

**Present:**  
**Mr. Justice Md. Salim**

**CIVIL REVISION NO.1509 OF 2016**

Omar Ali  
.....*Petitioner.*

-VERSUS-

Sree Kartik Chgandra Sarker and  
another  
.....*Opposite Parties.*

Mr. Fahad Mahmood Khan, Advocate  
----- For the petitioner.  
Mr. Md. Syed Hasan Zobair, Advocate  
----- For the opposite parties 1 and 2.

**Heard on 09.01.2025 and 16.01.2025**  
**Judgment on 16.01.2025.**

By this Rule, opposite parties were called upon to show cause as to why the Judgment and order dated 10.08.2015 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram, in Miscellaneous Appeal No.69 of 2011 dismissing the appeal and affirming the Judgment and order dated 24.08.2011 passed by the learned Assistant Judge, Phulbari, Kurigram in Miscellaneous Case No.18 of 2008 under Order IX Rule 13 of the Code of Civil Procedure rejecting the Miscellaneous Case should not be set aside and or pass such other or further order or orders as to this court may seem fit and proper.

The opposite parties, as plaintiffs, instituted Other Suit No.30 of 2002 before the Assistant Judge, Phulbari, Kurigram, for declaration of title with partition of the suit properties.

The learned Assistant Judge, Phulbari, Kurigram by the Judgment and decree dated 13.05.2008, decreed the Other Suit No.30 of 2002 ex-parte.

After that, the petitioner filed Miscellaneous Case No.18 of 2008 before the Assistant Judge, Phulbari, Kurigram, under Order IX, Rule 13 of the Code of Civil Procedure for setting aside the ex parte judgment and decree dated 13.05.2008.

The opposite parties contested the Miscellaneous Case by filing a written objection denying all the material allegations made in the application.

Subsequently, the learned Assistant Judge, Phulbari, Kurigram, by the Judgment and order dated 24.08.2011, rejected the Miscellaneous Case against which the petitioner, as appellant, preferred Miscellaneous Appeal No.69 of 2011 before the District Judge, Kurigram. Eventually, the learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram, disallowed the appeal and affirmed those passed by the trial Court by the Judgment and order dated 10.08.2015.

Being aggrieved, the petitioner filed the present Civil Revision before this court and obtained the instant Rule, with an order of stay extended from time to time.

I have considered the submission of the learned advocate for the petitioner perused the impugned Judgment and other materials on record. In order to appropriate the submission advanced by the Bar, the relevant law may be quoted as follows:--

*“Order IX Rule 13 of the Code of Civil Procedure provided that 13-In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; Provided that where the decree is of such a nature that it cannot be set aside as against such defendants only it may be set aside as against all or any of the other defendants also.”*

It manifests from the above provisions that an ex parte judgment and decree can be set aside on two grounds: (I) that the summons was not duly served or (II) that any sufficient

cause prevented him from appearing when the suit was called on for hearing.

In the instant case, after scanning the order sheet of the record, it manifests that the summons was admittedly not served duly upon the petitioner. Moreover, the petitioner was made a party in the original case as a defendant, but no summons was served upon him. However, while he knew about the original case's Judgment and decree dated 13.05.2008, he filed the instant Miscellaneous Case on 22.06.2008. However, both the courts below rejected the Miscellaneous Case on the grounds of limitation.

From all the materials, events, facts, circumstances, oral and documentary evidence, and the petitioner's conduct, it is clear that he was prevented by sufficient cause from appearing before the court.

Mr. Sayed Hasan Zobair, the learned advocate appearing on behalf of the petitioner, referred to the case of Akbar Hossain Khan (Md) and another Vs. Md. Awlad Hossain Khan and another report in 49 DLR 561 submitted that the application under Order 9 Rule 13 is barred under Article 64 of the Limitation Act.

