

9 SCOB [2017] AD 37**APPELLATE DIVISION****PRESENT****Mr. Justice Md. Abdul Wahhab Miah****Mr. Justice Mohammad Imman Ali**

CIVIL APPEAL NO. 39 of 2006

(From the Judgment and orders dated 22-06-2005 passed by the High Court Division in Civil Revision No. 923 of 2003)

**The Government of Bangladesh, represented by
Chairman Abandoned Property Management Board**

-- Appellant

Versus

Md. Mizanur Rahman

-- Respondent

For the Appellant : Mr. Biswajit Deb Nath, Deputy Attorney General, instructed
by Mr Zainul Abedin, Advocate-on-record

For Respondent No.1 : Mr. Syed Mahbubar Rahman, Advocate-on-record

Respondent Nos.2-7 : Not represented

Date of Hearing : The 12th May, 2015**The Code of Civil Procedure, 1908****Rules: 1 and 2 of Order XVIII:**

In the instant case, the defendant did not admit the case of the plaintiff and filed written statement denying the plaintiff's claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit. ... (Para 7)

Pleading of the plaintiff is not evidence:

As no witness was examined, no statement was made before the Court in relation to matters of fact under inquiry, that means, the facts stated in the plaint were not stated before the court on the date fixed for hearing of the suit and, in fact, it was only the pleading of the plaintiff and not the evidence which was before the Court. Therefore, in the absence of any evidence, the trial Court could not decree the suit. ... (Para 9)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. This appeal, by leave, is from the Judgment and order dated 18-6-2005 passed by a Single Bench of the High Court Division in Civil Revision No.5259 of 2002 discharging the Rule.

2. The appellant, the Government of the Peoples Republic of Bangladesh, represented by the Chairman, Abandoned properties Management Board, filed Title Suit No.62 of 1997 in the Court of Assistant Judge, 6th Court, Dhaka for declaration that the exparte decree passed in Title Suit No.103 of 1996 of the same Court was illegal, void and not binding upon it. Eventually the suit was transferred to the Court of Additional Assistant Judge, 5th Court, Dhaka and was renumbered as Title Suit No.27 of 1999.

3. The defendant filed written statement to contest the suit. Surprisingly at the hearing of the suit, none of the parties examined any witness and no document was filed and proved in accordance with law, even then the trial Court decreed the suit. On appeal the Appellate Court allowed the appeal by its judgment and decree dated 02.07.2002 and dismissed the suit. Against the judgment and decree of the Appellate Court, the plaintiff preferred Civil Revision No.923 of 2003 before the High Court Division. A learned Judge of the Single Bench by the impugned judgment and order discharged the Rule. Leave was granted in Civil Petition for Leave to Appeal No.1151 of 2005 giving rise to this appeal.

4. Heard Mr. Biswajit Deb Nath, learned Deputy Attorney General for the appellant and Syed Mahbubar Rahman, learned Advocate-on-record for respondent No.1.

5. The High Court Division discharged the Rule on the findings:

“It is found that neither the plaintiff-petitioner nor the defendant opposite party examined their witnesses or adduced any evidence to prove their respective case. Despite this position the trial Court decreed the suit in favour of the plaintiff-petitioner on the basis of a photostat copy of one page Bangladesh Gazette holding that the suit property is an abandoned property even though the photostat copy of the said Gazette was not proved and marked exhibit in court by the plaintiff-petitioner. It is also found that the plaintiff-petitioner filed the instant suit for a declaration without seeking any declaration as to his legal character or right to property to the suit land. The present suit was therefore not maintainable being hit by section 42 of the Specific Relief Act. The appellate Court therefore rightly dismissed the suit setting aside the judgment and decree passed by the trial Court. The impugned judgment and decree therefore deserve no interference by this Court”

6. It is an elementary legal principle that pleading is not the evidence and the facts stated in the plaint must be owned by the plaintiff even a suit is heard exparte, but admittedly none was examined on behalf of the plaintiff and therefore, the facts stated in the plaint were not owned. In this regard, we may refer to the provisions of rules 1 and 2 of Order XVIII of the Code of Civil Procedure (the Code) which are as under:

“1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts

alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

2(1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case”.

7. In the instant case, the defendant did not admit the case of the plaintiff and filed written statement denying the plaintiff’s claim that the suit property was an abandoned property, so it was the plaintiff who had the right to begin the hearing of the suit as per provision of rule 1 of order XVIII of the Code. Rule 2(1) of the Code has clearly provided that on the day fixed for hearing of the suit the party having the right to begin shall state his case and produce evidence in support of the issues which he is bound to prove, the other party shall then state his cause and produce his evidence (if any) and may then address the Court generally on the whole case. Therefore, there was no scope on the part of the plaintiff to avoid examination of witness and state the facts of the plaint at the hearing of the suit.

8. According to the Evidence Act, “Evidence” means and includes-

“(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry: such statements are called oral evidence:

(2) all documents produced for the inspection of the Court, such documents are called documentary evidence”.

9. And as no witness was examined, no statement was made before the Court in relation to matters of fact under inquiry, that means, the facts stated in the plaint were not stated before the court on the date fixed for hearing of the suit and, in fact, it was only the pleading of the plaintiff and not the evidence which was before the Court. Therefore, in the absence of any evidence, the trial Court could not decree the suit.

10. We also failed to understand how the Chairman of Abandoned property Management Board could file the suit representing the Government of Bangladesh for the relief aforementioned. The learned Deputy Attorney General failed to show any provision of law under which a suit of the instant nature could be maintained at the instance of the Chairman of the Abandoned Property Management Board.

11. In view of the above, we find no illegality with the judgment and order of the High Court Division and no merit in the appeal. Accordingly, the appeal is dismissed, However, no order as to costs.