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

Present

**Mr. Justice Md. Iqbal Kabir**
**And**
**Mrs. Justice Jesmin Ara Begum**

**First Appeal No.408 of 2010**

**IN THE MATTER OF:**

Purabi General Insurance Company Limited
... Defendant-Appellant

Versus

Riad Salt Industries Limited and others
... Plaintiff-Respondents

Mr. Mohammad Abul Kashem, Advocate with
Mr. Md. Muniruzzaman, Advocate

... For the Defendant-Appellant

Mr. Md. Mubarak Hossain, Advocate with
Mr. Md. Enayeat Ullah, Advocate
... For the Respondent No.1

**Judgment on: 24.02.2026**

**Jesmin Ara Begum, J:**

This First Appeal at the instance of the Defendant-appellant is directed against the judgment and decree dated 27.06.2010 (decree signed on 01.07.2010) passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Money Suit No.19 of 1998 decreeing the suit.

The case of the plaintiff of the original Money Suit, in short is that the plaintiff Riad Salt Industries Limited is a limited company registered in the joint stock company under company Act engaged in a business of buying, refining, crushing and selling salt having a warehouse and mill house at its address. The defendant No.1, Purabi General Insurance Company Limited is an insurance company and the defendant No.2 is its branch office. The plaintiff and pro-forma defendant No.3, the Manager Sonali Bank Limited, Cox's Bazar Branch, Cox's Bazar jointly took insurance policy of Tk.93,75,000/- for the stock of salt vide

Insurance Policy No.PGIC/Cox/FP-10/06/98 and Cover loan No.PGIC/Cox/FC 11.04.1997 subsequently issued and Tk.5,000/- for the risk of Hypothecation goods vide Insurance Policy No.PGIC/Cox/FP-11/06/97 and Cover loan No.PGIC/Cox/FP-12/04/97 for the period of 28.04.1997 to 28.04.1998. The officers of the principal defendant executed the insurance deeds in favour of the plaintiff. The plaintiff paid all the premiums on time. The pro-forma defendant No.3 is a govt. commercial Bank and the plaintiff has been carrying the salt business with financial support of the defendant No.3 bank by pg and Hypothecation mortgage of the stock of the warehouse and the same was under the control of the bank who appointed a store keeper (guard). On 19.05.1997 a catastrophic cyclone and tidal wave was occurred in Chattogram and Cox's Bazar and the salt mill and the stored salt of the plaintiff were damaged and 38,333 mounds of salt were floated in water and the plaintiff has been suffered a loss of Tk.39,99,950/-. The plaintiff informed the same to the principal defendants and lodged a general diary No.816 before the Cox's Bazar police station on 20.05.1997 and informed the same to the pro-forma defendant No.3 and the store keeper also informed the matter to the pro-forma defendant No.3. The local Chairman issued a certificate to the damage of salt of the plaintiff on 29.05.1997. The plaintiff also obtained a certificate from the Metrological Department on 12.06.1997. Moreover, the plaintiff obtained a water report from the BIWTA. On the basis of prayer of the plaintiff dated 10.06.1997 the defendant appointed their nominated surveyors to make survey regarding the damage of salt. Accordingly, the surveyors physically investigated and submitted joint report vide memo No.MS/BD-24/S-173/97 mentioning the amount of damage as Tk.34,70,360/-, though the actual damage was more than Tk.39,99,950/-. The plaintiff requested the principal defendants to pay and issue loss voucher of Tk.34,70,360/- as per the joint survey report in several times,

but the defendants payed no heed to that effect. The principal defendants appointed the surveyors and bound to pay the amount of damage as per the survey report along with 5% interest as per Insurance Act, 1938 and Rule 47(C) of amended ordinance No.25 of 1970. The damage was occurred by cyclone and tidal wave on 19.05.1997, the survey report was submitted on 16.07.1997. The plaintiff claimed to pay the amount of damage on 17.07.1997 and the defendants refused to pay the same on 17.05.1998 and the cause of action of the suit has been arisen on that date and filed the Suit for recovery of Tk.34,70,630/- with 20% interest against the principal defendant Nos.1/2.

The contesting defendant Nos.1 and 2 filed a written statement contending inter-alia that the statement made in paragraph No.3 of the plaint is true and accordingly the insurance deed was executed among the plaintiff and defendants but it is not true that the plaintiff stored the salt in the mill and warehouse. The plaintiff and defendant No.3 have created documents of purchasing and storing of salt in collusion to cause financial loss of the defendants. The plaintiff informed the defendants as to the cyclone and tidal wave dated 19.05.1997 and damage of 38,333 mounds of salt and loss of Tk.39,99,950/-. Accordingly, defendants appointed the surveyors namely Modern Surveyors Limited and S.M. Surveyors Limited to make survey of damages to the salt of the plaintiff. But the cunning plaintiff obtained a false survey report by managing the surveyors and no report was supplied to the defendants by the surveyors. The certificate obtained from the chairman and BRTA are false. The plaintiff did not cooperate with the defendants to survey and to make assessment of the damage, nor follow the procedure and as such the plaintiff is not entitled to get any relief and the suit is liable to be dismissed.

