IN THE SUPREME COURT OF BANDLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO. 396 of 2021.
Md. Insan Ali and others.
...Petitioners.
-Versus-
Md. Kudrat E Khoda @ Abu Sayed and others
....Opposite parties.
Mr. Md. Alamgir Mostafizur Rahman, Adv.
… for the petitioners
Mr. Sajjad Ali Choudhury and
Mr. Md. Fazle Rabbi, Advocate
… for the opposite parties.

Heard on: 24.08.2022, 31.08.2022, 01.09.2022 and 15.11.2022.
Judgment on: 20.11.2022.

Present:
Mr. Justice Md. Badruzzaman.

This Rule was issued calling upon the opposite parties to show cause as to why judgment and order dated 08.12.2020 passed by learned Additional District Judge, 3rd Court, Rajshahi in Miscellaneous Appeal No. 27 of 2018 disallowing the appeal and thereby affirming judgment and order dated 22.03.2018 passed by learned Joint District Judge, Additional Court, Rajshahi in Miscellaneous Case No. 117 of 2008 dismissing the case filed under Order IX rule 13 read with section 151 of the Code of Civil Procedure should not be set aside.

Facts, relevant for the purpose of disposal of this Rule, are that the petitioners herein (defendant Nos. 32, 33 and 16 respectively) as petitioners on 16.9.2008 filed Miscellaneous Case No. 117 of 2008 under Order IX rule 13 read with section 151 of the Code of Civil

Procedure praying for setting aside ***ex parte*** judgment and decree dated 18.7.1999 (decree signed on 22.7.1999) passed in Other Class Suit No. 44 of 1996 by 1st Court of Sub-ordinate Judge, Rajshahi stating, *inter alia*, that opposite party Nos. 1-14 filed Other Class Suit No. 44 of 1996 before 1st Court of Sub-ordinate Judge, Rajshahi for partition of 8.65 acre land which was dismissed vide judgment and decree dated 18.7.1999 (decree signed on 22.7.1999) on contest against defendant Nos. 1 and *ex parte* against the petitioners and others. The plaintiffs then preferred an appeal and upon hearing, the suit was decreed vide judgment dated 21.2.2001. The petitioners have learnt about the *ex parte* judgment and decree on 7.8.2008 from somebody and then filed an application by engaging learned Advocate on 18.8.2008 for perusal of the record of the suit who examined the record on 19.8.2008 and found that the process-server, without going to the respective houses of defendants, showed service of summons by hanging and by suppressing summons of the original suit, the plaintiffs fraudulently obtained the ***ex parte*** decree.

Plaintiff- opposite parties contested the application by filing written objection stating that the case is barred by limitation; that the summons was duly served upon the defendants by the process-server by hanging it on their respective house doors when they refused to receive the summons by signing acknowledgement and that they were aware of the suit and *ex parte* decree and accordingly, the *ex parte* decree was rightly passed and the defendants are not entitled to any relief.

Both parties adduced evidence to prove their respective case. The trial Court, upon consideration of the evidence and materials on record dismissed the miscellaneous case vide judgment and order dated 22.03.2018 holding that the summons was duly served and the application was barred by limitation. Being aggrieved by said judgment and order, the defendants preferred Miscellaneous Appeal No. 27 of 2018 before the learned District Judge, Rajshahi which, on transfer, was heard by learned Additional District Judge, 3rd Court, Rajshahi, who upon hearing both the parties vide judgment dated 08.12.2020 disallowed the appeal by affirming the judgment and order passed by the trial Court.

Being aggrieved by said judgment and order dated 08.12.2020 defendant Nos. 16, 32 and 33 have preferred this application under section 115(1) of the Code of the Civil Procedure and obtained the instant Rule and order of stay operation of the impugned judgment and order dated 08.12.2020.

The plaintiff-opposite parties have entered appearance by filing Vokalatnama to contest the Rule.

