

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

Present:

**Mr. Justice Md. Moinul Islam Chowdhury**

**Civil Revision No. 2997 of 2006**

Laila Begum and others

----- plaintiff-petitioners

=Versus=

Government of the People's Republic of  
Bangladesh, represented by the Deputy  
Commissioner, Cox's Bazar and others.

----- Defendant-opposite-parties.

Mr. Saleh Mahmood Nahid, Advocate

----- For the petitioners

Ms. Shahida Khatoon, AAG

----- For the opposite-parties

Heard on: 14.03.2017, 19.03.2017,  
02.04.2017 and

**Judgment on 09.04.2017**

At the instance of the plaintiff- petitioners Laila Begum and others, leave was granted and Rule was issued calling upon the opposite parity No. 1 to show cause as to why the order No. 1 dated 30.07.2006 passed by the learned District Judge, Cox's Bazar in Civil Revision No. 21 of 2006 rejecting the Civil Revision Summarily at the time of admission hearing of the same affirming the order No. 29 dated 13.07.2006 passed by the learned Senior Assistant Judge, in charge of the Court of the Assistant Judge, Moheskhali, Cox's Bazar in Other Class Suit No. 140 of 2004 allowing the application filed under order IX Rule 13 (a) of the Code of Civil Procedure should not be set aside.

The relevant facts for disposal of this Rule, inter alia, are that the present petitioners as the plaintiffs filed the Other Class Suit No. 140 of 2004 in the court of the learned Assistant Judge, Moheskhali, Cox's Bazar, for the declaration of title upon the land described in the schedule 1 and 2 of the plaint and also for declaration that B.S. Khatain in the name of the defendant No. 5, the Government in the said schedule of land without any basis.

The case in the plaint in short is that the schedule land described in the plaint originally belong to Khirode Chandra Roy, Ajit Kumar Roy and Indra Kumari Roy. The said owners were represented by the Deity named Sree Sree Karunamoyee Gopinath, and R.S. Khatian was published in their names after death of Khirode Chandra Roy. Ajit Kumar Roy settled land orally to different persons including the present plaintiff Nos. 1-6, and also to one Aflatoon, the predecessor of the plaintiff Nos. 7-13 by the un-registered Amaldaripatra dated 28<sup>th</sup> Choitra, 1350 B.S. thereby, the plaintiffs became owners by the operation of the State Acquisition and Tenancy Act. The plaintiffs thereafter sold a huge measurement of land to different persons, and the said plaintiffs also thereafter, transferred some portion of land to the defendant Nos. 18-27. On 21.11.2004 the plaintiffs could know that land has been recorded in P.S. and B.S. Kahtian equivalent to M.R.R and B.S Khatian published in the name of the said Ajit Kumar Roy and the B.S. Khatian in the name of the present defendant opposite parity No. 5, the Government, respectively. Thus the suit was filed.

The said suit was contested by the defendant Nos. 1-4 by filing a written statement. But the present defendant No. 5, the Government and at present the opposite party No. 1 did not appear in the suit even the notices were served upon the said defendant. In course of the hearing the defendant Nos. 1-4, compromised with the plaintiffs but the defendant No. 5 could not enter into the suit. The said suit was decreed on compromise between the plaintiffs and defendant Nos. 1-4 and exparte against the defendant No. 5 by the judgment and decree dated 09.02.2006.

The present defendant No. 5 - opposite party No. 1 filed an application on 07.05.2006 under Order IX Rule 13 and 13A of the Code of Civil Procedure in the trial court for setting aside the order dated 09.02.2006 and for restoring the Other Class Suit No. 140 of 2004 to its original file and number. After hearing the parties the learned Assistant Judge, Moheskhali, Cox's Bazar, allowed the application by the order No. 29 dated 13.07.2006 in order to restore the said suit. Being aggrieved the present petitioner as the petitioners filed the Civil Revision No. 21 of 2006 under Section 115(2) of the Code of Civil Procedure in the court of the learned District Judge, Cox's Bazar, who discharged the Civil Revision by his judgment and order No. 1 dated 13.07.2006. This revisional application has been filed under Section 115(4) of the Code of Civil Procedure, challenging the said order of the revisional court below and the leave was granted and the rule was issued thereupon.

Mr. Saleh Mahmood Nahid, the learned Advocate appearing for the petitioners submits that the learned Assistant Judge as well as the learned District Judge should have rejected the application filed under Order IX Rule 13 and 13A of the Code of Civil Procedure upon a finding that the application was not maintainable and the same was hopelessly barred by limitation and by not doing so the courts below committed an error of an important question of law resulting in erroneous decision occasioning failure of justice.

