

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice A.K. M. Zahirul Huq

First Appeal No.408 of 2015

Md. Asraf Ali being dead his legal heirs: 1(a) Mst.
Rowshan Ara and others appellants

-Versus-

Abdul Karim and others respondents

Mr. Fahad Mahmood Khan, Advocate

..... for the appellants

Mr. Md. Mozammel Hossain with Mr. Md. Harun
or Rashid, Ms. Mahfuza Begum and Mr. Md.
Moinul Hoque, Advocates for the respondents

Judgment on 26.05.2025

Bhishmadev Chakrabortty, J:

At the instance of the plaintiffs this appeal is directed against the judgment and decree of the Joint District Judge, Court 1, Kurigram passed on 25.11.2014 in Other Class Suit No.25 of 2009 dismissing the suit for partition.

The plaint case, in brief, is that Keramat Mamud and Nekmat Mamud were the recorded tenants of CS *khatian* 307 measuring 4.40 acres, CS *Khatian* 336 measuring .44 acres and CS *Khatian* 334 measuring .36 acres in equal shares. Keramat Mamud got 2.20 acres of CS *Khatian* 307, .22 acres of CS *Khatian* 336 and .18 acres of CS *Khatian* 334. In total he got 2.60 acres. In the same way Nekmat Mamud got 2.60 acres from the aforesaid *khatians*. During possession and enjoyment Nekmat Mamud died leaving behind wife Nekbib, daughter Aklima Khatun (plaintiffs' predecessor) and brother

Keramat Mamud as heirs. Thus Nekbibí got .325 acres, daughter Aklima got 1.30 acres and brother Keramat got .975 acres share as heirs of Nekmat. Subsequently Nekbibí died leaving behind her daughter Aklima who got .325 acres as her heir. Accordingly, Aklima Khatun totally got $(1.30 + .325)$ acres = 1.625 acres as heirs of Nekmat and Nekbibí and Keramat got the remaining part of the *khatians* measuring $(2.60 + .975) = 3.575$ acres. During her possession and enjoyment Aklima died leaving behind the plaintiffs as heirs while Keramat died leaving behind defendants 1-19 as heirs. The plaintiffs and above defendants have been enjoying the suit land in *ejmali*. The plaintiffs have homestead over plot 577 of CS *Khatian* 307 and other lands are cultivable. Proforma defendant Safar Ali is not a co-sharer in the suit land. The predecessor of the plaintiffs Aklima Khatun was a woman and Keramat was an illiterate person. They requested their relative Safar Ali to record their names in the SA *khatian*. But Safar fraudulently recorded the land in his name and another instead of Aklima and Keramat. Safar Ali has no right and title in the suit land and SA record has been wrongly prepared in his name. Proforma defendants 26-37 created a fraudulent deed of exchange on 31.01.1994 among them and as such the plaintiffs made them parties in the suit. The land was never partitioned by metes and bounds. The plaintiffs lastly requested the defendants on 22 Kartik 1411 BS to partition the suit land but the defendants refused to do so. Hence, the

suit for partition claiming *saham* to the extent of 1.625 acres out of 5.20 acres as detailed in the schedule to the plaint.

Defendants 1-19, 30-33 and 37 appeared in the suit and filed a joint written statement. They admitted the facts of the plaint and further stated that CS recorded tenant Keramat died leaving behind his 2 (two) sons Afzal Hossain and Jamal Uddin and 2 (two) daughters Kasimon Bibi and Asimon Bibi. Afzal died leaving behind 4 (four) sons namely Abdul Karim, Mohammad Hossain Ali, Md. Hasen Ali and Abdul Jalil defendants 1-4 in the suit and 4(four) daughters namely Rabeya, Jomila, Omila and Golejan who are defendants 5-8. Jamal Uddin died leaving behind 5(four) sons namely Abdul Gafur, Abdul Kader, Mojammel, Shafiq and Munnaaf defendants 9-12 and 7(seven) daughters namely Jamela, Rokeya, Jena Khatun, Samina, Sohfa, Bulu Bibi and Bijli Begum who are defendants 13-19. These defendants are in possession of the suit land in *ejmali* and claimed *saham* to the extent of 3.575 acres as heirs of Keramat.

