

**IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(Civil Appellate Jurisdiction)**

**First Appeal No. 152 of 2017**

**In the matter of:**

Rahima Begum being dead her heirs are already on record (defendant nos. 1(b) to 1(g) now appellants) 1. Khakon Kha and others.

... Appellants

-Versus-

Md. Ashraf Hossain and others.

... Respondents.

Mr. Md. Mizanur Rahman, Advocate

... For the appellants

Mr. Mallik Shafiuddin Ahmed with

Mr. Shamsul Alam, Advocates

... For the respondent nos. 1-12 and 14-16

**Heard on 26.02.2025 and  
27.02.2025.**

**Judgment on 27.02.2025.**

**Present:**

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

**Md. Mozibur Rahman Miah, J.**

At the instance of the heirs of defendant no. 1, namely, Sukur Khan, this appeal is directed against the judgment and decree dated 30.01.2017 passed by the learned Joint District Judge, 5<sup>th</sup> Court, Dhaka in Title Suit No.

192 of 2006 decreeing the same on contest against the defendant no. 1 and *ex parte* against the rest.

The short facts leading to preferring this appeal are:

The predecessor of the respondent nos. 1-11, namely, Baharuddin Chowdhury and Ashraf Uddin Chowdhury as plaintiff nos. 1 and 2 filed the aforesaid suit for declaration to the effect that those plaintiffs are 16 *annas* owner of the suit property and further declaration that the preparation of R.S Khatian No. 232 in the name of the defendant nos. 1 and 2 showing their share as 12 *annas* instead of 8 *annas* is illegal, inoperative and not binding upon the said plaintiffs.

The case of the plaintiffs in succinct is that, an area of 41 decimals of land out of C.S Plot No. 305 appertaining to C.S Khatian No. 307 originally belonged to two brothers namely, Toaz Kha and Moijuddin Kha in equal share. While they have been in peaceful possession of the same, Toaz Kha died leaving behind only son, Meher Kha and two daughters, Rifatun Bibi and Asirun Bibi and a wife. Subsequently, that very C.S recorded tenant Toaz Kha died leaving behind one son, Meher Kha and two daughters, Rifatun Bibi and Asirun Bibi and as per succession, Meher Kha acquired  $10\frac{1}{4}$  decimals and out of amicable partition Rifatun Bibi acquired  $5\frac{1}{4}$  decimals while Asirun Bibi acquired 5 decimals of land in the said suit plot. After that, for the necessity of fund, Meher Kha then transferred 8 decimals of land to one, Amin Kha by registered sale deed dated 03.07.1946 and delivered possession to him and as Meher Kha was

unmarried, he then gifted rest  $2\frac{1}{4}$  decimals of land in favour of his nephew, (sister's son) Amin Kha and in that way, Amin Kha became the owner of  $10\frac{1}{4}$  decimals of land. It has further been stated that during S.A operation, the suit plot was only recorded in the name of Abdul Aziz Kha and Sukur Kha in 6 *annas* share each while 4 *annas* share has been recorded in the name of Amin Kha in S.A Khatian No. 133 dropping the name of the other co-sharers that is, the two daughters of Toaz Kha namely, Rifatun Bibi and Asirun Bibi. After that, said Amin Kha transferred  $3\frac{1}{2}$  decimals and then  $3\frac{1}{4}$  decimals and finally,  $3\frac{1}{2}$  decimals of land totaling  $10\frac{1}{4}$  decimals in favour of one, Baharuddin Chowdhury herein the plaintiff no. 1 by those 3(three) registered sale deeds bearing nos. 48, 49 and 50 all dated 04.01.1971 and delivered possession to them. Thereafter, Asirun Bibi died leaving behind one son, Amin Kha and Jahira Begum as of only daughter and successor of the property and during her life time, Asirun Bibi verbally gifted her share of suit property measuring an area of 5 decimals of land to Jahira Begum. During R.S operation, the suit land was wrongly recorded in the name of Sukur Kha showing him 8 *annas* sharer Hamidun Nessa, daughter of Moijuddin as 4 *annas* share, one Amin Kha grandson of Toaz Kha as 1 *anna* 15 *gonda* share, while Baharuddin as 2 *annas* 5 *gonda* share in R.S Khatian No. 232 appertaining to R.S Plot No. 335. It has further been stated that though the S.A and R.S record was prepared wrongly in the wrong names yet the plaintiffs had been in possession over the suit properties but on 24.07.2006 when the plaintiff no. 2 went to the local

*Tahshil* Office to pay the rent then he first came to learn that the R.S record was prepared in his name only in respect of 2 *annas* 15 *gonda* share and upon coming to learn about the said wrong recording the suit has been filed.

