

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present

Madam Justice Kashefa Hussain

Civil Revision No. 4143 of 2017

Md. Whahed Ali and others

.....petitioners

-Versus-

Most. Rahima Khatun and others

----- Opposite parties

Mr. Momtaz Uddin Fakir, Senior Advocate

with Mr. M. Sadekur Rahman, Advocate

----- For the petitioners

Mr. Md. Mozammel Hossain, Advocate

----- For the Opposite Parties

Heard on: 01.11.2018, 11.11.2018,

12.11.2018, 10.12.2018 and

Judgment on 11.12.2018

Rule was issued calling upon the opposite parties Nos. 1-3 to show cause as to why the Judgment and decree dated 15.11.2017 (decree signed on 22.11.2017) passed by the learned Joint District Judge, 1st Court, Mymensingh in Other Class Appeal No.02 of 2006, allowing the same and thus reversing the judgment and decree dated 02.11.2005 (decree signed on 09.11.2015) passed by the learned Senior Assistant Judge, Gouripur, Mymensingh in Other Class Suit No. 77 of 2002 dismissing 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.

The opposite parties No. 1,2,3 as plaintiffs instituted Other Class Suit No. 77 of 2002 before the court of Senior Assistant Judge, Gouripur, Mymensingh. Upon hearing the trial court dismissed the suit by its judgment and decree dated 02.11.2005. Being dissatisfied with the judgment and decree dated 02.11.2005 passed by the Assistant Judge, Gouripur, Mymensingh in Other Class Suit No. 77 of 2002, the plaintiffs as appellants preferred Other Class Appeal No. 02 of 2006 before the court of District Judge, Mymensingh which upon transfer was heard by the Joint District Judge, 1st Court, Mymensingh. Upon hearing the court of Joint District Judge, 1st court, Mymensingh set-aside the judgment of the trial court and allowed the appeal by its judgment dated 15.11.2017. Being aggrieved and dissatisfied with the judgment and decree dated 15.11.2017 passed by the appellate court some of the defendants in the suit being respondents in the appeal filed the instant civil revisional application which is before this court for disposal.

The plaintiffs' case in short is that one Kanu Bepari was the owner in C.S. Khatin No. 61 of Mouza- Fulbaria, Police Station- Gouripur under District – Mymensingh. That while the said Kanu Bepari was owning and possessing the said land, he died leaving behind 3(three) sons namely Golam Hossain, Nabi Hossain and Mia Hossain and 2(two) daughters. Mia Hossain got the suit land along with other lands by amicable partition and

thereafter he transferred 9 decimals of land from suit plot No. 26 and 11 decimals of land from suit Plot No. 132 in total 20 decimals to his brother Nabi Hossain (Father of the plaintiffs) by registered Saf Kabla deed No. 4522 dated 02.11.1948. He also transferred 6 decimals of land from suit plot No. 120 to his brother the said Nabi Hossain by registered Saf Kabala deed No. 4231 dated 16.12.1950. In this way the plaintiffs' father got the suit land by the said two deeds. While he was owning and possessing the same, he died leaving behind the present plaintiffs and they were owning and possessing the same by cultivating the land through their husbands and had denied to sell the same to the defendants. For that reason the defendants on 15.02.1999 forcibly dispossessed the plaintiffs from the said suit lands by cultivating and by erecting tin shed house, digging ponds etc. After dispossessing the plaintiffs on 15.02.1999 there were several salish, but the defendants on 15.12.1999 finally refused to give back the possession of the suit land to the plaintiffs and from that date the cause of action arose and the plaintiffs have been constrained to file the present suit for declaration of title and recovery of possession against the defendants.

On the other hand defendant Nos. 2-7 contested the suit upon filing a joint written statement denying all the material allegations made in the plaint contending inter alia that the suit is not maintainable in its present form and manner and the suit is

barred by limitation and also bad for defect of parties. Their further case is that the two daughters of C.S. recorded tenant Kanu Bepari namely Engiler Ma and Kalar Ma transferred their share by registered kabala deed No. 4953 dated 14.12.1965 to Abu Siddik and his brother Fazlul Haq. Thereafter the said Abu Siddik transferred the same to one Saidur Rahman by registered deed No. 5235 dated 21.07.1981 and the said Saidur Rahman transferred 10 decimals of land to one Hamida Khatun by registered deed No. 1657 dated 08.03.1982. One Abdus Sattar purchased some land from Hamida Khatun by registered kabala deed No. 1656 dated 08.03.1982 and deed No. 635 dated 15.01.1980 from the suit plot and thereafter his sons Asad Ali and Jaher Uddin transferred the same to one Nurul Islam by a registered deed No. 4101 dated 20.06.1989. Defendant No. 7 Somed Ali purchased 3 ½ decimals of land from suit plot No. 26 on 30.06.1999 and 02 ½ decimals of land on 20.05.1997 and he is owning and possessing the same by purchase. Defendant No. 3 along with one Motiur Rahman purchased 12 ½ decimals of land from suit plot No. 132 on 26.11.1994 from Nurul Islam. Defendant No. 2 purchased 3 ½ decimals of land from suit plot No. 26 and another plot No. 27 on 15.03.1997. Defendant No. 5 purchased 2½ decimals of land from suit plot No. 26 on 31.12.1996 from Hamida Khatun and he also purchased 02½ decimals of land from the same plot. In this way the defendants are owning and possessing the suit land by erecting house with

two storied foundation and by erecting shop rooms in the frontal part of the said foundation. The suit land is not a cultivable land and the land of Plot No. 26 and 132 is a Chandina land of Bazar. Plaintiffs have no title and possession in the suit land and the defendants never dispossessed the plaintiffs. Plaintiffs filed the instant suit with a false statement and hence their suit ought to be dismissed with costs.

Learned Senior Advocate Mr. Momtaz Uddin Fakir along with Mr. Sadekur Rahman and Mahabul-Ule-Islam appeared on behalf of the petitioners while Mr. Md. Mozammel Hossain learned Advocate represented the opposite parties.

Learned Senior Counsel Mr. Momtaz Uddin Fakir on behalf of the petitioners submits that the trial court upon correct findings of facts dismissed the suit given that the plaintiffs failed to prove their possession including their subsequent claim of dispossession in 1999. He argues that the trial court correctly found that the evidences and depositions of the plaintiffs witnesses failed to prove that the plaintiffs have in possession in the suit land, nor could they prove their claim of unlawful dispossession in 1999. He persuades that however the appellate court upon wrong findings arrived at its conclusion to the effect that the plaintiffs succeeded in proving their possession and subsequently also their dispossession in the year 1999. Regarding the issue of title claimed by the plaintiffs-opposite

parties here, the learned Advocate for the petitioner submits that the plaintiffs have no title to the suit land given that they could not prove their title to the suit land at any stage neither during trial nor during appeal. In pursuance the petitioner agitates that there is nothing in the records to show that there was ever any amicable partition amongst the co-sharers, those being the heirs of the original C.S. recorded owner Kanu Bapari. He argues that the plaintiff-opposite parties No. 1 and 3 based their claims on two registered sale deeds being sub-kabala deed No. 4522 dated 02.11.1948 and another sub-kabala deed No. 4231 dated 16.12.1950. He continues that the plaintiffs-opposite parties claim that the saf kabala deed was executed by way of a sale by Miah Hossain one of the son of the original C.S. recorded owner in favour of Nabi Hossain another son of the C.S. recorded owner. In pursuance, regarding in the question of validity of the sale deeds of 1948 and 1952 respectively, the learned advocate for the petitioners argues that even if Miah Hossain had executed two sale deeds in favour of his brother Nabi Hossain nevertheless those are not valid sale deeds, since no amicable settlement between heirs of the original C.S recorded owner could be proved subsequent to the death of the said original C.S. recorded owner Kanu Bapari. In this context he submits that conversely to the claim of the plaintiffs, the S.A. records is in the name of the defendants which was marked as Exhibit No. 4 in the suit. He continues that the S.A. record as is evident from Exhibit No. 4

was prepared in one single list in the names of all the heirs of Kanu Bapari following his death. He agitates that if there was any amicable partition and settlement whatsoever the final record which was updated around the year 1962 which was several years after the execution of the deed, in that event the S.A. record would have been listed accordingly in separate khatians subsequently in the names of the heirs of Kanu Bapari. In support of his submission the petitioner cited a decision in the case of Shabiha Khanam Vs. Jaitun Bibi others reported in 3 MLR (AD) 1998 page 15 the relevant principle which is reproduced here under:

In the absence of any evidence as to the partition of share of joint property, the plaintiff although has title and interest to the purchased land, cannot maintain a suit simpliciter for mere declaration of title to the portion of his share without seeking relief in the form of partition.

He concludes his submission upon assertion that the appellate court upon wrong findings on possession allowed the appeal and therefor the judgment and decree of the appellate court would be set aside and the Rule bears merit and be made absolute for ends of justice.

On the other hand learned, Advocate Mr. Mozammel Hossain on behalf of the opposite parties No. 1,2,3 submits that the trial court upon erroneous findings on possession dismissed the suit but the appellate court upon correct findings reversed such decision of the trial court and allowed the appeal and therefore the judgment and decree of the appellate court calls for no interference and ought to be affirmed. He argues that the trial court gave correct finding on title given that the trial court found title in favour of the plaintiff opposite parties No. 1, 2, 3. He further agitated that the trial court however upon non consideration and misreading of the depositions of the pws arrived upon a wrong finding regarding possession and the subsequent unlawful dispossession of the plaintiff from the suit land by the defendant in the year 1999. He submits that the trial court did not even assess and analyse the depositions of witnesses. Regarding the depositions he continues that the appellate court rectified the wrong finding of the trial court and gave correct findings on possession in favour of the plaintiff and the subsequent unlawful dispossession, upon correct reading and appraisal of evidences and depositions by the plaintiffs' witnesses. On the issue of title he further asserts that both courts found that the plaintiff have title to the suit land. On the issue of the sale deeds from son of Kanu Bapari, Miah Hossain and another son namely Nabi Hossain in the years of 1948 and 1950 respectively, he argues that the sale deeds were executed

pursuant to an amicable settlement between the brother and sisters being who are the heirs of the original C.S. recorded owner Kanu Bapari who had three sons and two daughters. He persuades that both courts arriving upon correct finding on title on the plaintiff of the suit land and the appellate court rectifying the wrong finding of the trial court on the issue of possession therefore the defendants in the suit being respondent in the appeal being the instant petitioner heirs cannot make any claim to the suit land which rightfully belongs to the plaintiffs. In support of his submissions that amicable settlement between parties and title cannot be questioned and subsequently therefore no partition suit or any other Suit is maintainable, he cites a decision of our Apex Court in the case of Halima Khatun Vs Hamid Miah reported in 10 BLC(AD) (2005).

While summing up his submissions he concludes that the judgment of the appellate court being arrived upon correct findings on possession and title therefore it need not be interfered with and the Rule bears no merits and ought to be discharged for ends of justice.

Heard the learned Advocates from both sides, perused the application and materials on record including both the judgment of the courts below. As is evident from the records the instant civil revision arise against judgment of reversal. Apparently both courts found title in favour of the plaintiff. However the courts

diferred on their findings on possession. The trial court found that the plaintiff could not prove their possession and accordingly dismissed the suit on that ground while the appellate court reversed concurrent findings on title in favour of the plaintiff. However, the appellant court reversed the findings of the trial court on issue of the possession. The Appellate Court found that the plaintiff succeeded to prove their title to the suit land and also possession thereby allowed the appeal filed by the plaintiff.

I have examined the documents, of the case placed before me. As is clear from the records, the plaintiff's claim to title arise relying upon two sale deeds which were executed by one son of the original C.S. recorded owner in favour of another son of the C.S. recorded owner being Miah Hossain and Nabi Hossain respectively claiming an amicable "settlement" of the suit land including other lands of the C.S. recorded owner. It is evident from the records that the C.S. recorded owner Kanu Bapari was survived by 5 children, 3 sons and 2 daughters. The 3 sons are namely Golam Hossain, Nabi Hossain and Miah Hossain and two daughters. The defendant nos. 2-7 who are the petitioners here apparently based their claim by way of a purchase deed from a predecessor in interest of the daughters of the C.S. recorded owner. It also appears from the record that the 2 daughters who are called Engiler Ma and Kalar Ma sold the

property to one person and the instant petitioners after several transfers of the property purchased the land ultimately from Hamida Khatun. Now as is evident from the records both parties here are placing their reliance on title by way of purchase. However, the plaintiff's heirs are the direct heirs of Nabi Hossain who is the son of the C.R. recorded owner while the petitioners claim title upon purchase from the predecessor in interest of the daughter of the C.S. recorded owner. It is significant to note that the plaintiffs while relying on two sale deeds claimed that the sale and purchases between Miah Hossain and Nabi Hossain, being 2 sons of the original C.S. recorded owner took place pursuant to an "amicable settlement" of the land between all the heirs of the original C.S. recorded owner. Apparently the defendant No. 2-7 petitioners also claimed out of a purchase from a predecessor in interest of the daughter of the C.S. recorded owner.

I have gone through the records and upon examination. I have not found anything from the records which may indicate or support the claim of the plaintiff that the suit land was sold by Miah Hossain and to his brothers Nabi Hossain pursuant to an "amicable settlement". It goes without saying that amicable settlement of land must be proved upon credible evidence in this case following the death of the original C.S. recorded owner Kanu Bapari, the parties, particularly the opposite parties

plaintiff who claims “amicable settlement” could not show anything neither during trial nor during appeal to substantiate their claim that after the death of the original C.S. recorded owner Kanu Bapari the suit land was amicably partitioned between the brothers and sisters, being three sons and two daughters of Kanu Bapari who are the lawful heirs.

