

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CIVIL APPELLATE JURISDICTION)

Present

**Mr. Justice Md. Iqbal Kabir**

**And**

**Mr. Justice Md. Riaz Uddin Khan**

**First Appeal No. 29 of 2024**

**IN THE MATTER OF:**

Mst. Rina

... Defendant-Appellant

Versus

Mst. Rezia Begum being dead her heirs 1(a) Md. Liton and  
others

... Plaintiff-Respondents

Mr. Md. Hamidur Rahman, Advocate

... For the-Appellant

Mr. Shah Muhammad Ezaz Rahman, Advocate with

Mr. Md. Golam Faruque Bhuiyan, Advocate

... For the Respondent Nos. 1(a)-1(d)

**Judgment on: 02.02.2026**

**Md. Riaz Uddin Khan, J:**

This appeal is directed against the judgment and decree dated 02.03.2017 (decree signed on 09.03.2017) passed by the Additional District Judge, 2<sup>nd</sup> Court, Dhaka in Title Suit No. 07 of 2003, decreeing the suit ex-parte.

Succinct facts for disposal of this appeal are that the Respondent No.1 filed Title Suit No.07 of 2003 against the Respondent No.2 for specific performance of contract contending *inter alia* that the suit property situated at Mirpur Housing Estate was allotted to one Amena Begum by registered deed no.6735 dated 18.11.1999 by the then Ministry of Works who transferred the same to the defendant no.1, Kazi Fayez Ahmed by registered deed no.7447 dated 17.11.200 after obtaining permission from the authority. Thereafter, the defendant no.1 made a written agreement for sale of that property with the plaintiff receiving Tk-680,000/- out of Tk-740,000/- of consideration money on 25.02.2001 and received rest Tk-60,000/- on 07.06.2001 and 09.06.2001 on condition that after obtaining permission from the authority he will execute and register the sale

deed. The plaintiff took possession of the property and constructed two tin-shed houses, a boundary wall and got utility connection on the suit property. The defendant no.1 got permission for sale from the National Housing Authority on 30.07.2001 but on various pleas did not execute the sale deed as per agreement, hence the suit. At one stage of the suit on application the present appellant was added as Defendant No.3 and in order to contest the suit she filed written statement contending *inter alia* that she got the property executed and registered by the defendant no.1 through deed no.5756 dated 17.10.2001 and prayed for dismissal of the suit. Then the plaintiff amended the plaint and added a prayer for declaration that the deed no.5756 dated 17.10.2001 executed by defendant no.1 in favour of added defendant no.3 is totally ineffective.

At one stage of the suit the plaintiff-Respondent No.1 filed an application under section 24 of the Code of Civil Procedure before the District Judge for transferring the case which was rejected against which she filed civil revision no.3716 of 2012 before a Division Bench of this Court and obtained Rule and order of stay. However, after hearing the revision, this Court by judgment and order dated 02.10.2013 made the Rule absolute transferring the case to the Additional District Judge, 2<sup>nd</sup> court, Dhaka where an appeal was pending being Title Appeal No. 62 of 2011 regarding the same suit land between the same contesting parties. However, it appears from the record that the Defendant No.3-appellant did not appear before the transferee court who decreed the suit ex-parte as stated at the very outset.

Being aggrieved by and dissatisfied with the said judgment and decree the present appeal is preferred by the added defendant no.3. Both parties subsequently filed affidavit of facts along with annexures.

Mr. Md. Hamidur Rahman, the learned advocate appearing for the appellant submits that in a suit for specific

performance of contract an unregistered agreement for sale should be proved strictly and in the present suit the Plaintiff-Respondent failed to prove the execution of alleged agreement for sale dated 25.02.2001 (Bainanama) by adducing witnesses and scribe of the same, but the trial Court most illegally decreed the suit.

The learned advocate next submits that it is settled principle of law that when a document is registered, it shall be presumed that all the formalities as required under sections 34, 35, 58 and 59 of the Registration Act, 1908 i.e. presentation before the registering officer and authentication of the executant have been duly complied with and the document was explained to the executant before registration and that the whole proceeding and endorsement were regular and in order. If anyone alleges contrary to that he must prove the same and if he fails to prove such allegations, the deed will sustain. In the present suit, the defendant No.3-appellant purchased the suit land vide registered sale deed No.5756 dated 17.10.2001 pursuant to an unregistered agreement for sale dated 21.01.2001 from the defendant No.1, Kazi Fayez Ahmed who purchased the suit land from the original allottee of the National Housing Authority. The plaintiff filed the present suit for Specific Performance of Contract with a declaration that the registered sale deed No. 5756, dated 17.10.2001 executed by the defendant No.1 in favour of the defendant No.3-appellant is ineffective and the trial Court most illegally cancelled the said sale deed no.5756. The plaintiff of the instant suit was not a party to the sale deed No. 5756, dated 17.10.2001 and it is settled principle of law that a person who is not a party to any instrument cannot sue for cancellation of such instrument, without any evidence to the effect that the appellant got the sale deed in her favour fraudulently.

Mr. Rahman further submits that the instant suit being Title Suit No. 07 of 2003 was initially filed for Specific

Performance of Contract against the defendant no.1 and subsequently, by amendment of the plaint, the plaintiff prayed for a declaration that the registered sale deed No. 5756, dated 17.10.2001 executed by the defendant No.1 in favour of the defendant No.3-appellant is ineffective and long after 8 (eight) years, the defendant No.1 filed Title Suit No.335 of 2011 for cancellation of the deed executed in favour of the present appellant and subsequently said suit was withdrawn on 31.01.2016, and there was no agreement of compromise in the said suit which shows that the Defendant No.1 had abandoned his claim to the effect that the appellant got the sale deed fraudulently. The trial Court erred in law in decreeing the suit holding that the plaintiff, defendant Nos.1 & 3 entered into an agreement of compromise, but there is no evidence regarding so-called agreement or compromise and nothing was proved before the court that the suit being Title Suit No.335 of 2011 was adjusted wholly or in part by any lawful agreement or compromise. In that view of the matter in the present suit neither the prayer for cancellation of sale deed of the appellant nor declaration that sale deed executed in favour of the appellant is ineffective can be granted. Moreover, if the defendant-appellant got the sale deed fraudulently or by adopting unlawful means, the original deed of allotment would be available to the seller of the appellant namely defendant no.1, Kazi Fayez Ahmed or to the plaintiff who claimed that she purchased the suit land from Kazi Fayez Ahmed, whereas the fact remains that the original deed of allotment is lying with the appellant which proves that Kazi Fayez Ahmed sold out the suit land in favour of the appellant and delivered the relevant documents including the original deed of allotment to the appellant. In fact Kazi Fayez Ahmed, admitted owner of the suit land, entered into an unregistered agreement for sale (Bainanama) with the defendant No.3-appellant on 21.01.2001 while he allegedly entered into an unregistered agreement

for sale (Bainanama) on 25.02.2001 with the plaintiff to the instant suit and on 17.10.2001 said Kazi Fayez Ahmed sold out the suit land in favour of the defendant No.3-appellant by getting permission from National Housing Authority and in the given facts if there is any fraud, the same has been committed by Kazi Fayez Ahmed, but without considering the facts and circumstances of the suit, the trial Court most illegally decreed the suit.

The learned advocate further submits that the present appellant as plaintiff earlier to the present suit filed Title Suit No. 385 of 2002 against the present plaintiffs of the instant suit for declaration of title and recovery of possession by evicting the defendants and got a contesting decree dated 26.01.2011 in the suit against them against which Title Appeal No.62 of 2011 was filed which was ultimately dismissed for default on 02.03.2017 by the Additional District Judge, 2<sup>nd</sup> Court, Dhaka against which Miscellaneous Case no.04 of 2017 for restoration was filed which was also rejected on 09.07.2018 and as such the decree so obtained by the present appellant in the said suit is still in force and knowing full well about the said decree, the substituted plaintiffs to the instant suit obtained the instant ex parte decree against the present appellant by surpassing the fact of the decree passed against them in the earlier suit as well as by practicing fraud upon the Court. The plaintiff, Rezia Begum of instant Title Suit No. 07 of 2003, died and consequently Md. Abu Taher, Anwara Begum, Salma Akter, Liton, Rubel, Babu (heirs of Rezia Begum) were substituted on 25.09.2007 in the suit. On behalf of the plaintiffs, said Md. Abu Taher was examined as PW-1 on 02.05.2011, but from the plaintiff side, nothing was disclosed before the learned Court regarding the contesting judgment and decree dated 26.01.2011 (decree signed on 02.02.2011) so obtained by the present appellant in Title Suit No.385 of 2002 in respect

of self-same property and in that view of the matter the impugned judgment and decree is liable to be set aside.

The learned advocate then submits that the instant suit was instituted in the Court of Joint District Judge, 2<sup>nd</sup> Court, Dhaka and at one stage the plaintiff filed application for transferring the said suit before the learned District Judge, Dhaka which was summarily rejected vide order dated 23.05.2012 against which the plaintiff filed civil revision before this Court and upon hearing, this Court was pleased to transfer the instant Title Suit to the Additional District Judge, 2<sup>nd</sup> Court, Dhaka for disposal and on 18.01.2016 the trial Court passed an order to intimate the defendants to the suit, but no notice was issued upon the defendant-appellant regarding the trial of the suit in the transferee court for which she could not appear and contest the suit by adducing evidence and the suit was decreed ex parte and had the notice was served and appellant been able to place her case before the trial court, the result would have been otherwise.

Mr. Rahman lastly submits that without assessing the evidences on record in their truest perspective the trial Court most illegally decreed the suit and there may be thousands of weakness on the part of the defendant and it is settled principle of law that on the weakness of the defendant the plaintiff cannot get any relief.

Per-contra Mr. Shah Muhammad Ezaz Rahman with Mr. Md. Golam Faruque Bhuiyan, the learned advocate appearing for the Respondent Nos. 1(a)-1(d) submits that the Plaintiff-Respondent filed Title Suit No.7 of 2003 for specific performance of contract for sale of an immovable property. The agreement for sale dated 25.2.2001 between the Plaintiff, Mst. Rezia Begum and Defendant No.1, Kazi Fayez Ahmed, is not disputed or denied by Defendant No.1 in the suit or appeal, rather it is admitted by Defendant No.1 in Title Suit No. 335/2011 filed by the Defendant No.1 against the added Defendant-Appellant for cancellation of the

subsequent purchase deed (Exhibit 6). The Plaintiff is not required to prove the agreement for sale by examining the scribe or attesting witnesses, because- the agreement is not disputed or denied by Defendant No.1 rather it is admitted by Defendant No.1 in Title Suit No.335/2011. Section 58 of the Evidence Act says that facts admitted need not be proved. Under this Section, no fact needs be proved in any proceeding which by any rule or pleading in force at any time the parties are deemed to have admitted by their pleadings. Under Order VIII Rule 5 of the Code of Civil Procedure, facts not specifically denied are deemed admitted. In the present case, Defendant No.1 did not even contest the suit, let alone the question of disputing or denying the agreement. As such, the execution of the agreement for sale is to be considered admitted by Defendant No.1. The Plaintiff has already performed or is ready to perform his part of the contract: The Plaintiff paid the entire consideration amount to Defendant No.1 as per the terms and conditions of the agreement for sale which is evident from Exhibit-7, proved by PW-1 and not denied by Defendant No.1, rather the Defendant No.1 admitted this fact in his Title Suit No.335/2011. Possession of the property was handed over to the Plaintiff upon execution of the agreement for sale which was proved by PW-1. Defendant No.1 also admitted this fact in Title Suit No.335/2011 filed against added Defendant No.3, who also admitted Plaintiff's possession in Title Suit No.385/2002 filed against the Plaintiffs.

The learned advocate next submits that no agreement for sale relating to an immovable property was required to be registered prior to the incorporation of Section 17A in the Registration Act in 2004 (making registration compulsory for agreements for sale of immovable property) and Section 21A in the Specific Relief Act, 1877 in 2004 (barring specific performance of unregistered agreement for sale) and as such, any unregistered agreement for sale were

enforceable by specific performance. In the present case, the agreement for sale between the Plaintiff and Defendant No.1 is an unregistered deed and was executed on 25.02.2001 i.e. prior to Section 17A of the Registration Act and Section 21A of the Specific Relief Act coming into effect, and thus, it constitutes an enforceable contract, particularly given that the Plaintiff has paid the full consideration amount to Defendant No.1 in accordance with the contract, taken over possession of the property and is prepared to fulfill all the obligations under the agreement. In the present case, the Plaintiff had filed the suit for specific performance of contract before Section 17A came into force and as such, sub-section (1) shall not apply to the agreement for sale involved in the present case and thus, the validity or enforceability of the agreement cannot be called into question.

