Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1433 OF 2022.

Shaharavanu being dead, her legal heirs:
Md. Habib Mir @ Mir Habibur Rahman and others.

..... Plaintiff-Petitioners.

-VERSUS-

Sheikh Humayun Kabir and others.

..... Defendant-Opposite parties.

Mr. Awshafur Rahman, Senior Advocate,
with Mr. Jahangir Alam, Advocates

..... For the petitioners.

Mr. Md. Abdul Malek, Advocate

..... For the opposite parties.

Heard on 12.01.2025, 27.01.2025, 19.02.2025, 24.02.2025 and 25.02.2025.

Judgment on 03.03.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 07.02.2022 passed by the learned Additional District Judge, 2nd Court, Bagerhat in Title Appeal No.02 of 2018, allowing the appeal and reversing the Judgment and decree dated 27.04.2017 passed by the learned Senior Assistant Judge, Sadar, Bagerhat in Title Suit No.50 of 2003 decreeing

the suit 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 facts in brief for the disposal of Rule are that the predecessor of the petitioners as plaintiffs instituted a suit being, Title Suit No.50 of 2003, before the Assistant Judge, Sadar, Bagerhat for a declaration that the Judgment and decree dated 24.04.2001 passed in Title Suit No.199 of 1995 being fraudulent in operative illegal and collusive are liable to be set aside alleging inter alia that Gopal Mollah, Torfan Mollik, Baro Bibi and Said Uddin were the owners of 3.47 acres of land under C.S khatian No. 165 equally. Sayed Uddin settled his portion of land to Gopal Mollah, giving three-kilogram paddy and Tk.550/-and, on the death of Gopal Molla, his heirs realized the said paddy. After implementing the East Bengal Tenancy Act, the petitioners' predecessor became a tenant under the government. On the death of Sayed Uddin, his heirs never claimed title and possession of the said land. Gopal Mollah died, leaving Baro Bibi, three sons, and one daughter while possessing 1.74 acres of petitioner land, and accordingly, the petitioner got .0850 acres of land. Despite having no legal land in the Khatian in question in favor of Sayed Uddin after his death, his heirs and successive heirs claiming the land instituted Partition Suit No. 199 of 1995 without service of

notice upon the predecessor of the petitioner and obtained ex parte decree on 25.04.2001 which he knew from Maksed Mollik and subsequently on obtaining certified copies of the said Judgment and decree instituted the instant suit for setting a side thereof.

The opposite parties, as defendant Nos. 1-3 and 5-9 contested the suit by filing written statements denying the material allegation of the plaint, contending inter alia that Sayed Uddin and others equally got 3.47 acres of land contained in C.S. Khatian No. 165 and Sayed Uddin got 87 decimals of land in his share. After the death of Sayed Uddin, his three sons and one daughter, by instituting Suit No. 199 of 1995, got the said property due to the wrong record of S.A, Khaitan. In that suit, the heirs and the successive heirs of Gopal Mollah were impleaded as defendants, amongst whom the predecessor of the petitioner was defendant No. 12. All summons were duly served upon the opposite parties in Title Suit No. 199 of 1995, and the defendants-opposite parties having no right title and interest did not contest the suit and in consequence of which the said suit was decreed preliminary on 16.04.2002 and on 06.11.2006, the said decree is final. The said suit, having been filed by the petitioner's predecessor on an untrue allegation, is liable to be dismissed.

The learned Senior Assistant Judge, Sadar, Bagerhat, framed necessary issues to determine the dispute involved between the parties.

Subsequently, the learned Senior Assistant Judge, Sadar, Bagerhat, by the Judgment and decree dated 27.09.2017, after setting aside the ex partee Judgment and decree dated 16.04.2002 passed in the title suit No.199 of 1995, decreed the suit and restored the title suit No. 199 of 1995.

Being aggrieved by and dissatisfied with the above Judgment and decree, the defendant-opposite parties, as appellant, preferred Title Appeal No.50 of 2003 before the learned District Judge, Bagerhat. Eventually, the learned Additional District Judge, 2nd Court, Bagerhat, by the Judgment and decree dated 07.02.2022, allowed the appeal reversing the Judgment and decree of the trial Court.

Being aggrieved by and dissatisfied with the above Judgment and decree, the plaintiff-petitioners preferred this Civil Revision under section 115 (1) of the Code of Civil Procedure before this court and obtained the instant Rule.

Mr. Awshafur Rahman, the learned Counsel appearing on behalf of the petitioner, submits that when the plaintiff petitioner of the instant case and the defendant No.12 of Title

Suit No.199 of 1995 denied the service of summons upon him, the onus of proof lies on the defendant opposite parties of the instant case rather, the learned Additional District Judge, 2nd Court, Bagerhat in not discussing matter in the light of above provision of law discussed the matter indiscriminately and shifted the burden of proof upon the predecessor of the plaintiff-petitioner and committed error of law resulting in an error in the decision occasioning failure of justice.

Mr. Md. Abdul Malek, the learned counsel appearing on behalf of the opposite parties, submits that the nature of suit No.199 of 1995 for partition of the suit property, according to the provision of Order IX Rule 13 of the Code of Civil Procedure as 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; in Title Suit No.199 of 1995 it is proved that the summons was duly served upon the defendant No.12 namely Sahara Banu, the predecessor of the present petitioner and as such the Rule is liable to be discharged.

I have anxiously considered the learned counsel's submission for both parties, perusing the impugned Judgment, decree, and other materials on record.