On the contrary, the defendant nos. 1 and 2 contested the suit by filing joint written statement denying all the material averments so made in the plaint contending *inter alia* that, the suit land was recorded in C.S Khatian in the name of Toaz Kha and Moijuddin Kha who are two full-brothers. While Moijuddin Kha had been enjoying title and possession as 8 *annas* sharer in C.S record, he died leaving behind two sons, namely, Sukur Kha and Aziz Kha and one daughter, Hamidun Nessa. It has further been stated that though Toaz Kha died unmarried leaving behind his full-brother Moijuddin Kha and nephew, Sukur Kha and niece, Hamidun Nessa as the heirs and accordingly, Sukur Kha by virtue of inheritance as well as the heirs of his uncle, Toaz Kha got  $\frac{2}{3}$ rd share of the property mentioned in C.S record. It has further been stated that in order to look into the suit property Sukur Kha engaged Amin Kha as caretaker though S.A record was wrongly prepared in the name of Sukur Kha and his sister as 12 *annas* and 4 *annas* share respectively. Though by virtue of wrong recording in the name of Amin Kha, he never acquired title and possession over the suit property. It has further been stated that, while Sukur Kha as well as Hamidun Nessa had been in peaceful possession over the suit property, then out of amicable partition, Hamidun Nessa transferred 10 decimals of land and the rest 31 decimals of land retained in peaceful possession of defendant no. 1 which he kept on enjoying title and possession by erecting homestead and taking electricity connection and availing other utility

facilities and residing therein with his family. It has lastly been stated that the plaintiffs have got no title and possession over the suit property and in order to harass the defendants, the suit was filed which is liable to be dismissed.

In order to dispose of the said suit, the learned Joint District Judge framed as many as three different issues while the plaintiffs examined 5 witnesses. On the other hand, the defendants examined 3 witnesses in support of their respective cases. Apart from that, the plaintiffs produced several documents which were marked as exhibit nos. 1-14 series while the defendants produced a single document which was marked as exhibit-ka.

After considering the materials and evidence on record so adduced and produced by the parties to the suit, the learned Joint District Judge vide impugned judgment and decree, decreed the suit on contest against the defendant no. 1 and *ex parte* against the rest.

It is at that stage, the heirs of the defendant no. 1 preferred this appeal.

Mr. Md. Mizanur Rahman, the learned counsel appearing for the appellants upon taking us to the impugned judgment and decree and by reading out the deposition of P.W-1 and D.W-1 and taking us through the documents exhibited, at the very outset submits that it is the core defence case of the dependants that Toaz Kha died unmarried having no scope to get the property by the plaintiffs as the successors and subsequent successor of Toaz Kha and therefore, the plaintiffs have got no right to challenge the R.S record prepared in the name of the predecessor of the defendants.

In support of his such submission that Toaz Kha died unmarried and issueless, the learned counsel takes us through the 'heir certificate' so have been produced by the plaintiffs during the proceeding of the suit though it was not marked as any exhibit and pointed out from the said document that though the name of the father of Moijuddin Kha and Toaz Kha has been mentioned as Dilbor Kha in C.S record but the certificate of heirs produced by the plaintiffs shows that the name of father of Toaz Kha has been mentioned Dabir Kha which falsifies the claim of the plaintiffs, that Toaz Kha died leaving behind one son and two daughters and since subsequent S.A record was not prepared in the name of alleged two daughters and one son which alternatively proves that Toaz Kha died issueless and unmarried.

The learned counsel then contends that it is the plaintiff who is to prove his own case without depending on the weakness of the defendant's case under the provision of section 101 of the Evidence Act. In support of his such submission, the learned counsel then placed his reliance in the decision reported in 30 DLR (SC) 41.

In addition to that, the learned counsel further contends that it has also well-settled proposition that thousands of defects of the defendants' case will not cure the loopholes of the plaintiffs' case and therefore, what the defendants could not prove supporting his/her defence case, the plaintiff will not get any benefit out of that very defects and that very proposition has also been settled in the decision reported in 6 BLC (AD) 41.

