

District: Kushtia

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

Present:-

Mr. Justice Md. Zakir Hossain

Civil Revision No. 2212 of 2018

With

Civil Revision No. 04 of 2022

Mst. Julekha Khatun and others

... Plaintiff-Appellant-Petitioners
(In C.R No. 2212 of 2018)

Md. Yusuf Ali @ Yusuf Miah

... Defendant-Respondent-Petitioner
(In C.R No. 04 of 2022)

-Versus-

Mahibul Huq and others

... Defendant-Respondent-Opposite Parties
(In C.R No.2212 of 2018)

Mst. Julekha Khatun and others

... Plaintiff-Appellant-Opposite parties
(In C.R No. 04 of 2022)

Mr. Md. Nurul Amin, Senior Advocate

.....for the petitioners
(In C.R No. 2212 of 2018)

and

....for the opposite party Nos. 1-7
(In C.R. No. 04 of 2022)

Mr. Zulfiqur Ahmed with

Mr. Habib-un-Nabi, Advocate,

.....for the Opposite party Nos. 1-7
(In C.R No. 2212 of 2018)

and

.....for the petitioners
(In C. R. No. 04 of 2022)

Mr. Raghob Rouf Chowdhury with

Mr. K. M. Mamun-or-Rashid, Advocate

.....for the opposite party Nos. 9-14
(In both the Civil Revisions)

Heard on:09.03.2023 & 23.08.2023

Judgment on: 14.11.2023

Md. Zakir Hossain, J:

Since the questions of law and facts involved in the aforesaid two Civil Revisions are almost same and identical, those are taken up

together for hearing and are now being disposed of by this single judgment.

At the instance of the plaintiff-appellant-petitioners, the Rule was issued in Civil Revision No. 2212 of 2018 to examine the legality and propriety of the judgment and decree dated 28.11.2017 (decree being drawn on 30.11.2017) passed by the learned Joint District Judge, Second Court, Kushtia in Title Appeal No. 60 of 2016 dismissing the appeal and thereby modifying the judgment and decree dated 01.12.2015 (decree being drawn on 05.01.2016) passed by the learned Assistant Judge, Bheramara, Kushtia in Title Suit No. 59 of 1989 decreeing the suit in part.

At the instance of the defendant-respondent-petitioners, the Rule was issued in Civil Revision No. 04 of 2022 to examine the legality and propriety of the aforesaid judgment and decree so far it relates to disallowing the prayer for allocating saham to the petitioners.

The case of the plaintiff-appellant-petitioners, in short, is that the petitioners as plaintiffs filed Title Suit No. 59 of 1989 before the Court of the learned Assistant Judge, Bheramara, Kushtia impleading the opposite parties as defendants for partition of the 'Ka' scheduled land and for buy up under Section 4 of the Partition Act in respect of the 'Kha' and 'Ga' scheduled of land as mentioned in the schedule to the plaint alleging inter alia that the total 0.14 acre of land was recorded in S.A. Plot No. 382 in S.A. Khatian Nos. 48, 53 and 54. Land measuring 0.05 acre was recorded in the name of Lakhi Narayan

