

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Muhammad Abdul Hafiz

CIVIL REVISION NO. 1446 OF 2012

Md. Moti Miah being dead his legal heirs:

1. Sajeda Begum and others
Defendants-Respondents-Petitioners

Versus

Md. Moinal Kazi and others
Plaintiffs-Appellants-Opposite Parties

Mr. Rehan Hosain, Advocate
for the Defendants-Respondents-Petitioners

Mr. Moinuddin, Advocate
for the Plaintiffs-Appellants-Opposite Party
Nos. 1-7

Judgment on: 28.8.2023

This Rule was issued calling upon the opposite party Nos. 1-7 to show cause as to why the impugned Judgment and Decree dated 14.3.2012 passed by the learned Joint District Judge, 2nd Court, Tangail in Other Class Appeal No. 127 of 2011 allowing the appeal and thereby reversing the Judgment and Decree dated 28.7.2011 passed by the learned Senior Assistant Judge, Mirzapur, Tangail in Partition Suit No. 67 of 2003 dismissing the suit should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The predecessor of the present opposite parties No. 1-7 namely Tomser Kazi as plaintiffs instituted the Partition Suit No.

67 of 2003 in the Court of the learned Assistant Judge, Mirzapur, Tangail against the petitioners and opposite party Nos. 8-25 impleading them as defendant Nos. 1-19 praying for partition of the 127.5 decimal of land out of 2.12 acres of land. During pendency of the suit the plaintiff Tomser Kazi died leaving behind 3 sons and 4 daughters and they were substituted as plaintiff Nos. 1(Ka)- 1(Cha).

The plaintiff's Case, in short, is that the suit land is situated under Vabkhondo Mouza which is recorded as District Settlement Khatian No. 83 and jote was recorded in the name of Loshkor Kazi and possession was recorded in the name of Haran Kazi- 6 Anna, Jabbar Kazi- 6 Anna, Aymon Nesa- 1 Anna, Jamiron Nesa- 1 Anna, Moniron Nesa- 1 Anna, Ofaton Nesa- 1 Anna and in this way in total 2.12 acres of land was recorded in the name of Loshkor Kazi who died leaving behind three sons namely Haran Kazi, Jabbar Kazi and Boku Kazi. The name of Boku Kazi was not recorded in Khatian No. 83 but the names of the daughters of Boku Kazi were properly recorded in that khatian. By this way, Haran Kazi and Jabbar Kazi separately got 79.5 decimals of land and each daughter of Boku Kazi got 13.25 decimals. Accordingly 4 daughters of Boku Kazi sold 53 decimals of land in their life time.

Haran Kazi died leaving behind two sons namely Nalu Kazi & Uzir Kazi as his legal heirs as such they got 79.5 decimals of land. Nalu Kazi and Uzir Kazi separately got 39.75 decimals of land from their father; thereafter Nalu Kazi died without any issue as such his brother Uzir Kazi as only heir of Nalu Kazi got his share; Accordingly Uzir Kazi got in total 79.5 decimals of land in his life time and had been owning and possessing of the said land and he died leaving behind one wife namely Hameda Khatun, one son Tomser Kazi and two daughters namely Bachaton Nesa and Amena Khatun; Wife of Uzir Kazi namely Hameda got $9\frac{7}{16}$ decimals, son namely Tomser Kazi got 35 decimals of land and daughters namely Bachaton and Amena, each got 17.5 decimals of land; Wife of Uzir Kazi namely Hameda purchased 12 decimals of land on 29.10.1946 from plot No. $\frac{47}{662}$ by registered deed No. 4092 from Jabbar Kazi, the co-sharer of the said jote; Hameda Khatun by way of inheritance and by way of purchase became owner of $21\frac{7}{16}$ decimals of land; Hameda Khatun died leaving behind one son namely Tomser and two daughters namely Bachaton and

