

Present:

Mr. Justice Mohammad Ullah

Civil Revision No. 2014 of 2014

Abdul Matin and others

... Plaintiff-respondent-petitioners

-Versus-

Foyez Chowdhury and others

...Defendant-appellant-opposite parties

Mr. Muhammad Moshiul Alam, Advocate

... For the petitioners

Mr. M. Khaled Ahmed, Advocate

... For the opposite party
Nos.2, 4 and 5

Heard on: 12.12.2022 and
03.01.2023

Judgment on: 05.01.2023

On an application under section 115(1) of the Code of Civil Procedure, this Court by order dated 25.05.2014, at the instance of the plaintiff-respondent-petitioners, a Rule was issued in the following terms:

“ এই মর্মে অপরপক্ষদের প্রতি কারণ দর্শানো পূর্বক রুল জারী করা হইল, কেন সিলেটের বিজ্ঞ অতিরিক্ত জেলা জজ, তৃতীয় আদালত এর মিস ২৬/২০০৯ নং আপীলে প্রচারিত ১১/০২/২০১৪ তারিখের তর্কিত রায় এবং আদেশ রদ ও রহিত করা হইবে না, যে রায় ও আদেশমূলে সিলেটের বিজ্ঞ যুগ্ম জেলা জজ, অতিরিক্ত আদালত এর মিস ১৬/২০০৫ নং মামলায় প্রচারিত ৩০/১১/২০০৮ তারিখের রায় এবং আদেশ পরিবর্তন পূর্বক আপীলটি মঞ্জুর হইয়াছে এবং দরখাস্তকারীগণ অত্র আদালত এর বিবেচনায় আর যে সকল প্রতিকার পাইতে পারেন তাহার ও আদেশ কেন দেওয়া হইবে না ”।

At the time of issuance of the Rule, further proceedings of Title Suit No.11 of 2004 pending in Additional Joint District Judge Court, Sylhet, stayed initially for six months. After that, on 02.11.2015, the period of stay was extended till the disposal of the Rule.

The facts leading to disposal of the Rule, in short, are that Aftab Ali, as the plaintiff, instituted Title Suit No.71 of 1982 (partition) in the 2nd Court of Subordinate judge, Sylhet impleading the predecessor of the present opposite parties as defendant No.12 and others praying for a decree for partition in respect of their inherited joint land and properties mentioned in the schedule to the plaint.

Subsequently, the suit was transferred to the Court of the then Subordinate Judge and Artha Rin Adalat, Sylhet, and renumbered as Title Suit No.13 of 1992.

On 29.09.1996, the said suit was decreed ex-parte.

Subsequently, for drawing up the final decree, the suit was transferred to the Court of Joint District Judge, Additional Court, Sylhet, and renumbered Title Suit No.11 of 2004.

A survey-knowing advocate commissioner was appointed. Who, after the survey, submitted a report. But the defendant Nos. 18(ka) - 18(ga) filed a written objection against the Advocate Commissioner's Report.

The petitioners filed Miscellaneous Case No.16 of 2005 under order 9 rule 13 of the Code of Civil Procedure for setting aside the ex-parte decree dated 29.09.1996 passed by the Joint District Judge, Additional Court, Sylhet in Title Suit No.11 of 2004 contending *inter alia* that Aftab Ali, the predecessor of the petitioners as plaintiffs filed Title Suit No.71 of 1982 in the 2nd Court of Sub-ordinate judge, Sylhet impleading the predecessor of the present opposite parties as defendant No.12 and others for partition in respect of their inherited joint land and properties

mentioned in the schedule to the plaint of Title Suit No.71 of 1982. Waris Ali, the predecessor of the present opposite party, lived in Saudi Arabia from 1981 to 1988. As such, he was not notified, and he had no knowledge about Title Suit No.71 of 1982. In 1988, Waris Ali came back from Saudi Arabia and became paralyzed on 26.07.1995. Waris Ali (defendant No.12 of Title Suit No.71 of 1982) died in a paralyzed condition. After the death of Waris Ali, his legal heirs were not substituted in the suit, and they also did not know about the filing of the suit. In the first week of June 2005, an unknown person who happened to be an Advocate Commissioner came to the suit land. The present opposite parties asked one Taher Ali about such an unknown person who said there might be a suit pending in the Court regarding the land. On the advice of Taher Ali, present opposite party Nos. 1-3 inquired into the matter and learned through a Mohrar, namely Mubarok Husan, about the ex-parte decree.

