

17 SCOB [2023] HCD 34

HIGH COURT DIVISION

Civil Revision No. 449 of 2020

Chattogram Port Authority
... Petitioner
Vs.
Md. Mehedi Hasan
... Opposite party

Mr. Tanjib-Ul-Alam with
Mr. Saquibuzzaman, Advocates
... for the petitioner

Mr. NAM Abdur Razzak, Advocate
... for the opposite party

Judgment on 06.03.2022

Present:

Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Kazi Ebadoth Hossain

Editors' Note:

The question came up for consideration in the instant petition is whether a suit can be brought against the Chittagong Port Authority without service of a prior notice under section 49 of the Chittagong Port Ordinance, 1976 and whether issue of maintainability for non service of aforesaid notice can be realized after joining the issue. The High Court Division held that after joining the issue and on completion of the hearing plaint cannot be rejected. The Court also held that as there is no alternative remedy in the Chittagong Port Ordinance, 1976 regarding land dispute between the authority and the private individual the service of summon along with a copy of plaint upon the authority will be deemed as sufficient. In the result, the High Court Division discharged the rule.

Key Words:

Section 49 of the Chittagong Port Ordinance, 1976; Order VII, Rule 2; Order XIV, Rule 2; Order XV, Rule 3 and Section 151 of the Code Of Civil Procedure; Rejection of plaint, Service of Notice

Purpose of serving notice prior to the institution of the suit under section 49 of the Chittagong Port Ordinance, 1976:

Service of notice under Section 49 thereof prior to institution of any suit against the Chattogram Port authority has been incorporated for its smooth functioning and discharging its regular routine activities. Another purpose of such notice is to save public time and litigants' expenditure in the cases where any person aggrieved serves notice upon the port authority and the authority by itself addresses his grievance realizing the right course of action before going to the court. In such view of the matter, if a person already institutes a suit under whatever notion and the summon with a copy of the plaint is served upon the port authority, the purpose of notice under Section 49 of the Ordinance would be sufficiently served inasmuch as no alternative remedy is provided in the Ordinance for dissolving any land dispute between the Port Authority and a private individual. (Para-24)

Objection regarding rejection of plaint to be raised before joining the issues:

Even in case of proceedings of a suit without prior notice, where such notice is legally required, the objection must be raised before filing of written statement by the defendant concern. After joining the issues by filing written statement, settlement of all issues and completion of hearing, a plaint cannot be rejected under Order VII, rule 11 of the Code especially when two other suits between the parties on the selfsame subject matter are pending in the same court and one of them is fixed for simultaneous hearing with the present suit.

(Para-26)

JUDGMENT**Md. Ruhul Quddus, J:**

1. This rule was issued challenging order number 82 dated 21.10.2019 passed by the Joint District Judge, Second Court, Dhaka in Title Suit Number 766 of 2018 rejecting an application filed by defendant number 4 (petitioner herein) under Order VII, rule 11 read with Section 151 of the Code of Civil Procedure for rejection of plaint.

2. The plaintiff-opposite party filed Title Suit Number 189 of 2015 in the Fifth Court of Joint District Judge, Dhaka for declaration of title over the land as described in Schedule Ka of the plaint and for recovery of possession thereof with a further declaration that the registered sale deeds as described in Schedule Kha of the plaint were illegal, ineffective, collusive and not binding upon him. On transfer for the second time to the Second Court of Joint District Judge, Dhaka the suit was lastly renumbered as Title Suit Number 766 of 2018.

3. Chattogram Port Authority being defendant number 4 was contesting the suit by filing a written statement denying the material allegations of the plaint and claiming its title and possession over the suit land.

4. In course of hearing, evidence of both the parties was completed and the suit was fixed for argument. At that stage, defendant number 4-Chattogram Port Authority (petitioner herein) filed an application under Order VII, rule 11 read with Section 151 of the Code for rejection of the plaint on the ground that the plaintiff had not served any notice under Section 49 of Chittagong Port Authority Ordinance, 1976 (in brief “the Ordinance, 1976”). Learned Judge of the trial court rejected the application by the impugned order, challenging which the petitioner moved in this court and obtained the rule with an order of stay.

5. The plaintiff-opposite party contests the rule by filing a counter-affidavit stating, *inter alia*, that Title Suit Number 237 of 2015 brought by Chattogram Port Authority on the selfsame subject matter was being simultaneously heard with the present suit. Another suit on the same subject matter being Title Sui Number 245 of 2019 brought by a third party on the same suit land is also pending in the same Court, where the port authority and the present plaintiff are impleaded as defendants number 7 and 8 respectively. Certified copies of the written statement filed by the defendant number 4, plaints in Title Suit Number 237 of 2015 and 245 of 2019 have also been annexed with the counter-affidavit (vide Annexures: 1, 2 and 6 respectively to the counter-affidavit).

6. Mr. Tanjib-Ul-Alam, learned advocate for the petitioner submits at the very outset that the suit was instituted by the plaintiff without service of any notice under Section 49 of the Ordinance, 1976 which makes a clear bar against bringing of a suit against the Port Authority

without service of a prior notice. Since this is a question of law, it cannot be waived and at any stage of the proceedings the question can be raised. When the Port Authority brought it into the notice of the trial Court by filing an application, it was incumbent upon the Judge to reject the plaint on clear law point. Learned Judge without doing so observed that such notice was not applicable in a suit of present nature and thereby committed error of law resulting in an error in the decision occasioning failure of justice. In support of his submission Mr. Alam refers to the case of *Bangladesh Agricultural Development Corporation vs Md. Mannaf Hossain Khan and others*, 36 DLR (AD) 69 and an unreported decision of the Appellate Division passed in Civil Appeal Number 618 of 2009 (*Chairman, Bangladesh Agricultural Development Corporation vs Abedunnessa and others*).

7. Mr. N A M Abdur Razzak, learned advocate for the sole opposite party on the other hand submits that Section 49 of the Ordinance, 1976 does not impose a precondition of institution of a title suit over a land dispute in Dhaka against the Chattogram Port Authority, but this is a special law of limitation in case of bringing suit by a person somehow involved in the regular activities of Chattogram Port Authority. For the sake of argument, even if it is held that service of notice prior to institution of the suit is required, the notice demanding justice as mentioned in paragraph number 20 of the plaint would fulfill the purpose of such notice.

8. Mr. Razzak further submits that there are two more suits pending on the selfsame subject matter. In one of the suits, the Port Authority itself is the plaintiff and the present plaintiff is the principal defendant and in another suit brought by a third party, both the Chattogram Port Authority and the present plaintiff are made defendants. Of them Title Suit Number 237 of 2015 brought by the Port Authority is being heard simultaneously with the present suit. The Port Authority as defendant in the present suit has been contesting the same by filing written statement and has also examined witnesses and adduced documentary evidence. It did not raise the issue of maintainability of the suit for non-service of notice under Section 49 of the Ordinance, 1976 at initial stage. After closing the evidence and fixing both the suits for argument, the port authority has brought this application for rejection of the plaint only to drag the litigation by adopting delaying tactics.

9. We have considered the submissions of the learned advocates and gone through the record as well as the decision cited and another decision of the Appellate Division on rejection of plaint on the point of maintainability. The statements regarding pendency of two other suits are not controverted by the petitioner. The learned advocate rather admits it in course of his submission.

10. In the case reported in 36 DLR (AD) 69 as cited by the learned advocate for the petitioner, **an employee of Bangladesh Agricultural Development Corporation (in brief BADC) instituted the suit in declaratory form against his dismissal from service, where BADC itself was not made a defendant. The said suit was premature inasmuch the cause of action was yet to arise there.** Moreover, in the cited case, **the court concluded the trial and finally disposed of the suit on interpretation of law on the basis of finding of facts.**

11. In the present case, **the plaintiff is not an employee of the port authority, and not involved with its activities in any manner.** It is already stated that **the port authority has been made defendant number 4 in the suit.** The **cause of action for institution of the suit clearly arose, upon which as many as three suits are pending and in one suit the port**

authority itself is the plaintiff. The trial has not yet been concluded by pronouncement of judgment.

12. The facts, circumstances and law involved and the relief sought for in that suit were quite distinguishable with the case in hand.

13. In another case of Chairman, BADC (Civil Appeal Number 618 2009), the land was admittedly acquired in LA Case Number 30 of 1958-59 by the Government. The plaintiffs instituted suit on the grounds that the suit land was not utilized by the Government, the plaintiffs being original owners did not receive the compensation and they had no other land in Dhaka City. The Chairman, BADC was made defendant number 3, but BADC itself was not made a party. The suit was decreed ex-parte on rejection of an application filed by the defendant. An appeal filed by defendant number 3 (Chairman, BADC) was dismissed by the Joint District Judge, Dhaka and the High Court Division also discharged the rule that was issued on a civil revisional application. Defendant number 3 took the matter to the Appellate Division where leave was granted. Ultimately the Appellate Division dismissed the suit as being barred by Section 14A of the (Emergency) Requisition of Property Act, 1948.

