

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

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO. 1844 OF 2013

In the matter of:

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

And

Md. Tari Pramanik @ Md. Tariqul Islam being dead his heirs- Most. Echneara Bibi and others

... Petitioners

-Versus-

Most. Rabeya Khatun and another

... Opposite parties

Mr. Md. Makshed Ali, Advocate

... For the petitioner No.1.

Mr. Mohammad Abul Kashem Bhuiyan, Advocate

....For the petitioners.

Mr. Chanchal Kumar Biswas, Advocate

.... For the opposite party No.1.

Heard on 22.04.2025 and Judgment on 24.04.2025.

This Rule was issued calling upon the opposite party No.1 to show cause as to why the impugned judgment and order dated 09.05.2013 passed by the learned Joint District Judge, 1st Court, Naogaon in Miscellaneous Appeal No.53 of 2012 affirming the judgment and order dated 30.04.2012 passed by the learned Senior Assistant Judge, Niamatpur Court, Naogaon in Miscellaneous Case No.09 of 2007 dismissing the Miscellaneous Case should not be set aside and/or other or further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite parties as plaintiffs instituted Other Class Suit No. 351 of 1976 in the Court of Munsif, Rajshahi Sadar

for partition and above suit was transferred to the 4th Court of Assistant Judge, Naogaon and renumbered as Title Suit No.43 of 1985 and petitioners were defendant Nos.22 and 23 of above suit. No summon of above suit was served upon above defendants and they could not contest above suit which was decreed ex-parte on 16.07.2007. On 10.07.2007 for the first time petitioners came to about above ex-parte judgment and decree due to disclosure of the opposite parties and filed above Miscellaneous Case under Order 9 Rule 13 of the Code of Civil Procedure for setting aside above ex-parte judgment and decree.

In above Miscellaneous Case petitioners and opposite parties examined two witnesses each and document of the petitioners were marked Exhibit No.1 and those of the opposite parties were marked exhibit No."Ka" and "Kha".

On consideration of facts and circumstance of the case and evidence on record learned Assistant Judge dismissed above Miscellaneous Case.

Being aggrieved by above judgment and order of the trial Court above petitioners preferred Miscellaneous Appeal No.53 of 2012 to the District Judge, Naogaon which was heard by the learned Joint District Judge, 1st Court who dismissed above appeal and affirmed the judgment and order of the trial Court.

Being aggrieved by above judgment and decree of the Court of Appeal below above petitionrs as petitioners moved to this Court and obtained this Rule.

Mr. Md. Mokshed Ali, learned Advocate for the petitioner No.1 submits that admittedly opposite party filed above suit for partition in the Court of Rajshahi and after creation of new District at Naogaon above suit was transferred to the 4th Court of Assistant Judge and without service of any summon upon defendant Nos. 22 and 23 above suit was decreed ex-parte on 17.01.1987. As PW1 petitioner No.1 gave evidence in above case and stated that he did not receive any summon of above suit which was fraudulently suppressed by the opposite parties and above impugned judgment and decree was obtained fraudulently. In view of above evidence of PW1 the onus shifted upon the opposite parties to prove that summon of above suit was served upon the petitioners but the opposite parties did not make any endeavor to prove service of summon upon the petitioners but the learned Judges of both the Courts below utterly failed to appreciate above materials on record properly and the learned Senior Assistant Judge most illegally dismissed above Miscellaneous Case and the learned Judge of the Court of Appeal below unlawfully dismissed above appeal and affirmed the flawed judgment and order of the trial Court which is not tenable in law.

On other hand Mr. Chanchal Kumar Biswas, learned Advocate for the opposite party No.1 submits that the petitioners filed above Miscellaneous Case under Order 9 Rule 13 of the Code of Civil Procedure on 18.07.2007 for setting aside the impugned ex-parte judgment and decree dated 17.01.1987 and during above time case

record relating to service of summon was destroyed and the opposite party could not produce service return of the summons served upon the petitioners but the learned Judge of the Court of Appeal below on examination of entries of the relevant register rightly held that the summon of above suit was served upon the petitioners and accordingly dismissed the appeal and affirmed the judgment and order of the trial Court which calls for no interference.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on records.

It is admitted that the opposite parties as plaintiffs filed Other Class Suit No.351 of 1976 for partition in the Court of Munsif Rajshahi Sadar which was transferred to the Court of Senior Assistant Judge, Naogaon due to creation of new district and above suit was renumbered as Other Class Suit No.43 of 1985 and petitioners were defendant Nos.22 and 30 of above suit and above suit was decreed ex-parte on 17.01.1987.

Petitioner No.1 while giving evidence as PW1 has stated in his evidence that no summon of above suit was served upon them nor they had any knowledge as to above ex-parte judgment and decree until opposite parties disclosed about above ex-parte degree on 26th of Ashar.

On the other hand the husband of opposite party No,1 while giving evidence as OPW1 stated that petitioners as defendant Nos.22 and 30 entered appearance in above suit and contested above suit but subsequently abandoned the same. But as mentioned above admittedly

defendant Nos.22 and 30 did not enter appearance in above suit nor they contested the same at any stage of the proceedings and above claim of OPW1 was erroneous and without any basis. In his evidence OPW1 did not make any specific claim that summon of above suit was served upon defendant Nos.22 and 30. Nor any endeavor was made by the opposite parties to prove service of summon upon defendant Nos.22 and 30 by any other evidence oral or documentary.

The learned District Judge went beyond the pleadings and evidence on record and out of blue most illegally held that entries of order No.10 proved that excepting defendant Nos.26-35, 37-38 summons of all other defendants were served. Since above findings of the learned District Judge is beyond pleadings and not supported by any evidence the same is unlawful and not tenable in law.

In above view of the facts and circumstance of the case and evidence on record I hold that the opposite party has miserably failed to prove that summon of above suit was served upon defendant No.22 and 30 and the suit was lawfully decreed ex-parte on 17.01.1987 but the learned Joint District Judge utterly failed to appreciate above materials on record and most illegally dismissed the appeal and affirmed the unlawful judgment and order of the trial court which is not tenable in law.

I find substance in this civil revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, this Rule is hereby made absolute. The impugned judgment and order dated 09.05.2013 passed by the learned Joint District Judge, 1st Court, Naogaon in Miscellaneous Appeal No.53 of 2012 affirming the judgment and order dated 30.04.2012 passed by the learned Senior Assistant Judge, Niamatpur Court, Naogaon in Miscellaneous Case No.09 of 2007 dismissing above Miscellaneous Case is set aside and above ex-parte judgment and decree dated 16.07.2007 passed in Other Class Suit No.351 of 1976 is set aside and above suit is restored to its file and number

The learned Senior Assistant Judge is directed to conclude the trial of above case expeditiously within a period of 06 (six) months from the date of receipt of the order. *MD. MASUDUR RAHMAN*

However, there will be no order as to costs.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER