IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 3370 OF 2011

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Md. Fazlul Haque Pramanik being dead his legal heirs 1(Ka) Most. Rofikon Nesa and others

.... Petitioners

-Versus-

Saleha Khatun wife of late Kalu Pramanik and others

....Opposite-parties

Mr. Md. Esa, Advocate

…For the petitioner nos.1(ka)-1(gha), 2-14, 15(ka)-15(cha) and 17-19

Mr. Abdul Hoque, Senior Advocate with
Mr. Md. Masud Rana, Advocate

... For the opposite party nos. 13(a)-13(g)

Mr. Md. Yousub Ali, Advocate

...For the opposite party nos. 68, 83, and 95(a)-95(d)

Mr. M.A. Wadud Bhuiyan, senior Advocate for
Ms. Shamima Nasrin, Advocate

….For the opposite party no. 92

Heard on 05.01.2025, 12.01.2025

and Judgment on 16.01.2025.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

This matter has been referred by the Hon'ble Chief Justice of Bangladesh vide his order dated 18.04.2024.

At the instance of the defendant respondent nos. 2kha/২(খ) and 5(umo)(6)/৫(ঙ)(৬) as nos. 1-25, this rule was issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 09.05.2011 passed by the learned Additional District Judge, Nilphamari in Other Class Appeal No. 67 of 2009 dismissing the appeal and thereby affirming the judgment and decree dated 13.07.2009 passed by the learned Joint District Judge, Nilphamari in Title Suit No. 01 of 2003 dismissing the suit giving *saham* to 4.32 acres of land to the defendant nos. 9,15, 17, 18(ka) and 49 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Originally, the predecessor-in-interest of the present opposite party nos. 1-65 as plaintiffs filed a suit being Other Class Suit No. 01 of 1972 before the then subordinate judge, Rangpur for partition of the suit land described in schedule 'ka' and 'kha' to the plaint for an area of 14.71 $\frac{1}{3}$ acres of total land out of total land of 58.33 acres. The suit was then on transfer to the court of the then learned subordinate judge, Nilphamari on being set up new District there, renumbered as Other Class Suit No. 7 of

1983. Subsequently, on transfer to the court of learned Joint District Judge, 2nd court, Nilphamari it was again renumbered as Title Suit No. 9 of 1994 and lastly re-numbered as Title Suit No. 1 of 2003 in the court of learned Joint District Judge, Nilphamari.

The short facts so figured in the plaint of Title Suit are:

The suit properties so described the scheduled 'ka' to the plaint originally belonged to the predecessor of both the plaintiffs and defendants namely, Amirullah. Subsequently, Amirullah who died leaving behind 3 sons, Velsa Mahmud, Sohorullah, Togor Pramanick and one daughter, Mohirun Bibi. Then Velsa Mahmud died leaving behind wife, Anowara and 2 sons, Badil Pramanik and Shadil Pramanik. Then Shadil Pramanik died leaving his mother, Anowara and wife, Ajimon and 2 sons, Johiruddin and Bachha Sheikh and 2 daughters defendant no. 7 and Aafran Bibi. After the demise of Ajimon Nessa, her property was then inherited by her father, the defendant no. 7. Then Anowara Bibi died leaving behind son, Badia and on the demise of Badia, his property was inherited by his son, Kulto Mamud and Jhila Pramanik and wives, Atormai and Asuran while Jila Pramanik who died during the life time of his father.

Then Asiran died leaving behind defendant no. 18 and that of Azimuddin on the passing of Atormai. Thereafter, Zahiruddin died leaving behind two wives, Atormai and Kaltimai, two daughters, Fazrabi and defendant no. 1 Fatema Khatun, brother Bacha Mia and sister defendant no. 7, Myo Bibi and Zafran Bibi. After the demise of Bacha Mia, his property was inherited by his wife, defendant no. 14, Abeda