Upon hearing both the parties and on scrutinizing the record the learned trial Court decreed the Money Suit by the impugned judgment on

27.06.2010. Being aggrieved by and dissatisfied with the impugned judgment the defendants filed the instant First Appeal.

Mr. Md. Muniruzzaman, the learned Advocate appearing on behalf of the defendant-appellant submitted that the defendant has proved their case properly. On the other hand, the plaintiff has hopelessly failed to prove his positive case by adducing cogent evidence and the learned trial Court erred in law and also in facts in decreeing the suit.

He further submitted that the plaintiff has hopelessly failed in proving its specific case of destruction of 38,333 mounds of salt by catastrophic cyclone and tidal wave because it was the specific denial of the defendant that the plaintiff did not yet store the so called amount of salt in his warehouse or mill.

The learned Advocate also contends that the survey report is the vital evidence of the case for settling the insurance claim and the defendants case is that the surveyor did not file any report to them and the plaintiff in connection with the surveyors fraudulently obtained a report and the said report is not proved as the surveyor did not depose on oath and therefore, the impugned judgment and decree is liable to be set aside. In this respect the learned Advocate referred the decision of our Apex Court in the case of Abdus Sattar Vs. Lalon Mazar Sharif, reported in 56 DLR(AD)180.

Mr. Md. Muniruzzaman, the learned Advocate further submits that P.W.1 was examined on commission and during the course of deposition he submitted some papers and documents before the commissioner and the commissioner submitted the same to the learned trial Court and the learned trial Court did not record any order to consider the same as evidence of the Court and thus there is no scope to decide the case on the basis of the said deposition and documents as per Order-26 Rule-7 of the Code of Civil Procedure.

He next submits that the suit was earlier decreed ex-parte on 18.03.2001 and prior to this ex-parte decree the plaintiff has examined 5 witnesses and after setting aside the said ex-parte decree the suit was restored at the stage of its submission of written statement and the plaintiff did not challenge the said order, rather plaintiff participated to all of the subsequent proceeding i.e. framing of issues, steps, S.D. and pre-emptory hearing. He however argued that by participating to all other subsequent proceeding as stated above the plaintiff and the learned trial Court have wiped away all of the earlier steps and proceedings which were done prior to the ex-parte decree and that is why the P.Ws. which were examined prior to the ex-parte decree are required to be examined on oath afresh. As none of the P.W. was turned up before the Court afresh though summons were served thus the learned trial Court erred in law in decreeing the suit on the basis of said wiped out depositions of the P.Ws.

He again submits that as the defendant's non-appearance is condoned by setting aside the ex-parte decree, the evidence which were recorded in his absence before the ex-parte decree will not be admissible against him. He in this respect depends upon the decision of Calcutta High Court in the case of Kalachand Vs. Mobarak Hossain, reported in AIR 1957 Calcutta 170.

The learned Advocate lastly submits that the provision of Order IX Rule 15 of the Code of Civil Procedure is not applicable in this case as the learned trial Court without complying the provision of Rule 6 of Order IX of the Code of Civil Procedure earlier fixed the suit for ex-parte hearing without fixing any date of hearing. He however submits that the suit was fixed for ex-parte hearing for failure of the defendant to file his written statement and as the suit was not fixed for hearing in the absence of defendant thus it was not an ex-

parte proceeding at all and that is why Rule 15 of Order IX is not applicable in this case. He referred the case reported in 8 BLD(HC)92.

Per Contra, Mr. Md. Mubarak Hossain, the learned Advocate appearing for the plaintiff-respondent No.1 submits that the defendant-appellant have admitted in their written statement that the paragraph-3 of the plaint is true and they also admitted that on the basis of prayer of plaintiff the defendants appointed their nominated surveyors to survey the damage of salt. The learned Advocate then claimed that by this admission the case of the plaintiff-respondents stands proved.

He also submits that by examining all the relevant necessary oral witnesses and by filing and exhibiting all the necessary documentary evidences the plaintiff has become successful in proving his money suit. He claimed that during examination as P.W.1 plaintiff side has submitted the original survey report with original copy of the forwarding which was duly exhibited as the original copy of the survey report ext.2 and defendant side did not raise any objection and did not claim that the submitted survey report is a photocopy. He however submitted that the original survey report with original forwarding was exhibited but for unknown reason the original report is missing from the judicial record though the original forwarding of the report is lying with the record.

