

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,
Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 183 OF 2018.

(From the judgment and order dated 30.07.2015 passed by the Appellate Division in Civil Petition No.2121 of 2014)

Government of Bangladesh, represented by the Deputy Commissioner, Gazipur : Appellant.

=Versus=

Gazipur Samabaya Krishi Khamar Ltd., represented by its Secretary : Respondent.

For the Appellant : Mr. Sheikh Mohammad Morshed, Additional Attorney General, instructed by Mrs. Shirin Afroz, Advocate-on-Record.

For the Respondent : Mr. Probir Neogi, Senior Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

***Date of hearing* : 04.01.2023, 17.01.2023 & 24.01.2023**

***Date of judgment* : 25.01.2023.**

J U D G M E N T

Hasan Foez Siddique, C. J.: This civil appeal is directed against the judgment and order dated 30.07.2015 passed by this Division in Civil Petition for Leave to Appeal No.2121 of 2014 dismissing the same as being time barred.

The relevant facts, for the disposal of this appeal, are that the appellant instituted Title

Suit No.1454 of 1985 in the Court of the then Subordinate Judge, Dhaka for declaration that ex-parte decree dated 17.12.1980 passed by the learned Joint District Judge, Dhaka in Title Suit No.271 of 1980 is fraudulent, void and the same is not binding upon the plaintiff stating, inter alia, that the defendant Gazipur Shamabaya Krishi Khamar Limited is a fake and fictitious company. It earlier through Muslemuddin Ahmed and others, filed Title Suit No.233 of 1970 in the First Court of Subordinate Judge, Dhaka against the Government and managed to get an ex-parte decree on 14.01.1971 behind the back of the Forest Department. Knowing about the same, the Forest Department filed Miscellaneous Case No.124 of 1973 in the First Court of the then Subordinate Judge, Dhaka for setting aside the ex-parte decree which was allowed. Accordingly, Title Suit No.233 of 1970 was restored. Thereafter, Gazipur Shamabaya Krishi Khamar Limited instituted Title Suit No.250 of 1973 in the 2nd Court of Munsif, Dhaka against the Deputy Commissioner, Dhaka and others which was dismissed for default. Then, the defendant Gazipur Shamabaya Krishi Khamar Ltd. filed Miscellaneous Case No.234 of 1973 under order XXXIX Rule 2 (3) of the Code of Civil Procedure

which was dismissed for default. Thereafter, the defendant again filed Miscellaneous Case No.148 of 1980 for restoration of Title Suit No.250 of 1973 in the 2nd Court of Munsif, Dhaka. On transfer, the same was renumbered as Miscellaneous Case No.72 of 1981 in the Court of Subordinate Judge, Dhaka. The defendant filed another suit being Title Suit No.271 of 1980 in the 1st Court of Subordinate Judge, Dhaka against the Deputy Commissioner and others and managed to get impugned fraudulent ex-parte decree on 17.12.1980 without serving notice upon the defendants of the said suit. The scheduled property was notified as Forest land as per gazette notification No.38 dated 12.01.1934 and notification No.3125 dated 13.04.1955. The instant property is protected forest and the government declared the same as reserved forest. Gazipur Shamabaya Krishi Khamar Limited has had no title and possession in the same. The appellant came to know about the fraudulent ex-parte decree on 18.03.1982 and, thereafter, filed the instant suit.

The defendant respondent contested the suit contending that Title Suit No.271 of 1980 was fixed for hearing after due service of summons but the defendants of the said suit did not contest

the same. Accordingly, the suit was decreed ex-parte. The present plaintiffs have had no title and possession in the suit land.

The trial Court dismissed the suit. Then the present appellant preferred First Appeal No.89 of 2008 in the High Court Division. The High Court Division dismissed the said appeal by a judgment and decree dated 20.01.2014. Against which, the appellant filed the aforesaid Civil Petition for Leave to Appeal which was out of time by 128 days. This Division, by the order under review, dismissed the said petition since the same was barred by limitation. Against the order of this Division, the appellant filed this review petition and obtained leave. Hence, is the appeal.

