মিস (ছানি) কেস নং-১৪/২০২১
মূল অপর মামলা নং-৪৮/২০১৪

Present Md Hasan Zaman, Senior Assistant Judge
Senior Assistant Judge 2nd Court, Patiya, Chattogram

Order No- 50
Dt. 12.03.2024

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 16.03.2016 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. 48 of 2014 wherein the present-petitioner was the defendant No. 9-11. That the suit was decreed ex-parte against the present petitioner on 16.03.2016 and the decree was signed on 21.03.2016. It is claimed by the petitioner that the summons-notice upon the defendant petitioner was not served and the plaintiffs to that suit suppressing the service of summons obtained the ex-parte decree. Subsequently on 15.06.2021 the defendant petitioner through his Advocate Clerk came to learn about the ex-parte decree and finally the defendant petitioner after obtaining the information slip dated 14.06.2021 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.9-11 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 **5 years and 3 Months** and by separate petition praying condonation of said delay.

Per Contra, plaintiff **/Opposite Party No 1/3-12/14** stated in their W.O that the summons of the original suit has been duly served on petitioner 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 16.03.2016. The defendant/petitioners having no right title and interest over the suit land did not appear to contest the suit. The defendants after a long lapse of time only to harass the plaintiffs 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 16.03.2019 in Other Suit No. 48/2014 would be set-aside as per prayer of the petitioner ?

Discussion and Decision

The petitioner brought a witness to prove it's case namely **Doyal Iych** (Pt.W.1) and **during examination of Pt.W.1 t**he documents which were produced and proved have been marked as Exhibits:-1. On the other hand, the opposite parties produced a witness namely **Milton Iych** as O.P.W.1 and produced no documents. **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 -3

These issues are taken up together for convenience. Admittedly in the original suit being Other Suit No. 48 of 2014, the present-petitioner was the defendant No. 9-11. 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 plaintiffs in connivance with process server of the court showed the summons served upon the petitioner. On the other hand denying this allegation the O.P claimed that Summons has been duly served upon the petitioner as it was received by their son Prioton Iyach 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 came to contest the suit.

On examination of the report of **service-return**, it is evident that process was not directly received by the petitioner since they were not present at the residence that time but it was received by the son of defendant no.10. But Pt.W.1 denied that they did not receive any summons of earlier suit. Since the petitioner denied the proper service of summons, 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 O.P did not try to prove the signature of the Prioton Iych in the summons invoking handwriting opinion. It appears to me that plaintiff by placing a third person as Proton Iych become succeeded to show the summons of defendant no 9-11 as to be duly served upon them and thus keeping the defendant petitioner 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 petitioner brought this Miscellaneous case long after 5 years and 3 months. The cause shown and the explanation of delay given by the defendant petitioner that 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

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Ordered

that this Miscellaneous case is hereby allowed on contest against the O.P No 1/3-12/14 without any order as to cost.

The ex-parte decree passed on 16.03.2016 in Other suit No. 48/2016 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
Senior Asst. Judge 2nd Court,
Patiya Chattogram

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