The present opposite party No.1 learned that on 31.03.1982, when their predecessor Waris Ali was abroad, the summons was served by hanging at the door of his house. In fact, no notice was served to the predecessor of defendant No.12 Waris Ali, who was abroad at the relevant time. The opposite parties have subsisting interest in the suit property decreed ex-parte, and the summons was not served upon their predecessors or to them. Thereby, they became prejudiced, and as such, the ex-parte judgment and decree dated 29.09.1996 would be set aside, and the suit would be restored to its original file and number.

The present petitioners, as opposite party Nos.1-6, contested the miscellaneous case by filing a written objection contending, among others, that the miscellaneous case is not maintainable in its present form, barred by law of limitation and bad for defect of parties. Their further case is that the plaintiffs of Title Suit No.71 of 1982 filed the suit for

partition in respect of their inherited land and properties in which the predecessor of the opposite parties, Waris Ali was defendant No.12, and his other full brothers-Modaris Miah, Ustar Miah, and Harun Miah were defendant Nos.13, 14 and 15 respectively. The learned Court issued summons upon all the defendants, and being satisfied as to service of summons upon the defendants, the learned Court fixed the suit for hearing in which some of the defendants contested the suit by filing written statements. The summons upon the defendant Nos.12, 14, and 15 were served on 17.05.1982.

Defendant No.14 received the summons for defendants Nos.12 and 15. Meanwhile, the summons upon defendant No.13 was appropriately served.

The Trial Court, having satisfied with the service of summons upon the defendants and when found that the defendant Nos.12, 13, 14, and 15 did not file written statements for contesting the suit while

other defendants filed written statements did not contest afterward, decreed the suit ex-parte on 29.09.1996. A survey-knowing Advocate Commissioner was appointed to give Shaham to the decree-holder following the preliminary decree. Who, after the survey, filed a commission report to the Court in which the defendant Nos. 18(ka) -18(ga) filed written objections, but no other defendants have filed any objection against the preliminary decree as well as the report of the advocate commissioner. It is not true that the predecessor of the opposite party, Nos.1-3 Waris Ali, did not know about the original suit. In fact, all the defendants of the suit, including the present petitioners of the miscellaneous case, were well aware of the suit, but they filed the present miscellaneous case for setting aside the ex-parte decree with false assertion and as such, the miscellaneous case is liable to be dismissed.

The petitioners of miscellaneous cases have produced two witnesses, while the

opposite parties have produced one witness in support of their respective cases.

The Trial Court, having heard the parties and considered the evidence on record, rejected the miscellaneous case.

Being aggrieved by the judgment and order dated 30.11.2008 passed by the learned Joint District Judge, Additional Court, Sylhet, the opposite parties preferred Miscellaneous Appeal No.26 of 2009 before the learned Additional District Judge, 3rd Court, Sylhet who having heard the parties and on consideration of the evidence on record allowed the miscellaneous case and thereby restored the suit to its original file and number by the impugned judgment and order dated 11.02.2014.

Against which the plaintiffs of the original suit as petitioners moved this Court and, the Rule was issued, and the order of stay was passed as stated above.

Mr. Muhammad Moshiul Alam, the learned Advocate appearing for the plaintiff-respondent-petitioners, submits that the

summons of Title Suit No.71 of 1982 was duly served upon Waris Ali, the predecessor of the opposite parties. The learned Advocate submits further that defendant No.14, being an adult male member of the family as well as the brother of defendant No.12, received summons on behalf of defendant No.12, and as such, the service of summons to be treated as good service as provided under order 5 rule 15 of the Code of Civil Procedure.