Khatun and 2 daughters Sakina and Suroton and two sisters, Myo Bibi and Zafran. Then Sultan died leaving behind son, defendant no. 6 and defendant, Abdul Hamid. Then Zafran died leaving behind 2 sons, plaintiff nos. 8-9 and three daughters, plaintiffs nos. 10-11 and Saleha Khatun, Then Azimuddin died leaving behind his wife, plaintiff no. 15 and two sons, plaintiff nos. 8-9 and 5 daughters, plaintiff nos. 10-14. Then Saleha died leaving behind her husband, plaintiff no. 16 and father, Azimuddin . Fozar Bibi died leaving her husband Ismail, two daughters, plaintiff nos. 17-18 and sister, defendant no. 9. Then Kaltimai died leaving behind two sons, defendant nos. 11-12 and two daughters, defendant nos. 10 and 13. Mahirunessa died leaving nephews, the defendant nos. 2-5 and in that way the plaintiff got $\frac{4157}{64512}$ shares that comes to 12.61 $\frac{18}{21}$ acres of land which has been described in schedule *'ka'* to the plaint.

Further, the suit land so described in *'kha'* schedule to the plaint originally belonged to the predecessors of both the plaintiffs and defendants, Velsha Sheikh. On the demise of Velsa, his property was then inherited by the predecessor of defendant nos. 1-6, Kaltu Mahmud, Plaintiff nos. 7-19, defendant nos. 7-9, defendant nos. 11-12, and defendant nos. 10 and 13 and accordingly all the properties was duly recorded in the khatian in their name.

The plaintiffs in the month of Poush, 1377 BS while asked the defendant, to partition the suit land, they denied to do so, and hence the suit.

On the contrary, defendant nos. 1-6 and defendant no 14 (including the present petitioners) contested the suit by filing a joint written statement denying all the material allegation so made in the plaint. It is the definite case of the said defendants that, the predecessor of the plaintiffs nos. 1-6, Kalu Pramanik had no title and ownership in the case holding as he in his life time transferred his entire share of land. Only, to harass the defendants, the suit was filed by the plaintiffs. It has lastly been asserted in the written statement that the suit land was partitioned long ago among the parties (plaintiffs and the defendants) amicably and they are enjoying their respective share of lands accordingly and hence the suit is liable to be dismissed with costs.

On the basis of the suit pleadings the learned judge of the trial court framed as many as 4 different issues and the plaintiffs in support of his case, examined 4 witnesses and exhibited a host of documents which were marked as exhibit 1 series. On the contrary, the defendants did not adduce a single witness nor produce any document to prove their case. Ultimately, the then learned Subordinate Judge, 2nd court, Nilphamari vide judgment and decree dated 12.02.1995 dismissed the suit (then Other Class Suit No. 3 of 1994) on contest against the defendant nos. 1-6 and 14 and ex parte against the rest. Challenging the said judgment and decree, the predecessor of the present opposite party nos. 1-65 who are the plaintiffs in the suit, as appellants at first filed an appeal being Title Appeal No. 40 of 1995 before the learned District Judge, Nilphamari which was on transfer heard by the learned Additional District Judge, Nilphamari and the learned judge then vide judgment and decree dated

26.06.2002 allowed the appeal though sent back the case on remand to the trial court enabling both the plaintiffs and defendants to adduce witnesses and to cross examine the witness of the plaintiffs by the defendants. Accordingly, re-trial was held before the learned Joint District Judge, Nilphamari by registering the suit as Title Suit No. 1 of 2003. Since neither the plaintiffs nor the defendants came forward to take the opportunity either to adduce any witness (by the plaintiffs) vis-à-vis cross examine the plaintiff's witnesses by the defendants, the trial court again dismissed the suit by his judgment and decree dated 03.07.2009.

Challenging the said judgment and decree, the plaintiffs as appellants then preferred an appeal being Other Class Appeal No. 67 of 2009 before the learned District Judge, Nilphamari and the Additional District Judge, Nilphamari on transfer took up the said appeal for hearing. The learned Additional District Judge after considering the materials on record, then vide judgment and decree dated 09.05.2011 dismissed the appeal against the defendant nos. 1/2 (kha)-2(cha)/3(ka)/4/59(kha)-5(gha)/6/14 and exparte against the rest. However, the learned judge gave saham to the defendant nos. 9,15, 17, 18(ka) and 49 in respect of 4.32 acres of land.

