

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.2528 OF 2021.

Lutfun Nesa

..... Defendant No.66-Petitioner.

-VERSUS-

Feli Nessa and others.

..... Plaintiff-Opposite parties.

Mr. Ali Imam Khalid, with

Ms. Hosneara Shimul, Advocates

-----For the petitioner.

Mr. Ahmed Nowshed Jamil, with

Ms. Sayeda Shoukat Ara, Advocates

..... For the opposite parties.

Heard on 14.01.2025, 26.01.2025,
02.02.2025 and 05.02.2025.

Judgment on 16.02.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 10.10.2021 passed by the learned Additional District Judge, 1st Court, Jhenaidah in Title Appeal No.09 of 2012, disallowing the appeal and thereby affirming the Judgment and decree dated 23.11.2011 passed by the learned Joint District Judge, 1st Court, Jhenaidah in Title Suit No.50 of 2000

decreeing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The facts in brief for the disposal of Rule are that the opposite party Nos. 1-4 filed Title Suit No. 50 of 2000 before the learned Joint District Judge, Jhenaidah, for partition of the suit land alleging, *inter-alia* that among 15 scheduled lands, Azim Malitha had 08 annas share in the lands of schedule No. 13 and the lands of rest 14 schedules belonged to Azim Malitha in entirety., Azim Malitha died, leaving two sons, Erad Ali and Mohor Ali, and one daughter, Abiron Nessa. Subsequently, Irad Ali died, leaving three sons, Jonab Ali, Rofiuddin, and Khoda Box (father of the plaintiffs), and one daughter, Mojiron Nessa. Subsequently, Khoda Box died, leaving four daughters, i.e., the plaintiffs, and one wife, Fuli Nessa, and full brother Jonab Ali. Plaintiffs' uncle Rofiuddin died, leaving one son, namely Rojob Ali. The plaintiffs are illiterate village women, and only one plaintiff can sign her name. Behind the back and beyond the plaintiffs' knowledge, their cousin brother Rojob Ali and others secretly filed Title Suit No. 304 of 1985 before the learned Munsiff, 2nd Court, Jhenaidah, impleading these plaintiffs as plaintiff Nos. 8-11 in that suit but they did not sign that plaint.

The plaintiff, Nos. 2 and 3, sold 5.50 decimals of land to defendant No. 65 and in the rest of the land although the plaintiffs are in possession, the concerned S.A. record of rights was erroneously prepared.

The defendant, Nos.7-15, 16-19, 23(ka)-23(cha), 49, 63 & 64 and 66 contested the suit by filing six separate written statements.

Defendant Nos.7-15 contended that Khoda Box (father of the plaintiffs) sold 11.5 decimals of land to defendant No. 1 and gifted 54.5 decimals to his wife Fuli Nessa by registered Heba deed dated 21.11.1972 and thereafter Fuli Nessa sold 23 decimals to these defendants by registered deed dated 12.04.1973. The Government has acquired this land. And these defendants applied for compensation.

The defendant. Nos.16-19 contended that C.S. recorded tenant Azim Malitha died, leaving behind two sons, Erad Ali and Mohor Ali. These defendants are the heirs of Mohor All and are entitled to saham for 3.19 ½ acres of land.

The defendant Nos.23(ka)-23(cha) contended that C.S. recorded tenant Azim Malitha transferred 12 decimals of land to Suratun Nessa by oral settlement on 15th Kartick 1333 B.S. who subsequently settled the same to Sanaruddin on 12th Chaitra

1335 B.S. which have been duly recorded in his name. That Jonab Ali, Rofiuddin, and Khoda Box sold lands to defendant No. 23 by registered deed dated 15.11.1966. That, out of 38 decimals of land, 08 decimals of his land were acquired by the Government. They also sold 10 decimals of land, and 20 decimals remained with them. Their further case was that Rahima, as guardian of minor son Rojob Ali, settled 42 decimals to Sanarduddin by registered Kabuliyat dated 14.10.1949, but subsequently, Jonab Ali, Khoda Box and Mojiran Nessa raised claim over 15 decimals and then Sanarduddin took oral settlement of the same on 17th Jaistha 1357 B.S. and said 42 decimals were duly recorded in his name in S.A. record of right. Sanaruddin died, leaving one son, Alim Sheikh, defendant No. 23, and one daughter, Jamiron Nessa, and one grandson, Monsur Ali Sheikh, left by a predeceased daughter. Monsur Ali and Jamiron Nessa sold their shares to defendant No. 23 by registered deeds dated 05.10.1977 and 14.06.1980, respectively. Defendant No. 23 thus acquired entire lands of suit plot Nos. 82, 83, and 224.