The learned Advocate further submits that the courts below should have gone through the Code of Civil Procedure (Amendment) Act, 2006 and found that the same has given effect on 07.05.2006 and by an application dated 07.05.2006, the order dated 09.02.2006 passed long before the Code of Civil Procedure (Amendment) Act, 2006 was given effect thus cannot be maintainable and the Court has no power to set aside his own order dated 09.02.2006 in exercise of jurisdiction conferred by order IX Rule 13A of the code of Civil Procedure and by not finding so and rejecting the application dated 07.05.2006 and the Courts below committed an error of an important question of law resulting in erroneous decision occasioning failure of justice.

The Rule has been opposed by the present opposite party No. 1, the Government, represented by the Deputy Commissioner, Cox's Bazar.

Ms. Shahida Khatoon, the learned Assistant Attorney General appearing for the present opposite party No. 1 submits that the learned trial

court after considering the evidence and submissions made on behalf of the defendant No. 5 allowed the application filed under Order IX Rule 13 and 13A of the Code of Civil Procedure which was rejected by the revisional Court below concurrently finding in favour of the present opposite party No. 1 after considering the evidence against the decree on compromise and decree ex parte against the defendant No. 5-present opposite party No. 1 and thereby learned Courts below committed no error of law, as such, the leave granted in this application as well as the Rule issued thereupon should be discharged.

The learned Assistant Attorney General also submits that the ex parte decree against the present opposite party No. 1 by the Judgment and decree dated 09.02.2006 was obtained by practicing fraud upon the court by the plaintiffs petitioner without serving any required notice upon the present opposite party No. 1 and in connivance by the present plaintiff petitioner and the defendant Nos. 1-4 in the said suit obtaining a compromise decree keeping the defendant No. 5 in the dark and let the suit be decreed ex parte against the defendant No. 5, as such, under the provision of the Order IX Rule 13, the application was filed and both the courts found in favour of the present opposite party No. 1 but the present Rule was obtained by misleading the Court which is needed to be discharged and no interference from this court is called for.

Considering the above submissions of the learned Advocates appearing for the respective parties and also considering the revisional

application filed under section 115(4) of the Code of Civil Procedure, where in a leave was granted and Rule was issued by the impugned judgment and order of the revisional court below, it appears to me that the present petitioners as the plaintiffs filed the title suit for a declaration of title upon the land measuring 67.90 acres described in schedule 1 and 2 of the plaint of the Title Suit No. 140 of 2004. The said suit was also filed for declaration that the B.S. Khatian in the name of the present defendant-opposite party No. 1, the Government. the said suit was decreed on compromise with the defendant Nos. 1-4 who were the private parties and who admittedly obtained lease of the suit land form the present defendant-opposite party No. 1, the Government, Deputy Commissioner, Cox's bazaar.

It further appears that the present defendant No. 5-opposite party No. 1 did not appear in the said suit, therefore, could not file any written statement contorverting the statement of the plaint as no notices were served upon the Government.

In the above circumstances, the present opposite party No. 1, the Government filed an application in the same trial court under order IX Rule 13 and 13A of the Code of Civil Procedure for setting aside the exparte decree passed against the present opposite party No. 1. The said application has been annexed as annexer-A, in this revisional application which contains as follows:-

“১। বাদী ম-হশখালী উপ-জলার গোরক ঘাটা ইউনিয়ন ভূমি অফি-স গত ৩০/০৪/২০০৬ইং তারিখ গমন করিয়া ইউনিয়ন ভূমি সহকারী কর্মকর্তা বাবু চিত্তরঞ্জন কে অত্র মামলার রায় ডিক্রি দেখাইয়া খতিয়ান সং-শাধ-নর জন্য পরামর্শ চাহিলে ইউনিয়ন ভূমি সহকারী কর্মকর্তা সর্ব প্রথম উক্ত তারিখে জ্ঞাত হয় যে, বাদীগণ ও ১/২ নং বিবাদী পরস্পর যোগ সাজ-স নিরকুশ সরকারী খাস জমি অবৈধ ভা-ব ভোগ দখ-লর নিমিত্তে গত ১৯/০৯/২০০৫ইং তারিখ এক সো-ল নামা দাখিল করিয়া নাশিলী ৬৯.৯০ একর জমি ১/২ নং বিবাদীর বিরুদ্ধে সোলে সূত্রে ও সরকারের বিরুদ্ধে একতরফা সূত্রে ডিক্রি হাসিল করিয়াছে। এই বিবাদী উক্ত একতরফা ডিক্রি সংক্রান্তে ইতি পূর্বে ঘূনাক্ষরে জানি-ত পা-র নাই।”

