

Present Md Hasan Zaman, Senior Assistant Judge

Order No-
Dt.

Today is fixed for necessary order.

Both the petitioner and the opposite parties are present filing hazira.

The record is taken for necessary order.

The defendant/petitioner filed a petition under Order 9 Rule 13 of the Code of Civil Procedure (CPC) to set aside an ex-parte decree passed on 28.10.2015 in Other Suit No. 143 of 2007, claiming non-service of summons.

Petitioner's case in brief is that the present O.P No.1-5 as plaintiff instituted the original Civil Suit wherein the present-petitioner was defendant No.16.

The petitioner contended that the summons was not properly served, and the ex-parte decree was obtained by the plaintiff/OP through suppression of summons. The petitioner came to know about the decree on 23.05.2019 after obtaining the information slip from court. Thereafter on 19.06.2019 the petitioner filed this petition with a separate petition of condonation of delay.

Per Contra, **O.P No 1-5** stated in their W.O that the summons was duly served, both by Jarikarak and by post office and the petitioner despite of receiving summons chose not to appear in court and as a result the suit was decreed on ex-parte on 28.10.2015. The petitioner after a long lapse of time only to harass them brought this case on false allegation which is liable to be dismissed.

Issues for determination

1. Whether the 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 28.10.2015 in Other Suit No. 143/2007 would be set-aside as per prayer of the petitioner ?

Discussion and Decision

The petitioner brought a witness to prove it's case namely **Naim Uddin** (Pt.W.1) and his documents has been marked as Exhibits:-1. On the other hand, the opposite parties produced a witness namely **Md Harun** as O.P.W.1 and produced no documents.

Issue no. 1 -3

These issues are taken up together for convenience. Admittedly in original suit the petitioner was defendant No.16. The petitioner's witness Pt.W.1 denied receiving any summons. On the other hand O.P claimed that Summons has been duly served but despite of receiving the summons

petitioner did not appear and as a result the suit was decreed on ex-parte. It is evident from **report of service-return** that process was not directly received by the petitioner but by his brother defendant no.3. Since the petitioner denied the proper service then burden lies on defendants to prove the proper service of summons. The O.P. failed to provide sufficient evidence to prove that summons were duly served on the petitioner. Neither the process server nor the witnesses were produced as witness to prove the service. Moreover it appears that Summons for multiple defendants were issued together, which is contrary to the proper procedure that requires individual issuance. This procedural lapse casts doubt on the proper service of summons.

Although the petition was filed after 1326 days, the delay was satisfactorily explained by the petitioner, making the case not barred by limitation.

Considering the improper service of summons, the ex-parte decree dated 28.10.2015 cannot be sustained. An ex-parte decree should be set aside if summons were not duly served, as per the precedent set in 35 DLR(AD)162.

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

The Miscellaneous case is allowed on contest against the O.P. No. 1-5, subject to the payment of a cost of Tk. 5,000.

The ex-parte decree passed on 28.10.2015 in Other Suit No. 143/2007 is set aside. The original suit is revived and the next date for filing of the Written Statement (W/S) is fixed for 27.06.2024.

The petitioner must pay the cost of Tk. 5,000 to the O.P. No. 1-5 before the next date; otherwise, the case shall be disallowed

D/C by me

Md Hasan Zaman
Senior Asst. Judge
SeniorAsst. Judge 2nd Court,
Patiya, Chattogram

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