From the L.C.R I have examined the S.A. Khatian which was marked as exhibit No. 4 by the trial court. From a scrutiny of exhibit No. 4 it appears that the SA Khatian following the death of Kanu Bapari was prepared in the names of both the predecessors of the plaintiff and the predecessor in interest of the defendants. There is no separate listing of name in separate SA Khatians which may indicate that the suit land was amicably partitioned. It is my considered finding that if the suit land was amicably partitioned, the SA record would also have been prepared accordingly. It may be noted here that the purchase deed claimed by the plaintiffs go back to the years of 1948 and 1950 respectively and SA record was finally published in the year 1962 several years after the death of the CS recorded owner Kanu Bapari and also several years after execution of the two sale deeds of 1948 and 1950 respectively. I am of the considered opinion that if there was any amicable settlement between the predecessors of the parties following the death of the original C.S. recorded owner the SA record which was updated several

years later, in such SA record the names of the heirs would have been listed in separate Khatians accordingly. In the absence of any such listing by way of separate SA Khatians it may be assumed that there was no amicable settlement between the parties. I am of the considered finding that the sons of the plaintiffs could not prove amicable settlement between the parties therefore the sale deed executed by Miah Hossain in favour of Nabi Hossain are also not valid deeds. Since at the time of sale Miah Hossain did not have any lawful right to sell any portion of the suit land which till amicable settlement jointly belongs to all the heirs of the original CS recorded owner, similarly under the circumstances the petitioners also cannot claim title to the suit land by way of their purchase from the predecessor in interest of the daughter of the CS recorded owner.

The learned Advocate for the petitioner in support of his submission that in the absence of evidences of partition, a suit for declaration of title is not maintainable, he cited a decision of this division in the case of Shabiha Khanam Vs. Jaitun Bibi others reported in 3 MLR (AD) 1998 page 15. The relevant principle is reproduced here under:

In the absence of any evidence as to the partition of share of joint property, the plaintiff although has title and interest to the purchased land, cannot maintain a suit

simpliciter for mere declaration of title to the portion of his share without seeking relief in the form of partition.

To counter the reliance of the petitioners on this decision the learned Advocate for the opposite parties argued that this decision is not applicable in the case of the petitioners since in the 3 MLR (AD) our Apex Court maintained that a suit simpliciter for mere declaration of title shall not be maintainable in absence of any evidences as to partition of share of joint property'. He tried to persuade that the instant suit is a suit for title and recovery of khas possession and therefore the suit is not a suit "simpliciter" for mere declaration of title.

Regrettably, I cannot agree with the submissions of the opposite parties given that the spirit of the principle enunciated by our Apex Court is that whatsoever relief may be prayed for while seeking partition of joint property there must be evidence that the suit land in any particular case was actually partitioned. Therefore I am inclined to draw support from the decision in 3 MLR (AD) 1998 with the case before me.

The learned Advocate for the opposite parties by way of claiming amicable partition relied upon a decision of our Apex Court in the case of Halima Khatun Vs Hamid Miah reported in 10 BLC(AD) (2005) page 1. The relevant principle is reproduced here under:

“Suit for partition is not maintainable if the land is already amicably partitioned and acted upon- The land in suit has already been amicably partitioned amongst the co-sharers and specific share of the respective co-sharer has **been recorded in different SA plots** and separate municipal holdings have been opened in the name of co-sharers and as such the suit for partition was not maintainable. The view as taken by the appellate Court that amicable partition is not a partition by metes and bounds is not a correct one. Further, it appears that on accepting the amicable partition the parties by raising boundary wall around their respective shares are enjoying the saham so allotted through the amicable partition, the same verily discloses that the land was partitioned by metes and bounds”.

I have examined the relevant principle where in our Apex Court held that amicable partition of land can be assumed if the land claimed to have been amicable partition among the co-sharers has been recorded **in different SA plots**.

It may be relevant to remind here that in this case from the discussions in the judgments and as is apparent from exhibit No.

4 from the Lower Courts Records it is evident that following the death of the CS recorded owner the SA record appeared in the names of the heirs of the SA recorded original owner in one single SA khatian and not in separate SA Khatians. Regarding the issue of possession it is my considered view that whatsoever the finding of the court may be on possession, it is not much relevant in the instant case, since I am of the considered finding that from Annexure-4 of the Exhibits it is reflected that the suit land remains jointly in the name of all the heirs of the original recorded owner.

My considered view is that the suit is not maintainable in its present form given that the proper forum ought to have been a partition suit or any other appropriate forum and I am inclined to dispose of the Rule upon setting-aside both judgment by the courts below.

In the result, the Rule is disposed of and both the judgments of the trial court and the appellate court are set aside. The parties are however at liberty to file a partition suit or any other appropriate forum if they are so advised.

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

Send down the lower Court records at once.

Communicate the order at once.