Now the question is whether the present opposite party No. 1 was or was not aware of the suit filed by the present petitioners as the plaintiffs impleading the present Deputy Commissioner, Cox's Bazar, as the defendant No. 5. In this regard the learned Advocate for the petitioners admitted that notices were served upon the defendant Nos. 1-4 and they appeared and compromised with the plaintiffs. Whereas, the defendant No. 5 did not file any written statement and did not appear in the suit to contest. I am not benefitted as to the notices required to be served upon a defendant, however, the learned trial court had an opportunity to look into the record because the ex parte decree was passed by the same court who had considered the present application under order 9 Rule 13 and Rule 13A and allowed the application by his judgment and order No. 29 dated 30.07.2006, which was also affirmed by the revisional court below.

Order IX Rule 13 of the Code of Civil Procedure contains that a court has an authority for setting aside an ex parte decree on the ground of

non service of sommons upon the defendant under the required provisions of law. Alternatively, an exparte decree can also be set aside by a court if a sufficient cause can be shown by the defendant that he or she could not appear in the court when a suit has been taken up for hearing as he was prevented. In the instant, case the present opposite party No. 1, the Deputy Commissioner, Cox's bazaar filed an application on the ground that the plaintiffs shown the exparte decree in the office of assistant land officer (ভূমি সহকারী কর্মকর্তা) under Upazila- Mohishkhali on 30.04.2006, which is the date the present opposite party came to know about the exparte for the first time, accordingly, it transpires that the required summons were not served upon the present opposite party No. 1. In this regard the admitted position of the present opposite party No. 1, the Government could not contest their suit and no written statement was filed by them. However, the written statements were filed by the defendant Nos. 1-4 who were the private parties and they entered into a compromise agreement with the present petitioners, therefore, the suit was decreed on compromise against them and the suit was exparte decreed against the present opposite party No. 1, who was the defendant No. 5 in the suit. Under order IX Rule 13 before amendment provided as above, after amendment of Order IX by inserting Order 13A and the legislators intended to expedite the disposal of the dispute arising from an exparte decree. Under the literal interpretation, the Rule 13A has given a wider discretion upon a court to set-aside any decree, even without calling for any evidence for set-aside, by only payment of the



maximum of taka 3,000/-, therefore, this provision has been named as “directly setting aside the exparte decree”.

The said Rule 13A has also a proviso, the proviso contains that a decree shall not be set aside without an application by swearing an affidavit to be made within 30 days from the date of the decree passed who appear and file a written statement. The settled principle of law is that proviso of any provision of law is subject to the principal law of that provision, therefore, I am of the opinion that the Rule 13A sub (1) has given a wide description upon the court to set-aside an exparte decree after being satisfied and only by paying an amount not more than 3,000/-. The proviso, however, contains the manner of any prayer for directly setting aside an exparte decree, such as, an application, application filed after swearing an affidavit, the application to be filed within 30 days if an exparte decree passed against the defendant who appears and files a written statement before the suit was decree exparte. In view of above, I find the legislators have a clear and transparent intention for expeditious disposal of any dispute arising from any exparte decree.

In the instant case, the admitted position by both the parties that the present defendant No. 5- opposite party No. 1 could not appear in the court as no notice was served before passing the exparte decree, therefore, I considered that the Under Order IX Rule 13 is enough to set aside the judgment and decree passed exparte. Moreover, under Order IX Rule 13A the trial court ordered to pay Tk. 2,000/- which is a condition for setting

aside the judgment and decree. In view of the above I consider that the exparte decree passed on 09.02.2006 against the Deputy Commissioner, Cox's Bazar, i.e. the Government, is liable to be set-aside under the provisions of law.

I have carefully pursued the judgment and order passed by the learned courts below. The learned trial court by his order dated 13.07.2006 allowed the application filed under order IX Rule 13, on the basis of the following findings:-

“এমতাবস্থায় প্রধান বি-বচ্য বিষয় হল ৫নং বিবাদী Order IX Rule 13 A..... এর বিধান এর আওতায় প্রতিকার পে-ত পা-রন কিনা। নথি পর্যা-লাচনায় দেখা যায়। ৫ নং বিবাদী কখনও অত্র মামলায় হাজির হয় নাই এবং কোন লিখিত বর্ণনা দাখিল ক-র নাই। Order IX Rule 13A HI Sub Rule (i) এর Proviso তে যে বিবাদী-ক Rule 13A ..... এর আওতা বর্হিভূত করা হ-য়-ছ। বর্তমা-ন ৫ নং বিবাদী সেই ক্যাটাগরি-ত প-ড় না। কেন না বর্তমা-ন বিবাদী কখনই মামলায় হাজির হয় নাই। কিংবা লিখিত বর্ণনা ও দাখিল ক-র নাই। এমতাবস্থায় ন্যায় বিচা-রর স্বা-র্থ ৫ নং বিবাদী দরখাস্তখানা খরচ সহ মঞ্জুর যোগ্য। অতএব ৫ নং বিবাদীর বিগত ০৭/০৫/০৬ইং তারি-খর দরখাস্ত খানা ২,০০০/- (দুই হাজার) টাকা খরচ সহ মঞ্জুর করা হইল। ৫ নং বিবাদীর বিরুদ্ধে অত্র মামলায় প্রচারিত ০৯/০২/২০০৬ ইংরেজী তারিখের একতরফা রায় ডিক্রি রদ ও রহিত করা হইল। ”