Kunda in S.A khatian No. 48 in S.A Plot No. 382. The land measuring 0.05 acre was recorded in the name of Radha Sundori Kundu in S.A khatian No. 53 in S.A Plot No. 382. The land measuring 0.04 acre was recorded in the name of Haran Mistri and Abdul Goni in S.A khatian No. 54 in S.A Plot No. 382. The land measuring 0.17 acre appertaining to S.A Plot No. 383 was recorded in the name of the said Haran Mistri and Abdul Goni. Haran Mistri on 02.09.1976 transferred 0.02 acre of land in favor of the defendant No. 3 i.e. Asir Uddin through registered sale deed No. 8055 dated 02.09.1976. Abdul Goni died leaving behind 3 sons namely Babu i.e. Plaintiff No. 2; Nazrul Islam i.e. Defendant No. 9; Atiar Rahman i.e. Defendant No. 10 and 4 daughters namely Talu i.e. Plaintiff No. 4; Buri i.e. Plaintiff No.5; Jhorna i.e. Plaintiff No. 6 and one wife i.e. Hareza Khatun i.e. plaintiff No. 7 as his legal heirs. S.A khatian No. 48 corresponding to S.A Plot No. 382 was recorded in the name of tenant Lakhi Narayan Kundu who went to India for good as such the land was settled to Humayun, Sarejan Bibi, Nurjahan Bibi, Parejan Bibi and Noimuddin Biswas according to Disturb Person (Rehabilitation) Ordinance, 1964. Thereafter, the People's Republic of Bangladesh represented by the Deputy Commissioner, Kushtia settled the land on 07.09.1973 in favor of Humayun and others. The appointed attorney of Humayun and others i.e. Matiur Rahman transferred 0.250 acre and 0.250 acre of land appertaining to S.A Khatian No. 48 corresponding to S.A Plot No. 382 in favor of the defendant No. 3 i.e. Asir Uddin through registered deed No. 11318 and 11319 dated 13.07.1986 respectively. The land amounting 0.05 acre appertaining to S.A khatian No. 53

corresponding to S.A Plot No. 382 was recorded in name of Radha Sundori who died leaving behind one son; Fakir Chad Kundu as his legal heirs. Fakir Chad Kundu transferred the said land in favor of the defendant No. 3 i.e. Asir Uddin through registered deed No. 7000 dated 23.04.1975. The defendant No. 3 transferred 0.05 acre of land in favor of the plaintiff No. 1 through registered sale deed No. 2325 dated 22.06.1988. The suit Plot Nos. 382 and 383 are situated adjacently in the North side of the said Plots Vheramara- Pragpur road. Both the plots appertaining (0.14 + 0.17) acre =0.31 acre of land. Both the plots were converted in one plot during R.S operation as R.S Plot No. 410. However, 0.3050 acre of land was recorded instead of 0.31 acre during the R.S operation. The land amounting 0.1075 acre appertaining to R.S Kahtian No. 439 corresponding to R.S Plot No. 410 was recorded in the name of plaintiff Nos. 2 to 7 and the defendant Nos. 9 to 10. The land amounting 0.0425 acre appertaining to R.S khatian No. 718 corresponding to R.S Plot No. 410 was wrongly recorded in the name of the government i.e. the defendant No. 11. The rest of the land of the R.S Plot No. 410 was recorded in the name of other co-sharers.

The suit land is the undivided *ejmali* property of the plaintiff Nos. 2 to 7 and the suit land is the homestead of the plaintiff No. 1. Since the suit is adjacent to the R.S Plot, there is a road and as such, there are some shops owned by the plaintiffs and the defendants in the suit plot. Other than the plaintiffs, no one has any homestead in the suit plot. The suit land is not divided by metes and bounds between

the plaintiffs. The plaintiff No. 1 owned the land measuring 0.05 acre, the plaintiff No. 7 owned 0.0134 acre, the plaintiff No. 2 owned 0.0188 acre and the plaintiff Nos. 3 to 6 owned 0.0094 acre of land each. In such way, the plaintiff owned total 0.1198 acre of land described in the Schedule 'Ka'. The defendant No. 3 borrowed money from the defendant No. 1 due to business purpose and against the loan the defendant No. 3 as guarantee executed registered agreement for sale with the defendant No. 1 bearing registration No. 5258 in connection with 0.03 acre of land. Therefore, the defendant No. 3 tried to pay back the money but the defendant No. 3 with forgery did not accept the money rather filed the Title Suit No. 37 of 1986 for specific performance of contract. The suit was decreed and as such the defendant No. 1 obtained the registered deed bearing No. 2124 dated 04.06.1988 through court. The defendant No. 1 tried to get possession of the suit land as such filed Execution Case No. 11 of 1987.

At present, the proceeding of the said execution case is stayed. The said 0.03 acre of land is the 'Kha' scheduled land of the suit. The defendant No. 1 is not the close relatives of the defendant Nos. 2 to 7 and as such the plaintiffs have right to get the schedule 'Kha' land by way of buy up. The defendant No. 3 transferred 0.015 acre of land to the defendant No. 2 through the deeds dated 23.12.85 and 04.01.87. The defendant Nos. 9 to 10 transferred their portion to Ratan Ali Miah on 23.11.1981. Ratan Ali Miah transferred the same land on 12.09.1983 to the defendant No. 2. The defendant No. 10 transferred .0028 acre of land on 05.07.1984 and the defendant No. 9 transferred

0 188 acre of land to the defendant No. 2 on 13.11.1983. The lands are specifically described in the 'Ga' schedule of the land. Since the said lands were transferred out of the knowledge of the plaintiffs, the plaintiffs have right to obtain the 'Ga' scheduled land by way of buy up. On 14.09.1988, the defendants denied doing amicable partition and as such the present suit is filed.

On the other hand, the defendant No. 1 contested the suit by filing written statement contending *inter alia* that the defendant No. 3 executed an agreement for sale with the defendant No.1 in connection with 0.03 acre out of 0.05 acre of land appertaining to S.A khatian No. 53 in S.A Plot Nos. 382 and 383. The defendant No. 3 denied to execute sale deed and as such the defendant No. 3 filed the Title Suit No. 37 of 1987 for specific performance of contract and obtained decree. Thereafter, he filed Execution Case No. 11 of 1987 and through the execution case, he got the 'Kha' scheduled land through the registered deed bearing No. 2124 dated 04.06.1988. Thereafter, the defendant No. 3 preferred Title Appeal No. 3 of 1988 which was disallowed on 29.04.1989. Thereafter, the defendant No. 3 filed the Civil Revision No. 3623 of 1991 before the Supreme Court of Bangladesh, High Court Division which was discharged on 11.07.1999. After that, the defendant No. 3 preferred Civil Petition for Leave to Appeal No. 245 of 2000 before the Supreme Court of Bangladesh, Appellate Division which was dismissed on 23.03.2002.

In this way, the defendant No. 3 obtained right, title and ownership over the 'Kha' scheduled land. The defendant No. 3 and

the plaintiff No. 1 are husband and wife. The defendant No. 3 executed the Heba Deed on 26.06.1988 in favor of the plaintiff No. 1 which is barred by the principle of *lis pendense*. The plaintiff No. 1 does not have any homestead in the suit land. The plaintiff Nos. 3 to 7 are the women who live with their husband in different addresses. Since they belong to different families, the plaintiffs cannot accrue the right by way of buy up in connection with schedule Nos. 'Kha' and 'Ga' in accordance with the Partition Act. In the suit land, there is no dwelling house rather there are some shops in the suit land. Before R.S operation, the co-sharers of the khatian amicably partitioned the suit land for the better use of the suit land and as such during R.S operation, the land was recorded accordingly. The suit land being a commercial place, the plaintiffs cannot claim the suit land by way of buy up and as such, the suit is liable to be dismissed. The defendant No. 2 contested the suit by filing separate written statement contending *inter alia* that the land amounting 0.17 acre appertaining to S.A khatian No. 779 in S.A Plot No. 383 and the land amounting 0.04 acre appertaining to S.A Khatian No. 54 in S.A Plot No. 382 in total $(0.17 + 0.04) = 0.21$ acre belongs to Abdul Goni in 8 *anna* share and Haran Mistri in 8 *anna* share. Abdul Goni died leaving behind 3 sons and 4 daughters namely Bulbuli, Tuli, Buri and Jharna and one wife; Hafeza Khatun as his heirs. Atiqul alias Rakibul transferred 0.0960 acre of land to Ratan Miah through Registered Sale Deed No. 13726 dated 23.11.1989. The said Ratan Miah transferred 0.01 acre of land to the defendant No. 1 through Registered Sale Deed No. 5202 dated 12.09.1983. Atiqul alias Rakibul transferred 0.0028 acre of land

to the defendant No. 2 through Registered Sale Deed No. 4412 dated 05.07.1984. Nazrul transferred 0.0188 acre of land in favor of the defendant No. 2 through Registered Sale Deed No. 17081 dated 13.11.1983. The land measuring 0.50 acre appertaining to S.A Kahtian No. 53 in S.A Plot No. 386; the land amounting 0.05 acre appertaining to S.A Plot No. 382, the land amounting 0.10 acre appertaining to S.A Plot No. 385 in total $(0.50 + 0.05 + 0.10) = 0.65$ acre of land belonged to Radha Sundori Kundu. He died leaving behind one son; Fakir Chad as his legal heirs.

