3 SCOB [2015] AD 5

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Muhammad Imman Ali
Mr. Justice A.H.M.Shamsuddin Chowdhury

CIVIL PETITION FOR LEAVE TO APPEAL NO.1536 OF 2010
(From the judgment and order dated the 4th day of June, 2009 passed by the High Court Division in First Appeal No.328 of 1994)

Immam Hossain Sawdagor being dead his heirs: Mosammat Rasheda Begum and others	. . . Petitioners
-Versus-	
Abul Hashem and others	. . . Respondents
For the Petitioners	Mr. A. J. Mohammad Ali, Senior Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record
For Respondent Nos.1-4	Mr. Sheikh Mohammad Morshed, Advocate instructed by Mrs. Madhu Malati Chowdhury Barua, Advocate-on-Record
For Respondent No.5	Mr. Md. Firoz Shah, Advocate-on-Record
For Respondent Nos.6-8	Not represented
Date of Hearing	The 15th day of June, 2015

Third party right to file an appeal:
Even a third party can file an appeal in case he is affected by a decree passed in a suit. ...(Para 11)

Service of Summons:

The High Court Division was not also factually correct in finding that summons of the suit was not served upon defendant No.3, as report of the process server clearly showed that summons of the suit was served upon defendant No.3 by hanging and he gave report to that effect. Merely because the fact of service of summons upon defendant No.3 was not recorded in the order sheet, it may be through inadvertence which did not make the report of the process server as regards service of summons upon defendant No.3 ineffective or *nonest*. ...(Para 13)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This petition for leave to appeal has been filed against the judgment and decree dated the 4th day of June, 2009 passed by the High Court Division in First Appeal No.328 of 1994 allowing the same.

2. Facts necessary for disposal of this petition are that respondent Nos.1-4 as plaintiffs filed Other Class Suit No.167 of 1990 in the Court of Subordinate Judge, First Court, Chittagong for the following reliefs:

> "ক) বাদীগণ ১৬/০১/৭৯, ১৮/০১/৭৮ ও ২০/০১/৭৯ ইংরজী তারিখর চট্রগ্রাম সদর সাব রেজিষ্ট্রী অফিসর যথাক্রম ৫৫৮, ৬৬৫, ৬৬৬ ও ৭৬৩ নং কবলামূল মৃত হাজী ইমাম শরীফ হইত তপশীল বর্ণিত জমি খরিচ করিয়া তাহাত আইনঃ স্বত্ব অর্জন করিয়াছ ঘোষনা মর্ম উক্ত জমিত তাহাদর দখল স্হিরতরর ডিক্রী দেওয়ার আদশ হয়।
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> খ) ৩নং বিবাদী ও মৃত হাজী ইমাম শরীফ এর মধ্য কথিত সম্পাদিত ও রেজিষ্ট্রিকৃত ৩০/০১/৭৩ ইংরজী সনর ৬ ও ৭ নং বন্টননামা দলিল বেআইনী যোগাযাগী, পন্ড, অকার্যকর এবং তৎমূল তফসিল বর্ণিত জমিত বাদীগনর স্বত্বর কোন ব্যাঘাত হয় নাই এবং তদ্বারা ৩নং বিবাদী কোন রকম স্বত্ব দখল অর্জন করন নাই মর্ম ডিক্রী দেওয়ার আদশ হয়।
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> গ) ১ ও ২ নং বিবাদীর চট্রগ্রাম ১ম সাব জজ আদালতর ১৯৮৮ সনর ৮০ নং মামলায় ৩নং বিবাদীর বিরুদ্ধ ডিক্রীমূল তফশীল বর্ণিত জমিত বাদীগনর স্বত্ব দখলর কোন হানি হয় নাই মর্ম ডিক্রী দেওয়ার আজ্ঞা হয়।
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> ঘ) চিরস্হায়ী নিষধাজ্ঞার দ্বারা বিবাদীগণক তপশীল বর্ণিত জমিত বাদীগনর দখল কোন রুপ হস্তফপ ও ব্যাঘাত সৃষ্টি না করার জন্য নিষধাজ্ঞার ডিক্রী দেওয়ার আজ্ঞা হয়।
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> ঙ) অত্র মামলা চলাকালীন সময় বিবাদীগণ বাদীগণক গায়র জোর বাদীগণক তপশীল বর্ণিত জমি বা ইহার কান অংশ হইত বে-দখল করিল তাহার দখল পুনরুদ্ধারর ডিক্রী দেওয়ার আদশ হয়।
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> চ) মামলার খরচ প্রতিদ্বন্দ্বিতাকারী বিবাদীগনর বিরুদ্ধ ডিক্রী দেওয়ার আদশ হয়।
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> ছ) বাদীগণ অন্য যে, যে প্রতিকার আইনঃ পাইত পারন তাহা ডিক্রী দেওয়ার আদশ হয়।"