Against the said judgment and decree, the decedents defendants-respondent nos. ২(খ) and ৫(ঙ)(৬) filed this Civil Revision No. 3370 of 2011. And on the other hand the plaintiffs as appellants filed another revision being Civil Revision No. 3209 of 2011 before this court and both were heard on 21.05.2014 presided by Mr. Justice Sharif Uddin

Chaklader and Mr. Justice Abu Taher Md. Saifur Rahman who ultimately discharged both the rules.

Challenging that very judgment and decree dated 21.05.2014 passed in Civil Revision No. 3209 of 2011only the plaintiffs-appellants-petitioners preferred an appeal being Civil Petition for Leave to Appeal No. 3009 of 2014 before the Appellate Division which was ultimately disposed of sending back the said Civil Revision No. 3209 of 2011 before this court to dispose of the same on setting out certain terms vide judgment and order dated 02.05.2016. However, after an exhaustive hearing of that revision it was ultimately discharged by this court vide judgment dated 12.01.2025. Now the instant Civil Revision was taken up for hearing.

Mr. Md. Esa, the learned counsel appearing for the petitioner nos. 2-14 and17-19 submits that, the appellate court below committed an error of law in giving saham to the defendant-respondent nos. 9,15, 17, 18(ka) and 49 without any basis and therefore the same cannot be sustained.

In the same vein, Mr. Abdul Hoque, the learned counsel appearing for the opposite party nos. 13(a)-13(g) upon reading out the judgments of the courts below, including the High Court Division as well as Appellate Division, at the very outset submits that, insofar as regards to giving *saham* to some of the defendants being defendant nos. 9,15,17 18(ka) and 49 by the appellate court below, the learned counsel then by taking us to exhibit nos. 1(Na) ১(ন)', 1(ta), ১(ত), and 1(tha), ১(থ) contends that, though in the application filed by those defendants prayed for *saham,* which has been annexed as of annexure-B to the revision, claiming to be

the SA recorded tenant of SA khatian Nos. 492 and 292 but the name of the predecessor of those defendants have not been mentioned in SA khatian no. 489 and though some of the name of their predecessor appeared in SA khatain no. 492 and 292 however they in their application claimed to have acquired 4.54 acres of land but fact remains, there has been no specification for claiming such *saham* that is, in which plot and in which khatian they (those defendants) will get *saham* out of 4.54 acres of land and in spite of such indistinct claim, the learned judge of the appellate court below gave *saham* in respect of 4.32 acres of land. So on that score as well, the impugned judgment cannot sustain in law. When we pose a question to the learned counsel for the petitioners whether mere producing documents render the trial court to decree the suit and give shaham until and unless those are proved, the learned counsel then very frankly concedes that, the plaintiffs-petitioners actually could not prove their case through oral evidences though there has been no denying that the plaintiffs and the defendants are the successor-in-interest of Monirullah as well as Velsa Mahmud having no disagreement to that effect among the parties to get *saham* yet the learned judge of the trial court did not take into account of that very facts even then gave *saham* to some of the defendants and finally prays for making the rule absolute by setting aside the impugned judgment and decree so far it relates to giving *saham* to defendant nos. 9,15, 17, 18(ka) and 49.

On the contrary, Mr. Md. Yousub Ali, the learned counsel appearing for the opposite party nos. 68, 83, and 95(a)-95(d) supported the judgment passed by the appellate court below and simply prayed for

affirming the judgment and decree passed by the appellate court below sustaining 4.32 acres of land giving *saham* to the defendants-respondent nos. 9,15,17,18(ka) and 49.

In contrast Mr. M.A. Wadud Bhuiyan, the learned senior counsel appearing along with Ms. Shamima Nasrin the learned counsel for the opposite party no. 92 prayed for sustaining the judgment of the courts below and prays for discharging the rule.