Fakir Chad transferred 0.05 acre of land to the defendant No. 3 through Registered Sale Deed No. 1030 dated 23.04.1975. The defendant No. 3 transferred 0.01 acre of land to the defendant No. 2 through Registered Sale Deed No. 16963 dated 23.12.1985. He further transferred 0.0050 acre of land to the defendant No.2 through Registered Sale Deed No. 4609 dated 10.11.1987. In this way, the defendant No. 2 became the owner of the land measuring 0.0466 acre and after owning the land, he has been possessing of the same. So, the suit is liable to be dismissed.

Thereafter, on the pleadings, the learned Assistant Judge framed the following issues:

- (i) *Whether the suit is maintainable in its present form?*
- (ii) *Whether the suit is bad for defect of parties and for hotchpotch?*
- (iii) *Whether the plaintiffs are entitled to get the 'Kha' and 'Ga' scheduled land by virtue of buy up in view of Section 4 of the Partition Act?*

- (iv) *Whether the plaintiffs have title and ejmali possession in the suit land?*
- (v) *Whether the plaintiffs are entitled to the relief as prayed for?*

After conclusion of the trial, the learned Assistant Judge was pleased to decree the suit in part. Being aggrieved by and highly dissatisfied with the judgment and decree of the learned Assistant Judge, the plaintiffs being appellants preferred Title Appeal No. 60 of 2016 before the Court of the learned District Judge, Kushtia. After admitting the appeal and observing all the formalities, the learned District Judge was pleased to transmit the same to the learned Joint District Judge, Second Court, Kushtia for disposal. Upon hearing, the learned Joint District Judge was pleased to dismiss the appeal but modified the judgment and decree of the learned Assistant Judge. In fact, to examine the chastity of the judgment and decree of the Appellate Court, the aforesaid two Rules were issued.

For the purpose of brevity and convenience to avoid repetition, the plaintiff-appellant-petitioners of the earlier revisional application be treated as petitioners and the petitioners of the later revisional application be treated as opposite parties.

Mr. Md. Nurul Amin, the learned Senior Advocate for the petitioners takes me through the pleadings of the suit, oral & documentary evidence adduced by the parties. He strenuously submits that the learned Assistant Judge decreed the suit in respect of the land as mentioned in the 'Ka' schedule to the plaint but most illegally rejected the prayer of buy up in respect of 'Kha' and 'Ga' schedule of

land to the plaintiff, therefore, the petitioners preferred Title Appeal No. 60 of 2016. He further contends that there was no partition between the parties by metes and bounds therefore, the courts below ought to have held that the suit land is an undivided dwelling house and therefore, most illegally knocked down the prayer of buy up of the plaintiff-petitioners; hence, the impugned decree so far it relates to rejection of the contention of buy up is liable to be turned down to secure the ends of justice. He further submits that the concurrent findings as to the rejection of buy up are not based on sound reasoning rather those are apparently perverse, feeble and fragile and therefore, the petitioners are entitled to get the protection of Section 4 of the Partition Act. He, at the fag end, submits that the Courts below most illegally held that 'Kha' and 'Ga' schedule of land are not undivided dwelling homestead and as such, turned down the contention of the plaintiff-petitioners that they are not entitled to buy up the aforesaid land and thereby committed gross illegality in their decisions and therefore, the perverse and fragile finding of the Courts below is liable to be struck down. He finally submits that since the defendants did not claim separate saham either in the Trial Court or in the Appellate Court, therefore, they are not entitled to obtain any saham in the Revisional Court.