Defendants 20-29 filed a joint written statement denying the case of the plaintiffs. They stated that Keramat Mamud and Nekmat Mamud were the CS recorded tenants of the aforesaid 3(three) CS *Khatians* under landlord Ram Chandra Shorma Adhikari on payment of yearly rent of Taka 43/50. They defaulted in payment of rent and surrendered their tenancy right verbally to the superior landlord. They had no other land to reside in and for that reason they started residing

in plot number 583 taking permission from the landlord. Thereafter, Niamat Mamud and his son Safar Uddin took *pattan* from landlord the land of CS *khatian* 307 and jointly got .19 acres in plot 582, .10 acres in plot 583, .36 acres in plot 584, .02 acres in plot 585, .49 acres in plot 587, .13 acres in plot 591, .27 acres in plot 599 and .26 acres in plot 595. In this way they totally took *pattan* 1.74 acres at yearly rent of Taka 17.50. Safar Uddin took *pattan* separately .36 acres in plot 577 of CS *Khatian* 307 at yearly rent of Taka 1.00. Niamat Mamud and Safar Uddin jointly took *pattan* of .22 acres of CS *Khatian* 336 and .18 acres of CS *Khatian* 334 at yearly rent of Taka 1.00 and they have been possessing and enjoying the land by constructing houses, making garden, excavating pond and cultivating the other land. Keramat Mamud took *pattan* afresh 2.30 acres of CS *Khatian* 307, .22 acres of CS *Khatian* 336, .18 acres of CS *khatian* 334. Keramat Mamud died leaving behind 2 (two) sons Afzal Hossain and Jamal Hossain and 2(two) daughters Kosiman Bibi and Asimon Bibi. Nekmat Mamud had no interest in the land who died leaving behind only daughter Aklima Khatun. Aklima lost her first husband and Safar Uddin arranged her second marriage with one Jamir Uddin. After Aklima's dissatisfaction with the second husband, Safar brought her in a part of suit land and she started residing therein as permissive possessor. Niamat Mamud, Safar Uddin and Keramat Mamud got the suit land by way of *pattan* as aforestated and SA record was rightly

prepared in their names. Niamat Mamud died leaving behind sons Safar Uddin and Serab Uddin. During possession and enjoyment Safar Uddin transferred .37 acres through a registered *kabala* dated 23.01.1974 to defendants 27-29. He further sold out .395 acres through another registered *kabala* dated 13.01.1978 to defendant 26 and accordingly RS *khatian* 164 has been prepared in the name of the defendants. In RS *khatian* the name of Aklima was recorded as permissive possessor in respect of plot 879. In plot 582 the defendants are in possession. RS *Khatian* 120 has been rightly prepared in the name of defendants 26-29 and they are holding its possession. The predecessor of defendant 1-8 sold out a part of land by a registered *kabala* dated 26.12.1974 to Jamal Uddin, predecessor of defendants 9-19. Defendants 26-29 and the heirs of Jamal Uddin defendants 9-19 exchanged their land through a registered *heba bil ewaz* dated 30.01.1994. In these deeds defendants 9-19 have been given .20 acres from SA *khatian* 266, .16 acres from SA *khatian* 292 and .14 acres from SA *khatian* 290 in total .50 acres and in exchange of it defendants 26-29 have been given .06 acres from SA *khatian* 287, .44 acres from SA *khatian* 264 in total .50 acres of land. Defendants 1-8 and defendants 9-19 *i.e.*, the heirs of Afzal and Jamal respectively jointly sold out .02 acres from SA *khatian* 266 to defendants 20 through registered *kabala* dated 17.02.1983. Defendants 1-8 transferred .13 acres through a *heba bil ewaz* dated 23.03.1984 to