Mr. M. Khaled Ahmed, the learned Advocate appearing for the opposite parties, submits that defendant No.12 Waris Ali stayed abroad at the relevant time. As such, no summons was served upon him. Defendant No.14 is not an authorized agent of defendant No.12 to receive the summons of defendant No.12. So, the contention of the petitioners that the summons was duly served upon defendant No.12 has no leg to stand. The learned Advocate submits further that defendant No.12, after coming back from abroad, died in a paralyzed condition in 1995. His legal heirs, having known the ex-

parte decree, filed the miscellaneous case for setting aside the same within the stipulated period from their date of knowledge on 23.07.2005. As such, the miscellaneous case is not barred by law of limitation. The learned Advocate again submits that the opposite parties have subsisting interest in the suit property. The summons of the suit was not served upon their predecessor and or after the death of their predecessor to them and as such, for ends of justice, the ex-parte judgment and decree is liable to be set aside, and the suit should be restored to its original file and number.

To substantiate his submission, Mr. M. Khaled Ahmed, the learned Advocate, referred reliance in the case of Abul Khair Mia-vs-Abdul Latif Sardar reported in 32 DLR (AD) (1980) 167 and Abdur Rashid and another-vs-Abdul Barik and another reported in 35 DLR (AD) (1983) 163.

In the facts and circumstances, the question that survives for determination is

whether the summons was duly served upon defendant No.12 (opposite party Nos.1-3).

From the evidence on record, it appears that defendant No.14, an adult male family member of defendant No.12, received the summons on behalf of himself and defendant Nos.12 and 15.

Let us examine the provision of rule 15 of order 5 of the Code. Rule 15 deals with the service of summons to an adult member of the defendant's family. Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat, and there is no likelihood of his being found thereat within a reasonable time, then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult member of the family of the defendant who is residing with him. This proviso does not apply to the present facts and circumstances of the case. Summons can be serviced upon adult family members of the defendant; the said person should be an

adult man or woman and would be residing with that defendant in the same mess.

From the evidence on record, it does not appear that defendant No.14, who allegedly received the summons on behalf of defendant No.12, was residing with defendant No.12 as an adult family member in the same mess.

Moreover, from the evidence on record, it does not appear that defendant No.14 is an authorized agent of defendant No.12 to accept or receive the summons on his behalf.

If the service is made upon an agent, the agent must be an agent empowered to accept the service. The authority to accept summons must be written, and the same is to be produced or shown to the process surveyor if the authorized agent wants to receive the summons on behalf of the defendant.

In a case, a summons addressed to a female defendant was served upon her husband. In the return, it was stated that the husband used to look after his wife's property, and as such, the summons was served upon the husband. Such service was

not found to be due service because there was no evidence that the husband was the authorized agent of the wife. Reference may be made 7 BLT (AD) 125.

In the present case, defendant No.14 is neither an adult family member of defendant No.12 nor an authorized agent to accept the summons on behalf of defendant No.12. For service of summons to an adult male member of a family, does not include a person who resides in a separate mess.

Moreover, an adult brother or sister is not included as a family member of an adult person.

I have already found that defendant No.14 does not reside with defendant No.12 as his adult family member and also is not an authorized agent on his behalf to receive the summons.

Before passing an ex-parte decree, the Court should carefully consider whether the summons was duly served upon the defendant.

In such facts and circumstances, I find a good deal of force in submission of the learned Advocate for the opposite party.

Accordingly, the Rule that bears no merit is liable to be discharged.

As a result, the Rule is discharged.

However, there will be no order as to costs.

The order of stay granted earlier by this Court is hereby recalled and vacated.

Since the matter is old, the Court concerned is directed to dispose of the original suit with the utmost effort.