The learned counsel further contends that though the plaintiffs claimed to have acquired the property firstly, from three several deeds which have been registered on 04.01.1971, 29.06.2005 and 05.11.2006 and

were marked as exhibits 6-6(kha), 12 and 13 but not a scrap of document has been produced to prove that soon after purchasing the property in the name of the plaintiff nos. 1 and 2, they have ever mutated their name in the *khatian*.

The learned counsel next contends that though the plaintiffs claimed to have got the property by their predecessor Amin Kha from one, Meher Kha and produced the said sale deed dated 03.07.1946 which was marked as exhibit- 3 showing that Meher Kha is the son of Toaz Kha but not a single witness has been produced for proving that Meher Kha was the son of Toaz Kha.

Insofar as regards to the testimony of P.W-5 who is the *Mohorar* (মোহরার) and brought the volume of that very deed, the learned counsel then contends that, that very witness can say nothing other than what has been written in the volume but from his evidence it has not proved that Toaz Kha has got any son or daughters.

By taking us to the impugned judgment and decree, the learned counsel further contends that since two consecutive records that is, S.A record and R.S record were not prepared as per the genealogy of title asserted by the plaintiffs in the plaint yet the learned Judge of the trial court has very illegally and illogically avoided that very vital facts and therefore, the judgment and decree passed cannot be sustained in law and the appeal is liable to be allowed.

On the flipside, Mr. Mallik Shafiuddin Ahmed, the learned counsel appearing for the respondent nos. 1-12 and 14-16 (plaintiffs) very robustly opposes the contention taken by the learned counsel for the defendant no.

1-appellants and at the very outset submits that the learned Judge of the trial court has not committed any error in decreeing the suit in favour of the plaintiffs as always latest record prevails over previous record and since the latest record has been challenged by the plaintiffs so whatever has been recorded in earlier record namely, S. A record will not *ipso facto* defeat the case of the plaintiffs in getting the relief as prayed for.

When we pose a question to the learned counsel with regard to dissimilarity of the name of the father of Toaz Kha appeared in the C.S record with the heir certificate so produced by them before the trial court, the learned counsel then readily submits that in the rural area there has been nick name of the village people and therefore, the said name has been appeared in the heir certificate and merely for that the title of the plaintiffs in the suit land cannot be vitiated.

The learned counsel further contends that since it is admitted position that both the plaintiffs and defendants have been possessing from different side of the suit plot so it also proves that the plaintiffs have got title and possession over 8 *annas* share out of 41 decimals of land having no occasion to say that the plaintiffs have got no title and possession over the suit property.

When we pose a second question to the learned counsel why the plaintiffs could not adduce an independent witness to prove that Toaz Kha died leaving behind one son and two daughters, the learned counsel then contends that since the local Chairman did not turn up as witness to prove the heir certificate for that obvious reason, the plaintiffs could not prove the case of the plaintiffs that, Toaz Kha has got one son and two daughters yet



since there has been no deviation on that point then the trial court has rightly decreed the suit.

The learned counsel by referring to the deposition of D.W-2 also contends that, that very D.W-2 also proved the possession of the plaintiffs in the suit property and therefore, the learned Judge of the trial court has rightly decreed the suit.

By referring to the testimony of P.W-5, the learned counsel further contends that, his testimony has also proved that Amin Kha is the grandson of Toaz Kha who has rightly got 8 decimals of land from the son of Toaz Kha that is, Meher Kha.

By referring to the exhibit no. 10, the learned counsel next contends that since that very document remains unchallenged where the name of the father of the vendor has been shown as Toaz Kha, so it also proves that, he died leaving behind one son and two daughters and the plaintiffs has acquired right, title and possession over the suit property by purchase through various sale deeds in the year 1971, 2005 and 2006 through exhibit-6, 12 and 13 and in support of his submission, the learned counsel placed his reliance in the decision reported in 60 DLR (HCD) 29 and 59 DLR (HCD) 207 and finally prays for dismissing the appeal.

Be that as it may, we have considered the submission so advanced by the learned counsel for the appellants and that of the respondent nos. 1-12 and 14-16.