The learned counsel further submits that when the suit was earlier decreed ex-parte the defendant by filing miscellaneous case under Order IX Rule 13 read with section 151 of the Code of Civil Procedure prayed only for setting aside the ex-parte decree and accordingly the ex-parte decree was set-aside and there was no prayer for expunging the deposition of the witnesses of the plaintiff and as per Order IX Rule 15 of the Code of Civil Procedure the suit was restored on the stage where it was immediately before the decree and as

such the P.Ws. of the plaintiff remained unchallenged and basing upon the P.Ws the plaintiff's claim has been proved properly.

He also submits that during pendency of this First Appeal the defendants-appellants have filed an application on 04.06.2024 praying for re-calling the plaintiff's witness Nos.2-5 long after 14 years of filing the appeal by which the defendants-appellants have admitted their laches.

The learned Advocate for the plaintiff-respondent lastly submits that admittedly the plaintiff paid all the premiums on time without any default, thus the plaintiff is entitled to get the benefit of insurance which cannot be avoided by any technical point and one can never be allowed to take advantage of his own fault.

We have considered the submissions advanced by the learned Advocates of both the parties and also gone through the impugned judgment, the pleadings of the parties, the oral testimonies of witnesses, the documents exhibited along with the concerned record of the learned Court below and the decisions referred to.

On perusal of the record, it appears that the Money Suit was filed on 18.05.1998 and the suit was fixed for ex-parte hearing on 17.05.1999, the deposition of P.W.1 to P.W.5 was taken on 24.02.2000, 11.09.2000 and 09.10.2000, among the P.Ws P.W.2 was store keeper appointed by Bank, P.W.3 was director, Hydrography department, BIWTA, P.W.4 was Assistant Meteorologist who proved the cyclone and P.W.5 was Chairman who proved the damage of goods of the plaintiff and their certificates were marked as Exhibit Nos.4(Ka),15(Ka),9(Ka) and 5(Ka), which were not challenged by the defendants. By filing Miscellaneouos Case under Order IX Rule 13 read with section 151 of the Code of Civil Procedure the defendant restored the suit by setting aside the ex-parte decree. According to the provision of Order IX Rule

15 of the Code of Civil Procedure where a decree is set aside under Rule 13, the suit shall on restoration, proceed from the stage where it was immediately before the passing of the decree. As per the provision of this Rule 15 the suit was restored in the stage where 5 P.Ws have been examined and as the defendant wanted to contest the suit by filing written statement that is why they were given the scope to file written statement and then the suit runs in accordance with law. Five P.Ws which were examined before passing the ex-parte decree was remained there in the record and the defendant did not take any step to cross examine this 5 P.Ws, rather the plaintiff filed an application for issuing summons upon the witnesses along with the surveyor which was allowed on 13.11.2008 and accordingly plaintiff deposited the travel allowance for the witnesses on 25.02.2009 but ultimately none of the P.Ws were appeared and cross examined by the defendant. The defendant also did not take any step to cross the P.Ws during trial, lastly after 14 years of filing the instant First Appeal the defendant filed an application on 24.06.2024 praying for re-calling the P.Ws.2-5. So by filing this application the defendant appellant admitted the fact that the P.Ws which were examined before passing the ex-parte decree are remained unchallenged and they can be used against the defendant-appellant.

In this respect Mr. Md. Muniruzzaman, the learned Advocate for the defendant-appellant strongly argued that the effect of setting aside the ex-parte decree is that all proceedings subsequent to the stage of defendant’s non-appearance would no longer bind him. To substantiate his claim the learned Advocate placed before us the decision of Calcutta High Court in the case of Kalachand Vs. Mobarak Hossain, reported in AIR 1957 Calcutta170. On perusing this reported case, it appears that the judgment of this case was passed and reported in the year of 1957 and the Order IX Rule 15 was added in the Code of Civil Procedure by section 5 of the Code of Civil Procedure

(Amendment) Ordinance 1983 (Ordinance No. XLVIII of 1983). So the referred judgment as was passed in the year 1957 is not applicable after the incorporation of new Rule 15 in Order IX in the year 1983.