3. The suit was contested by defendant Nos.1 and 2 by filing written statement. Though defendant Nos.4 and 5 filed written statement, they did not contest the suit ultimately.

4. The trial Court by the judgment and decree dated 12.06.1994 dismissed the suit. Against the judgment and decree of the trial Court, the plaintiffs filed First Appeal No.328 of 1994 before the High Court Division. A Division Bench of the High Court Division by the impugned judgment and decree allowed the appeal and sent the suit back to the trial Court for fresh trial with the direction upon it to proceed with the suit after service of summons upon defendant No.3 on the finding, *inter alia*, that the order sheets showed that summons of the suit was not served upon the defendant. The High Court Division further held that as summons of the suit was not served upon defendant No.3, the judgment and decree passed by the trial Court was a nullity. The High Court Division did not at all enter into the merit of the case of the plaintiffs though the appeal was filed by them against the judgment and decree of the trial Court dismissing the suit.

5. Being aggrieved by and dissatisfied with the judgment and decree of the High Court Division, the heirs of defendant No.3 have filed this petition for leave to appeal as he died in the meantime.

6. Mr. A. J. Mohammad Ali, learned Counsel, for the petitioners submits that the plaintiffs having felt aggrieved by the judgment and decree of the trial Court dismissing the suit, preferred the first appeal in question, so the High Court Division as the last Court of fact was obliged to see whether the trial Court committed any error factually and legally in dismissing the suit, but it without directing its attention in that respect made out a third case

that as summons of the suit was not served upon defendant No.3, the judgment and decree passed in the suit was a nullity. He further submits that when defendant No.3 appeared in the first appeal and made no compliant as to the non-service of summons upon him, the High Court Division ought not to have sent the suit to the trial Court for service of summons of the suit afresh upon him and then to proceed with the suit and it should have disposed of the appeal on merit. The impugned judgment and decree calls for interference by this Court.

7. Mr. Sheikh Mohammad Morshed, learned Advocate who entered caveat on behalf of the plaintiff-respondents, on the other hand, supported the impugned judgment and decree. He submits that as summons of the suit was not served upon defendant No.3, the hearing of the suit should not have commenced, the High Court Division rightly remanded the suit to the trial Court and no interference is called for with the impugned judgment and decree.

8. As stated earlier, the plaintiffs' suit was dismissed and the appeal was filed by them. Let us see what the points were taken before the High Court Division on behalf of the appellants. In the memorandum of appeal as many as 16(sixteen) grounds were taken and not a single ground was taken as to the non-service of summons upon defendant No.3 for which the proceedings of the suit could be said to be illegal and the judgment and decree passed therein a nullity. At the time of hearing the appeal, no such point was also urged either by the learned Advocate for the appellants or by the learned Advocates for the defendant-respondents (besides respondent No.3, respondent No.2 also contested the appeal). The submission made by the learned Advocate for the appellants as noted in the impugned judgment and decree were as under:

