahman reported in 50 DLR(AD) 205 has been referred to. It was held therein that when an ex parte decree is challenged on ground of fraud and some elements of fraud and collusion are found on the record the Court should not sustain such fraudulent decree even if the application for setting aside the ex parte decree is barred by limitation.

In the present case as already discussed the record discloses apparent fraud in the service of summons. Moreover the miscellaneous case was filed on 04.10.2020 after the defendants obtained the certified copy on 03.09.2020. Therefore I find no substance in the submission of the learned Advocate for the plaintiff that the miscellaneous case is barred by limitation.

I also find no merit in the prayer for remand made by the learned Advocate for the plaintiff. The plaintiff had sufficient opportunity before the Court below to produce and examine his witnesses. Several dates were fixed for that purpose but no witness was produced. Even on 29.04.2024 the plaintiff did not produce any witness and instead prayed for withdrawal of the case from the date fixed for order.

Remand cannot be granted as a matter of course. More importantly remand would not cure the basic defect in the service of summons. The alleged service returns would still have to be proved in accordance with law. Therefore I find no reason to accept the prayer for remand.

Upon consideration of the pleadings of the parties, the evidence and the materials on record and the relevant provisions of law I find that both the Courts below rightly allowed Miscellaneous Case Number 1 of 2020. Their findings that the defendants were not duly served with summons are based upon the materials on record. I find no error of law or other ground which calls for interference by this Court in its revisional jurisdiction under Section 115(4) of the Code of Civil Procedure.

Consequently the judgments and orders passed by the Courts below are affirmed.

The exparte judgment dated 18.08.2019 and the exparte decree dated 21.08.2019 passed in Title Suit Number 248 of 2010 are hereby set aside and the said suit is restored to its original file and number.

The Rule is accordingly discharged.

The order of status quo passed by this Court stands vacated.

Communicate this judgment to the concerned Court at once.

Md. Ali Reza, J: