

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 1458 of 1993

Ram Chandra Paul being dead his legal heirs: 1(a) Parimal Bikash Paul also died leaving his legal heirs: 1(a)(i) Anjana Paul and others

... Petitioners

-Versus-

1(Ka) Gopal Krishna Paul and others

...Opposite-parties

Mr. Mustafa Kamal Pasha with

Mr. Apurba Kumar Bhattacharjee, Advocates

...For the petitioners

No one appeared.

...For the opposite-parties.

**Heard on 16.07.2024, 24.07.2024,
25.07.2024, 19.08.2024 and**

Judgment on 20th August, 2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party Nos. 1(ka)-1(kha) and 2 to show cause as to why the impugned judgment and decree dated 18.02.1993 and 25.02.1993 respectively passed by the learned Sub-ordinate Judge, (now Joint District Judge), Patiya, Chattogram in Other Appeal No. 281 of 1991 allowing the same and thereby reversing the judgment and decree dated 04.03.1991 and 09.03.1991 respectively passed by the learned Assistant Judge, 1st Court, Patiya, Chattogram

in Other Suit No. 203 of 1989 decreeing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts relevant for disposal of this Rule, in short, are that the present petitioners, as plaintiff, filed Other Suit No. 203 of 1989 in the Court of Assistant Judge, Patiya, Chattogram against the opposite-parties, as defendant, for a decree of partition of immovable property. The case of the plaintiff, in short, are that the disputed land belonged to Khetra Mohan Paul, Brajendra Paul, Kusum Kumari Paul and Baishnab Paul. R. S. Khatian accordingly stand recorded to the extent of 3(three) annas and 4(four) paies in the name of Khetra Mohan, 6(six) annas and 8(eight) paies in the name of Brajendra, 3(three) annas and 4(four) paies in the name of Kusum Kumari rest 3(three) annas and 4(four) paies in the name of Baishnab Paul. Baishnab Paul died issueless leaving brother Biswamber who got his share. In this way, Biswamber got his brother Baishnab's share and he died intestate leaving behind his only daughter Kusum Kumari. Biswamber earlier transferred his share in the suit land alongwith other non-suited property to her daughter Kusum Kumari by a

Registered Deed No. 23 dated 08.03.1913. Kusum Kumari possessed and enjoyed her father's 3(three) annas and 4(four) paies share by purchase and inherited her father's younger brother Baishanab's 3(three) annas and 4(four) paies share totalling 6(six) annas and 8(eight) paies measuring .24 sataks of land. She died leaving behind his only son, the present plaintiff as her legal heir who inherited said quantum of .24 sataks and he by a registered deed dated 13.08.1941 purchased $6\frac{1}{2}$ gonads of land from Brajendra, one of the co-sharers of the suit land and said Brajendra also sold out $11\frac{1}{3}$ sataks to the defendant Nos. 3, 4 and 5. R. S. recorded tenant Khetra Mohan died leaving the defendant Nos. 1 and 2 who got his share. In this way, the plaintiff, by inheritance and purchase owned .37 sataks of land and has been possessing the same in ejmali with other co-sharers.

Further case of the plaintiff is that the defendant Nos. 1 and 2 are not the legal heirs of Baishnab and they did not claim themselves at anytime as the legal heirs of Baishnab before 06.11.1989. The plaintiff for his convenience of possession and enjoyment proposed the defendants to get the property partitioned by mets and bound but

the defendants refused to partition them same rather the defendant Nos. 1 and 2 threatened the plaintiff that they will cut his trees from the suit land and hence, the plaintiff was constrained to institute the present suit for partition seeking separate saham of .37 sataks land out of .60 sataks acquired by inheritance and purchase.

Defendant Nos. 1-2 and 3-5 contested the suit by filing 2 separate written statements. The case of the defendant Nos. 1 and 2, in short, is that the suit is barred by limitation and is bad for defect of parties. According to the defendant Nos. 1 and 2 the suit land belonged to the predecessor of the plaintiff and the defendants named Data Ram Paul who died leaving 5 sons namely, 1. Biswamber, 2. Dharmacharan Paul, 3. Baishnab Pual, 4. Nilamber Paul and 5. Nil Kamal Paul. Nil Kamal transferred his share to Dharma Charan, consequently, Dharma Charan owned $\frac{2}{5}$ the share in the suit land. Dharma Charan died leaving son Shashi Kumar who possessed and enjoyed the said $\frac{2}{5}$ th share and died leaving son Brajendra who inherited his share. Accordingly, R. S. khatian stand recorded and finalized in the name of said Brajendra to the extent of

6(six) annas and 8(eight) paies. Thereafter, Biswamber died leaving wife Bama Sundari and daughter Kusum Kumari to inherit his share. Bama Sundari died leaving only daughter Kusum Kumari who got $\frac{1}{5}$ th share of her father. R. S. khatian recorded in the name of Kusum Kumari with other co-sharers. Subsequently, Nilamber died leaving son Khetra Mohan who got $\frac{1}{5}$ th share. R. S. khatian stands recorded in his name. Baishnab died leaving nephew Khetra Mohan who got his share. In this way, Khetra Mohan inherited $\frac{1}{5}$ th share from his father and $\frac{1}{5}$ th share from his father's elder brother Baishnab totaling $\frac{2}{5}$ th share. Khetra Mohan died leaving defendant Nos. 1 and 2 and they possessed and enjoyed the $\frac{2}{5}$ th shares measuring .24 sataks or 12 gandas of land as rightful owners. The plaintiff had no locus standi to institute the present suit and the suit is liable to be dismissed with costs.

The case of the defendant Nos. 3-5, in short, is that the suit property belonged to Brajendra Kumar Paul and Khetra Mohan Paul.

R. S. khatian stand recorded in their names. Brajendra sold $1\frac{1}{2}$ ganads land to Tripura Charan Paul by a Registered Deed No. 182 dated 31.01.1935. Tripura Paul died leaving son Prafulla Kumar Paul, the defendant No. 4. Brajendra Kumar by a Registered Deed No. 1262 dated 06.06.1939 sold 1(one) ganda 2(two) karas 1(one) kanta land to Digamber Paul, who died leaving 2(two) sons Abhimunnu Paul and Khirode Paul. Abhimunnu Paul died leaving son Mehir Kanti Paul, the defendant No. 3. Khirode died leaving son Dolan Kanti Paul, the defendant No. 5. Brajendra Paul again sold 5 sataks of land from Plot No. 2844 and 3 sataks 1(one) kanta to Tripura Charan Paul who died leaving defendant No. 4. Brajendra by different sale deeds transferred 8(eight) gandas 2(two) kantas. Said Khetra Mohan died 2(two) sons Sukhendu and Manindra Paul who by a Registered Deed No. 2247 dated 14.07.1986 transferred 1(one) ganda 2(two) kantas from Plot No. 2846 and 3(three) karas 1(one) kanta from 2844 totaling 1(one) ganda 3(three) karas 3(three) kantas to Prafulla Kumar. In the manner aforesaid defendant Nos. 3-5 acquired 10(ten) gandas 1(one) kara land, accordingly, P.S. khatian stands recorded in their names and they have been possessing the

same on payment of rents to the government as such, the suit is liable to be dismissed.

The trial court framed 6(six) issues for determination of the dispute between the parties. In course of hearing, both the plaintiff and the defendants examined 3(three) witnesses each as P.Ws. and D.Ws. Both the parties submitted some documents in support of their respective claim which were duly marked as Exhibits. The trial court after hearing by judgment and decree dated 04.03.1991 decreed the suit in preliminary form allotting saham to the plaintiff as well as to the defendants.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the defendants filed Other Appeal No. 281 of 1991 in the Court of District Judge, Chattogram. Eventually, the appeal was heard and disposed of by the learned Subordinate Judge, (now Joint District Judge), Chattogram who after hearing by the impugned judgment and decree dated 18.02.1993 allowed the appeal in part by setting aside the judgment and decree of the trial court. At this juncture, the present petitioner, moved this Court by filing this revision and obtained the present Rule.

Mr. Mustafa Kamal Pasha with Mr. Apurba Kumar Bhattacharjee, learned Advocates appearing for the petitioners submit that the genealogy as given in the plaint are admitted by the defendants by filing written statement and there is no dispute that the property in question belonged to Khetra Mohan Paul, Brajendra Paul, Kusum Kumari Paul and Baishnab Paul as per R. S. record and share mentioned therein. He submits that petitioner is son of Kusum Kumari Paul one of the R. S. recordees. The plaintiff claims that among the R. S. recorded owners Baishnab Paul and Biswamber Paul are full brothers. Baishnab Paul died issueless before Biswamber Paul consequently, as per Hindu Law of inheritance his share devolved upon full brother Biswamber. Accordingly, Kusum Kumari by purchase from her father Biswamber in the year 1913 acquired 3 annas and 4 paies share in the suit khatian. She inherited the share of Baishnab Paul through her father Biswamber, resultantly, she acquired title in 6 annas and 8 paies share in the suit khatian. The plaintiff further purchased $6\frac{1}{2}$ gondas land from Brajendra in the year 1941. Therefore, the plaintiff acquired by inheritance 24 sataks

and by purchase 13 sataks totalling 37 sataks of land in the suit khatian and prayed for saham of the same.