Mr. Zulfiqur Ahmed, the learned Advocate along with Mr. Habib-un-Nabi for the opposite party Nos. 1-7 in Civil Revision 2212 of 2018 and for the petitioners in Civil Revision No. 04 of 2022 submits that the Appellate Court after considering the materials on

record rightly reduced the saham of the plaintiffs from the 'Ka' schedule of land, therefore, the petitioners of the Civil Revision No. 04 of 2022 is entitled to get 0.04575 acre of land; but unfortunately, the learned Judge of the Appellate Court held to the effect but hopelessly failed to allocate saham increasing the share of the aforesaid petitioners i.e. the defendant No. 2 of the original suit. He further submits that the Appellate Court could have allocated saham in favour of the instant defendant-petitioners of the original suit but without allocating saham, the Appellate Court has committed a serious error of law resulting in an error in the decision occasioning a failure of justice. He next submits that the suit land under partition was not a dwelling house and as such, the Section 4 of the Partition Act is not applicable in the facts and circumstances of the case, therefore, the concurrent finding of the Courts below do not warrant for any interference. He further submits that the Courts below rightly decided the matter in controversy. In support of his contention, he has referred to the decisions reported in 14 BLC (AD) (2009) 103 & 72 DLR (AD) (2020) 66.

Heard the submissions advanced by the learned Advocates for the parties and perused the materials on record with due care and attention and seriousness as they deserves. The convoluted question of law embroiled in this case has meticulously been waded through.

It appears from the record that the learned Assistant Judge delving into the facts and circumstances of the case and evidence on record held that in respect of 'Ka' schedule of land, the plaintiffs are

entitled to 0.1198 acre of land. The Trial Court also held to the effect that the defendants did not deny the title of the plaintiffs in respect of the said land. The Trial Court rightly held to the effect:

“আরজীর “ক” তফশীলভুক্ত ১১৯৮ একর জমিতে বাদীপক্ষ বিভাগ বন্টনের প্রাথমিক ডিক্রী প্রার্থনা করেছেন। বিবাদীপক্ষ উক্ত জমিজমার মধ্যে কোন অংশ দাবী করেন না এবং বাদীগণের দাবীকৃত উক্ত সম্পত্তিতে বাদীপক্ষের স্বত্ত্ব দখল অস্বীকার করেন না বিধায় বাদীপক্ষ ‘ক’ তফশীলভুক্ত নালিশী জমি বাবদ পৃথক ছাহাম পেতে পারে।”

The defendants admitted the share of the plaintiffs and the defendants of the suit did not file any appeal nor any cross appeal against the judgment and decree of the Trial Court. But the Appellate Court most illegally reduced the saham of the plaintiffs; therefore, the same is liable to be struck down to secure the ends of justice.

It appears from the record that in the ‘Ka’ schedule of the plaint, the total area of land in the suit Plot is 0.3050 acre of land and the Trial Court allocated saham in respect of 0.1198 acre in favour of the plaintiffs without any objection from the defendant’s side, therefore, the reduction of the share of the plaintiffs by the Appellate Court is absolutely unfounded and baseless. The Appellate Court incidentally held that the share of the defendant No. 2 will be increased from 0.04575 acre instead of 0.0366 acre, but it did not allocate *saham* accordingly.

On perusal of the schedule to the land, it transpires that in the suit Plot No. 410 under different khatians, the total area of land is 0.3050 acre out of that; the plaintiffs shall obtain saham in respect of

0.1198 acre. The defendant No. 2 is entitled to have saham in respect of 0.04575 instead of .0366 acre of land and without infringing the share of the plaintiffs, the share of the defendant No. 3 will increase from 0.04575 and accordingly, the total area of the land shall stand (0.1198+0.03+0.04575) acre i.e. 0.19555 acre of land.

After deducting the said land from the suit land as mentioned in the 'Ka' schedule to the plaint appertaining to the Plot No. 410 still remains 0.19555 acre of land.