Md. Alamgir Mostafizur Rahman, learned Advocate appearing for the petitioners submitted that the trial Court committed an error of law by holding that the summons was duly served merely on the basis of service return which was not verified by an affidavit of the serving officer under rule 19 of Order V of the Code of Civil Procedure (the Code); that the process server was not examined on oath and service was not proved; that the process server did not make an affidavit as per Form 11 under APPENDIX-B of the Code but he only submitted a report showing service of summons by hanging

under rule 17 of Order V of the Code which is not sufficient service as per rule 19 of Order V of the Code; that the trial Court also committed illegality in holding that the summons was served upon the defendants by registered post though, as per rule 19B of Order 5 of the Code, such serving process is simultaneous one which cannot be taken as due service of summons in the absence of service by the process-server; that the trial Court upon misconstruction and misinterpretation of the service return wrongly concluded that the same was a declaration by the process-server; that the trial Court wrongly held that the case was barred by limitation without considering specific case of the defendants that the plaintiffs by fraudulent means obtained the ***ex parte*** decree and that they filed the case within 30 days from the date of their knowledge; that in the suit, the trial Court did not make any declaration as to due service of summons upon the defendants as per mandatory provision under rule 19 of Order V of the Code, and that the Court of appeal, as the last Court of facts, without considering factual and legal aspect of the case illegally upheld the order of the trial Court by the impugned judgment and thus interference is called for by this Court.

In opposing the submissions of the learned Advocate for the petitioners, Mr. Md. Sajjad Ali Chowdhury, learned Advocate appearing for the plaintiff-opposite parties submitted that the miscellaneous case was barred by limitation and the defendants could not prove the date of knowledge by sufficient evidence; that the Court of appeal concurrently found that the summons was duly served through process server and rightly dismissed appeal and as such, interference is not called for by this Court.

I have heard the submissions of the learned Advocates, scrutinized and gone through the pleadings of the parties, evidence, both oral and documentary, and judgments of the Courts below as well as relevant provisions of law to come to a proper decision.

Rule 16 of Order V of the Code of Civil Procedure provides the procedure of personal service of summons in usual course and rule 18 provides the procedure of endorsement of time and manner of service under rule 16. Rule 17 of Order V of the Code provides procedure when defendant refuses to accept service, or cannot be found while rule 19 provides provisions of examination of the serving officer when the summons were served under rule 17. Rule 19A of Order V of the Code stated evidentiary value of declaration made by the serving officer and rule 19B provides provisions of simultaneous issue of summons for service by post in addition to personal service. For ready reference, rules 17, 19 and 19A of Order V of the Code are reproduced below:

> **"17.** Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the

Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the service officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

19A. A declaration made and subscribed by serving officer shall be received as evidence of the facts as to the service or attempted service of summons.**"**

The defendant-petitioners adduced one oral witness and the plaintiff-opposite parties adduced two witnesses to prove their respective case. The certified copies of summons and the reports of the process server were produced before the trial Court and those were marked as Exhibit Nos. Ka(1) **–** Ka(4). While submitting service returns, the process server made a declaration that he went to the defendants' house with the summons along with local witnesses but the latter refused to receive the summons whereupon he served copies of the summons by hanging in the outer front doors of their

respective house in presence of witnesses. Evidently, the summons were served under provisions of rule 17 of Order V of the Code and the process server returned the original summons with a report stating his mode of service as above and the trial Court vide order No. 22 dated 28.10.1998 declared as follows:

> ‘‘উভয়পক্ষ হাজিরা দিয়াছে। ৯ থেকে ৩৪ নং বিবাদীর সমন জারী অন্যে ফেরত এসেছে। আগামী ৮/১১/১৯৯৮ তারিখ জবাব দাখিল।’’

Now question arises whether, given the facts of the case, such service can be considered as due service of summons upon the defendant-petitioners.

In the Case of Santosh Kumar Chakraborty & ors. vs. M.A. Motaleb Hosain and ors., reported in 36 DLR (AD) 248, questions arose whether the provisions as to inquiry, as contemplated in rule 19 of Order V of the Code of Civil Procedure, are mandatory in all cases, such as, where there is a declaration by the serving officer that summons was duly served by him under rule 17 of the said Order, and whether the learned Judges of the High Court Division have correctly held that the trial Court made a declaration under rule 19, that summons was duly served. The Appellate Division while answering those questions held as follows:

> “Two classes of cases are contemplated in rule 19, that in one class of cases, examination of the process server is mandatory, and in another class of cases it is discretionary. Where the serving officer has returned the summons and has also made a declaration to the effect that he served the summons by affixation under rule 17, then,

> examination of the process server as a witness in Court is not mandatory particularly when the proviso to this rule shows that a declaration of the serving officer shall be received as evidence of the facts as to the service or admitted service of the summons. In this case, admittedly the serving officer made a declaration that he went to the defendants' house with the summons but the latter refused to receive the summons whereupon he served it by hanging it on the defendants' door in presence of witness. But where there is no such declaration of the serving officer, examination of the serving officer as a witness is mandatory."