Mr. Ezaz Rahman then submits that although Defendant No.1 is alleged to have transferred the property to added Defendant No.3 by registered sale deed dated 17.10.2001, the Plaintiff's right is well-protected under Section 53A of the Transfer of Property Act, 1882, because- There is an agreement for sale between the Plaintiff and Defendant No.1; The agreement is legal and enforceable by law; The Plaintiff has taken possession and is continuing in possession till date; The Plaintiff has performed his part of the contract i.e. payment of the consideration amount as per agreement, which is acknowledged by Defendant No.1; The Plaintiff is prepared to do all acts in furtherance of the contract and never refused to purchase the property by registered sale deed; Accordingly, neither the Defendant No.1 nor the Defendant No.3 can enforce against the Plaintiff any right in respect of the suit schedule property, other than a right expressly provided by the terms of the contract.

The learned advocate further submits that Defendant No.3-Appellant will not get the benefit of the Proviso to

Section 53A of the Transfer of Property Act, 1882 i.e. no notice of the contract or part performance thereof, or Section 27(b) of the Specific Relief Act, 1877 i.e. bona fide purchaser for value in good faith and no notice of the contract, because- If not of the agreement for sale, Defendant No.3 was very much aware of the part performance of the contract i.e. the fact that the Plaintiff is in possession of the suit property and that is why, filed suit for recovery of possession of the property against the Plaintiff in 2002. Possession amounts to notice of such title of the person in possession as he may have and any other person who purchases, takes a mortgage etc. the same immovable property without ascertaining the nature of the claim of the person in possession, does so at his own risk. On this contention he referred some Indian decisions reported in (1) ILR 19 Bom 391 (ii) ILR 27 Bom 408 (iii) ILR 27 Bom 452 (iv) ILR 25 All 366 (v) 23 Bom L.R. 1062 (vi) ILR 27 Cal 468.

The learned advocate also submits that there is insufficient evidence to indicate that the added Defendant No.3, prior to purchasing the property in question from Defendant No.1, exercised reasonable care to ensure that the property was unencumbered. Specifically, this could have been demonstrated by publishing a notice in the newspaper or conducting a search at the local Sub-registrar's office or the National Housing Authority (NHA). While it is noted that the agreement for sale is unregistered and does not necessitate prior permission from the NHA for entering into an agreement, an attempt by Defendant No.3 to conduct a search in these government offices would have evidenced due diligence, potentially validating her status as a bona fide purchaser for value without knowledge of the contract or its performance. However, the records indicate that Defendant No.3 was aware of the contract's performance, specifically the Plaintiff's possession of the property, and subsequently filed Title

Suit No.385/2002 seeking a declaration of title and recovery of possession. Thus, it cannot be considered that Defendant No.3 was a bona fide purchaser for value without notice of the contract or its part performance and as such, cannot take benefit of the proviso to Section 53A of the Transfer of Property Act, 1882 or Section 27(b) of the Specific Relief Act, 1877.

The learned advocate strenuously submits that cancellation of a deed to which the Plaintiff is not a party in a suit for specific performance of contract will not render the decree illegal/inoperative, because- The procedure adopted in passing the decrees in suits for specific performance of decree is not uniform and there have been conflicting judicial views, regarding the form of decree which may be passed in a suit for specific performance of contract. Referring some decisions the learned advocate submits that while in some cases it was held that in a suit for specific performance of contract prayer must be made for cancellation of subsequent deed, the Court held in other cases that such prayer is not required to be made and the best course is to direct the contracting parties to join in a conveyance so as to pass on the title to the plaintiff. Thus, a suit for specific performance of contract will not fail even if a prayer for cancellation is made or without there being any such prayer, the trial Court cancels the subsequent deed. Even if the trial Court is determined to have erred in canceling the subsequent deed rather than instructing all parties to participate in the conveyance to transfer the title to the plaintiff, the Appellate Court possesses the authority to rectify this under Section 22 of the Specific Relief Act, 1877, which stipulates that any relief granted by the trial Court may be corrected by a Court of appeal. However, in the present case, there is no need for the Appellate Court to issue any such directive, as the decree rendered by the trial Court has already been executed through the