Defendant No.49 contended that C.S. recorded tenant Azim Malitha died, leaving behind two sons, namely Erad Ali and Mohor Ali, and one daughter, namely Abiron Nessa. Mohor

Ali died, leaving behind one son, Amir Hossain, defendant No. 49, and four daughters. This defendant purchased 55 decimals from defendant No. 55. This defendant is entitled to 2.25 acres in his saham.

Defendant Nos.63 and 64 contended that Jonab Ali sold 15 decimals to Dol Laskar by registered deed dated 11.02.1965, who sold the same to defendant No. 63 Shahida Begum by registered deed dated 08.07.1966. Mohor Ali sold 1.92 acres of land to Munshi Nurul Islam on 14.12.1961 and sold 68 decimals to Juron Mondol on 22.05.1957. Hemat Ali Sold 1.95 acres to Juron Mondol on 23.01.1957, and S.A. Khatian was rightly prepared. Juron Mondol sold 87 decimals to Surot Sheikh Mia on 21.08.1961, who sold 46 decimals to defendant No. 64. To avoid dispute this, defendant No. 63 also got a registered deed from Rojob Ali and his wife Rahimon Nessa on 28.10.1978 and 29.11.1978. These defendants prayed saham for 61 decimals of land.

Defendant No. 66 contended that the successors in interest of C.S. recorded tenant Azim Malitha filed Title Suit No. 304 of 1985, and the suit was disposed of on compromise with defendant Nos. 8 and 13 of that suit and those defendants got 18.5 decimals of land. That Feli Nessa and Tasa Nessa (present

plaintiff Nos. 1 and 2) sold 1.25 decimals, and Rokeya and Sufia (defendant Nos. 4 and 6) sold 1.5 decimals of land to defendant No. 66 by registered deeds dated 24.12.1995 and 07.03.1996 respectively. Mohor Ali inherited 71 decimals, and after his death, his heirs settled the same by registering Kabuliyat to Golam Rahman. Golam Rahman died, leaving three sons, Kuwat Ali, Surat Ali, and Chand Ali alias Ahmad Ali, and one wife, Jarimon Nessa. Surot Ali sold 12 decimals of land to Abzaluzzaman, the husband of this defendant No. 66. Surot Ali also sold 06 decimals to Abu Ahmed Sharfuddin, who sold the same to this defendant by registered deed dated 29.09.1973. Surat Ali also sold 02 decimals of land to this defendant by registered deed dated 29.09.1973. Kuwat Ali sold 04 decimals to Md. Atiar Rahman who sold the same land to Abzaluzzaman, the husband of defendant No. 66, by registered deed dated 21.03.1973; this defendant and her husband acquired a total of 26.75 decimals of land and residing therein by erecting their homestead. Monjera Khatun forcibly dispossessed this defendant from 2.75 decimals of land; consequently, this defendant filed a Title Suit. No. 64 of 1999 before the learned Senior Assistant Judge, Sadar, Jhenaidah, and obtained a decree on the contest, and against that, the defendants of that

suit preferred Title Appeal No. 51 of 2006, which is still pending.

The learned Joint District Judge, 1st Court Jhenaidah, framed the necessary issue to settle the dispute among the parties.

The learned Joint District Judge, 1st Court, Jhenaidah, by the Judgment and decree dated 23.11.2011, decreed the suit in part granting saham to plaintiffs and defendant Nos.63 and 64 but disbelieved the claim of defendant No.66.