In answering second question regarding the Court's declaration as to due service of summons, the Appellate Division held as follows:

> "This provision is mandatory, whether the serving officer is or is not required to be examined as witness. …….in both cases it is mandatory on the Court to either declare that the summons has been duly served or order such service, as it thinks fit……The real controversy in respect of this provision is in which 'manner' or 'form' the Court shall record a declaration that summons has been duly served……no particular form or manner has been prescribed in which a declaration under Order V rule 19 C.P.C shall be made by the Court……. the recording by the trial Court in the order sheet of the suit that summons has been served is sufficient compliance of the

> provision as to Court's declaration that the summons has been duly served. In fact when the service is returned with a declaration of the serving officer that he served the summons by hanging it on a conspicuous part of the defendants' house or his place of work in presence of witnesses and if the Court perused the declaration along with the service return containing names of witnesses in whose presence summons was purportedly served and records his satisfaction that summons has duly served, then the mandatory provision of the rule as to declaration has been complied with."

By endorsing above view, the appellate Division in the case of Md. Insan Ali vs. Mir Abdus Salam, reported in 40 DLR (AD) 193 held as follows:

> " There is no dispute that the onus to prove that the summons was duly served upon the defendant is on the plaintiff. In this case the onus is found to have been fully discharged as the process server-server submitted his report, along with a declaration, that the has served the summons by hanging it on the gate of the defendant when the latter refused to accept it and thereafter the plaintiff appeared in the Court and deposed on oath that the summons was duly served. Thereupon the onus shifted upon the defendant to prove that the summons was not served as claimed by the plaintiff ……The process-server was, of course, not examined as a witness

> as his examination is not mandatory in view of provision of rule 19A of Order V, Civil P.C. Examination of process server is mandatory when he has simply submitted his report about service of summons without any verification or declaration that he had served the summons, but when he made a declaration to this effect then his examination as a witness is not mandatory, although the Court may at its discretion call him as a witness."

The provision that 'a declaration of the serving officer shall be received as evidence of the facts as to the service or admitted service of summons' was available in the proviso to rule 19 of Order V of the Code before 'The Code of Civil Procedure (Amendment) Ordinance, 1983 (Ordinance No. XLVIII of 1983)' came into force. Said amendment introduced similar provisions by inserting rule 19A in Order V of the Code. According to this amendment 'declaration made by a serving officer shall be received as evidence of the facts as to the service or attempted service of summons'. This view also finds support in the case of Khurshid Anwar & another vs. Jamil Akhter, 6 BLD (AD) 83 wherein the Appellate Division held that 'the purport of the amended rule is that examination of the process server is not mandatory when he has made a declaration but it is mandatory when he has not made such declaration'. Same view has been expressed by the appellate Division in Shamsun Nahar Begum vs. Salauddin Ahmed and others, reported in 4 BLC (AD) 285. Moreover, the recording by the trial Court in the order sheet of the suit that the

summons has been served or that the summons has returned after service is sufficient compliance under provision of rule 19 of Order V of the Code as to Court's declaration.

In the instant case, learned Advocate for the petitioners raised a question that the process server did not make any affidavit as per 'Form No. 11 under APPENDIX-B' of the Code stating service of summons upon the defendants and he only submitted a report which cannot be considered as affidavit. This contention of the learned Advocate has no leg to stand because of the fact that the process-server made two declarations in respect of service of summons under rule 17 of Order V of the Code stating that he went to the defendants' house with the summons with witnesses but they having refused to receive the summons, he served those by hanging on the defendants' main door in presence of witnesses. The trial Court passed an order on 28.10.1998 that the summons has returned after service and accepting such service fixed the next date for submitting written statements.