It manifests that the plaintiffs preferred the instant suit for setting aside the ex parte Judgment and decree passed in Title Suit No. 199 of 1995.

It is now settled proposition of law that where a decree has been obtained by a fraud practiced upon the other side by which he was prevented from placing his case before the court when the suit was called for adjudicate, the decree is not binding upon him and that the decree may be set aside by a court of justice in a separate suit and not only by an application made in the suit in which the decree was passed to the court by which it was passed. This view is supported by the case of the Government of Bangladesh and others vs. Md. Osimuddin reported in II ADC (AD) 808 wherein their Lordships of the Appellate Division held that:

> "Law is now settled that a separate suit can be filed for setting aside the ex-parte decree on the ground of fraud practiced in obtaining the said ex-parte decree upon misleading the Court or preventing the defendant from placing his case before the Court."

A similar view has been taken in the case of Md. Wasiq Khan vs. Md. Sabiq Khan and others reported in 31 DLR (AD) 51 wherein the Appellate Division says that:

> "An ex parte decree can also be set aside by a regular suit if it is provided that there was suppression of summons and the defendant was prevented from defending the suit by reason of fraud (Nirsah v. Kishan, ATR, 1931 Patna, 204 (FB) Haricharan vs. Dwarika, ATR 1961. Patna, 88).
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> All the aforesaid remedies are concurrent. This has precisely caused much anxiety to the Courts as to the implication when a party has pursued the remedies simultaneously, that is, by filing an application under Order 9, rule 13 of the Code of Civil Procedure and also by filing an appeal before the Appellant Court against the ex parte decree. In the instant case, this was done."

In the instant case, it appears that the defendant of the instant case, as the plaintiff, filed Title Suit No. 199 of 1995

before the Senior Assistant Judge, Sadar, Bagerhat, and obtained an ex parte decree. Defendant No. 12 of that suit, as a plaintiff of the instant suit, filed the instant suit for setting aside the ex parte decree without complying with the provision of Order IX Rule 13 of the Code of Civil Procedure or any appeal before the proper court against the Judgment of ex parte decree of Title Suit No.199 of 1995. However, an ex-party decree can be set aside by filing a regular suit if it is proved that the summons was not duly served upon the defendant and the defendant was prevented from defending the suit by the reasoning of fraud. So, the instant suit is maintainable in its present form. Therefore, the submission made by Mr. Malek that the suit is not maintainable is not sustained.

Further it appears from the cross-examination of D.W.1 that he admitted that "পিয়ন জারি করার পর আমাকে দেখিয়ে যায়। ডাকঘরের পিয়ন। কোর্টের পিয়ন প্রথমে আমাদের বাড়ি যায়। তারপর জারী করে আমাদের দেখিয়ে আসে। সাহারা বানুর সই করা নোটিশের কপি আমাকে দেখায়" besides that D.W.2 and D.W.3 did not corroborated as to the service of summons upon the petitioner. The above statements indicate that the summons have been shown to have been served upon the petitioner by the opposite parties in collusion with the process server by fraudulent means. Moreover, the P.W.1 admitted that the peon died only. After excluding him, there remains process server, the persons in

whose presence the summons has been served have not been examined nor produced any documents regarding their death for determining the validity of service of summons, and the trial Court rightly and legally held that onus of proof of service of summons lies upon the defendant parties but they failed to prove the same.

It further appears from the judgment of the appellate Court below that the learned judge of the appellate court says that "বিবাদীপক্ষ থেকে উল্লেখ করা হয় সমন জারীর সংশ্লিষ্ট জারীকারক এবং ডাক পিয়ন মৃত্যুবরন করায় তাদেরকে আদালতে এনে সাক্ষ্য দেওয়া সম্ভব হয়নি। পি.ডব্লিউ-১ জেরায় স্বীকার করেছেন জারিকারক ডাক পিয়ন, আদালতে সংশ্লিষ্ট জারীকারক এবং মোকাবেলা সাক্ষীরা ইতিমধ্যে মারা গেছেন।" which is totally wrong finding. Only P.W.1 has admitted that the peon died. Nowhere D.W. 1, both in his examination in chief and cross-examination, say that the process server died, and nowhere P.W. 1, in his examination in chief and cross-examination, admit that the process server and proforma witnesses died. In view of the above statement, it appears that the defendant-opposite parties have enough scope to prove the service of summons upon the petitioner adequately by producing themselves in the court as witnesses, but they have failed to prove the same.

Considering the above facts and circumstances, it appears that the summons in Title Suit No.199 of 1995 was not duly served upon defendant No.12, who is the predecessor of the present plaintiff-petitioner. Therefore, it presumed that he was prevented from appearing before the court when the suit was called for an ex-parte judgment for non-appearing defendants.

Considering the above facts and circumstances, I am of the firm view that the learned Additional District Judge, 2nd Court, Bagerhat, did not correctly appreciate and construe the documents and materials on record in accordance with the law in simply allowing the appeal after setting aside the Judgment and decree of the trial Court thus, it is not a proper judgment of reversal and has occasioned a failure of justice. Consequently, I find merit in the Rule.

Resultantly, the Rule is made absolute.

The impugned Judgment and decree dated 07.02.2022 passed by the learned Additional District Judge, 2nd Court, Bagerhat in Title Appeal No.02 of 2018 is set aside, and the Judgment and decree dated 27.04.2017 passed by the learned Senior Assistant Judge, Sadar, Bagerhat in Title Suit No.50 of 2003 is hereby affirmed.

Let the title suit No. 199 of 1995 be restored in its original file and number.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).

Kabir/BO