Being aggrieved by and dissatisfied with the Judgment and decree dated 23.11.2011, defendant No.66 preferred Title Appeal No.09 of 2012 before the learned District Judge Jhenaidah. Eventually, the learned Additional District Judge, 1st Court, Jhenaidah, dismissed the appeal by Judgment and decree dated 10.10.2021.

Being aggrieved by and dissatisfied with the above Judgment and decree, defendant No.66, as petitioner, preferred this Civil Revision under section 115 (1) of the Code of Civil Procedure before this Court and obtained the instant Rule with an order of stay.

Mr. Ali Imam Khalid, the learned advocate appearing on behalf of the petitioner, submits that both the courts below failed to appreciate the witnesses of the plaintiffs and, by misconstruing and non-considering the evidence and records of the parties passed the impugned Judgment and decree and hence the Judgment and decree of the Court below are liable to be set aside. He then submits that the question of defect pleading was not pressed, and although in the memorandum of appeal, the appellant specifically asserted that her husband was a necessary party rather, the lower Appellate Court committed to considering this by a sweeping remark and this suit being a suit for partition the same must fail as being bad for defect of necessary party. He then submits that in the present case, neither the plaintiffs deposed before the Court to prove their case nor did they authorize the P.W.1 to depose on their behalf; consequently, the entire deposition given by P.W.1 is not admissible in evidence as he is an incompetent witness rendering plaint as the whole case without any evidence and the judgments of the courts below are liable to be set aside.

Mr. Ahmed Nowshed Jamil, the learned advocate appearing on behalf of the opposite parties, opposes the contention so made by the learned advocate for the petitioner

and submits that both the courts below, having considered all the material aspects of the case as well as discussing the evidence rightly passed the Judgment and decree and as such the Rule is liable to be discharged.

I have anxiously considered the submissions advanced by the Bar, perusing the Judgment of the courts below and oral and documentary evidence on the records. It manifests that the trial court, while decreeing the suit in part, gave saham to the plaintiff to the extent of $0.45\frac{1}{4}$ acres, defendant Nos.16-19 to the extent of $2.24\frac{1}{2}$ acres, defendant Nos.7-15 to the extent of 0.234 acres, defendant Nos.23(ka)-23(ca) to the extent of 0.62 acres, defendant No.49 to the extent of $1.55\frac{3}{4}$ acres, defendant Nos.63-64 to the extent of 0.56 acres and defendant No.66 nil.

The appellate Court below disallowed the appeal affirming the trial court's findings and also affirmed the saham given by the trial court below.

It manifests from the record that the plaintiff side, to prove the case, examined as many as one witness and also submitted the papers and documents exhibited as Exhibits-1-5 series. On the other hand, the contesting defendant Nos.63-64 examined one defense witness and filed the papers and documents

marked as Exhibits-Ka-1-kha-1 series, defendant Nos.7-15 examined two defense witnesses and filed papers and documents as Exhibits-Kha-2 series, defendant No.49 examined one defense witness and have filed document as Exhibit No.Ka-3, defendant Nos.16-19 examined one defense witness, defendant Nos.23(Ka)-23(Kha) examined one defense witness and have filed paper and documents marked as Exhibit Nos.Kha-4 series, defendant No.66, examined one defense witness and filed papers and documents marked as the Exhibits-Kha-5-Ga-5 series.

I have scrutinized each deposition and cross-examination of the witnesses and anxiously considered both parties' exhibited documents. It manifests that in the instant case, neither the plaintiffs deposed before the Court to prove their case nor did they authorize the P.W.1 to depose on their behalf; consequently, the entire deposition given by P.W.1 is not admissible in evidence as he is an incompetent witness rendering the entire plaintiff's case without any evidence. This view gets support in the case of *Abdur Rahim vs. Arifur Rahman and others* reported in 9 CLR (AD) 206 wherein their Lordship of the Appellate Division says that:

"On a breviary of the above provisions of law, it is clearly panoramic that a person, if not authorise by the plaintiff or defendant, except husband and wife, could not depose on his behalf in the Court, if depose, he would be treated as incompetent witness. The DW No. 1 deposed on behalf of other plaintiffs without any authority from them as found from record. Thus, it is obviously proved that he was an unauthorized and incompetent witness to prove the case on behalf of other plaintiffs."

