

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CIVIL REVISIONAL JURISDICTION)

**Present:**  
**Mr. Justice Md. Moinul Islam Chowdhury**

**CIVIL REVISION NO. 705 OF 2021**

**IN THE MATTER OF:**

An application under section 115(1) of the  
Code of Civil Procedure.

(Against Decree)

-And-

**IN THE MATTER OF:**

Abony Roy

--- Defendant-Respondent-Petitioner.

-Versus-

Rajeswar Mojumder and others

--- Plaintiff-Appellant-Opposite Parties.

Mr. Ahmed Nowshed Jamil, Advocate

--- For the Defendant-Respondent-Petitioner.

Mr. Uzzal Kumar Bhowmick with

Mr. Manaz Kumar Kirtonia, Advocates

---For the Plaintiff-Appellant- O. P. No. 1.

**Heard on: 09.01.2024, 21.01.2024,  
22.01.2024, 25.01.2024 and 28.01.2024.**

**Judgment on: 28.01.2024 and 29.01.2024.**

At the instance of the present defendant-respondent-petitioner, Abony Roy, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party No.1 to show cause as to why the impugned judgment and decree dated 13.01.2021 passed by the learned Additional District Judge, Court No. 2, Khulna in the Title Appeal No. 84 of 2016 modifying the

judgment and decree dated 28.02.2016 passed by the learned Assistant Judge, Batiaghata, Khulna in the Title Suit No. 68 of 2006 decreeing the suit in part should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present opposite party No. 1 as the plaintiff filed the Title Suit No. 68 of 2006 in the court of the learned Assistant Judge, Batiaghata, Khulna for partition in respect of schedule “Ka” of the land and also for recovery of khas (খাস) possession in respect of schedule “Kha” of the land of the plaint. The plaint further contains that Gurucharan Biswas and his brother Teniram Biswas were the owners of the total land measuring 2.64 acres as an equal share each. Teniram Biswas died leaving behind his wife, Pachi Dasi, who inherited the share of her husband. Duly the record was published in their names in the C. S. Khatian No. 146. Gurucharan and Pachi Dasi jointly transferred .37 acres of land from plot No. 767. Gurucharan died leaving behind his two sons, namely, Laxmikanta Biswas and Banikanta Biswas who inherited his property. Laxmikanta Biswas and Banikanta Biswas transferred .8850 acres of land to Amullah Dhan Saha on 17.05.1954 among which .2750 from the C. S. Khatian No. 146 by executing a mortgage deed on a condition of re-conveyance.

On 10.03.1960 Laxmikanta Biswas paid the mortgage money and got the deed back after paying money. On 05.08.1962 Laxmikanta Biswas and Banikanta Biswas sold some portion of land to Kalipada Biswas. Banikanta went to India and died leaving behind two sons, namely, Dulal and Nittananda Biswas. In the year 1965 Pachi Dasi died and her land was vested upon in Laxmikanta as a reversioner from her husband. Laxmikanta sold 60 decimals of land to Sunil Kumar Biswas. Out of the said 60 decimals of land got  $11 + 31 = 42$  decimals (11 decimals from Amullah Dhan Saha and 31 decimals from the reversioner of Teniram Biswas) of land which was transferred from plot No. 302. Sunil Biswas transferred 42 decimals of land from plot No. 302 to the plaintiff by the sale deed dated 26.09.1979 and also by the sale deed dated 23.05.1991. On 01.01.1999 the defendant No. 1 being substituted as defendant No. 1(a) and entered into the suit land by force as described in the schedule "Kha" of the plaint and constructed a house thereon which caused the plaintiff to file the Title Suit No. 24 of 1999 claiming declaration of title upon the suit land as described in the schedule "Ka" of the plaint and also claiming khas (খাস) possession by evicting from schedule "Kha" of the land as described in the plaint. Upon the

said suit decreed in part by giving title upon the land measuring 21 decimals. The Title Appeal No. 358 of 2000 was preferred in the learned appellate court who *set aside* the decree of the learned trial court on the ground that the suit plot No. 302 could not be identified or determined without partition, thus, the plaintiff offered to the defendant No. 1 for amicable partition but he refused. Hence, the present case was filed.

The suit was contested by the defendant No. 1(Ka) by filing a written statement contending, *inter alia*, that the suit was barred by limitation and there is a defect of parties. The defendant further contended that the said Gurucharan Biswas and Teniram Biswas were the owners of the suit jote jointly before C. S. Khatian and the said Teniram Biswas died leaving behind his wife Pachi Dasi who inherited the property. They jointly transferred the land measuring 37 decimals from C. S. Khatian No. 146 and the record of right was published in their names out of total land measuring 2.27 acres. The said Pachi Dasi died leaving behind two sons, namely, Laxmikanta Biswas and Banikanta Biswas who inherited the property as a reversioner of her husband. The said Laxmikanta Biswas was in possession from the northside and Banikanta was in possession from the

