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

Present
Mr. Justice Md. Iqbal Kabir
And
Mrs. Justice Jesmin Ara Begum

First Appeal No.109 of 2001

IN THE MATTER OF:
Rokshana Yasmin
... Defendant-Appellant
Versus
Md. Abdur Rashid and others
... Plaintiff-Respondents
Mr. Uzzal Bhowmick, Advocate
... For the Defendant-Appellant
Mr. Khair Ezaz Maswood, Senior Advocate with
Mr. Mohammad Abul Kashem Bhuiyan, Advocate
... For the Plaintiff-Respondents

Judgment on: 23.11.2025

Jesmin Ara Begum, J:

At the instance of the defendant-appellant, this appeal is directed against the judgment and decree dated 27.11.2000 (decree signed on 04.01.2001) passed by the learned Subordinate Judge, 1st Court, Manikganj in Title Suit No.01 of 1997.

The short facts behind the appeal is that respondent Nos.1 and 2 as plaintiffs filed the original Suit for partition against their brother defendant No.1-respondent, in which suit the appellant was impleaded as added defendant No.2 and contested the suit, which was decreed against her in preliminary form and being aggrieved by the preliminary decree of partition the added defendant No.2 as appellant filed the instant appeal.

The facts of the plaint in brief are that Jushon Ali Matbar was the owner of the suit land along with other non suit land amounting to 18.86 acres

of land and he gifted this entire property to his 3 sons, the two plaintiffs and defendant No.1 by gift deed dated 25.01.1980, that all other property of the gift deed, except the suit property, were amicably partitioned among the three brothers that suit property were never partitioned among the three brothers by metes and bounds and as three brothers acquired equal share in the suit jote by their father's gift deed and as the suit land are in their ejmali possession plaintiffs requested their brother defendant No.1 to make partition of the suit land but defendant No.1 denied to do so then the plaintiffs filed the suit to have saham of 2/3rd share of suit land.

Defendant No.2, the appellant contested the suit by filing written statement denying all the material allegations made in the plaint, contending inter-alia, that the three brothers amicably partitioned whole 18.86 acres of land of their father's gift deed dated 25.01.1980 and on the basis of this amicable partition defendant No.1 exclusively possessed the whole suit land, and subsequently transferred 300 decimals of land from the suit land to defendant No.2 for Tk.1,35,000/- by a sale deed dated 05.03.1990, but in the said kabala Tk.30,000/- was written as the price only to minimize the cost of registration. The suit is not maintainable for defect of hotchpotch for non inclusion of all the joint property in the suit land and the suit is bad for defect of parties, since all the co-sharers of those lands were not made parties to the suit.

To adjudicate the suit, the learned trial court framed as many as five different issues when the plaintiff No.1 came up and deposed as P.W.1 and he submitted the certified copy of his father's deed of gift and the concerned S.A. khatian which were marked as Exhibits 1 and 2. The plaintiff side also examined another witness as P.W.2 to substantiate their claim. The defendant No.2 also examined 2 witnesses including herself and submitted documents which were marked as exhibit Nos.Ka-Gha(3).

Upon examining the oral and documentary evidences on record the learned trial Court being found the suit as proved decreed the partition suit in preliminary form by its impugned judgment and decree dated 27.11.2000 (decree signed on 04.01.2001).

Being aggrieved by and dissatisfied with the impugned judgment and decree the contesting added defendant No.2 as appellant preferred this First Appeal.

Mr. Uzzal Bhowmick, the learned Advocate appearing for the defendant-appellant has submitted that the trial Court erred in decreeing the suit without enforcing the fundamental requirement that all joint family property be brought into the hotch potch for a proper and complete accounting of share. He however submitted that the suit is not maintainable for the defect of hotch potch since all the 18.86 acres of lands donated by the deed of gift dated 25.01.1980 were not impleaded in the suit. He also stated that the suit is bad for defect of parties, since all the co-sharers of those lands were not made parties in the suit.

Mr. Uzzal Bhowmick also contended that the contesting defendant-appellant has submitted Ext.'Gha' series in proving the facts that on receiving the gifted 18.86 acres of land from their father the plaintiffs and defendant No.1 have effected an amicable partition of all the gifted properties and on the basis of this amicable partition defendant No.1 got the suit land and the other two brothers, the plaintiffs, got the non suit properties but the trial Court hopelessly failed to consider the documentary evidence of ext. 'Gha' series. He however stated that without any cogent proof the trial Court wrongly arrived at a decision that other than the suit land all other non-suit land of gift deed were amicably partitioned among the three brothers and thus the trial Court has wrongly applied the principle of partial partition in this suit.

