

*Present:-*  
*Mr. Justice Mahmudul Hoque*  
*And*  
*Mr. Justice Md. Ali Reza*

**F. A. No. 59 of 2008**

Mohammad Jahangir Chowdhury and others

..... Appellants

-Versus-

Dashrat Chjaran Shil and others

..... Respondents

Mr. Kamal-ul-Alam, Senior Advocate with  
Mr. Md. Ahsan Habib, Advocate

.... For the appellants

No one appeared.

... For the respondents

**Judgment on 12<sup>th</sup> November, 2023.**

**Mahmudul Hoque, J:**

This appeal is directed against the judgment and decree dated 06.11.2007 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Chattogram in Other Suit No. 274 of 2005 dismissing the suit *ex parte*.

Shorn of unnecessary details, fact of the case lies in a very narrow compass. The appellants, as plaintiff, instituted Other Suit No. 274 of 2005 in the Court of 2<sup>nd</sup> Joint District Judge, Chattogram for a declaration of title and confirmation of possession and for further declaration that the P.S. and B.S. khatians are wrong, incorrect inoperative, illegal and the same is not binding upon the plaintiffs,

narrating the fact of their acquisition of title in the property by several title deeds starting from 1938 to 1962 as described in the plaint. The defendants did not appear and contest the suit. Among the defendants, the defendant Nos. 1-3 are private persons, defendant Nos. 4-6 are government upon whom summon notices were duly served. Since the defendants did not appear and filed written statement denying the plaintiffs claim the trial court as per provision of law fixed the suit for *ex parte* hearing on 08.06.2006. After several adjournments the court took the matter for *ex parte* hearing on 06.02.2007 and on different dates recorded evidences of P.Ws.1 and 2. After recording evidence the trial court by its judgment and decree dated 06.11.2007 dismissed the suit *ex parte*, holding that the suit is for declaration of title and confirmation of possession but in the schedule to the plaint no boundary has been given specifying the property. In the suit the plaintiffs claimed part of the schedule property measuring 60.42 sataks out of 98.42 sataks, as such, unless the suit property is specified with boundary the suit is not maintainable.

Being aggrieved by and dissatisfied with the judgment and decree passed by the trial court the plaintiffs preferred this instant appeal.

Mr. Kamal-ul-Alam, learned Senior Advocate with Mr. Md. Ahsan Habib, learned Advocate appearing for the appellants candidly submits that because of observations made by the trial court in respect of unspecification of the property the appellants field an application for amendment of the plaint which was heard and allowed by this Court on 18.11.2015. Accordingly, the plaintiffs got their plaint amended by giving specific boundary of the suit property in the schedule to the plaint. Because of such amendment of the schedule to the plaint, the defect whatever have had, become cured. He argued that the plaintiffs in support of their claim examined 2(two) witnesses. P.W-1 deposed in support of the statements made in the plaint in its entirety and proved the documents filed before the court which were duly marked as exhibits. P.W.2 deposed in respect of possession of the plaintiffs in the suit land, but the trial court while dismissing the suit *ex parte* most unfortunately did not discuss the evidences both oral and documentary, adduced in support of case of the plaintiffs, but only on the ground of non-specification of the property dismissed the suit.

Mr. Alam submits that the appellate court has all powers of the trial court under section 107 of the Code of Civil Procedure. Because of

non-appreciation of the evidences led and documents submitted before the trial court this Court as an appellate Court can adjudicate the matter upon assessment of the evidences available in record and can pass a judgment on merit in accordance with law. He submits that it is true that the trial court passed judgment in a very slipshod manner only finding that the schedule to the plaint is vague and unspecified instead of passing a judgment in compliance with the provisions of Order 20 Rule 4(2) of the Code. Since the trial court failed to consider the case of the plaintiffs, as an appellate Court this Court has every power to pass a judgment on merit on the basis of the evidences both oral and documentary. He finally submits that since the appellate Court has power to pass judgment on merit upon discussion of the evidences, the suit is not at all liable to be sent back to the trial court on remand for fresh trial as there are sufficient evidences in records to pronounce a judgment by the appellate court.

We have heard the learned Advocate of the appellants, have gone through the appeal memo and the grounds setforth therein, plaint, evidences both oral and documentary available in records and the judgment and decree appealed against.

The plaintiffs filed the instant suit for declaration of title, confirmation of possession and for further declaration regarding wrong recording of P.S and B.S. khatians. The trial court without going through the merit of the case and discussing the evidences both oral and documentary came into conclusion only observing that the schedule to the plaint is vague and unspecified. Unless the property claimed by the plaintiffs is specified no declaration can be given on an vague schedule.