southside by making amicable partition thereof. Banikanta's two sons died during his lifetime. Banikanta died leaving behind a daughter, namely, Urmila Mondal (defendant No. 4) who inherited her father's property and she had two sons being defendant Nos. 2 and 3. The said Urmila Mondal sold 21 decimals of land for the purpose of her maintenance and for the purpose of educational expansion for her two minor sons from plot No. 42 in the southside to defendant No. 1 {substituted defendant No. 1(ka)}. Accordingly, the record was prepared. However, the plaintiff filed the Miscellaneous Case No. 22 of 1992-93 against the record of right prepared but the said Miscellaneous Case was dismissed. The plaintiff earlier filed the Title Suit No. 24 of 1999 and an appeal was preferred which was also dismissed by the learned appellate court below, thus, the present suit is barred by *res-judicata* under the provision of the Code of Civil Procedure.

After receiving the said suit the learned Assistant Judge, Batiaghata, Khulna decreed the suit in part by the judgment and decree dated 28.02.2016. Being aggrieved the plaintiff preferred the Title Appeal No. 84 of 2016 in the court of the learned District Judge, Khulna which was heard by the learned

Additional District Judge, Court No. 2, Khulna who allowed the appeal and thereby reversing the judgment and decree passed by the learned trial court by his judgment and decree dated 13.01.2021.

This revisional application has been filed by the present defendant-respondent-petitioner under section 115(1) of the Code of Civil Procedure challenging the legality of the impugned judgment and decree modifying the judgment and decree passed by the learned trial court and this Rule was issued thereupon.

Mr. Ahmed Nowshed Jamil, the learned Advocate, appearing for the defendant-respondent-petitioner submits that the learned courts below have committed an error of law resulting in an error in the decree occasioning failure of justice in not considering that the instant suit is not maintainable in view of Order 2 Rule 2(3) of the Code of Civil Procedure.

He also submits that the learned courts below have committed an error of law resulting in an error in the decree occasioning failure of justice in not holding that the instant suit is barred by *Res-judicata*.

The Rule has been opposed by the present plaintiff-opposite party No. 1.

Mr. Uzzal Kumar Bhowmick, the learned Advocate, appearing along with the learned Advocate, Mr. Manaz Kumar Kirtonia, for the plaintiff-opposite party No. 1, submits that the learned trial court allocated shaham (সাহাম) for the plaintiff upon the suit land measuring 1.55 acres by the preliminary judgment and decree, whereas, the learned appellate court below-allocated shaham (সাহাম) of 41 decimals on the basis of the documentary and the oral evidence by way of depositions allocating shaham (সাহাম) from the total land measuring 2.27 acres after considering the evidence adduced and produced by the parties but this Rule was obtained by the present defendant-petitioner by misleading the court, as such, the Rule is liable to be discharged.

The learned Advocate also submits that the plaintiff-opposite party preferred an appeal against the preliminary judgment and decree passed by the learned trial court who allocated shaham (সাহাম) of 1.55 acres but the learned appellate court below allocated shaham (সাহাম) of 41 decimals from the Khatian No. 163 out of total land measuring 2.27 acres which contains 6 (six) dag (দাগ) numbers, as such, the Rule is liable to be discharged.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree passed by the learned appellate court below on 13.01.2021 as well as I have examined the essential documents available in the lower courts records, it appears to me that the present opposite party No. 1 filed a title suit for partition of the suit land and also for recovery of khas (খাস) possession from the land as described in the schedule “Kha” of the plaint. It further appears that the present defendant No. 1(Ka) contested the suit by filing a written statement denying the suit by contending that the instant partition suit was wrongly decreed by the learned trial court and also by the learned appellate court below by allocating shaham (সাহাম) of 41 decimals of land from the “Ka” schedule out of 2.27 acres by modifying the judgment of the learned trial court.

There are some admitted positions between the parties as to the original owners of the suit land being Gurucharan Biswas and Pachi Dasi and the present plaintiff-opposite party is the legal heirs of the original owners. However, there are some



disputes between the parties on the course of succession from the said original owners. The present defendant-petitioner contended that the suit is barred by *res-judicata* under section 11 of the Code of Civil Procedure and also barred by Order 2 Rule 2(3) of the Code of Civil Procedure. The provision of *res-judicata* contains a bar upon a court to take for trial of any suit which is directly or substantially in issue in a formal suit between the same parties or between the successors if any competent court already decided the issues raised subsequently by filing another suit. In the instant case, the defendant-petitioner raised a question that the present Title Suit No. 68 of 2006 is barred as the matters in issue already settled by a competent court upon the Title Suit No. 24 of 1999 filed by and between the same parties. The learned trial court considered this provision of law and decided that the suit between the parties is not the same issue under the provision of law because the earlier suit was filed for claiming title.

The instant case has been filed for partition of the suit property occupied as the email (এজমালী) properties. In the earlier Title Suit being the Title Suit No. 24 of 1999 and the learned appellate court below, therefrom, ensured the title of the present

plaintiff-opposite parties but there was no partition among the parties, as such, the learned appellate court below could not decide as to the title of the present plaintiff-opposite parties as there was no partition among the parties.