It also revealed from the record that before the trial Court, Mr. Afzaluzzaman, husband of defendant No.66, deposed as D.W.7 and produced the documents in respect of her claim as well as his claim, and all those documents were marked as Exhibits i.e. Exhibits-Ka-5 series-certified copy of the plaint, decree, and solenama of Title Suit No.304 of 1985, registered deed No.12126 dated 24.12.1995, registered deed No.2525 dated 07.03.1996, registered deed No.4110 dated 23.01.1977, registered deed No.1069 dated 26.01.1971, registered deed No.10488 dated 01.10.1976, registered deed No.10490 dated 01.10.1977, registered deed No.4923 dated 04.04.1973,

registered deed No.1970 dated 29.05.1968, 4 rent receipts, judgment and decree passin in Title Suit No.64 of 1999.

It also manifests that before the lower Appellate Court, defendant No.66 produced a certified copy of registered Kabuliyat No.3819 dated 23.12.1952 marked as Exhibit-Ka(6) without objection.

Therefore, it appears that in spite of a series of documents filed by defendant No.66, the appellate Court below erroneously held that the defendant-appellant-petitioner did not file any document, and this error clearly shows that the Judgment of the appellate Court suffers from total non-application of mind and non-consideration of material evidence and as such the same is not a judgment in accordance with the mandatory provision under Order XLI Rule 31 of the Code of Civil Procedure. This view gets support in the case of Azizul Huq (Md) and others vs. Purna Chandra Das and another report in 9 BLC (AD) 218 wherein it was held that:-

"The appeal was disposed of in a slipshod manner. As a first court of appeal the High Court Division ought to have considered the evidence, both oral and documentary, adduced from the sides of the contesting parties to

arrive at a correct finding which is very much lacking in the present case."

It is further notable that it was a specific case of defendant No.66 that her husband also purchased land in the scheduled property and, as such, a necessary party in the suit land, and her husband himself deposed before the Court as D.W.7 and produced registered documents showing his purchase as Exhibits-Kha 5(2), 5(6) and Ga 5 series without any objection. Still, by gross misreading the trial Court erroneously held that the question of party defect was not pressed. Although in the memorandum of appeal, the appellant specifically asserted that her husband is a necessary party, the appellate Court omitted to consider this by a sweeping remark and this suit being a suit for partition must fail as being bad for the defect of necessary party. This view gets support in the case of Matilal Sikder and ors vs. Benodini Dasi reported in 28 DLR (AD) 5 where it is held that:-

"In a suit for partition the co-sharers are necessary parties in the sense that in the absence of any such co-sharer the Judgment which will be given in such a suit may be rendered infructuous at the option of the excluded party."

It is also notable that the trial Court at one place held that all the documents produced by the defendant, Nos.23(ka)-23(Cha), are forged documents created for the purpose of this suit, surprisingly granted saham of 62 decimals to them.

Based on the above facts, circumstances of the case, and discussions made herein above, I am of the firm view that the evidence of defendant No.66 petitioner have not been considered at all. The Courts below ought to have considered the evidence, both oral and documentary adduced from the sides of contesting parties to arrive at a correct finding, which is very much lacking in the present case. For the reasons stated above, the case should be sent back on remand to the trial Court below.

Resultantly, the Rule is made absolute without any order as to cost.

The Judgment and decree dated 10.10.2021 passed by the learned Additional District Judge, 1st Court, Jhenaidah in Title Appeal No.09 of 2012 disallowing the appeal and affirming the Judgment and decree dated 23.11.2011 passed by the learned Joint District Judge, 1st Court, Jhenaidah in Title Suit No.50 of 2000 is hereby set aside.

The Title Suit No.50 of 2000 is hereby sent back on remand to the trial Court to dispose of the suit afresh giving the parties opportunity to prove their respective cases in the light of the observation made above in accordance with law.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).

Kabir/BO