District-Barishal.

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Toufiq Inam

Civil Revision No. 6330 of 2023.

Foyjul Haque Bhuiyan.
---- Plaintiff-Respondent-Petitioner.

-Versus-

Md. Khorshed Alam Mallik (Tulu Mallik) and others.
---- Defendant-Appellants-Opposite Parties.

None appears.
---- For the Plaintiff-Respondent-Petitioner.

Mr. Mr. Rafiqul Islam Faruk, Advocate
----For the Defendant-Appellants-Opposite Parties.

Judgment Delivered On: 25.02.2026.

Md. Toufiq Inam, J:

This Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 18.07.2023 passed by the learned Additional District Judge, 2nd Court, Barishal in Miscellaneous Appeal No. 24 of 2022 allowing the appeal, restoring Title Suit No. 359 of 2012 and thereby setting aside the order dated 18.04.2022 passed by the learned Senior Assistant Judge, Barishal Sadar in Miscellaneous Case No. 42 of 2017 under Order IX Rule 13 of the Code of Civil Procedure, should not be set aside.

The defendants-opposite parties Nos. 1–6 filed Miscellaneous Case No. 42 of 2017 under Order IX Rule 13 read with sections 151 and 146 of the Code of Civil Procedure in the Court of the learned Senior Assistant Judge, Barishal Sadar, praying for setting aside the ex parte judgment and decree dated 08.09.2016 (decree signed on 18.09.2016) passed in Title Suit No. 359 of 2012.

Their case, in substance, was that their mother, Jinnatara Begum, was defendant No. 1 in Title Suit No. 359 of 2012. She died on 05.05.2016 before the judgment and decree were passed. Without substituting her heirs, the plaintiffs proceeded with the suit and obtained the ex parte decree. They further asserted that summons had not been duly served; that false personation was shown; and that they came to know about the judgment and decree only on 23.07.2017. Upon obtaining certified copies and inspecting the records, they filed the Miscellaneous Case within the statutory period.

The opposite party Nos. 1–3 contested the Miscellaneous Case by filing written objection denying the allegations. They contended that summons, including registered summons, had been duly served upon the defendants; that defendant Nos. 1 and 2 had appeared and filed a solenama; and that the decree was lawfully passed. They further claimed that mutation had been effected and rent paid thereafter.

The learned Senior Assistant Judge, by judgment and order dated 18.04.2022, dismissed the Miscellaneous Case.Being aggrieved, the petitioners preferred Miscellaneous Appeal No. 24 of 2022 before the learned District Judge, Barishal. On transfer, the learned Additional District Judge, 2nd Court, Barishal heard the appeal and, by judgment and order dated 18.07.2023, allowed the appeal, set aside the order of dismissal and restored Title Suit No. 359 of 2012 to its original file and number.

Challenging the appellate judgment, the present Rule has been obtained by the plaintiff-petitioner. None appears to press the Rule on behalf of the petitioner when the matter was taken up for hearing. However, since the Rule has been issued and the records are before this Court, the revisional application is disposed of on merit.

In the revisional petition it has been contended that the learned appellate court failed to appreciate that summons was duly served upon defendant No. 1 by hanging and that the process server was examined as OPW-2 to prove service. It has further been contended that the trial court rightly observed inconsistencies regarding the date of knowledge of the decree and that no document was produced to prove the alleged death of defendant No. 1 prior to the decree. According to the petitioner, the appellate court committed an error of law resulting in failure of justice.

Per contra, Mr. Rafiqul Islam Faruk, learned Advocate appearing on behalf of the defendant-opposite party Nos. 1–6, submits that defendant Nos. 1 and 2 had died prior to the alleged *solenama* and, admittedly, no steps were taken for substitution of their legal heirs before proceeding further with the suit. He contends that any *solenama* purportedly filed thereafter, in the name of deceased defendants, is a nullity in the eye of law and cannot form the basis of a valid decree.

He further argues that the plaint itself contains both the present and permanent addresses of the defendants. However, according to the report of the process server, summons was allegedly served only at the so-called present address without any attempt to effect service at the permanent dwelling house. This, he submits, is in clear violation of Explanation 1 to section 20 of the Code of Civil Procedure, which provides that where a person has a permanent dwelling house at one place and also resides temporarily at another, he shall be deemed to reside at both places for the purpose of jurisdiction and service. In such circumstances, service confined to one address, particularly when the permanent residence is known and disclosed in the plaint, cannot be treated as due service in the eye of law. In support of his submission, Mr. Faruk refers to a decision reported in 1985 BCR (AD), wherein the Appellate Division emphasized that when both permanent and temporary addresses are available on record, the court

must be satisfied that reasonable steps were taken to ensure effective service, failing which any ex parte decree passed on the basis of such defective service cannot be sustained.

