

Bench:
Mr. Justice Bishmadev Chakraborty

Civil Revision No.3958 of 2018

Md. Mukhles Miahpetitioner

-Versus-

Abdul Kadir being dead his heirs:

1(Ka) Shahat Ali others

.....opposite parties

Mr. Mohammad Abul Kashem Bhuiyan,
Advocate for the petitioner

Mr. Ali Ahsan Mullah, Advocate
..... for opposite parties 1(Ka),1(Kha),
1(Uma), 1(Cha), 1(Chha) and 2

Judgment on 30.05.2024

This Rule at the instance of defendant 2 was issued calling upon plaintiff-opposite parties 1(Ka) to 1(Chha) and 2 to show cause as to why the judgment and decree of the Additional District Judge (in-charge), Court No.1, Brahmanbaria passed on 28.10.2018 in Title Appeal No.44 of 2017 dismissing the appeal affirming the order and final decree of the Senior Assistant Judge, Nasirnagor, Brahmanbaria passed on 13.02.2017 and 20.02.2017 respectively in Title Suit No.55 of 2000 (partition) rejecting the petitioner's objection against the Advocate Commissioner's Report and drawing up final decree in the suit should not be set aside and and/or such other or further order or orders passed to this Court may seem fit and proper.

At the time of issuing the Rule all further proceedings of Execution Case No.02 of 2017 was stayed for a limited period which was subsequently extended till disposal of the Rule.

The material facts for disposal of the Rule, in brief, are that the plaintiffs instituted the suit for partition of the land as described in the schedule to the plaint claiming their *saham*. Defendant 2 appeared in the suit, filed written objection and claimed *saham*. The suit was ultimately decreed in preliminary form by the judgment and decree passed on 03.07.2002. The Assistant Judge allocated *saham* to plaintiff1 of $\cdot 12 \frac{1}{6}$ acres, plaintiff 2 to $\cdot 12 \frac{2}{3}$ acres and defendant 2 to $\cdot 12 \frac{1}{6}$ acres. Thereafter, on appeal before the District Judge the parties became unsuccessful and the judgment and decree passed by the trial Court was upheld. After decreeing the suit in preliminary form the plaintiffs filed applications for appointment of Advocate Commissioner to allocate *saham* physically as per preliminary decree which were allowed in several occasions but ended fruitless due to the disagreement of the parties with Commissioners' reports. Finally, the plaintiffs filed an application to the trial Court on 24.05.2016 for appointment of an Advocate Commissioner to allocate *saham* for preparing final decree. The application was allowed on that day and Mr. Md. Emdadul Haque, learned Advocate was appointed to do Commission in the suit land as per writ. The Advocate Commissioner performed his job according to the provisions of Rule 13 of Order 26

of the Code and finally submitted his report on 30.06.2008 along with field book, *chitta*, *saham* sheet and sketch map wherein he gave possession to plaintiff 1 in respect of A, B, C, D and E and plaintiff 2 land of F, G and H to the sketch map.

Against the aforesaid report defendant 2, petitioner herein filed written objection. The petitioner stated facts therein that although the trial Court allocated *saham* to defendant 2 for $12\frac{1}{6}$ acres but the Commissioner did not distribute *saham* to him and kept his share out of the sketch map. However, the Assistant Judge examined the Advocate Commissioner on oath, rejected the objection on 13.02.2017 and prepared final decree on 20.02.2017.

Against the aforesaid final decree, defendant 2 filed appeal before the District Judge. The appeal was heard on transfer by the Additional District Judge, Nasirnagor, Brahmanbaria who by its judgment and decree dated 28.10.2018 dismissed the appeal and affirmed the judgment and final decree passed by the Assistant Judge which prompted the petitioner to approach this Court and this Rule was issued and an interim order of stay was passed.

Mr. Mohammad Abul Kashem Bhuiyan, learned Advocate for the petitioner takes me through the materials on record and submits that the trial Court decreed the suit in preliminary form wherein *saham* was allocated to this petitioner as defendant 2. But the

Advocate Commissioner held local investigation in his absence and gave *saham* to the plaintiffs only and he was left out. In a suit for partition the footing of the defendants who has been allocated *saham* by Court is similar to the plaintiffs. The Advocate Commissioner ought to have given *saham* to defendant 2 similarly to the plaintiffs but he did not do so. Although this petitioner raised objection against the report in writing stating reasons but the learned Assistant Judge failed to apply his judicial mind and rejected it allowing the Commissioner's report and prepared final decree. The lower appellate Court also affirmed the judgment and order and final decree passed by the Assistant Judge. In passing the judgments the Courts below committed error of law resulting in an error in such decision occasioning failure of justice. Therefore, the judgment and decree passed by the Courts below including the order passed by the Assistant Judge accepting the Commissioner's reports are to be set aside and the final decree should be prepared as per the terms of the preliminary decree by appointing an Advocate Commissioner afresh with direction to allocate share to this petitioner granted by the trial Court.