Mr. Sheikh Mohammad Morshed, learned Additional Attorney General appearing for the appellant, submits that the land as described in the schedule to the plaint was forest land and the Government declared the same as reserved forest which was duly published in official gazette, the learned Courts below erred in law in decreeing the suit and this Division erred in law apparent on the face of record in dismissing the same though there were sufficient reasons to consider the same positively. He submits that the trial Court

decreed the suit ignoring the provision of law thereby committed error of law which has caused total failure of justice. He lastly submits that since the property, in question, is reserved forest and that the plaintiff claimed title in the same on the basis of oral settlement which has not been proved.

Mr. Probir Neogi, learned Senior Counsel appearing for the respondent, submits that the learned Courts below upon proper appreciation of the materials on record, rightly decreed the suit.

The Government instituted the instant suit for the declaration that the judgment and decree dated 17.12.1980 passed in Title Suit No.271 of 1980 was fraudulent and void and the same was not binding upon the plaintiff. The contesting defendant instituted said suit on 24.03.1980 in respect of the land measuring an area of 200 acres out of 232.60 acres of land of C.S. plot No.171 stating that the suit land originally belonged to Kumar Rabindra Narayan Chowdhury, represented by the Bhawal Court of Wards who settled the same to Feroza Begam, Muslehuddin and Intaz Ali executing dakhila and handed over possession. They transferred those 200 acres of land to the plaintiff, Gazipur Samabaya Krishi Khamar Limited

by different kabla deeds from 01.02.1973 to 20.04.1973.

It appears from the order sheet of the said suit that the same was registered on 24.03.1980 and decreed ex-parte on 17.12.1980. The orders passed by the then Subordinate Judge, Dhaka in Title Suit No.271 of 1980 were as follows:

"Order Sheet.

District-Dacca

In the Court of 1st Sub-Judge, Dacca

Present Mr. Z.H. Md. Daud

T.S. No.271 of 1980

Gazipur Samabaya Krishi Khamar Ltd.

-- Plaintiff.

-Versus-

The Government of the People's Republic of Bangladesh. ----- Defendant.

Sl.No.	Date	Order	Signature.
1	24.3.80	Register. The valuation and the Court fees given by the plff be accepted provisionally. Requisites filed. Issue summons upon the defendants fixing 8.5.80 for appearance.	Sd.Z.H.Md. Daud
2	8.5.80	Plff filed hazira . S.R. not received. To 6.6.80 for S.R.	Sd.Z.H.Md. Daud

3 6.6.80 Plff. files hazira. Summons on defdt (Govt.) served. None appears on behalf of the defdt. To 12.7.80 for exparte hearing.

Sd.Z.H.Md. Daud

4 12.7.80 Plff. filed hazira. Court being engaged. To 1.8.80 for exparte hearing.

Sd.Z.H.Md. Daud

5 1.8.80 On the prayer for the plff. to 12.9.80 for exparte hearing.

Sd.Z.H.Md. Daud

6 12.9.80 On the prayer of the plff. to 3.11.80 for exparte hearing.

Sd.Z.H.Md. Daud

7 3.11.80 Plff. filed hazira. Court is otherwise engaged. To 17.12.80 for exparte hearing.

Sd.Z.H.Md. Daud

8 15.11.80 Plff. filed hazira. Court is otherwise engaged. To 17.12.80 for exparte hearing.

Sd.Z.H.Md. Daud

9 17.12.80 Plff. filed hazira. P.W.1 A.K.M. Abdur Rouf examined on S.A. Documents proved and marked Exts. 1 to 1(n) 2(16) 3 to (16) and 4 for the plff. case is proved C.F. paid is correct. Hence.

Ordered

That the suit be decreed exparte without cost. It is hereby declared that the plff is the sole owner of

the suit land.

Sd.Z.H.Md. Daud

10 03.2.81 Decree prepared sealed and signed
this day.