'Form No. 11 under APPENDIX-B' of the Code of Civil Procedure is applicable only when the process-server makes an affidavit in respect of service of summons upon the defendants under rule 17 of Order V of the Code. There is no requirement of law that the declaration should be made by the process-server showing service of summons upon the defendant under rule 17 in the form of affidavit as prescribed in 'Form No. 11 under APPENDIX-B' of the Code'.

Since the trial Court declared in the suit that the summons has returned after service, the requirement of Court's declaration under

rule 19 of Order V of the Code has been complied with. Moreover, the process-server made declarations in respect of service of summons under rule 17 of Order V of the Code and since such declaration of the process-server shall be received as evidence of the fact as to the service of summons upon the defendant-petitioners as per rule 19A of Order V of the Code, I am of the view that the summons upon defendant Nos. 16, 32 and 33 was duly served and the onus was shifted to the defendants to prove by evidence that the summons was not duly served upon them.

Though PTW. 1 (Md. Insan Ali, defendant No. 33) in his deposition stated that the summons upon defendant Nos. 16, 32 and 33 was not duly served but the defendants did not adduce any other witness to support such claim. Accordingly, the trial Court rightly held that the defendant-petitioners have failed to prove their case.

On the other hand, rule 19B of Order V of the Code provides provisions of simultaneous service of summons by registered post. In the case of Shamsun Nahar Begum vs. Salauddin Ahmed and others, reported in 4 BLC (AD) 285 the Appellate Division held as follows:

> “Apart from this, rule 19B(2) of Order V speaks that if acknowledgement due is lost or mislaid or for any other reason has not been received by the Court within 30 days from the date of posting of the letter the Court issuing the summons shall declare that the summons has been duly served on the defendant.”

In the present case, the summons was also sent by registered post with acknowledge due to the defendants under rule 19B(1) of

Order V of the Code. While passing judgment on 22.3.2018 in this case, the trial Court specifically observed that registered postal receipts in respect of defendant Nos. 16, 32 and 33 were laid with the record of the suit and that defendant Nos. 16 and 32 received the postal summons by endorsing their respective signatures and their acknowledge dues were laid with the record. Thought, in the suit, the trial Court did not declare that the postal summons has been duly served, but from records it appears that the registered summons was duly served upon the defendant petitioners as per law. Moreover, since summons was duly served by the process-server, the postal service became immaterial.

The trial Court also came to the conclusion that the case was barred by limitation. Admittedly, the miscellaneous case has been filed after nine years from the date of *ex parte* decree. The trial Court found that the defendants could not prove their date of knowledge about the *ex parte* decree by adducing any evidence. PTW 1 deposed on behalf of the defendants stating that after knowing about the fact of *ex parte* decree from somebody on 7.8.2008, they engaged learned Advocate for inspection of the record of the suit and he inspected the record on 19.08.2008 and thereafter, they filed the miscellaneous case on 16.09.2008.

In his testimony, PT.W 1 could not mention the name of any particular person from whom the defendants for the first time came to know about the *ex parte* judgment and decree on 7.8.2008 and they also failed adduce any such witness to prove their definite date of knowledge about *ex parte* decree. Mere inspection of the record of the suit in a particular date by their engaged learned Advocate

cannot be treated as the date of knowledge of the defendants about *ex parte* decree. Admittedly, *ex parte* decree was passed on 18.7.1999 and Miscellaneous Case No. 117 of 2008 was filed on 16.9.2008, long after nine years of the *ex parte* decree. Accordingly, I am of view that the trial Court committed no illegality in coming to the conclusion that the miscellaneous case was barred by limitation.

It appears from the impugned judgment that the Court of appeal, as the last Court of facts, after due consideration of the materials on record came to the finding that the summons was duly served upon the defendant-petitioners and concurred with the findings of facts and decision of the trial Court.

I do not see any finding of the appellate Court which is based on non-consideration and misreading of any evidence. Since the appellate Court, after sifting the evidence on record, found that the summons was duly served upon the defendant-petitioners, I find no reason to interfere with the concurrent findings of facts of the appellate Court. The impugned judgment of the Court of appeal does not also suffer from legal infirmity or impropriety and as such, no interference is called for by this Court.

In view of the above, I find no merit in this Rule.

In the result, the Rule is discharged, however, without any order as to costs.

Send down the L.C.R. along with a copy of this judgment at once to the Courts below.