

8 SCOB [2016] HCD 147

**HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

Civil Revision No. 2702 of 2013

Mr. Md. Khalilur Rahman, Advocate
...for the petitioners

Aleya Begum and others

...Petitioner

Mr. Mohammad Eunus, Advocate
...for the opposite-parties

Versus

Mir Mohsin Ali and others

...Opposite-Parties

Heard on: 01.04.2015, 02.04.2015 &
08.04.2015

Judgment on: 16.04.2015

Present:

Mr. Justice Sharif Uddin Chaklader

And

Mr. Justice Khizir Ahmed Choudhury

Partition Suit:

In our view the petitioners will not be prejudiced for not impleading them parties because as legal heirs, they are entitled to get the shares of their predecessors. Even a non contesting party, who has got share in the partible property, can pray for allotment of saham on payment of proper court fees before drawing up the final decree. ... (Para 13)

Judgment

Khizir Ahmed Choudhury, J:

1. Instant Rule has been issued calling upon opposite parties to show cause as to why judgment and decree dated 13.03.2013 passed by learned Joint District Judge, 2nd Court, Patuakhali in Title Appeal No.84 of 1996 allowing the appeal by setting aside the judgment and decree dated 30.05.1996 passed by leaned Additional Senior Assistant Judge-in-charge, Patuakhali Sadar, Patuakhali in Title Suit No.84 of 1981 decreeing the suit should not be set-aside.

2. Sona Banu Bibi, predecessor of present petitioners being plaintiff No.1, Abdur Rahman predecessor of opposite party No.2 and Lal Banu Bibi plaintiff No.3 filed the aforesaid suit contending inter-alia that entire lands of cadastral survey khatian No.599, eight annas share of C.S. khatian No.611 and fourteen annas share of C.S. Khatian No.709 belonged to Meher Ali Khan and rest land of C.S. Khatian No.611 and 709 belonged to Jahur Jan Bibi; that Jahur Jan Bibi died leaving behind two sons Meher Khan and Alam Khan and three daughters Khatejan, Abejan and Elemjan; that Meher Khan executed and registered a deed of release on 12.04.17 in favour of Alam Khan in respect of ten annas share of C.S. khatian 599, eight annas share of C.S. khatian 611 and six annas share of C.S. khatian 709 and handed over possession; that Meher Khan also sold .75 acres of land of C.S. khatian Nos.599, 611 and 709 to plaintiff Nos.1 and 3 in the benami of Maizuddin Peada and Abdul Ali Howader and subsequently Abdul Ali and heirs of Maizuddin peada executed deed of release in favour of the plaintiffs on 07.10.1976; that Alam Khan died leaving behind one

Brother Meher Khan, two daughters plaintiff Nos.1 and 3 and wife Aiful and thereafter Aiful died leaving behind two daughters plaintiff Nos.1 and 3; that Meher Khan died leaving two sisters Elemjan and Abejan and thereafter, Elemjan died leaving behind her only sister Abejan and then Abejan died leaving behind only son plaintiff No.2 and thus plaintiffs got 3.62 acres of land but the defendants declined to effect partition taking advantage of wrong record and hence the suit.

3. Defendant Nos. 5-6 and 18-19 contested the suit by filing a separate written statement contending that Tara Khan being owner and possessor of C.S. Khatian Nos. 599, 611 and 709 died leaving behind wife Jahur Jan, one son Alam Khan and three daughters Khatejan, Elemjan and Abejan. Jahur Jan died leaving aforesaid son and daughters and then Khatejan died leaving behind one son defendant No.1 who sold $25\frac{1}{2}$ decimal land on 04.04.1970 to defendant Nos.5 and 6 and $25\frac{1}{2}$ decimal to defendant No.7 who sold his interest to plaintiff Nos.1 and 3 by a kabala dated 07.7.1976. Present plaintiffs earlier filed Title Suit No.253 of 1970 before the First Munsif, Patuakhali wherein they admitted Tara Khan as the owner of C.S. Khatian No. 599, 611 and 709.

4. Defendant No.18 and 19 contested the suit by filing written statement contending inter-alia that Tara Kha being original owner of the suit land married Johura Bibi who has a son namely Meher Ali by her previous husband Dhonai; that one son Alam Kha and three daughters namely Abejan, Alemjan and Khotejan were born in the wedlock of Johura Bibi and Tara Kha and during C.S. record Meher Ali prepared entire land of Tara Kha in his name but subsequently he executed and registered a deed of release on 12.08.1977 in favour of Alom Kha; that in fact Alom Kha and his 3 (three) sisters became owner as heirs of Tara Kha; Alom Kha survived by 2 (two) daughters Lalboru, Sona Boru and 2 (two) sisters Abejan and Elemjan and thereafter Abejan and Elemjan transferred their shares to defendants Nos.18 and 19 by deed of sale dated 18.07.1975 but as there was mistake in the sale deed regarding plots, they instituted Civil Suit No. 207/91 to the court of Assistant Judge, Patuakhali. Hence they prayed for dismissal of the suit.