Abdul Karim and Hasen Ali. Thereafter, Hasen Ali through registered *kabala* dated 07.05.1985 sold out .065 acres to Abdul Karim. Afzal Hossain through 2(two) registered *kabalas* dated 19.08.1990 and 02.05.1991 sold out .08 and .09 acres respectively to defendant 20 and subsequently defendant 20 and Abdul Karim and their wives made a deed of exchange on 02.03.1994 in respect of the aforesaid land. Defendant 20 got .20 acres of SA *khatian* 266 and Abdul Karim and Samsul got .20 acres of SA *khatian* 264. Thereafter, Abdul Karim and Samsul sold .20 acres to defendant 20 through a registered *kabala* dated 29.05.1994. Niamat Ullah alias Niamat Mamud, Keramat Ullah alias Keramat Mamud, Nekmat Mamud and Ekabber Ali were full brothers. Defendant 20 is in possession in SA plot 596 of *Khatian* 266 by implanting lemon bush therein. The document of *pattan* was with Safar Ali which was lost during liberation war. The superior landlord Ram Chandra Sharma Adhikari died leaving behind his son Krishna Chandra Sharma Adhikari. SA record was prepared in the name of Niamat Ullah and Safar Uddin under Krishna Chandra Sharma. The tenancy right in the name of plaintiffs' predecessor Nekmot Mamud and Karamat Mamud was lost and new tenancy was created in the name of defendants' predecessor. Therefore, the plaintiffs have no right and title in the suit land and as such they are not entitled to get any relief in the suit. The plaintiffs earlier instituted Title Suit No.158 of 2004 against these defendants. During pending of the said suit, the

plaintiffs instituted this suit for partition. In the premises above, the suit would be dismissed.

On pleadings the trial Court framed 5 (five) issues. In the trial, the plaintiffs examined 3 (three) witnesses and produced their documents exhibits 1-3. On the contrary the defendants also examined 3 (three) witnesses and their documents were exhibits-Ka-Ta. However, the Joint District Judge dismissed the suit deciding all the material issues against the plaintiffs. Being aggrieved by the plaintiffs approached this Court with the present appeal.

Mr. Fahad Mahmood Khan, learned Advocate for the appellants taking us through the materials on record submits that the plaintiffs claimed the suit land as heirs of CS recorded tenant Nekmat Mamud. In support of plaintiffs' case PW1 led oral evidence and produced certified copies of CS *khatians* 307, 336 and 334 exhibits-1, 1(1) and 1(2). The defendants 20-29 admitted that Nekmat Mamud and Keramat Mamud were the CS recorded tenants but they tried to make out a case that the predecessor of the plaintiffs and defendants 1-19 surrendered the land to the superior landlord for nonpayment of rent and predecessor of defendants 20-29 and Keramat took *pattan* afresh. But the contesting defendants 20-29 by evidence of DWs 1-3 failed to prove the case of surrender by CS recorded tenants and taking of *pattan* afresh by the predecessor of the above defendants. DW2 and 3 did not corroborate the fact of surrender and taking *pattan* afresh by

the predecessors of the defendants. The trial Court misdirected and misconstrued in its approach of the matter and dismissed the suit for partition which is required to be interfered with in this appeal. He then refers to the evidence of PWs 2 and 3 and submits that through evidence they proved that the plaintiffs are the heirs of Aklima who inherited the property of father Nekmat Mamud and mother Nekbibbi. Their predecessors never surrendered the suit land to the superior landlord and predecessors of the contesting defendants did not take *pattan* of it. Moreover, the plaintiffs are in possession in a part of the suit land as heirs of Nekmat Mamud. He then refers to the evidence of DWs 1 and 3 and submits that in evidence they admitted that the plaintiffs are in possession in a part of the suit land and they have homesteaded in plot 577. The plaintiffs proved their title and possession in the suit land, therefore, Court below erred in law in dismissing the suit for partition. Since the plaintiffs have been able to prove that they are the gradual heirs of Nekmat Mamud a CS recorded tenant, the Court below erred in law in dismissing the suit which is required to be interfered with in this appeal.