I consider that the present suit is not barred under section 11 of the Code of Civil Procedure as there are different causes of action available here. The learned Advocate for the present defendant-petitioner also submits that the present partition suit is barred under the Order 2 Rule 2(3) of the Code of Civil Procedure, whereas, the court of law barred a subsequent claim which could have been claimed earlier as barred.

In this regard, I am of the opinion that the plaintiff-opposite parties filed the earlier suit being Title Suit No. 24 of 1999 claiming the title but the instant suit claimed for partition of the suit land among the successors of the original owners, as such, this provision is not applicable in the present Rule.

I have carefully examined the claim and counterclaims by and between the parties as to the measurement of land to be succeeded and obtained by way of a sale deed.

The learned trial court as well as the learned appellate court below examined the evidence adduced and produced by the

parties and came to a conflicting decision by the learned courts below. The present defendant-petitioner claimed his entitlement on the basis of the principle laid down in Dayabhaga Law/School (দায় ভাগা স্কুল) which is applicable in Bangladesh.

The said Dayabhaga School of Hindu Law provides that a girl cannot succeed after the death of her father if there is a brother available of the same father. The present defendant-petitioner claimed that they succeeded from the father as the daughter obtained entitlement. On the basis of the above principle of Hindu Law/School, the learned trial court allocated shaham (সাহাম) of the present plaintiff-opposite parties and allocated shaham (সাহাম) upon the land measuring 1.55 acres of land. Whereas, the learned appellate court below modified the judgment and decree of the learned trial court by allocating shaham (সাহাম) upon the land measuring 41 decimals from the Khatian No. 163 as prayed by the plaintiff-opposite parties.

In view of the above, I do not consider that the learned appellate court below committed any error of law by allocating shaham (সাহাম) upon the land measuring 41 decimals out of a total land measuring 2.27 acres.

Now, I consider the judgment and preliminary decree of the learned courts below.

The learned trial court came to a wrongful conclusion on the basis of the following findings:

...“The inherited property of Banikanta Biswas, as heir and reversioner, measuring .155 acres of land in the suit plot No. 302 devolved on his heirs. His chronological heirs are entitled to this .155 acres of land from suit plot No. 302. The defendant No. 1 {Substituted defendant No. 1(a)} contended title through the heirs of Banikanta Biswas. As it was decided in the appellate court that the defendant had no title to the land, I am of the same view that the defendant has no title to this suit plot No. 302.”...

Whereas, the learned appellate court below came to a lawful conclusion by allocating shaham (সাহাম) on the basis of the following findings and manner:

...“এমতাবস্থায় বাদী/আপীলকারী নালিশী জমা হ-ত .৪১ একর জমি-ত একটি পৃথক ছাহাম পে-ত পা-রন। কিন্তু বিজ্ঞ বিচারিক আদালত দেওয়ানী আপীল ৩৫৮/২০০০ নং মোকদ্দমার রায়-ডিক্রী অনুযায়ী বাদী/আপীলকারী-ক নালিশী জমার .৪১ একর জমি-ত পৃথক ছাহাম বরাদ্দ না ক-র ভ্রমাত্মকভা-ব নালিশী ৩০২ দা-গর .১৫৫ একর জমিতে পৃথক ছাহাম বরাদ্দ করেছেন। কেননা নালিশী এস.এ. ১৬৩ নং

খতিয়া-ন লিখিত ০৬ টি দা-গর মোট ২.২৭ শতক জমির জমা হ-ত .৪১ একর জমি-ত বাদী/আপীলকারীর এজমালী স্বত্ব দখল নির্ধারণ হওয়ার পর কেবলমাত্র একটি দাগের জমি হতে আংশিক ছাহাম বরাদ্দের আইনগত সু-যাগ -নই।”...

In the above circumstances, I consider that the learned appellate court below did not commit any error of law by allocating shaham (সাহাম) upon the land measuring 41 decimals out of a total land measuring 2.27 acres by modifying the judgment and preliminary decree passed by the learned trial court. As such, I do not consider that this is a proper case for interference.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

The impugned judgment and decree dated 13.01.2021 passed by the learned Additional District Judge, Court No. 2, Khulna in the Title Appeal No. 84 of 2016 modifying the judgment and decree dated 28.02.2016 passed by the learned Assistant Judge, Batiaghata, Khulna in the Title Suit No. 68 of 2006 is hereby upheld.

The interim order passed by this court at the time of issuance of this Rule staying the operation of the impugned

judgment and decree dated 13.01.2021 passed by the learned Additional District Judge, Court No. 2, Khulna in the Title Appeal No. 84 of 2016 modifying the the judgment and decree dated 28.02.2016 passed by the learned Assistant Judge, Batiaghata, Khulna in the Title Suit No. 68 of 2006 for a period of 6 (six) months and subsequently the same was extended time to time and lastly, it was extended till disposal of this Rule are hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower court records along with a copy of this judgment and order to the learned courts below at once.