

Order No- 32

Dt. 28.11.2024

Today is fixed for necessary order.

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

The record is taken for necessary order.

This is an application filed under Order IX Rule 13 of the Code of Civil Procedure (CPC), 1908, seeking to set aside the ex-parte decree dated 27.04.2017 passed in Other Suit No. 23/2016, along with an application under Section 5 of the Limitation Act, 1908, for condonation of delay of 2,140 days.

Petitioner's case in brief is that the Opposite Parties No. 1-5 were the plaintiffs in a previous suit numbered 23/2016 before this court. The petitioner in this miscellaneous case was Defendant No. 33 in that original suit. The plaintiffs in Suit No. 23/2016 sought a declaratory decree but did not make the petitioner's wife, Selina Zaman, a party to the case. Consequently, the ex parte judgment and decree obtained by the plaintiffs in that suit are liable to be set aside.

The petitioner, Defendant No. 33, Mr. Morijuzzaman, is a marine engineer by profession and serves on international commercial ships. At the time of the previous suit in 2016, he was employed abroad on a foreign trading vessel. No caretaker by the name of Nurul Islam or Jamal Hossain was ever engaged at the petitioner's residence. Furthermore, while the residences of Defendants No. 32 and 33 are both located in Shantibagh Residential Area, they are situated at significantly different addresses. Defendant No. 32 resides at Holding No. 530/2, Shantibagh, whereas the petitioner, Defendant No. 33, resides at Holding No. 90/1-D, Bashir Mohammad Road, Shantibagh Residential Area.

The geographical distance and absence of any relationship between Defendants No. 32 and 33 rendered it necessary for the plaintiffs to serve separate summonses upon them. However, the process server, acting under the plaintiffs' direction, failed to issue clear and separate reports on the service of summons for Defendants No. 32 and 33. Instead, the report ambiguously referenced service of summons on a caretaker, failing to clarify whether Nurul Islam or Jamal Hossain was the caretaker for Defendant No. 33's residence. Moreover, the petitioner asserts that no caretaker was employed at his residence, and the process server did not provide any explanation as to how he identified either person as being associated with the petitioner's property.

The petitioner first became aware of the earlier suit on March 10, 2022, when he attempted to pay land rent and later learned of the ex parte judgment and decree on March 6, 2023. The summons in Suit No. 23/2016 was never properly served upon the petitioner, rendering the ex parte order dated April 27, 2017, and the ex parte decree signed on May 8, 2017, void and liable to be set aside. It is claimed by the petitioner that the original suit be restored to its original position to allow him the opportunity to contest the case.

The petitioner acknowledges a delay of 2,140 days in filing the instant case. However, he has submitted a separate application under Section 5 of the Limitation Act, 1908, seeking condonation of the delay with justifiable reasons.

In their written objection, O.P Nos. 3-5 asserted that summons for Original Suit No. 23/2016 were duly served on the petitioner via both Jarikarak and post. Despite receiving the summons, the petitioner failed to appear, resulting in an ex-parte decree on 27.04.2017. Following the decree, the Plaintiffs/O.P approached the Assistant Commissioner (Land), Karnaphuli, to record the decreed land in their names. During this process, they discovered that the property was recorded under separate mutation cases—Mutation Case Nos. 1-138/95-96, 355/05, and 1-2265/2015—bearing Khatian Nos. 621, 729, and 2165, respectively, in the petitioner's name.

The O.P filed a written objection on 10.07.2018 before the Assistant Commissioner (Land), seeking cancellation of these mutation records. After notifying the petitioner and conducting a field investigation, the surveyor's report confirmed that the decreed property was under the O.P's possession, with no possession by the petitioner. Based on these findings, the Assistant Commissioner (Land) canceled Mutation Khatian No. 2165 on 19.06.2019 and restored the property to B.S. Khatian No. 455. Subsequently, the decreed land was recorded under Mutation Case No. 613/19-20, leading to the issuance of Mutation Khatian No. 2829 on 10.10.2019.

The petitioner was aware of the notices regarding the suit since 2016 and the ex-parte decree in July 2018 via communication from the Assistant Commissioner (Land). Despite this, the petitioner took no action for a prolonged period and only filed the present application to harass the O.P. The petition is baseless, filed with malafide intent, and lacks a satisfactory explanation for the delay. The decree and orders passed are lawful, valid, and

enforceable, causing no prejudice to the petitioner, who is not entitled to any relief in this matter.

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 27.04.2017 in Other Suit No. 23/2016 would be set-aside as per prayer of the petitioner ?