The learned revisional court also came to a concurrent finding in favour of the present opposite party No. 1 by discharging the revisional application filed under section 115(2) of the Code of Civil Procedure, in the following manner.

“তর্কিত ১৩/০৭/২০০৬ ইং তারিখ-র আ-দশ এবং একই সা-ত দাখিলকৃত দলিলাদি পর্যা-লাচনায় দেখা যাচ্ছে যে, অত্র রিভিশন মামলার প্রার্থীকগণ বিজ্ঞ নিম্মাদাল-ত উচ্চা-ণর প্রার্থনায় অপর- ১৪০/০৪ নং মামলা দা-য়র কর-ল ১ ও ২ নং বিবাদীর সঙ্গে সোলেনামা সূত্রে এবং অন্যান্য বিবাদীদের (৫নং বিবাদী গণপ্রজাতন্ত্রী বাংলাদেশ সরকার সহ) বিরুদ্ধে একতরফা সূত্রে মামলাটি ডিক্রী হয়। পরবর্তীতে ৫ নং বিবাদী মামলার বিষয় অবগত হ-য় সরকার-র স্বার্থ সংশ্লিষ্ট আ-ছ ম-র্ম উ-ল্লখ ক-র দেওয়ানী কার্যবিধি আই-নর ৯ অর্ডার ১৩ (এ) রুলের বিধান মতে তাঁর বিরুদ্ধে প্রদত্ত একতরফা রায় ডিক্রী রদ ও রহিতক্রমে মামলাটি পুন: নাম্বারে বহাল করার প্রার্থনা করলে বিজ্ঞ নিম্মাদালত মামলাটি উভয় প-ক্ষর শুনানীর জন্য দিন ক-রন এবং উভয় প-ক্ষর শুনানীক্রমে ৫ নং বিবাদী (গণপ্রজাতন্ত্রী বাংলাদেশ সরকার)- এর মামলা পুন:বহা-লর প্রার্থনা ২,০০০/- (দুই হাজার) টাকা খরচ প্রদান সাপেক্ষে মঞ্জুর ক-রন। বর্ণিত অবস্থায়, নিম্মাদাল-তর অপর ১৪০/৪০ নং মামলায় সরকার-র স্বা-র্থ জড়িত থাকায় এবং বিজ্ঞ নিম্মাদালত যথাযথ আদেশ প্রচার করায় তর্কিত ২৯/০৫/২০০৬ ইং তারিখের আদেশে অত্রাদালত কর্তৃক হস্তক্ষেপের প্র-য়াজন আ-ছ ব-ল ম-ন হয়না। ”

After concurrently findings of the courts below and the discussion made above I consider that the learned revisional courts committed no error of law by discharging the revisional application by affirming the order of the learned trial court. I therefore, consider that the decree passed on compromised against the defendant Nos. 1-4 and also the decree passed exparte against the defendant No. 5, the Government is hereby set-aside and the title suit No. 140 of 2004 pending in the court of learned Assistant Judge, Moheshkahli, Cox's Bazar is hereby restored to its original file and number.

I am therefore, not inclined to interfere into the judgment and order passed by the courts below.

Accordingly, I do not find merit in the leave granting order and the Rule.

In the result, leave granting order is rejected and the Rule is discharged.

The learned Assistant judge, MoheshKhali, Cox's Bazar is here by directed to dispose of the Title Suit No. 140 of 2004 within the period of 8(eight) months from the date of receipt of this Judgment and order.

In the mean time, both the parties are directed to maintain status-quo regarding the possession and position of the suit land till disposal of the suit. The parties are directed to take all necessary steps for disposal of their respective cases in order to reach to a conclusion of the suit within the aforementioned 8(eight) months,

The interim order of stay granted at the time of issuance of the Rule upon the operation of the order dated 13.07.2006 is hereby recalled and vacated.

The office is directed to communicate this judgment and order to the concerned Court immediately.