5. The case of defendant No.16 in short, is that, Abejan Bibi, Sona Banu Bibi and Lal Boru while owning and possessing lands under (in S.A. khatian No.4149), R.S. khatian No.1761, and R.S. Khatian No.1701 corresponding to S.A. khatian No.394 sold .11 decimals land to Motaharuddin and Farooq Ahmed on 13.02.1997 and also transferred .11 decimals land to Mizanur Rahman and Haron-or-Rashid on 20.02.1971 and thereafter Sona Boru and Lal Boru jointly sold .11 decimals of to Mizanur Rahman and Nurun Nahar alias Rebaka Begum on 22.03.1972 and Sona Banu alone sold .11 decimals land to Motahar Uddin on 13.02.1971; that in the aforesaid manner Motaharuddin and others became owners of 44 decimal land and they transferred said land on 14.02.1977 and 15.02.1977 to defendant No.16 Abdul Latif Miah and who has been holding and possessing 22 decimal land as homestead.

6. Plaintiff examined 4 witnesses, defendant No.5 and 6 examined 6 witnesses, defendant No.18 and 19 examined 4 witnesses and defendant No.16 examined himself in support of his claim.

7. Trial Court decreed the suit in part by judgment and decree dated 30.05.1996 allotting 3.21 acres of land to the plaintiffs and 0.22 acres to defendants No.16.

Plaintiffs preferred appeal, being Title Appeal No.84 of 1996 before District Judge, Patuakhali. Learned Subordinate Judge, 2nd Court, Patuakhali after hearing, allowed the appeal by judgment and decree dated 05.11.1997 allotting 3.62 acres land to the plaintiffs. In Civil Revision 812 of 1998, preferred by defendant No.18 and 19, High Court Division made the rule absolute and remanded the Appeal to the Appellate Court by judgment and order dated 25.07.2010 directing the appellate court to determine the share of Abejan and Elemjan keeping the share of the plaintiffs intact.

8. By filing an application on 23.10.2012 under Order 6 Rule 17 read with Section 151 of the Code of Civil Procedure present petitioners prayed for amendment of plaint of original suit which was disallowed by the appellate Court on 12.02.2013 holding that the plaintiffs brought certain new facts beyond the order of remand. The appellate court found that the Hon'ble High Court Division kept the share of the appellant having 3.62 acres intact. By judgment and decree dated 13.03.2013, appellate court allowed the appeal granting .56 acres land to the share of defendant No.18 and 19 keeping shares of the plaintiffs intact.

9. Mr. Md. Khalilur Rahman learned advocate appearing on behalf of the petitioners submits that the appellate court committed error in not impleading the heirs of deceased Sonabanu Bibi and deceased Abdur Rahman in the appeal as they are entitled to get 3.62 acres of land left by their predecessors. Learned lawyer further submits that the appellate Court committed error by rejecting the application for amendment.

10. Mr. Md. Younus learned advocate appearing on behalf of the opposite parties submits that the appellate court passed decree in favour of the appellants in preliminary form which is not inconsistent with remand order and the appellate Court also committed no error in rejecting the application for amendment of plaint filed by the petitioners.

11. We have studied, and considered impugned judgment and decree of the appellate court and other papers. The contention of the petitioners is that as legal heirs of decree holders, they are entitled to be impleaded as parties in the appeal as there would be complicity to draw final decree in their absence. Their further contention is that as the revisional court impleaded them as parties, so the appellate Court also ought have implead them as parties.

12. It appears that in appeal they brought a lengthy application for amendment of plaint where also they sought to be impleaded as plaintiffs but the petitioners brought some new facts beyond the findings of the revisional Court for which their plea of impleading them parties might be kept out of consideration by the appellate court.

13. In our view the petitioners will not be prejudiced for not impleading them parties because as legal heirs, they are entitled to get the shares of their predecessors. Even a non contesting party, who has got share in the partible property, can pray for allotment of saham on payment of proper court fees before drawing up the final decree.

14. In the case of Sayeda Khatoon -vs- Abdur being dead his heirs 1A Abdus Salam and others reported in 6 MLR (AD) 234 our Apex Court held that "***Although the petitioner did not contest the suit for partition, she could pray for allotment of her Saham on payment of proper court fee before drawing up the final decree. With the drawing up of the final decree the proceedings come to an end. This being the position of law with regard to partition suit, the stay of the execution proceeding as prayed for***

in the subsequently instituted suit can not be granted.” So, they can brought this matter to the notice of the trial Court where final decree will be drawn and they are entitled to get the share as allotted in favour of their predecessors.

15. In the present case, the claim of the petitioners are on better footings as their predecessors got saham from the court of law which they are entitled to get and they were also impleaded in the Civil Revision. If they so desire, they still can file application to the trial Court to implead them as heirs in place of their predecessors as the trial Court is in seisin of the matter and can consider such application.

16. Considering the facts and circumstances and legal aspect appellate Court rightly allowed the appeal and we find no infirmity therein.

17. In the result, the rule is discharged without any order as to costs. The judgment and decree dated 13.3.2013 passed by the learned Joint District Judge, 2nd Court, Patuakhali in Title Appeal No.84 of 1996 is hereby upheld.

18. The order of status-quo granted earlier by this Court stands vacated.

19. Let a copy of this judgment along with lower Court’s record be sent to the concerned Court at once.