14. In the latter, the Appellate Division did not take its decision on the basis of Section 74 of the Agricultural Development Corporation Ordinance, 1961 but Section 14A of the (Emergency) Requisition of Property Act, 1948 that was in force at the material time. The Act, 1948 provided for alternative remedy by way of compensation against acquisition of land by the Government for public purpose under Sections 5B, 6, 7, 7B and 7F thereof. It further provided the forum of appeal and revision under Section 4A (1) (2), objection hearing under Section 5 (5), arbitration by a Judicial Officer under Section 7 (aaa)(i), (b), civil suit for dissolving dispute regarding apportionment of compensation under Section 7A. Any such provision of alternative remedy, or arbitration, or settlement of dispute is absent in the Chittagong Port Authority Ordinance, 1976 and as such the decision of the Appellate Division taken in that case would not mechanically apply in this case.

15. In order to appreciate the submission of Mr. Razzak, we brought the record of Writ Petition Number 12321 of 2014 that has been referred to in paragraph number 20 of the plaint (Annexure-A to the revisional application) and found that a notice demanding justice for mutation of record was served upon the Assistant Commissioner of Land, Demra Circle, Dhaka with copy to the Chairman, Chattogram Port Authority and the Secretary, Ministry of Shipping and two others (Annexure-G to the Writ Petition). They have been also made respondents in that writ petition, which is now pending in the High Court Division.

16. The written statement filed by the port authority (Annexure-1 to the counter-affidavit) does not show that any specific objection regarding maintainability of the suit in view of Section 49 of the Ordinance, 1976 was taken except a general objection in respect of maintainability in a stereo type manner. It further appears from the contents of the counter-affidavit [see paragraph number 9 (f)] that “maintainability of the suit” was framed as issue number 1 in the suit. Since the matter is fixed for argument, defendant number 4 has got ample opportunity to argue its case on the point of maintainability in view of Section 49 of the Ordinance, 1976 as well if it is yet not satisfied with the point of maintainability.

17. In the case of *Ismat Jerin Khan vs The World Bank and others* 11 MLR (AD) 58, an application for rejection of plant filed under Order VII, rule 11 of the Code on the ground of maintainability was rejected. The defendant moved in the High Court Division and got the rule absolute. The plaintiff took the matter to the Appellate Division. After granting leave, the

Appellate Division heard the civil appeal and allowed the same directing the trial Court to decide all the issues including that of maintainability. In so doing the Appellate Division observed:

“The question of immunity is a mixed questions of law and fact and the material has to be produced by way of averments in the written statement and thereafter the materials are required to be considered in the light of the evidence in the suit and a decision should be arrived at accordingly....” Paragraph 18)

18. In the above cited case of *Ismat Jerin Khan*, the Appellate Division further observed:

“... we are of the view that the issues of law impliedly arose therefrom as to whether the suit is barred under section 42 of the Specific Relief Act read with section 56 (f) of the Specific Relief Act could be conveniently decided by the trial Court upon filing of the written statement containing certain material averments on behalf of the defendant which are vital for consideration of the issues as to maintainability and evidence is required to be led in support thereof. Ends of justice would best be served if we remain confined ourselves to the leave granting order instead of exercising our power under Article 104 of the Constitution and allowing the respondents to take resort of Order 41, rule 33 of the Code of Civil Procedure....” (Paragraph 21)

19. We have also got the case of *Salahuddin Khan and others vs Md. Abdul Hai Bahar and others*, 63 DLR (AD) 138 where the full court of the Appellate Division comprising of eight Hon’ble Judges dismissed a civil appeal that was filed against an order of rejection of plaint at a belated stage, when the suit was fixed for peremptory hearing.

20. For a better understanding of the law of rejection of plaint as being barred by law under rule 11 of Order VII, it must be read with Order XIV, rule 2; Order XV, rule 3 and Order XX, rule 5 of the Code and interpreted in a harmonious manner. According to XIV, rule 2 the issue of maintainability only on law point can be decided first in a suitable case to save public time and expenses of the litigants, but it must be decided finally once for all. When two other suits are admittedly pending between the same parties on the self-same subject matter, question of disposal of one suit by rejection of plaint will not arise at the concluding stage.