From record, it appears that one Md. Shafiqul Mowla Chowdhury, a Constituted Attorney of the plaintiffs deposed before the trial court as P.W.1 who in his deposition stated the plaint case as well as deposed in support of documents filed before the trial court which were duly marked as exhibits, one Md. Solaiman deposed as P.W.2 who stated that the plaintiffs are in possession of the suit property. The trial court though rightly held that the schedule to the plaint is vague and unspecified, but failed to pass judgment on merit on the basis of evidences both oral and documentary. The plaintiffs in this appeal by filing an application under Order 6 Rule 17 of the Code of Civil Procedure got their plaint amended by giving specification of the property to the schedule to the plaint which was allowed by this Court. Because of giving specific boundary

of the suit property, the point upon which the trial court dismissed the suit, has become cured, but facts remain that the suit has not been adjudicated on merit upon discussion of the evidences available in record. Unless the suit is disposed of by giving a judgment on merit it cannot be said whether the plaintiffs have title and possession in the suit property, whether P.S and B.S khatians wrongly recorded in the name of defendants without their presence.

From order sheets of the trial court, it appears that the summon notices were duly served upon the defendant Nos. 4-6 government who received the same by putting seal and signature. But the summon notices upon defendant Nos. 1-3 were served by the Process Server furnishing a report that the defendant Nos. 1-3 found absent at the address and he handed over the summon notices to their Karjokarok/Agent. In our view, the report of the Process Server shows that the summon notices have not been duly/properly served upon the defendant Nos. 1-3. Moreover, the trial court while dismissing the suit by the impugned judgment and decree failed to comply with the provisions of Order 20 Rule 4(2) of the Code of Civil Procedure. The Code of Civil Procedure provides no distinction and difference between the judgment passed *ex parte* and the

judgment passed on contest but provided that judgment of the Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision, all those ingredients are absent in the judgment passed by the trial court. Because of failure of the trial court in giving a judgment as per provision of Order 20 Rule 4(2) of the Code, the judgment appealed against is not sustainable in law and the suit is liable to be sent back to the trial court on remand for fresh trial.

Before parting with the case, we like to note and observe that the Process Server almost in every cases used to serve notices upon defendants either by hanging or reporting that the defendants found absent at home, consequently, he handed over the summon notices to a self made agent of the defendant without showing reason of such service of summons. Apart from this Peon of the Postal Department nowadays found to be very very reluctant in distributing and delivering letters or notices of the court to the person concerned. Because of such tendency of the Postal Peon, summon notices remain unserved and its A/D did not return back after service. Sometimes it is reported that the Postal Peon used to throw the letters or summons in the dustbin and taking such

advantage and advantage of provisions in Order 5 Rule 19 of the Code after expiry of 30(thirty) days, the concerned section of the Court noted service of summon upon the defendants and respondents. Not only that, the Process Servers of the Court used to serve the notices upon the defendant or respondent by sitting at the Corridor of the court or in a tea stall by signing name of any other persons showing him agent of the defendant. Because of such situations, sometimes the evil litigants got their suit heard *ex parte* and after obtaining an *ex parte* decree by suppressing summon of the defendant put the said decree in execution and most unfortunately taking possession of the property by ousting a rightful owner, consequently, rightful owners are becoming homeless/landless.

In this situation, we like to direct the Court below to ensure at the time of registering a suit that in the plaint mobile number of the defendant has been mentioned and in case of any organization or company their Email has been given.

The trial court is hereby directed to see when a suit came for hearing *ex parte*, whether summon notices upon the defendants have been properly served and to examine the report of the Process Server



whether the summon notices served upon the defendants by hanging or by handing over the same to any alleged agent of the defendants. In that case, the court should direct the plaintiff to supply available mobile number of the defendant or Email and the concern Sheresta of the court below shall communicate to the defendant concerned over phone to ensure whether he knows about filing of the suit and whether any summon served upon him by Process Server or through Postal Department. In the event of non-supply of mobile number of the defendant by the plaintiff, the plaintiff must be asked to supply the mobile number of local Member and Chairman. And the office must communicate with the Member of the said ward or the Chairman of the said Union Parishad, so that backlog of the cases now prevailing whole over the country will reduce day by day.

The learned District Judge, Chattogram is directed to initiate a proceeding against the Process Server concern in the instant suit asking him why he has served all the 3(three) summon notices upon the defendant Nos. 1-3 by handing over the same to their alleged agent/karjokarok instead of serving the same upon the defendants and collecting mobile number of those defendants and why he did not

communicate them about summons and filing of the suit over phone and after receipt of explanation to take necessary action as per law as the court seems fit and proper.

The learned District Judge, Chattogram should direct all the Process Servers to collect mobile number of the defendant when at the address they found the defendant absent so that the defendant can be communicated and be informed over phone about filing of the suit.

With the above observations, we find merit in the appeal as well as in the submissions of the learned Advocate for the appellants.

In the result, the appeal is allowed, however, without any order as to costs.

The impugned judgment and decree appealed against is hereby *set aside*. The suit is sent back on remand to the trial court for hearing and passing judgment afresh within 06(six) months after issuing summon notices to the defendants afresh and ensuring service of summons upon them affording sufficient opportunity to the parties to adduce evidences both oral and documentary.

Communicate a copy of the judgment to the Court concerned and send down the lower court records at once.

**A copy of the judgment be sent to;**

1. The Registrar General, Supreme Court of Bangladesh to issue a General circular in the light of the observations made in this judgment in respect of service of summons.
2. The learned District Judge, Chattogram for information and to take necessary action.

**Md. Ali Reza, J:**

**I agree.**

*Helal/Abo*