> "Mr. SK. Md. Morshed, learned Advocate, appearing for the appellant placed the ground taken by him in the memo of appeal, and thereafter submitted that the plaintiffs proved his (sic, it would be their) case by oral and documentary evidence, but the trial court without appreciating the evidences on record, exhibited documents and plaintiffs case dismissed the suit. He draws our attention to the ground no.14, and submits that the suit was wrongly dismissed on the finding that it was bad for defect of parties. He submits that the heirs of the original owners, as well as defendant no.3, were parties in the suit, and there being no case that any other person has had got any interest in the suit land, there is no defect of parties in the suit. He submits that the defendant no.3, was served with summons but did not appear in the suit and the suit was accordingly taken up for exparte hearing, and draws our attention to the order sheet of the court below and submits that the plaintiffs of the suit submitted the requisites for the service of summons on the defendant and the summons were issued by registered post, and also by process server, by the order dated 10.11.90 and it was fixed for the return of service, thereafter on 2.2.91. He referring to the report of the process server from the L.C. record submits that the summons was issued against the defendant no.3 and it was served by hanging and there is report of the process server to that effect. Beside this the summons were also served under registered post, and that the presumption in such event is, that the summon was duly served and the trial Court on the failure of the defendant no.3 in appearing in the suit proceeded with the suit against the defendant no.3 for exparte disposal, and there was no wrong committed by the trial Court in proceeding of the suit against the defendant No.3 exparte. The defendant being served with the process duly did not appear in the suit, and consequently it was decided against defendant no.3 exparte. The defendant no.3 is the respondent no.3, in the appeal, and he on receipt of the notice of the appeal entered appearance in the appeal by engaging learned Advocate."

9. So, from the submissions made before the High Court Division on behalf of the appellants, it is rather clear that they insisted very much that summons of the suit was served upon defendant No.3, in both ways, by the process server as well as by registered post.

10. Interestingly, though the High Court Division found that summons of the suit was not served upon defendant No.3, but defendant No.3 who was respondent No.3 in the appeal appeared through his lawyer, Mr. Md. Asadullah and did not make any complaint or grievance about non-service of summons of the suit upon him. Rather his learned Advocate made a candid submission as noted in the impugned judgment to the effect *"appearing for the respondent no.3 admitted in his oral submission that the defendant no.3 had knowledge about the suit, but he did not contest the suit. But, he being served with notice in the appeal, appeared to contest the appeal and he will make submissions on the law point for the respondent, defendant no.3, in the suit. . . . He made submission about his entitlement to submit on the law point in the appeal, and he next submits that the appeal is the continuation of the suit, though, the defendant opted not to contest the suit, but now, the suit having been dismissed by judgment and decree impugned in the appeal, he submits, that the plaint of the suit is not maintainable, and the trial Court rightly dismissed the suit."* The very submission of the learned Advocate for respondent No.3 quoted above, *prima facie* shows that summons of the suit was served upon him, but he chose not to appear in the suit and contest the same. But that does not mean that defendant No.3 cannot contest the appeal. He has every right to contest the appeal regarding the factual aspect of the case as well as the legal aspect which followed from the evidence on record. In the Code of Civil Procedure (the Code), there is no provision that a defendant, who did not appear in the suit in spite of service of summons upon him and did not file any written statement, cannot contest an appeal filed against the decree passed in a suit on the evidence on record.

11. In the context, it may be stated that even a third party can file an appeal in case he is affected by a decree passed in a suit. But unfortunately, the High Court Division did not accept the said submission of the learned Advocate for defendant No.3-respondent on the view *"As we have found from the record that the summons was not served on the defendant no.3 and that the defendant did not enter in the suit the submission of the learned Advocate for the respondent no.3 in the appeal that the defendant no.3 opted not to contest the suit is not tenable in the facts on record, which is against the scheme of the Code of Civil Procedure. The defendant being served with the process of summons in the suit, or having knowledge of the suit is to enter appearance in the suit, and answer the plaint, should be in attendance in the Court house in person or by his pleader. Under the Rule requires the attendance of the defendant on being served with summons. In this case, the submission of learned Advocate that the defendant opted not to contest in the suit is not contemplated in the Order 9 of the Code of Civil Procedure the consequence of his non appearance in the suit has to be followed."*

12. In taking the above view, the High Court Division totally failed to consider the legal position that in Order IX, rules 6(1)(a) and 11 of the Code, the consequences of non-appearance of a defendant on the date fixed for hearing the suit, in case summons was served upon him, have been clearly spelt out; the consequence is that the suit would be heard *ex-parte* against the defaulting defendant. That actually happened in the instant case. Defendant Nos.1 and 2, 4 and 5 appeared in the suit and filed separate written statement. As defendant Nos.4 and 5 did not contest the suit ultimately, the suit was dismissed on contest against defendant Nos.1 and 2 and *ex-parte* against the other defendants including defendant No.3. But the High Court Division without considering the provisions of rules 6(1)(a) and 11 of

Order IX of the Code considered rule 1 of Order IX only and thus fell in an error in refusing the learned Advocate for defendant-respondent No.3 in making submission on the point of law.

