

Order No-

Today is fixed for necessary order.

Dt.

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

The record is taken for necessary order.

This is an application under **Order 9 Rule 13** of the Code of Civil Procedure, 1908 (CPC), filed by the petitioner to set aside the **ex-parte decree** dated **13.04.2022** passed in **Other Suit No. 1283 of 2021** (Original O.S No. 201 of 2008). The petitioner contends that the decree was obtained through suppression of summons and fraud. The petitioners claim non-service of summons and argue that they had no knowledge of the suit until **23.11.2022**, when they obtained the information slip from the court, following which they filed the current petition along with an application for condonation of delay on **01.12.2022**.

Facts in Brief:

The **plaintiff/opposite party (O.P)** filed a civil suit against the present petitioner, among others, where the petitioners were made **Defendants No. 2 and 3**. The plaintiff allegedly personified a stranger, **Mokbul Ahmed**, as the legal heir of the original recorded tenant, **Asmot Ali**, while concealing the existence of the true son namely **Neamot Ali**. The petitioner alleges that the summons in the original suit was not properly served, leading to the ex-parte decree in favor of the plaintiff.

In contrast, the opposite party claims that the summons was duly served both by Jarikarak and by post, and that the petitioners, having knowledge of the suit, deliberately chose not to contest. The O.P further argued that Defendant No. 1-3 appeared through Advocate and sought time for filing of W/S. Later on the defendant No.1 contested the suit by filing a written statement (W/S) while Defendants No. 2 and 3 (the present petitioners) failed to appear, leading to the ex-parte decree against them. The opposite party has, therefore, prayed for the dismissal of this petition, contending that it was filed merely to harass them after an unjustifiable delay.

Issues for Determination:

1. Whether the Miscellaneous Case is maintainable in its present form and manner?
2. Whether the case is barred by limitation as per the applicable legal provisions?

3. Whether the ex-parte decree dated 13.04.2022 in Other Suit No. 1283 of 2021 is liable to be set aside under Order 9 Rule 13 CPC, as prayed by the petitioners?

Discussion and Decision:

Issue No. 1 and 2: Maintainability and Limitation

The petitioners argued that they were unaware of the proceedings in the original suit and came to know of the decree only on 23.11.2022, after which they acted promptly in filing the application to set aside the ex-parte decree on 01.12.2022, along with a petition for condonation of delay. It was argued that the delay was 220 days, which is not excessive given the circumstances, and the delay has been adequately explained. This court finds that this delay is satisfactorily accounted for and that the petition is not barred by limitation.

Under Section 5 of the Limitation Act, 1908, the court has the discretion to condone the delay if it is convinced that the petitioner has provided a valid explanation for the delay. In the case of *Abdul Gani & Others vs Md. Abbas Ali & Others* (25 DLR (SC) 1967), the Supreme Court has held that courts should adopt a liberal approach in cases involving delay, especially when rights to property are involved, as long as the delay is justified. The present court, in light of this jurisprudence, finds that the petitioners' explanation of being unaware of the decree is reasonable.

Hence, the petition is maintainable, and the case is not barred by limitation.

Issue No. 3: Whether the ex-parte decree is liable to be set aside

The petitioners' primary argument is that summons were not properly served, which resulted in their inability to contest the original suit. They produced Rashida Ahmed (Pt.W.1) to deny receiving the summons. On the contrary, the O.P produced Jaheda Begum (O.P.W.1) and Md. Abdul Sukkur (O.P.W.2), claiming that summons were properly served, and that the petitioners appeared on 16.06.2008 and later filed a written statement (W/S) through Advocate Md. Moajjem Hossain.

I have, however, carefully examined the Service Return on record. It revealed that while Rashida Khatun received the summons, there was no record of proper service of summons on Mazma Khatun. Furthermore, though the Vokatnama contains the thumb impression of the defendant no.1-3 but time petition dated 16.06.2008 contained only the name of Defendant No. 1 Nurul Alam which casts serious doubt

regarding appearance of defendant no.2/3. The failure of the O.P to produce the lawyer who allegedly represented the petitioners further weakened their case. The O.P also did not attempt to prove the authenticity of the thumb impressions on the Vokatnama.

The absence of clear evidence from the O.P raises serious doubts about the proper service of summons on the petitioners and their appearance in the suit on 16.06.2008. In the landmark case of Abdul Jalil vs. Abdul Kader and Others (22 DLR (SC) 1969), the Supreme Court emphasized that where service of summons is questioned and the facts are unclear, the benefit of the doubt should be given to the petitioner. Following this principle, I am inclined to rule in favor of the petitioners.

The fact that the petitioners have significant interest in the suit land, which is their only inherited property further strengthens their case. Denying them an opportunity to contest would result in severe prejudice. Moreover, Order 9 Rule 13 CPC provides a remedy to set aside ex-parte decrees if it is shown that the summons were not duly served, or if there was sufficient cause for the defendant's non-appearance.

In conclusion, the court deems it necessary to give the petitioners an opportunity to contest the original suit in order to ensure that justice is served and to avoid multiplicity of litigation. The court's decision is guided by the principles of equity, fairness, and good conscience, ensuring that no party suffers unduly due to procedural lapses or fraudulent acts.

Therefore, in the interest of justice and considering that the ex-parte decree appears to have been obtained through concealment of summons and practicing fraud, the court finds it appropriate to set aside the decree.

Hence it is Ordered:

that the Miscellaneous Case is allowed on contest against O.P No. 2(Ka)/3 and ex-parte against the rest of the opposite parties, subject to the payment of a cost of Tk. 5,000 to the O.P before the next date of hearing.

The ex-parte decree dated 13.04.2022 in Other Suit No. 1283 of 2021 (Original Suit No. 201 of 2008) is hereby set aside. The original suit is revived, and the next date for filing of the Written Statement (W/S) by the petitioners is fixed for -----

If the petitioner fails to pay the cost of Tk. 5,000 to the O.P before the next hearing date, the case shall stand dismissed.