Discussion and Decision

The petitioner brought a witness to prove it's case namely **Moniruzzaman** (Pt.W.1) and his documents has been marked as Exhibits:-1. On the other hand, the opposite parties produced a witness namely **Md Azam Ali** as O.P.W.1 and produced no documents. Besides this the concerned Jarikarak **Md Julfiqar Rahman** as C.W.1 deposed in this case.

Issue no. 1 -3

These issues are taken up together for convenience. The petitioner **Morijuzzaman (Pt.W.1)**, a marine engineer by profession, contends that in original suit he was defendant No.33. The ex-parte decree was obtained against him without proper service of summons. The petitioner asserts that at the time of the suit in 2016, he was employed abroad on a foreign trading vessel and thus unaware of the proceedings. **Exhibit-1** proves that fact to be true. He further asserts that summons were not duly served upon him. The process server's report ambiguously referred to service upon a caretaker (Nurul Islam or Jamal Hossain) without specifying which caretaker was associated with his residence. He claimed that he resides at 90/1-D, Bashir Mohammad Road, Shantibagh, which is distinct from Defendant No. 32's address at 530/2, Shantibagh. Despite this, separate summonses were not served upon them. Moreover his wife Mrs. Selina Zaman was not made parties to that suit which affected her legal rights.

On the other hand O.P.W.1 contends that Summons were duly served upon the petitioner via both Jarikarak and postal service in 2016. The petitioner was aware of the suit and the decree as early as July 2018 through communications from the Assistant Commissioner (Land). The ex-parte decree was passed lawfully, and subsequent actions, including mutation of the decreed land, have

been completed. The petitioner's delay in filing the petition is inexcusable and reflects malafide intent.

On examination of the report of **service-return**, it is evident that process was not directly received by the petitioner since he was not present at the residence that time it was served by hanging. 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. Though O.P produced the Process server as C.W.1 but could not produce any witness before whom summons was hanged. Order V Rule 19 of the CPC mandates that the process server's report must clearly indicate whether summons was duly served and, if not, the manner of service. In the present case, the service report ambiguously mentions two names of caretaker without specifying any verifiable connection to the petitioner's property. The distinction between the addresses of Defendants No. 32 and 33 further underscores the likelihood of non-service. In view of above discussions it appears that summons was not properly served since it was not proved by independent witnesses stated in the summons.

The apex court in *Al-Amin Corporation vs Md. Kafiluddin* (31 DLR 69) held that improper service of summons is sufficient grounds for setting aside an ex-parte decree. Similarly, in *Rupali Bank vs Md. Golam Sarwar* (53 DLR 138), the court emphasized that failure to serve summons properly vitiates the proceedings. In this case since the summons was not duly served upon the petitioner in compliance with Order V CPC, rendering the ex-parte decree liable to be set aside.

Section 5 of the Limitation Act permits condonation of delay for sufficient cause. The petitioner has explained that his employment abroad, coupled with improper service of summons, led to his lack of awareness of the decree until 06.03.2023. The O.Ps' assertion that he was aware in 2018 remains unsubstantiated.

The Supreme Court in *Bangladesh vs Md. Abdul Motaleb* (44 DLR 221) held that courts must adopt a liberal approach when sufficient cause is shown, especially in cases where rights to contest the matter were deprived without

proper notice. The petitioner's explanation for the delay is satisfactory. Hence, the delay of 2,140 days is condoned.

Order IX Rule 13 CPC empowers the court to set aside an ex-parte decree if the defendant shows sufficient cause for non-appearance. Improper service of summons constitutes such cause. The absence of Mrs. Selina Zaman, a necessary party, further undermines the validity of the decree.

In *Abdul Latif vs Abdul Khaleque* (60 DLR 349), the court held that an ex-parte decree obtained through procedural lapses cannot stand. Applying this principle, the ex-parte decree dated 27.04.2017, passed in violation of the principles of natural justice, is liable to be set aside.

Court fee paid is correct

Hence

Ordered

The Miscellaneous case is allowed on contest against the O.P. No. 3-5, subject to the payment of a cost of Tk. 10,000.

The ex-parte decree passed on 27.04.2017 in Other Suit No. 23/2016 is set aside. The original suit is revived and the next date for filing of the Written Statement (W/S) is fixed for **02.02.2025**.

The petitioner must pay the cost of Tk. 10,000 to the O.P. No. 3-5 before the next date; otherwise, the case shall be disallowed

D/C by me

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

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