Amena; Tomser Kazi got $10\frac{23}{32}$ decimals, Bachaton got $5\frac{23}{64}$ decimals and Amena got $5\frac{23}{64}$ decimals of land from their mother; by this way plaintiff namely Tomser Kazi from his father got $39\frac{1}{6}$ decimals and $39\frac{1}{6}$ decimals from his brother; Nalu Kazi got $10\frac{23}{32}$ decimals from his mother and in total got $89\frac{1}{12}$ decimals of land; Bachaton Nesa and Amena from their father and mother got 45.5 decimals of land and with the help of their brother namely Tomser Kazi, they were cultivating their land and during this time Bachaton and Amena made a gift of their portion i.e. 45.5 decimals of land to their only brother Tomser Kazi and also delivered possession as well; the plaintiffs by this way got 135.5 decimals of land and owning and possessing the said land and during this time the plaintiffs sold 8 decimals of land from plot No. 47 out of 135.5 decimals of land to the defendant No.10; by this way the plaintiffs became the owners and possessors of 127.5 decimals of land from the suit land; the predecessor of the defendant No. 1 namely Sobed Ali on 10.12.1925 through a registered deed No. 1241 purchased

10 decimals of land from the co-sharer tenant of the said jote and on 17.03.1926 Sobed Ali purchased 5 decimals of land by registered deed No. 2356 and in total Sobed Ali got 15 decimals of land; the two sons of Sobed Ali namely Sonu Miya and Mazom Miya got 15 decimals of land after the death of Sobed Ali as the heirs of Sobed Ali; Mazom Miya had no wife and issues as such his brother Sonu Miya got 15 decimals of land and after the death of Sonu Miya defendant No.1 had been owning and possessing 15 decimals of land; the plaintiff possessed a portion of the said land and as such requested the defendants to give his Saham of the entire land which he is entitled to get but instead of repeated request, the defendants did not comply with the request of plaintiffs and at last the defendants denied to make partition in 1410, B.S. last month of Ashar as such the plaintiffs filed the instant suit for claiming partition over land of 127.5 decimals.

The defendant No.1 contested the suit by filing a written statement denying all material allegations. The case of the defendants-petitioners is that Armon Nesa alias Sharifon Nesa and Baniron Nesa were the co-sharers of the suit-jote recorded in District Settlement khatian No.83 under Mouza Bhabkhanda, P.S.

Mirzapur; that thereafter at the time of having possession of Armon Nesa and Baniron Nesa, at first Sharifon Nesa on 17.03.1926 by registered deed No. 2356 sold 5 decimals of land from the plot No. 47 along with sold 21 decimals of land to the predecessor of the defendants namely Sobed Ali and also delivered possession to Sobed Ali as well; thereafter another heir Baniron Nesa sold 21 decimals of land on 10.12.1925 by registered deed No. 1251 to Sobed Ali and delivered possession from the plot Nos. 47 and $\frac{47}{662}$ accordingly Sobed Ali in this manner in total got 42 decimals of land from the plot No. 47 and $\frac{47}{662}$ and after constructing houses, Sobed Ali lived there with his family peacefully and after the death of Sobed Ali, his two sons namely Chunnu and Mazom Ali got 42 decimals of land; Mazom Ali died being unmarried as such Chunnu as the heir of Mazom got the share of Mazom; the name of Chunnu was recorded in R.O.R Khatian No. 131; after the death of Chunnu, his only son i.e. the defendant by way of inheritance became the owner and possessor of the said land and the defendants are possessing the said suit land with his family peacefully without any interference from others;

the plaintiff filed the said suit for causing harassment of the defendants; the plaintiffs mentioned only khatian No. 83 in the plaint but the plaintiffs possessed lands from khatian No. 51 and 71 through amicable partition with his family; the plaintiffs filed this suit very cunningly only claiming the property from Khatian No. 83 without including the entire property of the owners of the jote; as such the suit is barred by law; the defendants are praying for dismissal of suit and if the suit is decreed in that case the defendants are praying for Saham which they are entitled to get measuring 15 decimals of land.

