

Present:
Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Mansur Alam

First Appeal No. 405 of 2017

In the Matter of:

Memorandum of appeal from the original
decree.

-and-

In the Matter of:

Alamgir and others.

.....Plaintiff-appellants.

-Versus-

Shalah Uddin and others

.....Defendant-respondents.

Mr. Md. Shamsul Haque Bhuiyan,
Advocate

..... For the appellants.

None appears.

.....For the respondents.

Heard on 22.10.2024, 18.11.2024 and
Judgment on 25.11.2024.

Sheikh Abdul Awal, J:

This appeal at the instance of the plaintiff-appellants is directed against the judgment and decree dated 09.07.2017 (decree signed on 13.07.2017) passed by the learned Joint District Judge, Narsingdi in Civil Suit No. 89 of 2011 dismissing the suit exparte.

Material facts relevant for disposal of the Rule, briefly, are that the appellants as plaintiffs filed Civil Suit No. 89 of 2011 in

the Court of the learned Joint District Judge, Narsingdi impleading the defendants praying the following reliefs:

- ক) নালিশা ভূমিতে বাদীগনের ১ আনা স্বত্ব আছে মর্মে ঘোষনার ডিক্রী দিতে;
- খ) নালিশা আর.এস ৫৪০ নং খতিয়ানে ২৯৪ দাগে ১-১১ নং বিবাদীগণের নামে একক ভাবে লিপি হওয়া ভুল ও অশুদ্ধ মর্মে ঘোষনার ডিক্রী দিতে;
- গ) তৎস্থলে বাদীগনের পূর্ব পুরুষের নামে । আনা হিস্যায় লিপি হওয়ার আদেশ দিতে;
- ঘ) সম্যক আদালত ব্যয় ভার বাদীগনের অনুকূলে ও বিবাদীগনের প্রতিকূলে আদেশ দিতে;
- ঙ) অথবা ন্যায় বিচারের স্বার্থে বাদীগন আর যে যে প্রতিকার ভাজন হয় তাহাও এক আদেশ দিয়া সুবিচার করিতে আজ্ঞা হয় ।

Defendants entered appearance in the suit and filed written statements denying all the material allegations made in the plaint contending, inter-alia, that the suit is not maintainable in its present form and manner. The suit is barred by section 42 of Specific Relief Act, the plaintiffs have/had no right, title and possession over the suit land, the plaint case is unspecified and motivated and as such, the suit is liable to be dismissed.

The learned Joint District Judge on the pleadings of the parties framed the following 5 issues for determination.

- i. Whether the suit is maintainable in its present form and manner?
- ii. Whether the suit is barred by limitation?
- iii. Whether the suit is bad for defect of parties?
- iv. Whether the plaintiffs have right, title, interest and exclusive possession over the suit land?
- v. Whether the plaintiffs are entitled to get a decree as prayed for?

The defendants after filing the written statement did not turn to contest the suit and thus, the suit was proceeded ex parte, vide order dated 27.01.2015.

In this backdrop, the plaintiff side examined 4 witnesses to prove their respective case.

The learned trial Judge by his judgment dated 09.07.2017 dismissed the suit ex parte.

Being aggrieved by the aforesaid impugned judgment and decree dated 09.07.2017 passed by the learned Joint District Judge, Narsingdi the plaintiff-appellants preferred this First Appeal.

Mr. Md. Shamsul Haque Bhuiyan, the learned Advocate appearing for the plaintiff-petitioner in the course of argument at the very outset takes me through the impugned judgment, plaint of the suit, written statements, deposition of witnesses and other materials on record and then points out that in this case it is on record that the plaintiffs by adducing sufficient evidence both oral and documentary proved their title and possession in the suit land and also proved that RS record was wrongly prepared in the name of defendants although the trial court below without considering all these aspects of the case wrongly dismissed the suit by ex parte judgment and decree dated 09.07.2017. He further submits in this case it is on record that the defendants entered appearance in the suit and filed written statements although they did not turn to contest the suit. However, at the end of the day the learned Advocate referring an application under Order 41, Rule 23 of the Code of Civil Procedure submits

that since the suit was dismissed by ex parte judgment and decree, the same may be sent back on remand to the trial Court for fresh trial by giving an opportunity to the parties to adduce fresh evidence in support of their respective cases

No one appears for the defendant-respondents.

Having heard the learned Advocate for the appellants and having gone through the materials on record including the impugned judgment of the trial Court.

On a scrutiny of the record, it appears that in this case the plaintiffs filed the suit for declaration of title and also prayed that R.S. record was wrongly prepared in the name of the defendants. The defendants entered appearance in the suit and filed written statements denying all the material allegations made in the plaint contending, inter-alia, that the suit is not maintainable in its form and manner, the suit is barred by section 42 of Specific Relief Act and contents of plaint do not disclose any cause of action. Thereafter, the defendants did not turn to contest the suit. In this backdrop, the suit was proceeded ex parte in which the plaintiffs examined in all 4 witnesses to prove their case. The learned Joint District Judge, Narsingdi by his judgment dated 09.07.2017 dismissed the suit ex parte. It is found from the impugned judgment that the trial Court dismissed the suit mainly on the ground that the plaintiff did not mention any partition between the parties, so there was no mention of their respective shares. The trial court also observed that the plaintiffs could not adduce sufficient evidence to prove their exclusive possession over the suit land as described in the

schedule of the plaint although it appears from the evidence of PWs that PW-1 stated in his deposition that they have been living in the suit land by constructing homestead and there was amicable settlement between the parties. This witness also stated that- “৩০.০৩.১১ ইং তারিখে বিবাদীরা ভুলভাবে রেকর্ড হওয়ার কারণে নালিশী জমি দাবী করে । নকল নেই। পরে এ মামলা করি।” PW-2 also stated that- “বাদী ও নালিশী জমি চিনি। নালিশী জমিতে বাদীরা ঘর বাড়ী করে দখলে আছে। দাগ নং ৫৯। আর.এস ২৯৪ নং দাগ, এখানে ৮শং নালিশী জমির পূর্বে আমার বাড়ী। ৮ শং এর উত্তরে মোজাফ্ফর, দক্ষিণে সোনামিয়া, পশ্চিমে বন্দর আলী।” PW-3 and PW-4 are the witnesses of deed No. 3685 dated 01.04.1987.

On a close perusal of the impugned judgment, it appears that the learned Trial Judge, in fact, did not consider the evidence of PWs both oral and documentary particularly on the point of possession. Moreover, in this case the reasons best known to the defendants as to why they did not turn to contest the suit after filing written statement. In the facts and circumstances of the case as revealed from the materials on record and in view of the submission of the learned Advocate for the appellant, we are of the view that in the interest of justice and to prevent failure of justice it is necessary that this case should be sent back on remand to the trial Court below for deciding the suit afresh allowing the parties to adduce evidence both oral and documentary in support of their respective cases.

In the result, the appeal is allowed. The judgment and decree dated 09.07.2017 (decree signed on 13.07.2017) passed by the learned Joint District Judge, Narsingdi in Civil Suit No. 89 of 2011 dismissing the suit *exparte* is set-aside without any order as to costs. The case is remanded to the trial Court below

for deciding the same afresh in accordance with law and for the said purpose the parties will be permitted to adduce evidence both oral and documentary in support of their case, if so required and thereafter the learned trial Court shall dispose of the suit on merit in accordance with law.

In the facts and circumstances of the case there will be no order as to costs.

Send down the LC Records at once.

Md. Mansur Alam, J:

I agree.