He also stated that the observations of the trial Court are self-contradictory as it determined the suit is maintainable by applying the principle of partial partition, on the other hand the trial Court has observed that the contesting defendant No.2 is entitled to recover her residuary share from other non-suit lands of the defendant No.1. He then submitted that by giving such an observation the trial Court has impliedly acknowledged that the property which are included in the suit schedule are not enough to determine the claim of the parties.

Mr. Uzzal Bhowmick also contended that the trial Court committed a material irregularity by wrongly shifting the burden upon the defendant and the trial Court wrongly went into deciding the title and possession of the defendant No.2 in a suit for simple partition, particularly when her claim is derived from an unchallenged deed executed by an admitted co-sharer.

On the other hand, Mr. Khair Ezaz Maswood, the learned Senior Advocate appearing for the plaintiff-respondents submitted that as the defendant No.1 does not contest or deny the claim of plaintiffs that save and except the suit property all other non-suit joint properties of the plaintiffs and defendant No.1 have been amicably partitioned, thus such claim of the plaintiffs is deemed to be admitted. He however submitted that under such a circumstances partition of the suit property only, without including the other non suit property in the suit land, is permissible. In support of his claim the learned Senior Advocate placed before us the decision of our Appellate Division, reported in 51 DLR(AD)155.

Mr. Khair Ezaz Maswood also contended that as the defendant No.2 purchased land only from the suit khatian No.167 of Beutha Mouza, so she is not a co-sharer of the plaintiffs in any other non-suit khatians and she has no joint property with the plaintiffs other than the suit khatian. He also stated that,

it has been settled long ago that only the joint properties of the parties to the suit for partition have to be brought into hotchpotch and it is also settled that any property in which every party of the partition suit does not have an interest cannot be brought into hotchpotch. He however stated that appellant's plea of defect of hotchpotch in the present suit does not have any substance.

He also stated that the defendant-appellant's claim that her vendor defendant No.1 got the whole of the suit property by way of amicable partition is not supported by her title deed, ext. 'Ka' because in the said deed the vendor defendant No.1 says, "নিম্ন তফসিল বর্নিত ভূমিতে আমি পৈত্রিক ওয়ারিশসূত্রে স্বত্ববান ও মালিক দখলকার আছি।". So section 92 of the Evidence Act bars the defendant-appellant in contradicting the statement made in her deed of title.

Mr. Khair Ezaz Maswood lastly stated that the transferees from the plaintiff No.1 vide exhibit-Gha,Gha(1),Gha(2),Gha(3) are neither necessary nor proper parties in this suit, because by the sale deeds of exhibit Gha series the plaintiff No.1 has disposed of the lands of non-suit Mouza Kusher Char to different persons and those purchasers do not have any interest in the suit land and as such they cannot be made parties in the present suit.

We have heard and considered the submissions made by the learned Advocates for both the parties, have gone through the memo of appeal and the grounds set forth therein, pleadings of the parties, the evidences adduced by the parties both oral and documentary, the impugned judgment and decree along with the concerned record of the lower Court.

It is admitted by both the parties that Jushon Ali Matbar, the father of 2 plaintiffs and defendant No.1 was original owner of 18.86 acres of land of various mouza of Manikganj police station. It is also admitted that this Jushon Ali Matbar donated the whole 18.86 acres of land of different mouza to his three sons by a deed of gift on 25.01.1980. Plaintiffs filed the instant suit for simple

partition claiming that all property of their father's gift deed, except the suit property was amicably partitioned among the three brothers and currently the plaintiffs are possessing less than their share in the suit property and hence they filed the suit for partition through Court only for the suit land.

Per contra, the defendant No.2 claims that all the property of the gift deed of Jushon Ali Matbar were amicably partitioned among the three brothers and defendant No.1 got the suit land exclusively and subsequently sold 300 decimals of land from the suit land to defendant No.2 by a sale deed dated 05.03.1990. So the main point for determination in this suit is whether the whole property of the gift deed dated 25.01.1980 were amicably partitioned among the three brothers or not.

