

**Present Md Hasan Zaman, Senior Assistant Judge
Assistant Judge Court, Boalkhali, Chattogram**

Order No-
Dt.

Today is fixed for necessary order.

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

The record is taken for order.

Since both **Misc. Case No. 02 of 2021 and 04 of 2021** are very much interrelated with the suit property and arisen out of the same Original suit so the decision of these two cases are given in a single judgment.

The Brief facts of the Petitioner in **Misc Case No. 02/2021** is that the present opposite party No.1-4 as plaintiff instituted the original Civil Suit in the present court being Other Suit No. 03 of 2006 wherein the present-petitioners were the defendant No.21/22. That the suit was decreed ex-parte against the present petitioners on 04.10.2020 and the decree was signed on 08.10.2020. It is claimed by the petitioners that summons-notice upon the defendant petitioners were not served and the plaintiff to that suit suppressing the service of summons obtained the ex-parte decree. Subsequently on 19.01.2021 the defendant petitioners came to learn about the ex-parte decree and finally the defendant petitioners after obtaining the information slip dated 24.01.2021 came to known about the ex-parte decree. If the petitioners got summons of the original suit, they would certainly contest the suit. Knowing about the ex-parte decree the defendant No. 20/21 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 **114 days** and by separate petition prayed condonation of said delay.

The brief facts of petitione's case in Misc case No 04 of 2021 is that the petitioner was defendant no.2 in the Original suit. Summons upon the defendant petitioner was not served and the plaintiff no1-4 to that suit suppressing the service of summons obtained the ex-parte decree. Hence this case.

Per Contra, plaintiff /**Opposite Party No 1-4 of both Misc cases** stated that the summons of the original suit has been duly served on petitioners both by the Jarikarak and by post office. Despite of receiving summons of original suit, the defendants did not appear and as a result the suit was decreed on ex-parte on 04.10.2020. The defendant/petitioners having no right title and interest over the suit land did not appear to contest the suit. The defendants

petitioners after a long lapse of time only to harass the plaintiff O.P brought this Miscellaneous cases 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 ex-parte decree dated 04.10.2020 in Other Suit No. 03/2006 would be set-aside as per prayer of the petitioner ?

Discussion and Decision

In Misc case No. 02/2021, the petitioner brought a witness to prove it's case namely **Abdus Salam** (Pt.W.1) and **during examination of Pt.W.1** the documents which were produced and proved have been marked as Exhibits:-

1. Again in Misc case No. 04/2021, the petitioner brought 02 witnesses to prove it's case namely **Osman Gani** (Pt.W.1) and Bodiul Alam (Pt.W.1). On the other hand, the opposite parties in both cases produced a witness namely **Md Jane Alam** as O.P.W.1 and produced no documents. The Process Server Durga Prodo das has been examined as C.W.1. **Pt.W.1** for the petitioner and **OP.W 1** for the opposite parties has given statements admitting the facts of the application and written objections respectively.

Issue no. 1 -2

These issues are taken up together for convenience. Admittedly in the original suit being Other Suit No. 03 of 2006, the petitioners were defendant No.2, 21 and 22. 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 petitioners and claimed that the plaintiff in connivance with process server of the court showed the summons served upon the petitioners. On the other hand denying this allegation the O.P claimed that Summons has been duly served upon the petitioners but despite of receiving the summons they did not appear to the suit and as a result the suit was decreed on ex-parte. The defendant petitioners having no right title and

interest over the suit land and knowing the fate of the suit did not come to contest the suit.

Pt.W.1 of both the Misc cases denied that they did not receive any summons of earlier suit. Since the petitioners denied the proper service of summons, then it is incumbent upon the O.P to prove the service of summons of earlier suit by adducing proper witness. Because burden of proof has been shifted upon the O.P to prove that summons were duly served upon the defendant petitioners as per provision of section 103 of the Evidence Act.

In this context the O.P produced the concerned Process Server as witness to prove the service. The Process Server (C.W.1) deposed in support of his service of summons upon the concerned defendants. On examination of the report of **service-return submitted by C.W.1**, it is evident that summons was not directly received by any of the petitioners. The report shows that on their behalf summons was received by the defendant no.5 Rokhon Uddin who has been claimed to be a minor by the petitioners. In view of Secondary School Certificate of Rokon Uddin it appears that his date of Birth is 11.07.1995. On the other hand the summons was served on 12.03.2007. Thus it is crystal clear that at the time of service Rokon Uddin was a minor and the C.W.1 served the Summons upon a minor boy. Though the relevant law provides for service of summons upon adult member of the concerned family but unfortunately in this case summons in the name of the petitioner was received by a minor boy which is direct contravention of law of service of summons. Moreover it appears that that Rokon Uddin is not a family member of the petitioners. Thus it seems to me that plaintiffs in connivance with the process server become succeeded to show the summons of defendant no. 2/21/22 as to be duly served upon them and thus keeping the defendant petitioners in the dark obtained the ex-parte decree. Considering all these

facts and circumstances it is my considered view that summons was not duly served upon the defendant petitioners.

The O.P claimed the present case to be barred by limitation. It appears that the petitioners brought these two Miscellaneous case long after 114 and 134 days. We know very well that the year 2020-2021 was the year of pandemic Covid-19 which shut down the regular activities of all courts throughout the country. Thus considering pandemic situation and the cause shown and the explanation of delay given by the defendant petitioners appears to me as reasonable and satisfactory.

In view of above discussion since summons was not duly served on the defendant petitioners, 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 these two Miscellaneous case are hereby allowed on contest against the O.P No 1-4 without any order as to cost.

The ex-parte decree passed on 04.10.2020 in Other suit No. 03/2006 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
Boalkhali Asst. Judge Court,
Patiya Chattogram

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