Mr. Md. Mozammel Hossain, learned Advocate for respondents 20-29 supports the judgment and decree passed by the trial Court. He submits that the plaintiffs claimed 1.625 acres of land out of 5.20 acres from CS *khatians* 307, 334 and 336. Although they produced CS *khatians* but failed to prove that CS *khatians* were prepared in the

names of the aforesaid 2 (two) persons correctly. They failed to produce any documents or rent receipt to show their chain of title. The plaintiffs claimed that Safar Uddin was entrusted with the responsibility of preparing SA *khatian* in the name of the predecessors of the plaintiffs but he collusively managed to record his name and the name of his father with co-sharer Keramat. But the plaintiffs did not take any step against the said wrong record of rights. Mr. Hossain then submits that RS *khatian* has been also prepared in the name of the defendants as per their possession in the suit land but the plaintiffs for long years did not take any step against the said wrong record of rights. The plaintiffs failed to prove their possession in the claimed land by evidence. None of the PWs have been able to identify the suit land specifically. RS *khatian* has been prepared in the name of defendants 20-25 where the name of Aklima, predecessor of the plaintiffs has been written as permissive possessor in respect of .36 acres. It was the definite case of the defendants that Aklima was a permissive possessor and it is well settled proposition of law that a permissive possessor is always a permissive possessor. The plaintiffs failed to prove their title in the suit land, therefore, the suit for partition simpliciter is not maintainable in the present form. The trial Court, therefore, rightly dismissed the suit. Mr. Hossain further submits that the above respondents successfully proved their title and possession in the suit land by oral and documentary evidence. They

proved that due to non payment of rent, the CS recorded tenants surrendered the suit land to the superior landlord and their predecessors Niamat Mamud and Safar Uddin took settlement 2.50 acres from CS *khatians* 307, 334 and 336 and Safar Uddin alone took settlement of .36 acres of CS *Khatina* 307, plot 577 on payment of proper *nazarana* to the superior landlord and Karamat Mamud took settlement of remaining 2.70 acres afresh. Accordingly, SA *khatians* 264 and 265 were prepared in the names of Safar Uddin, Niamat Mamud and in the name of Afzal and Jamal sons of Karamat Mamud. During possession and enjoyment some of the defendants transferred part of suit land to other persons through registered *kabalas* and those documents were duly exhibited and have presumptive value. The rent receipts proves payment of rent by defendants 20-29 in respect of the suit land. The defendants in evidence further proved that they could not produce any document of *pattan* because those were lost at the time of liberation war. The plaintiffs failed to prove their title and possession in the suit land. On the contrary defendants 20-29 proved their title and possession in the suit land since taking of *pattan* and subsequent records have been prepared in their names. The Court below on correct assessment of fact and evidence dismissed the suit which may not be interfered with by this Court in appeal. The appeal, therefore, would be dismissed.

We have considered the submissions of both the sides and gone through the materials on record. It is admitted by the parties that the suit land was consisted of CS *khatians* 307, 334 and 336. It is further admitted that CS *khatian* 307 contained land of 4.40 acres while *khatians* 336 and 334 contained .44 acres and .36 acres respectively and total quantum of land in the *khatians* were 5.20 acres. The plaintiffs further claimed that Nekmat Mamud and Karamat Mamud owned held and possessed the suit land in equal shares from each *khatians*. The plaintiffs claimed that Nekmat Mamud died leaving behind his wife Nekkibi, daughter Aklima (the predecessor of the plaintiffs) and brother Karamat Mamud. The predecessor of the plaintiffs Aklima got 1.30 acres as daughter of Nekmat while wife Nekkibi got .325 acres. After the death of Nekkibi, Aklima inherited her share measuring .325 acres also and in this way she totally got 1.625 acres share as heirs of Nekmat Mamud and Nekkibi. The contesting defendants did not disagree that Aklima was the daughter of Nekmat Mamud who died leaving behind his wife Nekkibi, daughter Aklima and brother Karamat as heirs and subsequently Nekkibi died. The case of the contesting defendants is that these two CS recorded tenants used to enjoy the land on payment of rent to the superior landlord. But subsequently they failed to pay rent to the landlord and consequently surrendered the land. The predecessors of these defendants and Keramat then took *pattan* afresh from the