On perusal of the deed of gift dated 25.01.1980, i.e. the exhibit-1, it appears that 18.86 acres of lands were gifted from different mouza namely, Kusher Char, Maiddha Benguri, Chakhai, Paschim Bandutia, Uttar Bagha and Beutha, all under the police station of Manikganj. Only 3.73 acres of land of khatian No.167(old)/252(new) of mouza Beutha have been included by the plaintiffs in the schedule of the plaint as suit land for partition claiming that only this 3.73 acres of land of Beutha mouza were not partitioned among the three brothers but the other lands from other different mouza of the deed of gift were rightly amicably partitioned among the three brothers. To substantiate their claim the plaintiff side did not produce any single document to show that the defendant No.1 after being owner of other non-suit property by amicable partition has transferred any land from other non-suit land of gift deed or to show that the defendant No.1 mutated any non-suit land in his name or he pays tax or khajna for any non-suit land which he got amicably from any non suit land. Plaintiffs have hopelessly failed to produce any kind of documentary evidence to show that except the suit land other non-suit land of the gift deed of

Jushon Ali were amicably partitioned among the three brothers and the defendant No.1 got property amicably from other non suit property. Further, the plaintiff No.1 as P.W.1 stated in his cross, in his verbatim, that, "আমাদের তিন ভাইকে ১৮.৮৬ শতক জমি আমাদের পিতা দান করে দেন। ২৫/০১/১৯৮০ তারিখের দানপত্র দলিলের জমি বৈউথা, মধ্যে বিন্দু, কুশের চর, পশ্চিম বান্দুটিয়া মৌজাভূক্ত। আমার পিতা থাকাকালীন আমরা পৃথক হই। আমি বেংলই থাকি। বিবাদী আরশেদ থাকে বেউথা। অন্য ভাই মোতালেব দেশের বাড়ীতে থাকে। আমরা আমাদের পিতার উপস্থিতিতেই ১৮.৮৬ শতক জমি বিভাগ বন্টন করে নেই।" So it is evident from the above statement of P.W.1 that the three brothers amicably partitioned the whole 18.86 acres of land of gift deed during their father's life time. Admitted facts need no proof. Basing on the above admission of P.W.1 we can hold the view that the case of the defendant-appellant is correct that the whole 18.86 acres land of gift deed were rightly amicably partitioned among the three brothers, therefore, the plaintiffs have brought the suit on wrong and false assertion.

Plaintiff Abdur Rashid as P.W.1 also admitted in his cross that the properties which he sold are all from non-suit land. In this respect on perusing the exhibit-Gha, Gha(1), Gha(2) and Gha(3) of defendant it appears that plaintiff No.1 transferred lands to different persons by this deeds of exhibit Gha series by mentioning in the averment of the deeds that he has got the property from his father's gift deed and on an amicable partition with his brothers. So by producing the documentary evidence of exhibit Gha series the contesting defendant-appellant side has become successful in proving the fact that the whole property of the gift deed of Jushon Ali Matbar were amicably portioned among the three brothers and the plaintiff No.1 got the non-suit land on this amicable partition.

On perusing the testimony of P.W.1 it also appears that he has denied the suggestion put to him that defendant No.1 previously filed Title Suit No.23 of 1995 and Title AppealNo.71 of 1998 against the defendant No.2 to

grab her suit property. The P.W.1 also denied that they filed the instant suit for partition to harass the defendant No.2 and to illegally grab her property when the defendant No.1 has failed in the previous Title Suit and Title Appeal against the defendant No.2. In this respect on perusing the exhibit Ga, Ga(1) and Kha, it appears that defendant No.1 Arshed Ali filed the Title Suit No.23 of 1991 against defendant No.2 Rokhsana Yeasmin, which was dismissed for default on 28.08.1993 and thereafter, the defendant No.1 again filed another Title Suit No.23 of 1995 against the same defendant No.2 claiming that the property, which he has sold to the defendant No.2 by exhibit-'Ka' deed was a sale with an agreement to reconvey. The defendant No.2 has contested the Title Suit No.23 of 1995 by asserting that her transaction by deed of transfer of exhibit-'Ka' was an out and out sale and the suit was dismissed on contest against which the defendant No.1 preferred Title Appeal No.71 of 1998, which was also dismissed on contest.