registration of a sale deed in favor of the Plaintiff prior to the filing of the current Appeal. [AIR 1931 Cal 67-34 CWN 698, it was by the Calcutta High Court that the contracting parties and the subsequent purchaser should join in the conveyance so as to pass on the title to the plaintiff to avoid further difficulties. AIR 1932 All 694, the Allahabad High Court held that the subsequent deed must be cancelled. AIR 1954 SC 75 the Indian Supreme Court held that the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. 26 DLR 247 our High Court Division followed the decision of Durga Prasad Case (AIR 1954 SC 75). 47 DLR (AD) 71 our Appellate Division directed the vendor to execute necessary document in favour of the plaintiff. 49 DLR (AD) 85, our Appellate Division followed AIR 1931 Cal 67 and Durga Prasad Case (AIR 1954 SC 75). AIR 2017 SC 3934 the Indian Supreme Court held that prayer must be made for cancellation of subsequent deeds. AIR 2024 SC 3328 the India Supreme Court followed Durga Prasad Case and held that there is no need to pray for cancellation of the subsequent deed.]

The learned advocate further submits that none of the Defendants raised any objections when Plaintiff presented and marked exhibits 6, 6/1, and 6/2 i.e. the certified copies of the Plaintiff of Title Suit No.335/2011, the application for withdrawal of the suit, and the withdrawal order. Therefore, the trial Court did not commit any error in considering these exhibits and based its findings on the facts concerning the amicable settlement between the parties as outlined within them. This conclusion is supported by the fact that Defendant No.3 contested Title Suit No. 335/2011 and was present when the withdrawal order was passed in the said suit but did not raise any objection regarding amicable settlement between the parties. The

trial Court's findings are also supported by the fact that following the amicable settlement, Defendant No.3, despite submitting a written statement, did not appear before the trial Court to contest the present suit after the High Court Division transferred it to the Court of the Additional District Judge, Second Court, Dhaka, which was within the knowledge of Defendant No.3. The added Defendant No.3 had sufficient knowledge of the fact, the suit had been transferred to the Second Additional District Judge, Dhaka and that Title Suit No.335/2011 had been withdrawn by Defendant No.1 following an amicable settlement. As such, the Defendant-Appellant cannot take advantage of her own laches and acquiescence by saying that she did not have any opportunity to contest the suit or that the decree was obtained by practicing fraud. The certified copy of the withdrawal order of TS 335/2011 (Exhibit 6/2) shows that the added Defendant was present when the order was passed following an amicable settlement, yet raised no objection at that time nor did the said Defendant contest the present suit after it had been transferred to the 2<sup>nd</sup> Additional District Judge's Court, Dhaka.

The learned advocate emphatically submits that the decree passed in Title Suit No.385 of 2002 filed by the Appellant for declaration of title and recovery of possession will not operate as a res-judicata in the subsequent suit for specific performance of contract inasmuch as the Appellant filed the suit for declaration of title and recovery of possession under Section 8 of the Specific Relief Act, 1877 on the basis of his purchase deed but the validity and enforceability of the agreement for sale between the Plaintiff and Defendant No.1 neither adjudicated upon nor cancelled by the learned Assistant Judge in the previous suit. As such, the Defendant No.1 is not precluded from filing the suit for specific performance of contract on the basis of the agreement for sale. The decree passed in Title Suit No.385/2002 will have no impact