The learned Senior Assistant Judge, Mirzapur, Tangail after hearing both the parties dismissed the suit vide judgment and decree dated 28.7.2011 in Partition Suit No. 67 of 2003. Against the aforesaid judgment and decree the plaintiffs as appellants preferred Other Class Appeal No. 127 of 2011 which was heard by the learned Joint District Judge, 2nd Court, Tangail who allowed the appeal vide judgment and decree dated 14.3.2012 and thereby reversing the judgment and decree dated 28.7.2011 passed by the learned Senior Assistant Judge, Mirzapur, Tangail in Partition Suit No. 67 of 2003 and as such, the defendants as petitioners moved

this application under Section 115(1) of the Code of Civil Procedure before this Court and obtained this Rule.

Mr. Rehan Hosain, learned Advocate for the defendants-petitioners, submits that both the Courts below failed to discuss about the Saham prayed for by the defendants-respondents-petitioners in their written statement due to a formal defect of not paying Court Fee for Saham. In fact according to the written statement the predecessor of the defendants purchased 42 (forty two) decimals of land through 02(two) registered deeds dated 10.2.1925 and 15.3.1926.

Mr. Moinuddin, learned Advocate for the plaintiffs-opposite party Nos. 1-7, submits that the plaintiffs are the owners and possessors of 127.5 decimals of land out of 212 decimals of land by way of inheritance and also by way of gift from their sisters; that the learned Trial Court admitted in his findings that the plaintiffs are entitled to get Saham of $82\frac{3}{4}$ decimals of land and issue No. 4 was disposed of in favour of plaintiffs and the learned Trial Court passed the impugned judgment and decree holding that “নালিশী জোতের ভূমিতে বাদীপক্ষের স্বত্ব দখল তাই প্রমাণিত হলো। তবে বাদীর দাবীমতে $১২৭\frac{১}{২}$ শতক ভূমিতে নয় বরং জোতের $৮২\frac{৩}{৪}$ শতক ভূমিতে বাদীপক্ষের স্বত্ব প্রমাণিত হইলো। বিচার্য বিষয় নং ৪ বাদীপক্ষের অনুকূলে

নিষ্পত্তি করা হলো” But in contradiction of its own finding, the learned Trial Court dismissed the suit on the ground of defect of parties which was cured by the plaintiffs by filing an application dated 18.02.2007 which was allowed on 21.03.2007 for amendment of plaint and as such the learned Appellate Court below elaborately discussed the same and allowed the appeal and gave the Saham to the plaintiffs-appellants for 82 $\frac{3}{4}$ decimals of land as such the findings of the Trial Court is not correct findings which is rightly interfered with by the Appellate Court below. He further submits that the plaintiffs prayed for Saham in respect of 127.5 decimals of land mentioned in the schedule of the plaint; the learned Trial Court after calculation admitted that the plaintiffs would get 82 $\frac{3}{4}$ decimals of land out of 127.5 decimals of land which was affirmed by the learned Appellate Court below but the learned Trial Court in contradiction with its own finding illegally dismissed the suit on the ground of defect of the parties in the suit. He then submits that the plaintiffs filed an application on 18.02.2007 by adding the legal heirs of Bachatun and Amena which was allowed on 21.03.2007; the learned Trial Court without considering the same most illegally dismissed the suit on the ground of defect of parties holding that the plaintiffs did not substitute the heirs of Bachatun; the learned Appellate Court below after considering the same and reversing the said illegal findings of