Be that as it may, we have considered the submission so advanced by the learned counsel for the petitioners and that of the opposite parties as mentioned above, perused the revisional application and all the judgments passed earlier in connection with this matter, including the impugned judgment and decree as stated herein above. Apart from that, we have also gone through the evidence so have been adduced and produced by the plaintiffs-opposite parties vis-a-vis the plaint itself. On going through the plaint, we find that several amendments were made since filing of the suit back in the year 1972 and by way of last amendment, allowed vide order no. 52 dated 03.02.1987 where we find that the total quantum of claim land (suit land) has been reduced to 12.61 $\frac{18}{21}$ acres from the original claim of 16.89 $\frac{4}{21}$ acres so described in schedule 'ka' and 'kha' to the plaint. And by that amendment, made on 03.02.1987, a separate paragraph being paragraph no. 23 (ka) was inserted and thereby a prayer was made in the following manner:

(ক) আর্জির বর্ণিত বিভাজ্য ক তপসিলের জোত সমূহে বাদী পক্ষের একত্রে ১২.৬৯ একর অংশ এবং খ তপসিলের সম্পত্তি সমূহ ২. $\frac{১০}{৩}$ অংশ ভাগ বাটোয়ারা ডিক্রি প্রচার করিতে।

The said prayer appears to have been made in line with the break down made in the fag end of paragraph no. 23(ka) as stated above. Now, if we compare the prayer portion with that of the above break down regarding the suit land, we also find explicit difference about the exact claim of the suit land and for that obvious reason, the learned Additional District Judge while disposing of Title Appeal being No. 4 of 1995 vide judgment and decree dated 26.06.2002 had given the opportunity to the plaintiffs-petitioners to substantiate the modified claim by sending the case back on remand. However, after the case was sent back on remand, neither the plaintiffs nor the defendants bothered to take any steps curing the defects of the pleading by leading evidence compelling the learned Joint District Judge to pass judgment and decree dated 13.07.2009 making following observation:

> *"বিগত ১৩.০৩.২০০৮ইং তারিখ থেকে অর্থাৎ ৯৫নং আ*
>
> *থেকে মোকদ্দমাটি ১১০ নং আদেশ পর্যন্ত উভয়প*
>
> *পরিপ্রেক্ষিতে যুক্তি তর্কের জন্য এবং বিভিন্ন তদবিরের জন্য ধার্য্য থাকে। এত সুযোগ পাওয়ার পরও পক্ষগণ উহা গ্রহণ না করায় বাদীর মোকদ্দমাটি পূর্ব বৎ রয়েছে। অর্থাৎ বিগত ১২.০২.১৯৯৫ইং তারিখে বিজ্ঞ বিচারিক আদালত যে রায় প্রদান করেছিলেন অর্থাৎ নালিশী জমিতে বাদীপ*
>
> *দখলের ইস্যুটি বাদীপ*
>
> *পরিস্থিতিরই সৃষ্টি হয়ে অর্থাৎ নালিশী জমিতে বাদীপ*
>
> *অপ্রমানিত রয়ে গেল।"*

Though against that judgment, the plaintiffs herein opposite party nos. 1-65 finally preferred Title Appeal No. 67 of 2009, still the plaintiffs did not bother to take any steps to cure the defects asserting title and

possession in the suit land they prayed for partition as per amendment. Though they could do so even in the appellate court below under the provision of section 107 of the Code of Civil Procedure.

Apart from that, we have very meticulously gone through the impugned judgment and decree passed in Other Class Appeal No. 67 of 2009 where the learned Additional District Judge, Nilphamari has very exhaustively discussed the evidences in particular, the evidence made by PW 2 and found that the plaintiffs have utterly failed to lead their case in line with the plaint rather PW 2 in his deposition asserted the claim of the defendants who stated in their written statement that, by way of amicable partition, both the plaintiffs and the defendants have been enjoying their respective share in the suit land. In that regard though the learned counsel for the plaintiffs-opposite parties submits that, in spite of such assertion, the plaintiff will not be deprived of getting their *saham* in the suit property. But we are not at one with such submission, because the plaintiffs claimed a huge quantum of land measuring an area of 16.89 $\frac{4}{21}$ acres and there have been scores of schedules described in the plaint and in every schedule the plaintiffs claimed a certain portion of land. So mere producing documents and making it exhibits will not *ipsofacto* render the case of the plaintiffs proved until and unless they could support their entitlement to each and every portion of land as per the description made in the plaint through oral evidence as well. Furthermore, PW 2 in his deposition both in his chief and cross-examination cannot say how and under what basis the plaintiffs claimed such portion of land in the schedules which has elaborately been discussed by the appellate court