The learned Advocate for the defendant-appellant also mentioned the case of K.D.H. Laboratories Ltd. Vs. Rupali Bank and others, reported in 8 BLD(HC)92, and the learned Advocate contends that a suit fixed for ex-parte hearing for failure of the defendant to file his written statement is not an ex-parte proceeding at all, and as per the provision of Order IX Rule 6 when the defendant does not appear the suit should be fixed for hearing stage not for ex-parte hearing. In this reported case it was decided in paragraph No.15 that, "An ex-parte proceeding against a defendant is permissible under Order IX Rule 6 when the defendant does not appear when the suit is called on for hearing. If a suit is fixed for written statement it is not fixed for hearing at all. In order to attract the provisions of Order 9 Rule 6 the default in appearance must be made by the defendant when the suit is called on for hearing, not when the suit is fixed for filing written statement."

By referring the decision of this 8 BLD case Mr. Md. Muniruzzaman contends that the provision of Rule 15 of Order 9 is not applicable in this case at all. But the contention of the learned Advocate is not acceptable because in the 8BLD case when the learned Subordinate Judge ordered by the impugned order that since no ex-parte decree has been passed, the defendant's prayer to submit written statement should be allowed and the written statement was accepted subject to payment of costs of Tk.250 and against this Order of acceptance of written statement the plaintiff-petitioner has obtained the rule and in our instant case ex-parte decree was drawn up and after the ex-parte decree miscellaneous case under Order IX Rule 13 was filed by the defendant appellant and was allowed by setting aside the ex-parte decree. As the facts of

8 BLD case are different from that of instant case we cannot accept the submission made by learned counsel for the defendant-appellant and cannot take the decision that Order IX Rule 15 is not applicable in our instant case.

Be that as it may, on careful scrutiny of the pleadings it appears that the defendant-appellant admitted in paragraph No.17 of their written statement that the plaintiff informed the defendant about the cyclone and tidal wave and damage on 19.05.1997 and accordingly, the defendant appointed the surveyors and the plaintiff served two legal notice to the defendant by requesting the defendant to issue the loss voucher mentioning the survey report and filing the instant suit on 18.05.1998 as the defendant did not take any step to pay the same for a laps of one year time. The defendant appeared before the Court on 27.03.2002 and filed written statement on 23.05.2005 after perusing the survey report filed by the plaintiff and claimed that the plaintiff obtained a false survey report by managing the surveyors and no report was supplied to them by the surveyors but the defendant did not take any step to obtain the report till appearing before the Court or informed about the suit or till filing written statement, nor they took any step to obtain 2$^{nd}$ report which clearly proved the gross negligence of the defendant in obtaining any report as well as in paying the loss.

Moreover, admittedly the plaintiff paid all the premiums on time without any default, thus the plaintiff is entitled to get the benefit of insurance which cannot be avoided by any technical point or any fault of them. The defendant appointed the surveyors on the basis of claim of the plaintiff but the defendant did not take any step to ascertain the damage or did not take step to obtain 2$^{nd}$ survey report as per Rule 26(A) of the Insurance Rules 1958 though they claimed that the plaintiff obtained the 1$^{st}$ report by managing the surveyors.

Plaintiff is claiming that he submitted the original survey report with original forwarding but in reality only original forwarding is found in the case record but the survey report which is found in the file is a photocopy one. On this point it appears from the deposition of P.W.1 that he submitted the original copy of the survey report and the original one was exhibited as ext.2 and during cross examination of P.W.1 the defendant side did not claim that photocopy of the survey report was submitted and exhibited. So the defendant cannot be allowed to claim that original survey report was not submitted by the plaintiff.

From the record it appears that the matter is pending for a long time of 27 years and the appeal is pending for long 14 years. The defendants have cross examined the P.W.1 on 24.01.2008 but subsequently did not take any step to cross examine the other P.Ws. for $2\frac{1}{2}$ years before pronouncement of the impugned judgment and decree on 27.06.2010 and even after filing of this appeal for 14 years, which clearly shows that the defendants-appellants have filed the application for cross examination of the P.Ws only to delay the matter and to deprive the plaintiff-decree holder to enjoy the consequence of the decree and as such they are not entitled to get such opportunity to cross examine the P.Ws long after 27 years to fill up the lacuna and thus the application for re-calling the P.Ws is rejected.

From the above discussions and findings, we are of the view that the plaintiff has become successful in proving his Money Suit and there is nothing to interfere with the impugned judgment and decree passed by the learned trial Court.

Resultantly, the First Appeal No.408 of 2010 is dismissed without any order as to costs.

The impugned judgment and decree dated 27.06.2010 (decree signed on 01.07.2010) passed by the learned Joint District Judge, 1st Court, Cox's Bazar in Money Suit No.19 of 1998 decreeing the suit is hereby affirmed.

Send down the LCR along with a copy of this judgment and order to the concerned Court below at once.

**Md. Iqbal Kabir, J**:

I agree.

Md. Anamul Hoque Parvej
Bench Officer