So, it has already been settled by judgment and decree of Title Suit No.23 of 1995 and Title Appeal No.71 of 1998 that the defendant No.1 has sold 300 decimals of land from the suit land to the defendant No.2 by exhibit-'Ka' deed. It is evident from the above mentioned Title Suit and Title Appeal that the defendant No.1 has an enimity with the defendant No.2 and after selling 300 decimals of land from the suit khatian to the defendant No.2 this defendant No.1 was trying to deny his sell.

Therefore, there are sufficient reasons to believe the defendant-appellant's claim that the present suit is malafide and has been instituted only to deprive the defendant-appellant from her purchased land and the plaintiffs filed the present suit in collusion with the defendant No.1 for which this defendant No.1 did not appear and contest the suit.

Importantly that the plaintiffs have filed the instant suit for partition claiming that out of 18.86 acres of land of their father's gift deed only 3.73 acres of suit land were not amicably partitioned but the other remaining land of their father's gift deed have been settled among the three brothers by the amicable partition. Onus lies upon the plaintiffs to prove their case. To discharge the onus the plaintiffs were required to bring all the 18.86 acres of land of their father's gift deed into the hotchpotch and were required to prove it and make it simple by producing sufficient and necessary oral and documentary evidences that except the land of Beutha mouza all other lands of different mouzas of the gift deed have been amicably partitioned among the three brothers, but the plaintiffs have failed to do so. It has been decided in the case of Nurul Afsar Vs. Rafiqul Ahmned & others, reported in 51 DLR (AD) 155 that, "The general rule that a partition suit should embrace all the joint properties of the parties concerned is indeed a rule of convenience. If properties are left out in a partition suit it brooks further litigation. It is true that this rule is relaxable. But there are specific situations calling for relaxation. They are generally (a) where different portions of the property lie in different jurisdictions or (b) when some portion of the property is at the time incapable of partition, or (c) when the property from its nature is impartible, or (d) when property is held jointly with strangers who cannot be joined as parties to a general suit for partition, or (3) where co-tenants, by mutual agreement, decide to make partition of a part of the joint property retaining the rest in common."

Though the learned Senior Advocate for the plaintiff-respondents has referred this 51 DLR(AD) case before us, but in the present suit none of the above situations have arisen. So the instant suit is not fit for applying the principle of partial partition.

On the other hand, if we agree for the sake of argument with the claim of the plaintiff-respondents that only the suit lands were not amicably partitioned among the three brothers, in that situation also the other non-suit lands of the gift deed dated 25.01.1980 were required to be included in the suit land only to give appropriate share to the defendant No.2 who has a legal saf kabala deed from a co-sharer.

Plaintiff-respondents are claiming that the defendant No.1 has no saleable right to sale 300 decimals of land to the defendant No.2. To determine the actual saleable right of defendant No.1 and to ascertain the actual account of share of all the co-sharer whole property of the gift deed were required to be included in the suit land and without it the suit is seriously bad for defect of hotchpotch.

So the instant partition suit is not maintainable for the defect of hotchpotch since all the 18.86 acres land of gift deed dated 25.01.1980 were not impleaded in the suit and the suit is bad for defect of parties since all the co-sharers of those lands were not made parties in the suit.

The main question in controversy between the contesting parties were clearly solved by the testimony of P.W.1 where he admitted in his cross that the whole 18.86 acres of land of the gift deed were amicably partitioned among the three brothers during the life time of their father Jushon Ali Matbar.

The learned trial Court without considering the oral and documentary evidences of the parties and without considering the facts and circumstances of the suit as discussed above, has arrived at a decision without showing any cogent reasoning that only the suit lands of the gift deed of Jushon Ali Matbar were not amicably partitioned among the three brothers. Thus the impugned judgment and decree suffers from illegality which needs interference by this Court.

In view of the above, we do not find merit in the submissions of the learned Senior Advocate for the plaintiff-respondents.

Resultantly, the First Appeal No.109 of 2001 is allowed without any order as to costs.

The impugned judgment and decree dated 27.11.2000 (decree signed on 04.01.2001) passed by the learned Subordinate Judge, 1st Court, Manikganj in Title Suit No.1 of 1997 is hereby set-aside.

Send down the LCR along with a copy of this judgment and order to the concerned Court below at once.

Md. Iqbal Kabir, J:
I agree.

Md. Anamul Hoque Parvej
Bench Officer