The Appellate Court in its judgment held to the effect:

“২নং বিবাদী ইউসুফ মিঞার জমির মোট পরিমাণ দাঁড়ায় (.০১+.০০২৩৭৫+.০১৮৩৭৫+.০১৫০=) ০.০৪৫৭৫ একর। কিন্তু বিজ্ঞ বিচারিক আদালত দালিলিক সাক্ষ্য পর্যালোচনা ব্যতিরেকে ২নং বিবাদীকে আরজীর 'গ' তফসিল বর্ণিত .০৩৬৬ একর জমি বাবদ ছাহাম প্রদান করেছিলেন। ২নং বিবাদীপক্ষ বিজ্ঞ বিচারিক আদালতের রায়-ডিক্রীর বিরুদ্ধে কোন আপীল দায়ের করেন নাই এবং অত্র আপীল মোকদ্দমাতেও ক্রস অবজেকশন দাখিল করেন নাই। ফলে ২নং বিবাদীকে প্রদত্ত ছাহামের পরিমাণ বিষয়ে অত্র আপীল মোকদ্দমায় হস্তক্ষেপ করা যৌক্তিক হবে না।”

In partition suit, the non-appealing defendant may obtain saham if on perusal of the record; the Appellate Court finds that in calculating of their share, the Trial Court committed an illegality. Admittedly, the character of the parties to the partition suit is almost similar and identical. The Appellate Court could have increased the saham of the defendant-respondent No. 2 without infringing the saham of the plaintiffs. The concurrent finding of the Courts below is that the land appertaining to schedule 'Kha' & 'Ga' is not an undivided dwelling house of the plaintiffs. In this respect, the Trial

Court rightly held that the 'Kha' and 'Ga' schedule of land do not come within the ambit of undivided dwelling house and the reasons assigned by the Trial Court is well founded. The Appellate Court assigning cogent reason rightly concurred with the decision of the Trial Court. The Appellate Court in respect of reducing saham of the plaintiffs made some omnibus discussion which entail unnecessary time and energy. The Appellate Court should not forget the mandate of law as enshrined under Order 41 Rule 31 of the CPC at the time of disposing appeal. The Appellate Court should not travel beyond its limit earmarked by the law. The Appellate Court should not discuss the undisputed issues incurring unnecessary time and energy. The Appellate Court should always be vigilant in addressing the disputed issues raised before it unless any exceptional circumstance comes to its notice.

Having regard to the facts and circumstances of the case, my penultimate decisions are as follows:

- (i) *The decree of the trial Court so far it relates to allocating separate saham in favour of the plaintiffs in respect of 0.1198 acre of land as mentioned in the schedule 'Ka' to the plaint appertaining to R.S. Plot No. 410 shall remain valid.*
- (ii) *The saham in respect of .0366 acre of land allocated in favour of the plaintiff Nos. 1(ka)-1(Cha) of the original suit shall also remain valid.*
- (iii) *The saham allocated to the defendant No. 2 shall increase from 0.0366 acre to 0.04575 acre of land.*

- (iv) *In a partition suit both the parties fill same character. To avoid multiplicity of the suit, the Court even at the Appellate stage may allocate separate saham even in favour of the defendant who has not preferred Appeal or Cross Appeal.*
- (v) *The land appertaining to Kha and Ga schedule to the plaint are not undivided dwelling house rather they are commercial land and the same by lapse of time turned into urban land. The ingredients Section 4 of the Partition Act are absent, therefore, the concurrent findings of the Courts below that the aforesaid land is in market place or on the commercial land. Considering the evidence on record, I strongly hold the view that the aforesaid suit land is not liable to be preempted by the plaintiff as a matter of course or luxury and opulence.*

With the above observation, both the Rules of Civil Revision No. 2212 of 2018 and Civil Revision No. 04 of 2022 are made absolute in part, without passing any order as to costs. The earlier order of stay granted by this Court in Civil Revision No. 2212 of 2018 thus stands recalled and vacated.

Let a copy of the judgment with LCRs of Civil Revision No. 2212 of 2018 and Civil Revision No. 04 of 2022 be transmitted to the Courts below at once.

Md. Zakir Hossain, J

Naser
P.O