13. The High Court Division was not also factually correct in finding that summons of the suit was not served upon defendant No.3, as report of the process server clearly showed that summons of the suit was served upon defendant No.3 by hanging and he gave report to that effect. Merely because the fact of service of summons upon defendant No.3 was not recorded in the order sheet, it may be through inadvertence which did not make the report of the process server as regards service of summons upon defendant No.3 ineffective or *nonest*. Moreso, it further appears that summons of the suit was also sent to defendant No.3 by registered post in compliance with the provisions of Order V, rule 19B of the Code. When attention of Mr. Morshed was drawn to the fact that he did not make any submission before the High Court Division as to the non-service of summons upon defendant No.3, rather he insisted that summons of the suit was served upon him, he submitted that even if no submission was made, the Appellate Court was under an obligation to see the entire record and be satisfied whether summonses of the suit were served upon the defendants before the commencement of the trial of the suit. We failed to understand any logic behind the said submission of Mr. Morshed. The Code enjoins that the plaintiffs are to take necessary step in the suit for service of summons upon the defendants and the objection, as to the non-service of notice, if any, can be taken only by the defendant(s). Mr. Morshed himself made submission before the High Court Division by pointing out from the lower Court's record that there was report of the process server with the record that he served summons upon defendant No.3 as per provision of rules17-19 of the Code, he could not make a reverse submission before this Court just to support the impugned judgment and decree. And such attempt shows that somehow the plaintiffs were interested to get a fresh trial of the suit by the trial Court to fill up the lacuna in their case as pointed out by the trial Court in its judgment and decree. Further defendant No.3 appeared before the High Court Division in the appeal and his learned Advocate made the submission that the defendant had knowledge about the suit, but he opted not to appear in the suit and wanted to contest the appeal on the point of law through his learned Advocate which, in effect, proved that defendant No.3 accepted the factual position that summons of the suit was duly served upon him; the question of service of summons upon the defendant afresh did not arise at all.

14. In the context, it may be stated that Mr. Mustafa Neaz Mohammad, learned Advocate for respondent No.2 also made submission that summons of the suit was duly served upon defendant No.3. He further submitted that the trial Court rightly dismissed the suit and there was no illegality in the judgment and decree of the dismissal. Therefore, the High Court Division was totally wrong in sending the suit on remand to the trial Court for hearing the same afresh after service of summons upon defendant No.3. It further appears that the plaintiffs and defendant Nos.1 and 2 adduced evidence both oral and documentary in support of their respective case and the trial Court on consideration of the evidence on record dismissed the suit, the plaintiff filed the appeal against such dismissal, so it was incumbent upon the High Court Division as the last Court of fact to see whether the trial Court was correct in dismissing the suit, instead it sent the suit on remand to the trial Court on a point which was never urged by any of the parties in the appeal. In passing the impugned judgment and decree, the High Court Division also failed to consider the legal proposition that even a suit is heard *ex parte*, the plaintiff cannot get a walk over and he has to prove his own case.

15. For the discussions made above, the impugned judgment and decree cannot be sustained in law.

16. Be that as it may, since the High Court Division did not enter into the merit of the appeal and sent the suit on remand to the trial Court for fresh hearing on the erroneous view of the facts and the law as pointed out hereinbefore and we have heard both the parties, we consider it proper to send the appeal back to the High Court Division for hearing the same afresh and dispose of the same in accordance with law on the evidence on record.

17. Accordingly, this petition is disposed of in the following terms:

> The impugned judgment and decree of the High Court Division is set aside. The appeal is sent back to the High Court Division for hearing afresh and dispose of the same in accordance with law on the evidence on record.

18. The first appeal shall be heard and disposed of by the Bench presided over by Nozrul Islam Chowdhury, J. within 2(two) months from the date of receipt of this judgment.