the Trial Court, allowed the appeal holding that “পক্ষদোষ সম্পর্কে বিজ্ঞ নিম্ন আদালত বলেছেন যে, বাদীপক্ষের দাদা উজির কাজী মারা গেলে এক স্ত্রী হামেদা, এক পুত্র তমসের আলী, দুই কন্যা বাছেতন ও আমেনা থাকে। কিন্তু বাছেতন এর পরবর্তী ওয়ারিশদের মূল মোকদ্দমায় পক্ষ করা হয় নাই। বিজ্ঞ নিম্ন আদালতের উক্ত সিদ্ধান্ত সঠিক নাই। কারণ বাদীপক্ষ ইং ২১.০৩.০৭ তারিখে আরজি সংশোধনের দরখাস্ত দিয়ে আমেনা ও বাছেতনের পরবর্তী ওয়ারিশদের পক্ষভুক্তির প্রার্থনা করেন যা মঞ্জুর হয় আরজির এক অংশ বলে গণ্য হয়। এমতাবস্থায় মূল মোকদ্দমাটিতে বাছেতনের ওয়ারিশদের পক্ষ করা হয় নাই মর্মে সিদ্ধান্ত দিয়ে বিজ্ঞ নিম্ন আদালত কর্তৃক শুধুমাত্র পক্ষদোষের কারণে মূল মোকদ্দমাটি খারিজ করার সিদ্ধান্ত সঠিক নয়। বর্ণিত আলোচনার প্রেক্ষিতে মূল মোকদ্দমায় বাদীপক্ষ আইনত: ডিক্রী পেতে অধিকারী।” and as such the learned Appellate Court below allowed the appeal with correct findings which cannot be interfered with by this Hon’ble Court. He next submits that the learned Trial Court admitted that the plaintiffs had right, title and interest over the 82 ³/₄ decimals of land instead of 127.5 decimals of land and the defendant-respondent No.1-petitioner did not file any cross objection under Order 41 rule 22(1) of the Code of Civil Procedure before the Appellate Court below against the said findings of the Trial Court as such the findings of Trial Court are valid and correct in respect of suit land measuring 82 ³/₄ decimals of the land of the plaintiffs

and that the learned Appellate Court below affirmed the said findings of the Trial Court and allowed the appeal and decreed the suit as such the learned Appellate Court below did not commit any error of law resulting an error in the decision occasioning failure of justice. He next submits that the learned Appellate Court below is the last Court of fact and that the learned Appellate Court below after an elaborate discussion on oral and documentary evidence on record rightly set aside the illegal and incorrect findings of the Trial Court allowing the appeal and decreeing the suit which cannot be interfered with by this Hon'ble Court in its revisional jurisdiction. He lastly submits that defendant No. 1 is not the co-sharer of the said jote; he purchased only 15 decimals of the land and he filed a written statement praying for Saham 15 decimals of land; the Appellate Court below after considering the oral and documentary evidence on record allowed the appeal by setting aside the judgment and decree of the Trial Court as such the learned Appellate Court below did not commit an error of law and thus the interference of the Hon'ble High Court is not necessary and as such the Rule issued on the basis of flimsy grounds may kindly be discharged.

Heard the learned Advocates for the parties and perused the record.

From the record it appears that the predecessor of defendants-respondents-petitioners purchased 42 decimals of land through 02 (two) registered deeds dated 10.2.1925 and 15.3.1926 from the CS recorded tenants and the plaintiffs are owners and possessors of 127.5 decimals of land by way of inheritance and also by way of gift from their sisters. Therefore, apparently there is no conflict of interest between the parties. But only because of a formal defect of non-payment of Court Fee for Saham the defendants-petitioner's case was not considered by the Courts below.

Considering the facts and circumstances of the Case, I find no substance in this Rule.

In the result, the Rule is discharged without any order as to costs.

However, the present defendants-respondents-petitioners may pray before the concerned Court for their Saham upon paying Court fee before the Final Decree and which will be considered by the concerned Court.

The impugned Judgment and Decree dated 14.3.2012 passed by the learned Joint District Judge, 2nd Court, Tangail in Other Class Appeal No. 127 of 2011 allowing the appeal and thereby reversing the Judgment and Decree dated 28.7.2011 passed by the

learned Senior Assistant Judge, Mirzapur, Tangail in Partition Suit No. 67 of 2003 dismissing the suit is hereby upheld.

The order of stay granted earlier by this Court is hereby vacated.

Send down the lower Court's record with a copy of the Judgment to the Courts below at once.