

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Akhtaruzzaman

First Appeal No. 240 of 2017

Md. Feroz Hawlader and othersappellants

-Versus-

Lal Miah and others respondents

Mr. Md. Mostafa, Advocate

..... for the appellants

No one appears for the respondents

Judgment on 11.01.2024

Bhishmadev Chakrabortty, J.

This appeal, at the instance of the plaintiffs, is directed against the judgment and decree dated 04.06.2017 passed by the Joint District Judge, Court No. 1, Patuakhali in Title Suit No. 44 of 2012 dismissing the suit.

The present appellants as plaintiffs instituted the aforesaid suit praying for declaration of title and partition in the suit land claiming their *saham* to the extent of 10.34 acres in three schedules as detailed to the schedule of the plaint. The notices of the suit were served upon the defendants but except one none of them appeared in the suit. The defendant who appeared in the suit subsequently did not file any written statement to contest it and consequently the suit was fixed for *ex parte* hearing.

PW1 was examined on 25.03.2013 and some documents were exhibited. Subsequently, he was recalled and examined on 23.04.2017 and the learned Judge fixed next date of the suit for passing *ex parte*

judgment. The learned Judge took the matter for disposal and passed the judgment on 04.06.2017 dismissing the suit. In the impugned judgment learned Judge observed that the suit was bad for defect of parties and all the properties were not brought into *hotch potch*. Against the aforesaid judgment and decree the plaintiffs preferred this appeal.

Mr. Md. Mostafa, learned Advocate for the appellants takes us through the plaint, evidence of PW1, the documents exhibited and the impugned judgment and decree and submits that the trial Court on misconception of fact and law in a *slipshod* manner passed the impugned judgment and decree dismissing the suit which is required to be interfered with by this Court. He submits that it would be just and proper if the impugned judgment and decree is set aside and the suit is sent back on remand to the trial Court for retrial. He refers to provision of order 41 rule 23 of the Code of Civil Procedure (the Code) and submits that in the absence of any application of either party this Court for effective disposal a suit can *suo moto* send the case on remand for fresh trial by setting aside the judgment and decree passed by the trial Court.

No one appears for the respondents.

We have considered the submissions of Mr. Mostafa, gone through the materials on record and the impugned judgment and decree.

It appears that the plaintiffs brought the suit for declaration of title and partition claiming *saham* of 10.34 acres of land out of 13.23 acres as detailed to the schedules of the pliant. The plaintiffs examined PW1 who exhibited documents exhibits 1, 2 and 3 but the trial Court dismissed the suit as under-

“অদ্য একতরফা আদেশের জন্য দিন ধার্য্য আছে। বাদীপক্ষ হাজিরা দেন। নথি আদেশের জন্য উপস্থাপন করা হল। দেখিলাম। নথি আদেশের জন্য লওয়া হইল। PW1 এর হলফী জবানবন্দি, প্রদর্শনী ১-৩ সিরিজ চিহ্নিত কাগজাদী ও আরজি মূলে সমুদয় নথি পর্যালোচনা করিলাম। উক্তরূপ পর্যালোচনায় দেখা যায় যে, অত্র মোকাদ্দমায় বাদী নালিশী সমুদয় জমির SA ও RS পর্চা দেন নই এবং পর্চা মূলে ও প্রদত্ত জেনোলজী মূলে সকল রেকর্ডীয় মালিক তথা তাদের সকল ওয়ারিশদেরকে মোকাদ্দমায় পক্ষ করেন নাই। সুতরাং অত্র মামলাটি ব্যাপক পক্ষদোষ ও হচপট দোষে অচল বলিয়া প্রতীয়মান হয়। এমতাবস্থায় বাদীপক্ষ প্রার্থীত মতে কোন প্রতিকার পাইতে পারে না।

অতএব,

আদেশ হয় যে,

অত্র মামলাটি সকল বিবাদীগণ বিরুদ্ধে একতরফা সূত্রে বিনা খরচায় খারিজ হইল।”

On assessing the evidence of PW1 and perusing the documents exhibited, we find that the trial Court on misconception of fact and law in a *shipshod* manner passed the impugned judgment and decree. He dismissed the suit only on two counts that the suit is bad for defect of parties and all the properties were not brought into *hotch potch*. To pass an *ex parte* judgment either dismissal of the suit or decreeing it, the trial Court is to discuss the evidence both oral and documentary adduced by the party. But here the learned Judge did not do it. If the

findings and observations made in the impugned judgment is taken into account, we find that the above two defects could have been cured by amendment of the plaint.

The learned Judge could have given a chance to the plaintiffs to amend the plaint to implead the necessary parties to the suit and bringing all the properties, if any, to *hotch potch* for proper and effective disposal of the suit taking into account that the suit was for declaration of title and partition. The learned Judge did not mention who were required to be added as defendants or which properties were not brought into *hotch potch*. He did not frame any issue to dispose of the suit. Even he did not bother to discuss the plaintiffs case. In the case of Chand Miah being dead his heirs Vs. Shamsuddin and others, 5 BLC (AD) 163 the High Court Division sent the case to the trial Court in open remand with liberty to the parties to adduce evidence which was not interfered with by the Appellate Division. Similarly in the case of Narayan Chandra Ghosh and others Vs. Moksed Mollah and others, 13 BLT (AD) 28 the remand order passed by the High Court Division was not interfered with by the Appellate Division. This Court under order 41 Rule 23 of the Code can send this suit to the trial Court for trial afresh to secure the ends of justice and to resolve the dispute once for all.

In view of the aforesaid discussion, the *ratio* laid in the cited cases and nature of the impugned judgment, we find substance in the submission of Mr. Mostafa. Therefore this appeal succeeds. The

judgment and decree passed by the Joint District Judge, Court No. 1, Patuakhali in Title Suit No. 44 of 2012 is hereby set aside.

The case is send to the trial Court in open remand for retrial. In disposing the suit, the learned judge will allow the plaintiffs to amend the plaint, if they desire so. If the defendants appear in the meantime, they will be entitled to file written statement to contest the suit. The parties will be at liberty to lead evidence in support of their claim or amended claim. The trial Court is directed to the dispose of the suit within 06 (six) months from the date receipt of this judgment.

Communicate the judgment and send down the lower Court records.

Md. Akhtaruzzaman, J.

I agree.