superior landlord. The above case of the defendants has to be proved by them under the provisions of section 103 of the Evidence Act. We do not find any evidence on record except oral evidence of DW1 in a very casual manner that CS recorded tenants surrendered the land to the superior landlord. The defendants also failed to produce any documents in support of taking *pattan* from the landlord. Although they tried to make out a case that the documents of taking *pattan* were lost during liberation war but in evidence DW1 stated that *pattan* was given orally which is found self-contradictory and make the defendants' case unbelievable. The contesting defendants admitted that Nekmat Mamud and Karamat Mamud were the CS recorded tenants. If the defendants fail to prove their case that CS recorded tenants surrendered the land to superior landlord and they took *pattan* from him, the case of the plaintiff of acquiring the land as heir of CS recorded tenant stands. If the plaintiffs succeed in proving that they are the heirs of CS recorded tenant in that case they are entitled to get *saham* in the suit land. In this case, the plaintiffs proved that their predecessor Aklima was the daughter of CS recorded tenant Nekmat Mamud. The aforesaid fact was not denied by the defendants. In the absence of any proof by the defendants that Nekmat Mamud and Karamat Mamud surrendered the land to the superior landlord and their predecessor took *pattan* of it, the CS record prepared in the names of Nekmat and Karamat stands. If CS *khatians* in the names of

Nekmat and Karamat stands in that case the plaintiffs predecessor Aklima would surely get his share. It is fact that SA and RS records have been prepared in the names of the defendants' predecessors but such record of right in no way extinguish the right of the plaintiffs' predecessor who accrued her title in the suit land as heirs of CS recorded tenant. The series of subsequent transfers by the predecessor of the contesting defendants as well by the defendants in no way effect the legal right of the plaintiffs as heirs of CS recorded tenant. In evidence it is found that the plaintiffs' predecessor and the plaintiffs was/are in possession in a part of the suit land. The defendants admitted that Aklima possessed suit plot 577 measuring .36 acres but as permissive possessor from Safar Uddin. But in the aforesaid discussion, we find that Aklima got the suit land as heir of CS recorded tenant. Therefore, the case of the defendant of permissive possessor do not stand.

It appears that defendants 1-19 filed written statement in the suit and claimed *saham* to the extent of 3.575 acres as heirs of Keramat Mamud but it appears that they filed written statement in a very casual way. They did not lead evidence in support of their claim. Even they did not prefer any appeal against the judgment and decree of dismissal of the suit, although they are more or less standing on the similar footing with the plaintiffs. In the premises above, we do not pass any comment about their claim. In view of the discussion made

hereinabove, we find that the plaintiffs have been able to prove their title in the suit land and possession in a part of it by adducing oral and documentary evidence. The trial Court ought to have decreed the suit as per the claim of the plaintiffs and by not doing so erred in law causing serious injustice to the appellants which is to be interfered with by us.

Therefore, this appeal bears merit and accordingly it is allowed. No order as to costs. The judgment and decree passed by the trial Court is hereby set aside. The suit be decreed as claimed by the plaintiffs. The plaintiff-appellants will get *saham* of 1.625 acres out of 5.20 acres as detailed in the schedule to the plaint.

Communicate the judgment and send down the lower Court records.

A.K.M. Zahirul Huq, J.

I agree.