21. Order XV, rule 3 of the Code makes an exception to the general rule of deciding all the issues together ‘where the Court may after settlement of all the issues take up the hearing of certain issues which may be of fact or of law, on the basis of the evidence which may be produced by the parties at once and leave aside the hearing of other issues, if the Court is of the view that the decision on such of the issues will be sufficient to dispose of the entire suit without causing prejudice to any of the parties’ [30 DLR (AD) 30]. It appears that the Court has a kind of discretion in taking up any issues for hearing under Order XV, rule 3. The general rule of hearing and deciding all the issues together is provided in Order XX, rule 5 of the Code which says that if the issues are already framed in a suit, the court shall state its finding or decision with a reason therefore upon each separate issues.

22. The scope of rejection of plaint under Order VII, rule 11 of the Code and hearing of any issue of law under Order XIV, rule 2 thus appears to be narrow in a suit where the issues are already framed. The scope of hearing of any certain issues under Order XV, rule 3 in the midst of hearing is similarly narrow and after amendment of Order XX, rule 5 of the Code by the Ordinance Number XLVIII of 1983, it has become narrower.

23. In view of the above, a general proposition of law can reasonably be drawn that after settlement of the issues and completion of hearing, Court should decide all the issues

together, and at that stage, there would be no scope to entertain an application under Order VII, rule 11 of the Code at the instance of a party who already joined the issues. In the present case, where the defendant-petitioner filed written statement and joined the issues, adduced evidence and the suit is fixed for argument simultaneously with another suit brought by the petitioner, there is no scope to split up one suit and reject the plaint under Order VII, rule 11 of the Code even to decide any issues under Order XV, rule 3 inasmuch as it will not finally end the litigations between the parties.

24. If the Ordinance, 1976 is carefully read over, it would be easily understood that service of notice under Section 49 thereof prior to institution of any suit against the Chattogram Port authority has been incorporated for its smooth functioning and discharging its regular routine activities. Another purpose of such notice is to save public time and litigants' expenditure in the cases where any person aggrieved serves notice upon the port authority and the authority by itself addresses his grievance realizing the right course of action before going to the court. In such view of the matter, if a person already institutes a suit under whatever notion and the summon with a copy of the plaint is served upon the port authority, the purpose of notice under Section 49 of the Ordinance would be sufficiently served inasmuch as no alternative remedy is provided in the Ordinance for dissolving any land dispute between the Port Authority and a private individual.

25. From a plain reading of the pleadings of the parties, it appears that the port authority purchased land in Dhaka for construction of its Guest House and started construction there. The plaintiff also claimed title over the same land by way of purchase through registered sale deed from its recorded tenant and prayed for recovery of possession. Now the civil court is to adjudicate the dispute. On receipt of summon accompanied by the plaint, the port authority could have done the same thing what it would do after receiving the notice under Section 49, if served upon it. Section 46 of the Ordinance, 1976 provides requisition and acquisition of land for carrying out the purpose of the Ordinance. But it does not appear that the port authority made any requisition for land to the Deputy Commissioner, Dhaka and got the suit land by way of acquisition, but itself purchased the land for reason best known to its officials. Procurement of land and construction of Guest House outside the limit and navigable approaches of port and bypassing the legal process of acquisition of land as provided in the Ordinance is not a regular routine activity on the part of Chattogram Port Authority and as such no prior notice is required to be served to seek relief against such extra ordinary activity. Learned Judge of the trial court did not commit any error of law in arriving at his decision and rejecting the application under Order VII, rule 11 of the Code.

26. Even in case of proceedings of a suit without prior notice, where such notice is legally required, the objection must be raised before filing of written statement by the defendant concern. After joining the issues by filing written statement, settlement of all issues and completion of hearing, a plaint cannot be rejected under Order VII, rule 11 of the Code especially when two other suits between the parties on the selfsame subject matter are pending in the same court and one of them is fixed for simultaneous hearing with the present suit. If the plaint is rejected at this stage, what would be its legal consequence? Will the plaintiff be barred by res-judicata and law of limitation and by hyper technicality will he be non-suited? In our opinion, certainly not. Then will he serve a notice under Section 49 of the Ordinance, 1976 and after expiry of the time-limit as prescribed there, be at liberty to begin the legal battle afresh, and do the same thing what he already did in the present suit? Law does not provide any meaningless things to be done.

27. We, therefore, do not find any merit in the rule. Accordingly, the rule is discharged however without any order as to cost. The trial court is directed to conclude the hearing of the suit within 2 (two) months from receipt of this judgment.