on the decree passed in the instant suit and has become inoperative and in-executable because- The Defendant No.3-Appellant, though filed a written statement in the suit, did not mention anything about her filing Title Suit No.385 of 2002 in the WS nor did she subsequently amend the WS at any point of time to bring on record the fact that a decree had been passed on 26.01.2011 in Title Suit No. 385 of 2002, rather the Defendant-Appellant stopped contesting the suit after it had been transferred by the High Court Division to the Second Court of Additional District Judge, Dhaka with the consent of the Defendant No.3. In the meantime, the decree passed in the present suit has been executed by registration of sale deed in favour of the Plaintiff in 2022 and thus, the Plaintiff's title has been established through the specific performance decree following cancellation of the subsequent purchase deed by the trial Court. The Defendant No.3 did not raise any objection even in the Execution Case filed by the Plaintiff and has filed the instant appeal about two years after the decree was executed and sale deed registered through Court. The decree for specific performance, upon execution and registration of the sale deed, will supersede any prior decree for possession. This is because the execution of the sale deed transfers the title, and the prior possession becomes irrelevant and meanwhile, the execution case of the defendant has become hopelessly barred by limitation.

Mr. Ezaz Rahman finally submits that the Explanation of Section 12 of the Specific Relief Act, 1877 makes it clear that unless and until the contrary is proved, the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. In the instant case, admittedly the Plaintiff took possession immediately upon execution of the contract in 2001 and since then, has been living therein for more than two decades upon construction of buildings and making other

improvements. As such, it is not possible to relieve the breach adequately by compensation in money.

We have heard the extensive arguments advanced at the bar and perused the memorandum of appeal, affidavit of facts along with annexures. We have also examined the plaint, deposition of PW-1 along with the exhibits of the plaintiff. We have carefully scrutinized the impugned ex-parte judgment and decree passed by the trial Court.

It appears from the above mentioned facts that there is a chequered history of the case. At first the present appellant being plaintiff filed Title Suit No.385 of 2002 for declaration of title and recovery of possession against the respondents of the present case and ultimately got a contested decree dated 26.01.2011 against which Title Appeal No.62 of 2011 was filed before the District Judge, Dhaka which was ultimately dismissed for default on 02.03.2017 by the Additional District Judge, 2<sup>nd</sup> Court, Dhaka against which Miscellaneous Case no.04 of 2017 for restoration was filed which was also rejected on 09.07.2018. On the other hand the predecessor of the present respondents filed the present Title Suit No.07 of 2003 for specific performance of contract against the present respondent no.2 who never appeared before the court and at one stage the present appellant was added as defendant no.3 on her prayer who filed written statement and at one stage the plaintiff filed an application for transferring the suit which was ultimately allowed by a Division Bench of this Court transferring it to the court of Additional District Judge, 2<sup>nd</sup> Court, Dhaka before which the abovementioned Title Appeal No.62 of 2011 was pending for hearing with a direction to hear the suit with the appeal simultaneously. The present appellant who was defendant no.3 did not appear before the Additional District Judge, 2<sup>nd</sup> Court, Dhaka. On the other hand the present respondents who were appellants of Title Appeal No.62 of 2011 did not pursue the appeal. It appears from

record that both the present suit and the said appeal were fixed on 02.03.2017 for simultaneous hearing. On that date i.e. 02.03.2017 the learned Judge decreed the present Title Suit no.07 of 2003 ex-parte in presence of the plaintiffs while at the same time dismissed the Title Appeal No.62 of 2011 for default. Is it not unusual that while the substituted plaintiffs were present before the court in the suit but absent in their preferred appeal before the same court on the same date? However, it is noteworthy that in the mean time, the present respondent no.2 admitted owner of the suit property who sold it to both parties filed Title Suit no.335 of 2011 for cancellation of the registered deed executed in favour of the present appellant impleading 10 (ten) defendants including both the present appellant and the respondents which was ultimately withdrawn by order dated 31.01.2016. It appears from the order dated 31.01.2016 that both parties were present. When there were ten defendants having conflicting interest, it is not clear who were those both parties: the plaintiff is sure but who was on the other side, the present appellant or the present respondents, it's not clear from the order dated 31.01.2016.