below in the judgment under challenge. Also, though by way of amendment, total claim of the plaintiffs shown at 12.61 $\frac{18}{4}$ acres but in paragraph 25(ka) of the prayer, of the plaint, it has been stated to be 12.61 and 2.10 $\frac{1}{3}$ respectively even then, from the judgment of the appellate court below, we further find that the PW 2 clearly asserted that, they had transferred 9 *bigas* of land. So, if that 9 *bigas* of land was transferred out of the total quantum of the suit land, the claim of the plaintiff cannot stand.

Now let us examine how the *saham* so have been given to the defendant nos. 9,15, 17, 18(ka) and 49 by the appellate court below which is under challenge in this revision by the petitioners can be sustained. On going through SA khatian no. 492 (exhibit-1ন), we find that, out of 5 defendants, only the name of Moniruddin, Fatema Khatun and Sakina are there and total area under that SA khatian stands 34 decimals and out of that 34 decimals what is the claim of those defendants is totally absent. Similar shortcomings are also there in respect of SA khatian no. 489, exhibit-১(খ) where we find the name of only Fatema Khatun and Moniruddin and more surprisingly, in respect of SA khatian no. 292 (exhibit ১(খ)) there has been no name of successor-in-interest, of the SA recorded tenants that is, the defendants nos. 9,15, 17, 18(ka) and 49. Then again, while giving *saham* in respect of 4.32 acres of land to those defendants, what the appellate court below has observed in the fag end of the impugned judgment has got no nexus with the claim made by the defendant in their application praying for *saham* (annexure-B to the

revisional application). So obviously we don't find any basis of the observation vis-à-vis finding in regard to giving *saham* of 4.32 acres of land to the defendant nos. 9,15, 17, 18(ka) and 49. So in absence of any specific assertion in regard to giving *saham* to those defendants, we find patent illegality of the appellate court below and on that score as well, the impugned judgment cannot be sustained.

It is the universal proposition, the plaintiff has to prove his/ her own case without depending on the weakness of the defendants case. In the written statements, the contesting defendants have very robustly asserted that the predecessor of the plaintiffs have no title and possession in respect of the land mentioned in slot 7 and 8 out of 7 slots of the suit property and that of the right, title and ownership of Velsa Mahmud from whom the plaintiffs claimed to have got suit property. So onus thus shifted to the plaintiffs to disprove such assertion of the defendants. But on going through the evidence adduced by 3 PWs that is, PW 2 to PW 4 we don't find the plaintiffs could substantiate their claim in respect of the suit land rather what those PWs stated in their respective testimony, clearly went against their pleading which has elaborately been discussed by the appellate court below in his judgment calling for no repetition here.

Regard being had to the above facts, circumstances, discussion and observation we don't find any basis in the finding of the appellate court below in regard to providing *saham* to the defendant nos. 9,15, 17, 18(ka) and 49 and thus it is liable to be set aside.

Overall, the rule is made absolute however without any order as to costs.

The judgment and decree passed by the learned Additional District Judge, Nilphamari in Title Appeal No. 67 of 2009 giving saham to the defendant respondent nos. 9,15,17,18(ka) and 49 for an area of 4.32 acres of land is thus set aside.

The order of status quo granted at the time of issuance of the rule stands vacated.

Let a copy of this judgment and decree along with the lower court records be sent to the court concerned forthwith.

Md. Bashir Ullah, J:

I agree.

Kawsar/AB.O