The trial court considering evidences on record, both oral and documentary found that before transfer of 13 sataks land in favour of plaintiff, Brajendra earlier by 2 sale deeds transferred $11\frac{1}{3}$ sataks to the defendant Nos. 3-5 leaving only $12\frac{2}{3}$ sataks in his share.

Accordingly, the plaintiff entitled to get by purchase $12\frac{2}{3}$ sataks and 24 sataks by inheritance totalling $36\frac{2}{3}$ sataks. The trial court allotted saham to defendant Nos. 3-5 for $15\frac{1}{3}$ sataks subject to payment of court fees, but the defendant Nos. 3-5 did not pay court fee, rather, preferred appeal before the learned District Judge against the judgment and decree of the trial court. The appellate court while allowing the appeal in part reducing saham of the plaintiff wrongly held that Biswamber died earlier leaving Baishnab, therefore, Biswamber did not inherit the property left by Baishnab. Consequently, deducted 12 sataks of land from the saham of the plaintiff given by the trial court. The appellate court failed to

distribute said quantum of land in the share of any of the parties to the suit and did not even written a single word who is entitled to get the share of Baishnab.

He finally argued that in deciding the matter by the appellate court, the appellate court imported himself a theory to the effect that if Biswamber was alive during R. S. operation, name of his daughter Kusum Kumari would not have recorded in R. S. khatian who inherited the property left by Biswamber without noticing the fact that Kusum Kumari did not inherit the share of Biswamber, but she purchased the suit land along with other non-suited plots from his father by a Registered Deed No. 23 dated 08.03.1913. Because of such fact her name was recorded in R. S. khatian as owner of 3 annas 4 paies share. The plaintiff inadvertently did not file the Sale Deed No. 23 dated 08.03.1913 before the trial court and got the same as exhibited. But in the evidence and by way of amendment of plaint the fact of purchase of the property has been incorporated. Therefore, the trial court rightly decreed the suit giving saham to the plaintiff, but the appellate court by reducing quantum of land from the saham

of the plaintiff has committed an error of law in the decision occasioning failure of justice.

The opposite-party Nos. 1(ka)-1(gha) and opposite party No. 2 entered into appearance through learned Advocate Mr. Saifuddin Ahmed Chowdhury and Mr. Tapan Kanti Das they did not come forward to oppose the Rule, though, the matter appearing in the daily cause list for couple of days as heard in part.

Heard the learned Advocate for the petitioners, have gone through the revisional application, plaint, written statement, application for taking additional evidence, evidences both oral and documentary and the impugned judgment and decree passed by both the courts below.

The plaintiff claimed that the property under R. S. Khatian No. 241 covering Plot Nos. 2844, 2845, 2846, 2847 and 2851 measuring 79 sataks originally belonged to Khetra Mohan 3 annas and 4 paies, Brajendra Kumar 6 annas 8 paies, Kusum Kumari 3 annas 4 paies and Baishnab Charan Paul 3 annas 4 paies as recorded in R. S. Khatian. The defendants claimed that the property originally

belonged to one Data Ram who died leaving 5 sons, but the plaintiff claimed that Data Ram had only 2 sons, namely, Baishnab Charan and Biswamber Paul. Though, the defendants claimed that Data Ram had 5 sons, but they could not prove the same by any evidence either oral or documentary. Therefore, as per R. S. record the claim of the plaintiff stands good. According to plaintiff, Biswamber transferred his share in the property along with other non-suited property in favour of his only daughter Kusum Kumari by a registered deed dated 08.03.1913. Accordingly, R. S. khatian stands recorded in the name of Kusum Kumari during R. S. operation. The plaintiff further claimed that among the R. S. recordees, Baishban Chanran Paul was full brother of Biswamber and uncle of Kusum Kumari Paul who died leaving his full brother Biswamber, father of Kusum Kumari Paul who inherited the share of Baishnab Charan Paul measuring 12 sataks. Biswamber died leaving only daughter Kusum Kumari Paul to inherit him, consequently, Kusum Kumari by purchase got 12 sataks land and by inheritance from her father Biswamber Paul 12 sataks totalling 24 sataks. Kusum Kumari Paul died leaving only son, the plaintiff, Ram Chandra Paul who inherited 24 sataks of land

from his mother. Subsequently, by a registered deed of sale dated 13.08.1941 he purchased 13 sataks of land from another R. S. recordee named Brajendra Lal. Therefore, he claimed 37 sataks of land from the schedule property.