Sd.Z.H.Md. Daud

Sub-Judge"

It was definite case of the plaintiff that no notice was served upon the Government and from the order passed by the learned then Subordinate Judge, Dacca it appears that there was no endorsement in any order that notice was duly served upon the defendant Government of the said suit and the Court was satisfied that the same was duly served. In the Case of Alfu Mia and others Vs. Bangladesh, reported 1 BLT (AD 25) this Division has observed,

"The Latin expression 'ex-parte' meaning from one party or side, has not been defined in the Code of Civil Procedure. One of the basic principles of the adversary procedure followed in our court system is that as far as possible, no proceeding be conducted to the detriment of a person in his absence. One exception to this principle is that when the defendant, duly served with summons, does not avail himself of the opportunity to appear, the Court may proceed in his absence under Rule 6(1)(a) of Order IX. There being no mandate as such to make an 'ex-parte', decree the Court may order for fresh service of

summons on the defendants or adjourn the matter suo motu. If the Court is satisfied that the summons was duly served on the defendant may proceed to decide the matter"

Rule 69 Civil Rules and Orders Volume-1 provides that Service should always be personal wherever practicable (Or. 5, r. 12) and the Courts ought not in ex-parte cases to act upon anything short of personal service until they are satisfied that personal service could not reasonably be effected.

We do not find any endorsement in the order passed by the learned Subordinate Judge that he was satisfied that the notice upon the defendant government of the said suit was duly served. It further appears from the orders that the learned Subordinate Judge on 06.06.1980 endorsed that the summon on defendant Government was served and, thereafter, fixed 12.07.1980 for ex-parte hearing. There is nothing in the plaint or the orders of the Subordinate Judge that before filing the instant suit against the Government any notice was issued upon the Government.

Provision of section 80 of the Code of Civil Procedure is relevant here to quote which runs as follows:

"80.(1) A suit may be instituted against the Government or against a public officer, in respect of any act purporting to be done by such public officer in his official capacity, after the expiration of two months next after notice in writing has been delivered to or left at the office of,-

and in the case of a public officer, delivered to him or left at his office stating the cause of action, the name, description of place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Where any such suit is instituted without delivering or leaving such notice as aforesaid or before the expiration of the said period of two months or where the plaint does not contain a statement that such notice has been so delivered or left, the plaintiff shall not be entitled to any costs if settlement as regards the subject-matter of the suit is reached or the Government or the public officer concedes the plaintiff's claim, within the period of two months from the date of the institution of the suit.

Provided that in a suit instituted without such notice the Court shall allow not less than three months to the Government to submit its written statement."

Learned Additional Attorney General repeatedly, submits that the land as described in the schedule to the plaint is reserved forest and he produced gazette notification by which it has been clearly mentioned that the property in question has been declared as reserved forest. It further appears that the Gazipur Samabaya Krishi Khamar Limited prayed for a decree in respect of 200 acres of land out of 232.60 acres of land of C.S. plot No.171, which is huge land and it claimed that the Bhawal Court of Wards settled the same to one Muslehuddin and two others on 06.02.1939 on the basis of pattannama. There is no finding as to whether said Gazipur Samabaya Krishi Khamar Ltd. had been able to prove said pattannama or not . Considering the aforesaid facts and circumstances, we find substance in the appeal.

Accordingly, the appeal is allowed. The judgment and decree passed by the trial Courts as well as High Court Division are set aside. The order passed by this Division dated 30.07.2015 in

Civil Petition for Leave to Appeal No.2121 of 2014 is also set aside. Ex-parte decree dated 17.12.1980 passed by the then First Court of Subordinate Judge, Dacca in Title Suit No.271 of 1980 is also set aside. The said suit is restored to its original file and number. The First Court of Joint District Judge, Dhaka is directed to transmit the case of Title Suit No.271 of 1980 to the Court of Joint District Judge, Gazipur and the Joint District Judge, Gazipur is directed to proceed with the suit in accordance with law.

C.J.

J.

J.

The 25th January, 2023.

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