I have gone through the Akbar Hossain Khan's (supra) case. Where it was held that-

*“In this case it is an undisputed fact that summons was duly served upon the defendants whereupon they entered appearance in the suit and filed written statements. It is also clear from the evidence on record that subsequently defendant opposite party No. 2 failed to appear after 12.06.88 and took no further step following which the suit was decreed on 28.09.89 on contest against defendant No. 1 and ex parte against defendant No. 2. It is also an admitted fact that the application under Order 9 rule 13 CPC, which gave rise to Miscellaneous Case No. 106 of 1989, was filed on 16.11.89. From this it is apparent that this application for setting aside the ex parte decree was filed after 49 days from the date of passing the impugned decree. Article 164 of the Limitation Act provides that an application for setting aside an ex parte decree shall have to be filed within 30 days from the date of the decree where summons was duly served and within 30 days from the date of knowledge when summons was not duly served. In our case under review there is no denial of the fact of due service of summons. So, evidently this case is governed by Article 164 of the Limitation Act, which provides that the application for setting aside the ex parte decree is required to be filed within 30 days from the date of decree impugned. The application under Order 9 rule 13 CPC having not been*

*filed within 30 days from the date of decree, it is evidently barred by limitation. But, unfortunately, the learned Assistant Judge has allowed the Miscellaneous Case under Order 9 rule 13 CPC completely ignoring this vital aspect of the case and the law bearing on the subject. Since, on the face of the record it is evident that the application under Order 9 rule 13 CPC is barred by limitation under Article 164 of the Limitation Act and the Court has not lawfully condoned the said delay on cogent grounds, the learned Assistant Judge clearly erred in law in passing the impugned order.*

*It is well settled that once a party receives an intimation of an action in a Court, it is for him to pursue it diligently and to keep himself in touch with the proceedings, either personally or through his Counsel, and the consequences flowing from his failure to keep pace with the developments must be borne by him. In the instant case, the defendant opposite party No. 2 Sher Mohammad admittedly received summons, duly filed written statement in the suit and obtained a number of adjournments and, as such, it was incumbent upon them to pursue the proceedings of the suit with due diligence. It is evident from the impugned order that defendant opposite party No. 2 Sher Mohammad did not take any step in the suit since 12.06.88 and the impugned decree was passed on 28.09.89. Under such*

*circumstances, he must bear the whole brunt of the ominous consequences that naturally flow from his failure to keep pace with the developments of the suit, unless the failure is lawfully condoned on convincing grounds but, unfortunately, for him, nothing has been done in this regard to salvage him from the inevitable legal impediments.”*

I fully agree with the above-cited case, but it is to be noted that each case has its own merit, facts, and circumstances. In the present case, I have already noticed that the summons was not served upon the petitioner. So, he was admittedly prevented from appearing in court proceedings. Therefore, I am of the view that the Miscellaneous case was filed within thirty days from the date of his knowledge of the ex parte judgment and decree.

On perusal of the Judgment and order of both the courts below, it seems that in deciding the Miscellaneous Case and the Miscellaneous Appeal, the learned Judges did not keep in mind the provision of Order IX Rule 13 of the Code of Civil Procedure and misdirected themselves in their approach on the matter. Moreover, the petitioner had made out a case with sufficient cause for non-appearance before the court; thus, the application for restoration of the suit is required to be granted.

On the above facts, circumstances of the case, and discussions made herein above, I am of the firm view that the

learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram, did not correctly appreciate and construe the documents and materials on record in accordance with the law in affirming the Judgment and order of the trial court which suffers from legal infirmity and perversity and as such, the same is liable to be set aside.

Resultantly, the Rule is made absolute without any order as to costs.

The Judgment and order dated 10.08.2015 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Kurigram, in Miscellaneous Appeal No.69 of 2011 dismissing the appeal and affirming the Judgment and order dated 24.08.2011 passed by the learned Assistant Judge, Phulbari, Kurigram in Miscellaneous Case No.18 of 2008 is hereby set aside.

Communicate this Judgment and send down the record at once.

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**(MD. SALIM, J).**