Be that as it may, the learned advocate for the appellant submitted that the defendant no.3-appellant was not notified after the transfer of the suit to the Additional District Judge, 2<sup>nd</sup> Court, Dhaka who tried the suit ex-parte. Neither the High Court Division nor the trial Court fixed date for her appearance before the trial court. Had she been notified, she must be appeared before the trial court to contest the suit as she had a very good arguable case including a decree of her title from a competent court against the present respondents. On the other hand the learned advocate for the respondents submitted that as the suit was transferred on the application of a party issuing notice was not mandatory rather if the court transferred the suit otherwise than on

the application of a party, then notifying the parties was mandatory as per section 24A(2) of the Code of Civil Procedure.

Now, a question of law has been arisen before this Court as to whether it was mandatory for the Court to notify the appellant who was the defendant no.3, after the suit being transferred under section 24 of the Code of Civil Procedure. Section 24A(1) of the Code of the Civil Procedure deals with the matter which runs as under-

**Appearance of parties on transfer of suit, etc.** “24A.(1) Where any suit is transferred under section 22, or any suit, appeal or other proceeding is transferred or withdrawn under sub-section (1) of section 24 on the application of a party, the Court ordering the transfer or withdrawal shall fix a date for the appearance of the parties before itself, if the suit, appeal or other proceeding is to be tried or disposed of by itself, or before the Court to which the case is so transferred.” (Emphasis added).

(2) Where any suit, appeal or other proceeding is transferred from one Court to another, otherwise than on the application of a party, the parties thereto shall appear before the Court from which the suit, appeal or other proceedings is to be transferred, on the day already fixed for their appearance before that Court, and such Court shall then communicate the order of transfer to such parties and direct them to appear before the Court to which the suit, appeal or other proceeding is to be transferred, either on the same day, or on such earliest day as may be reasonable having regard to

the distance at which the other Court is located.

It appears from the above quoted sub-section (1) of section 24A that it provides “the Court ordering the transfer or withdrawal shall fix a date for the appearance of the parties” and further provides that when a case is transferred or withdrawn on the application of a party either under section 22 or 24(1) the transferring court shall fix a date for the appearance of parties either before itself if it hears the matter or “before the Court to which the case is so transferred”. The word “shall” has been used in the section indicating the obligation of the Court. In the present case the High Court Division transferred the case to the 2<sup>nd</sup> court of Additional District Judge, Dhaka by its judgment and order dated 02.10.2013 on the application of the plaintiff-respondent and it turns out from the judgment that no date was fixed for appearance of the parties before the Court to which the case was so transferred, as mandated under section 24A(1) of the Code of Civil Procedure. This is, in our view, a mandatory provision which has not been followed. Further, it appears from the record that the 2<sup>nd</sup> court of Additional District Judge, Dhaka that the court did not fix any date for appearance of the parties or notified the parties regarding the date for resuming the trial. Since the transferring Court i.e. the High Court Division did not fix any date, it was required as a matter of fairness for the transferee court i.e. the trial court after issuing notice giving opportunity to both parties to appear and contest the suit and the transferring court should not have proceeded the trial and passed decree ex-parte without ensuring that the parties were notified the post transfer hearing date. Sub-section (2) is not applicable in the present case as it was transferred on the application of a party. Since the High Court Division neither fixed any date for appearance of the party before the transferee court nor the transferee court

itself notified the parties for appearance, which in our view, violation of mandatory provision, the whole trial has been vitiated. In such facts and circumstances, the fairness demand that the ex-parte decree passed by the trial court should be set aside and the suit be sent on remand for fresh trial against the backdrop of chequered history of the present case.

Since we have already decided to send the present suit on remand for fresh trial, we do not think it proper and apposite to discuss the merit of this First Appeal or Suit and the points raised by the learned advocate for both the parties which may affect the trial afresh.

In the facts and circumstances of the case and the position of law as discussed above we are inclined to interfere with the impugned ex-parte judgment and decree which is liable to be set aside.

In the result, the appeal is **allowed**. The judgment and decree dated 02.03.2017 (decree signed on 09.03.2017) passed by the Additional District Judge, 2<sup>nd</sup> Court, Dhaka in Title Suit No. 07 of 2003, is thus set aside. The suit is sent back on remand for trial afresh to be tried by the 2<sup>nd</sup> court of Additional District Judge, Dhaka.

Send down the Lower Court Records at once along with a copy of this judgment.

**Md. Iqbal Kabir, J:**

I agree.