The trial court found that Brajendra Lal is owner of 24 sataks land in the khatian, out of which he transferred $11\frac{1}{3}$ sataks to the defendant Nos. 3-5 by sale deed dated 05.06.1939 and also transferred 5 sataks of land by way of mortgage on 31.01.1935. Thereafter, Brajendra transferred 13 sataks of land on 13.08.1941 to the plaintiff. Since the deeds of defendant Nos. 3-5 earlier to the deed of the plaintiff, those will get preference over the later on. Therefore, the trial court held that since the deed dated 31.01.1935 is a mortgage deed the defendant Nos. 3-5 acquired no title in respect of 5 sataks of land from Brajendra Paul. Out of his 24 sataks land he transferred $11\frac{1}{3}$ sataks to the defendant Nos. 3-5 leaving $12\frac{2}{3}$ sataks, which was transferred in favour of the plaintiff, accordingly, the trial court decreed the suit allotting saham to the plaintiff for $36\frac{2}{3}$ sataks.

From the facts and circumstances and documents filed by the plaintiff, I find that the trial court rightly found title of the plaintiff in the suit land by inheritance as well as by purchase. But the appellate court while allowing the appeal in part and setting aside the judgment and decree of the trial court on his own motion made out a third case that since R. S. khatian stands recorded in the name of Kusum Kumari as heir of Biswamber it is presumed that during R. S. operation Biswamber was not alive, but Baishnab Paul was alive as per R. S. record. The appellate court failed to consider the statement made in the plaint as well as made by the P.W.1 in his deposition. This is because of not filing the Sale Deed No. 23 dated 08.03.1913 before the trial court by the learned Advocate for the plaintiff.

At the time of hearing this Court noticed the fact consequently, the plaintiff got his plaint amended by incorporating the statement that Biswamber by a registered deed of Sale No. 23 dated 08.03.1913 sold out the property in favour of his daughter Kusum Kumari Paul and the said deed of sale in original submitted before this Court and taken back by furnishing photocopies as annexure to the application for taking additional evidence. Since the

deed is more than 100 years old and filed in original before this Court, I think that the deed is not required to be formally proved as it has legal presumption under section 90 of the Evidence Act. Accordingly, the evidence has been accepted and said Deed No. 23 dated 08.03.1913 to be marked as Exhibit-4. So, the trial court is hereby directed to mark the said deed as Exhibit-4 after receipt of lower court records.

In the facts and circumstances stated above, I find that Kusum Kumari purchased 12 sataks of land from her father Biswamber by Sale Deed No. 23 dated 08.03.1913. Biswamber inherited 12 sataks of land from his full brother Baishnab Chanran Paul as he had no heir to inherit. After the death of Biswamber, daughter Kusum Kumari got 12 sataks of land by inheritance and 13 sataks by purchase from Brajendra totalling 24 sataks which is inherited by the plaintiff. Therefore, the trial court rightly allotted saham for $24 + 12\frac{2}{3}$ = $36\frac{2}{3}$ sataks in favour of plaintiff and $15\frac{1}{3}$ sataks in favour of defendant Nos. 3-5, but the appellate court made a new case to the effect that Biswamber died before Baishnab, as such, he did not

inherit the property of Baishnab and allowed the appeal in part leaving the share of Baishnab Charan Paul undistributed without any reason ignoring the fact that the plaintiff by evidence could able to prove that Baishnab died leaving Biswamber to inherit his share.

In view of the above, I find that the trial court rightly decreed the suit giving saham to the plaintiff for $36\frac{2}{3}$ sataks and the appellate court wrongly reduced the share of the plaintiff deducting share of Baishnab Charan Paul measuring 12 sataks, as such, the judgment and decree of the appellate court is liable to be interfered with.

Taking into consideration the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioners.

In the result, the Rule is made absolute, however, without any order as to costs.

The judgment and decree of the appellate court is hereby set aside and the judgment and decree of the trial court is hereby restored.

Communicate a copy of the judgment to the Court concerned
and send down the lower court records at once.

Helal-ABO