The crux of the dispute in disposing of this appeal is whether Toaz Kha died unmarried and issueless because if it is proved that Toaz Kha has got any issues then the plaintiff's title will be established and if not, then

the case of the defendants will succeed. Since the plaintiffs claimed to have acquired the suit property through transferred from the heirs ranging from the C.S recorded owner Toaz Kha, so it is the plaintiffs who have to prove their positive case. But as the learned counsel for the appellants by taking through the C.S record as well as the heir certificate, we find from those that the name of the father of Toaz Kha is totally different from one another. Had the plaintiffs succeeded in proving the heir certificate by making it exhibit, then the case of the plaintiffs would have proved. But the name of the father of Toaz Kha, has been found different from the material document but in that regard, the submission so placed by the learned counsel for the plaintiffs-respondents does not hold water. Because in absence of any plausible explanation led by the plaintiff's witnesses or from the plaint it cannot be taken as true, that the name of the father of Toaz Kha is Dabir Kha.

Furthermore, as we have repeatedly asked the learned counsel for the respondents what prevented the plaintiffs to adduce any witness who is acquainted with the son, daughters of Toaz Kha to prove that Toaz Kha did not die issueless but we don't get any reply from the learned counsel to that effect because mere producing P.W-5 a, *Mohorar* in the respective sub-registry office does not *ipso facto* prove that Amin Kha is the grandson of Toaz Kha because that very P.W-5 cannot say anything beyond what has been written in the volume he brought with him to the court.

Another pertinent question is that the plaintiffs have not challenged the preparation of S.A record as majority part of the suit land had earlier been prepared in the name of the predecessor of the defendants that is,

Sukur Kha and his sister Hamidun Nessa in S. A record. Though it is the case of the defendants that 4 *annas* share has wrongly been prepared in the name of Amin Kha in the said record though he did not challenge that very S.A record. However, it is incumbent upon the plaintiffs to challenge the S.A record first since they claimed to have entitled 8 *annas* share as per C.S record but the learned counsel for the respondents submits that since 4 *annas* share has been prepared in the name of Amin Kha- the grandson of Toaz Kha so they did not feel it urge to challenge the S.A record. But we don't find any substance in the said submission because keeping S.A record wrong, the subsequent R.S record cannot be challenged.

Further, since 1971 to 2006- the plaintiffs claimed to have acquired the suit property but fact remains, we don't find any mutation in the name of the predecessor of the plaintiffs or the plaintiffs though the learned counsel for the respondents shows us exhibit-5 and 5(ka) to that effect. But on going through exhibit- 5 and 5(ka), we find that those are a single *dakhila* but all the columns of that *dakhila* remains blank having not shown any *khazna* has been given and though exhibit- 5(ka) reveals that one, Halima Begum paid *khazna* up to 1405 B.S in respect of  $10\frac{1}{4}$  decimals of land but such single *dakhila* does not *ipso facto* proves holding possession by that Halima Begum in the suit property. Also, we have gone through decisions so have been cited by the learned counsel for the respondents reported in 60 DLR (HCD) 29 but *ratio* so has been settled in the said decision with regard to variation in the description of boundaries in the suit land which is not any point-in-issue among the parties in the instant suit. Another decision which has been cited by the learned counsel for the

respondent reported in 59 DLR (HCD) 207 is with regard to provision of application of section 143A of the State Acquisition and Tenancy Act where a universal proposition has been settled that “Record of rights neither creates nor destroys title. It is merely a record of physical possession at the time of when it is prepared.” But materials on record does not suggest, that the said *ratio* has got any nexus with the facts and circumstances of the case of the plaintiffs when they have failed to prove the cardinal point about acquiring any property from the predecessor, Toaz Kha.

Then again, we have very carefully gone through the impugned judgment but with regard to the said pivotal point of genealogy of acquiring title by the plaintiffs we have not found that the trial court has ever taken into consideration of that material point and how the learned Judge came to a definite finding that R.S record was wrongly prepared in the name of the defendants is totally incomprehensible to us when admittedly the previous record stands in the name of the predecessor of the defendants. Though it is not the duty of the defendants to prove their defence case but after examining the deposition of D.W-2 and D.W-3, we find that they have proved their possession in the suit land without any deviation in the cross-examination by the plaintiffs.

Given the above facts, circumstances, discussion and observation made hereinabove, we don't find any shred of substance in the impugned judgment and decree which does not simply stand.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and decree dated 30.01.2017 passed by the learned Joint District Judge, 5<sup>th</sup> Court, Dhaka in Title Suit No. 192 of 2006 is thus set aside and the suit is dismissed.

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

**Md. Bashir Ullah, J.**

I agree.