Mr. Ali Ahsan Mollah, learned Advocate for opposite parties 1(Ka), 1(Kha), 1(Uma), 1(Cha), 1(Chha) and 2 on the other hand opposes the Rule. He submits that the preliminary decree was prepared in the terms as appears in the judgment passed by the trial

Court wherein it was ordered that failing to make amicable partition within 60 days, the plaintiffs would take steps for getting their share by appointing an Advocate Commissioner. Here the plaintiffs filed application for appointment of Advocate Commissioner and as such the appointed Commissioner cannot handover possession of the allocated share to this petitioner. To get share as per the preliminary decree he had to file a separate application for appointing Advocate Commissioner. The trial Court on correct assessment of facts and law rejected petitioner's objection and accepted the report and accordingly prepared the final decree. There is no error in the impugned judgments and, therefore, the Rule having no merit would be discharged.

I have considered the submissions of both the sides, gone through the materials on record, the decree passed by the trial Court in preliminary form, the report of the Commissioner along with index, field book, *chitta*, the sketch map and order passed by the Assistant Judge rejecting the petitioner's objection.

The plaintiffs instituted the suit for partition claiming their share as described in the schedule to the plaint. The petitioner as defendant 2 appeared in the suit and claimed *saham* by paying *ad valorem* Court fees which appears from order dated 23.04.2000. However, after examining witnesses of the parties the Assistant Judge decreed the suit in preliminary form on 30.07.2002. The preliminary decree has been passed in the following manner-

“অত্র মোকদমা ১-২নং মূল বিবাদীগণের সহিত দোতরফা সূত্রে এবং অন্যান্য বিবাদীর সহিত একতরফা সূত্রে বিনা খরচে বন্টনের প্রাথমিক ডিক্রী হইল। এতদ্বারা নালিশী খতিয়ানের ১২^১/_৬ শতক ভূমিতে ১নং বাদী, ১২^২/_৬ শতক ভূমিতে ২নং বাদী ও ১২^১/_৬ শতক ভূমিতে ২নং মূল বিবাদী মালিক বলিয়া সাব্যস্ত করা হইল। অদ্য হইতে ৬০ দিনের মধ্যে পক্ষগণকে আপোষে স্ব স্ব প্রাপ্য হিস্যা ভাগ করিয়া নেওয়ার জন্য নির্দেশ দেওয়া হইল। অন্যথায় বাদীপক্ষ নিজ খরচে আদালতযোগে একজন উকিল কমিশনার নিয়োগ করিয়া তাহাদের প্রাপ্য হিস্যা ভাগ করিয়া নিতে পারিবে।”

This preliminary decree was affirmed in appeal. It further appears that previously for 3 (three) times Advocate Commissioners were appointed. They submitted reports but those were rejected on objections. Plaintiffs 1 and 2 finally filed an application for such appointment to handover their allocated *saham* as decreed. The Assistant Judge by order dated 24.05.2016 allowed the said application and appointed Mr. Emdadul Haque as Advocate Commissioner and accordingly issued writ. It is found that the Advocate Commissioner submitted report on 30.08.2016. In the sketch map submitted with the report he has given *saham* plaintiff 1 in the land described in A, B, C, D and E and plaintiff 2 to F, G and H but no share was given to this defendant 2-petitioner.

It is well settled position of law that if in a suit for partition the defendant appears and claims *saham* by paying ad valorem Court fees

his status is to be treated like plaintiff. It is clear from preliminary decree that the trial Court allocated *saham* to this petitioner to the extent of $12\frac{1}{6}$ acres. The final decree is to be prepared in terms of the preliminary decree. The appointed Advocate Commissioner has to handover *saham* in terms of the decree but in this case it is found that he gave *saham* only to plaintiffs 1 and 2. Although this petitioner raised objection against such report but it was rejected. The report was consequently accepted and final decree was prepared. Therefore, I find that the Assistant Judge did not apply the judicial mind in rejecting the objection and accepting the Commissioner's report. By the report of the Commissioner this petitioner has been seriously prejudiced and deprived of enjoying the property in terms of the decree. The reason assigned by the Assistant Judge in rejecting the objection appears against the settled principle laid in a suit for partition where both the parties have been allocated *saham*. The appellate Court ought to have scrutinized the judgment and preliminary decree passed by the trial Court and allowed the appeal but it dismissed the appeal and affirmed the order, judgment and final decree passed by the Assistant Judge in a very casual manner which cannot be sustained. Therefore, I find merit in the submissions of Mr. Bhuiyan.

Accordingly, the Rule is made absolute. The judgment and decree passed by both the Courts below and the order passed by the

Assistant Judge in Title Suit No.55 of 2000 on 13.02.2017 is hereby set aside. The Advocate Commissioner's report is rejected. Therefore, the final decree dated 20.02.2017 prepared in the aforesaid suit is to be treated as *non est*.

If any of the parties file application for appointed of Advocate Commissioner the learned Assistant Judge may allow it appointing an Advocate Commissioner to distribute land to plaintiffs 1, 2 and defendant 2 as allocated in the preliminary decree. The parties will bear the Commissioner's cost as per their shares.

However, the Assistant Judge is directed to dispose of the suit by preparing final decree as directed and observed above within 6 (six) months from the date of receipt of this judgment and order. The order of stay of the execution case stands vacated.

Communicate this judgment and send down the lower Courts' record.