Having gone through the revisional application, the impugned judgment and the materials on record.It appears that the core issues before the appellate court were:

1. Whether summons in Title Suit No. 359 of 2012 was duly served upon defendant No. 1;
2. Whether the application under Order IX Rule 13 was within limitation; and
3. Whether the trial court correctly appreciated the evidence.

The learned appellate court examined the record of Title Suit No. 359 of 2012 and found that the service report showed refusal and hanging of summons at the paternal residence of defendant No. 1. It further noticed that defendant No. 1 was a married woman whose husband’s address was shown elsewhere in the plaint, yet no attempt was made to serve summons at her matrimonial home. The alleged eyewitnesses to the service were not examined. Though the process server was examined, the appellate court held that in absence of independent corroboration, mere reliance upon the testimony of the process server was not sufficient in the peculiar facts of the case.

The appellate court also considered the question of registered service under Order V Rule 19B(2) of the Code of Civil Procedure and found that although a postal receipt was on record, no acknowledgment signed by the defendant or endorsement of refusal by postal authority was produced. The postman was not examined. On such materials, the appellate court concluded that due service was not proved.

On limitation, the appellate court referred to Article 164 of the First Schedule of the Limitation Act, 1908 and found that where summons was not duly served, limitation runs from the date of knowledge. From the evidence it appeared that knowledge was obtained on 23.08.2017 upon inspection of records, and the Miscellaneous Case was filed on 29.08.2017, well within thirty days thereof. Accordingly, the appellate court held that the application was not barred by limitation.

It is settled that in exercise of revisional jurisdiction this Court does not sit as a court of appeal. Interference is warranted only where the subordinate court has acted without jurisdiction, failed to exercise jurisdiction, or committed an error of law resulting in failure of justice.

In the present case, the learned appellate court, being the final court of fact in respect of the Miscellaneous Appeal under Order XLIII Rule

1(d) of the Code of Civil Procedure, reappreciated the evidence and assigned reasons for reversing the findings of the trial court. The conclusions arrived at are based on examination of the record and application of the relevant provisions of law. The view taken by the appellate court cannot be said to be perverse or based on misreading of evidence.Even if another view were possible, that by itself would not justify interference in revision unless jurisdictional error or material illegality is demonstrated. The petitioner has failed to show that the appellate court exceeded its jurisdiction or misapplied the law.

When the plaint itself discloses both the present and permanent addresses of a defendant, and the defendant is shown to have a permanent dwelling house at one place and temporary residence at another, Explanation 1 to section 20 of the Code of Civil Procedure mandates that such person shall be deemed to reside at both places. In such circumstances, service of summons must be effected in a manner that reasonably ensures notice at either or both of the disclosed residences. Service confined to only one address, particularly when the permanent address is known and available on record, without satisfactory explanation, does not constitute due service in the eye of law.

Further, if a defendant dies before the filing of a solenama or before passing of decree and no substitution of legal representatives is made

in accordance with law, any proceeding taken or compromise recorded in the name of the deceased defendant is void and the decree passed on that basis is a nullity. An ex parte decree founded upon defective service or against a deceased person without substitution is liable to be set aside under Order IX Rule 13 of the Code of Civil Procedure, and the limitation for such application shall run from the date of knowledge where due service is not proved.

The restoration of the suit merely reopens the matter for adjudication on merit. No irreparable prejudice is caused to the present petitioner, who will have full opportunity to contest the suit before the trial court.

In view of the discussions made above, this Court finds no substance in the Rule.

Accordingly, **the Rule is discharged.**

The order of status-quo stands vacated.

The trial court is directed to proceed with Title Suit No. 359 of 2012 expeditiously and dispose of the same in accordance with law, preferably within 1 (one) year from date, without being influenced by any observation made herein, which were made solely for the purpose of disposal of this revision.

Communicate this judgment to the court concerned at once.

(Justice Md. Toufiq Inam)

Ashraf/ABO.