

উপস্থিত- মোঃ হাসান জামান, সিনিয়র সহকারী জজ  
সিনিয়র সহকারী জজ আদালত, পটিয়া, চট্টগ্রাম

Order No- 71  
Dt. 07.02.2024

Today is fixed for necessary order.

Both the petitioner and the opposite party are present by filing hazira.

The record is taken for order.

The defendant /petitioner has filed this instant petition under Order -9 Rule 13 of CPC for restoration of the original suit upon setting aside the ex-parte decree passed on 08.06.2017 by this court.

The petitioner's case in brief is that the present opposite parties as plaintiffs instituted the original Civil Suit in the present court being Other Suit No. 62 of 2013 wherein the present-petitioner was the defendant No. 1. That the suit was decreed ex-parte against the present petitioner on 08.06.2017 and the decree was signed on 15.06.2017. It is claimed by the petitioner that the summons-notice upon the defendant petitioner was not served and the plaintiff to that suit suppressing the service of summons obtained the ex-parte decree. Subsequently on 23.10.2018 the defendant No. 1 through his Attorney came to learn about the ex-parte decree and finally the defendant petitioner after obtaining the information slip dated 25.10.2018 and inspecting the suit registrar came to know about the ex-parte decree on 25.10.2018. If the petitioner got summons of the original suit, they would certainly contest the suit. Knowing about the ex-parte decree the defendant No. 1 for setting aside the same filed this Miscellaneous Case under Order 9, Rule 13 of the Code of Civil Procedure.

The petitioner brought this petition long after 510 days and by separate petition praying condonation of said delay.

Per Contra, plaintiff (**Opposite Party**) stated in their W.O that the defendant no.1 himself received the summons of the original suit on 27.05.2013. Summons has been duly served on him by the Jarikarak. Despite of receiving summons of original suit, the defendant no.1 did not appear and as a result the suit was decreed on ex-parte on 08.06.2017. The defendant No.1 having no right title and interest over the suit land did not appear to contest the suit. The defendant No.1 after a long lapse of time only to harass the plaintiff to that suit has brought this Miscellaneous case on false allegation which is liable to be dismissed.

**Points for determination**

1. Whether the present misc case is maintainable in its present form and manner ?
2. Whether the case is barred by limitation ?
3. Whether the ex-parte decree dated 08.06.2017 in Other Suit No. 62/2013 would be set-aside as per prayer of the petitioner ?

### **Discussion and Decision**

The petitioner brought a witness to prove it's case namely Md. Shajahan (Pt.W.1) and **during examination of Pt.W.1** the documents which were produced and proved have been marked as Exhibits:-1 and Exhibits:- 2. On the other hand, the opposite parties produced a witness namely Md Mohiuddin as O.P.W.1 and he produced no documents. **Md. Shajahan (Pt.W.1)** for the petitioner and **Md. Mohiuddin (OP.W 1)** for the opposite parties has given statements admitting the facts of the application and written objections respectively.

### **Issue no. 1 -3**

These issues are taken up together for convenience. Admittedly in the original suit being Other Suit No. 62 of 2013, the present-petitioner was the defendant No. 1. It appears that Pt.W.1 is the attorney of the defendant petitioner. It is found from the averment of the petition and the testimony of the Pt.W.1 who has categorically denied the service of Summons upon the petitioner and claimed that the plaintiff in connivance with process server of the court showed the summons served upon the petitioner. Pt.W.1 claimed that summons has been served in the addresses where the petitioner did not reside and the process server served it to a third person in the name of petitioner. On the other hand denying this allegation the O.P claimed that Summons has been duly served upon the petitioner but despite of receiving the summons he did not appear and as a result the suit was decreed on ex-parte. The defendant petitioner having no right title and interest over the suit land and knowing the fate of the suit did not come to contest the suit.

On examination of the **service-return**, it is evident that process was not duly served at the addresses stated in the plaint and in the summons. The report shows that in order to serve the summons the process server went to the addresses as stated in the plaint under Hathazari thana where he found the petitioner absent. Later on, knowing the present addresses of petitioner over telephone, the process server rushed there and directly served the summons on the petitioner. It is found from S/R that the petitioner Mohammad Hossain by putting signature himself received the summons. But Pt.W.1 denied that he did not receive any summons of earlier suit. Since the petitioner denied his signature on the summons and claimed the summons not duly served upon him, then it is incumbent upon the defendant to prove the service of summons of earlier suit by adducing proper witness. Because burden of proof has been shifted upon the defendant to prove that summons were duly served upon the defendant petitioner as per provision of section 103 of the Evidence Act. In this context the O.P totally failed to discharge this burden. The Opposite parties failed to prove the matter by producing the concerned Process Server or the witnesses in whose presence the summons was served. Even the O.P did not try to prove the signature of the petitioner by resorting handwriting expert. Since the petitioner was found absent at the time of service, the process server ought to follow the procedure as laid down in order V Rule 17 of C.P.C. Service of summons in the different address not stated in plaint on the petitioner cast on serious doubt about the proper service of summons on the petitioner. It appears to me that plaintiff willfully mentioned that addresses in the summons so that it cannot be served properly and thus by keeping the defendant petitioner in the dark can obtain the ex-parte decree. Considering all these facts and circumstances it is my considered view that summons was not duly served upon the defendant petitioner.

The O.P claimed the present case to be barred by limitation. It appears that the petitioner brought this Miscellaneous case long after 510 days. The cause shown and the explanation of delay given by the defendant petitioner appears to me reasonable and satisfactory.

In view of above discussion since summons was not duly served on the defendant petitioner the ex-parte decree cannot sustained in law. The proper service of summons is a pre-requisite of sustainability of an ex-parte decree. It has been held in a case reported in 35 DLR(AD)162 that “ An ex-parte decree will be set aside if it is found that there was no service of summons on the defendant.” In such situation, in order to avoid multiplicity of suits between the parties and to meet the ends of justice I am very much inclined to allow this Misc case.

Court fee paid is correct

Hence

Ordered

that this Miscellaneous case is hereby allowed on contest against the O.P No 1/2 without any order as to cost.

The ex-parte decree passed on 18.06.2017 in Other suit No.62/2013 by this court is hereby set aside and let the original suit be revived to it's number and file fixing the next date on-----at the stage of filing of W/S.

D/C by me

Md Hasan Zaman  
Senior Asst. Judge  
Asst. Judge Court, Boalkhali  
Chattogram

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