

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

*Present:*

*Mr. Justice S M Kuddus Zaman*

**CIVIL REVISION NO.1226 OF 2022**

In the matter of:

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

And

Nogendra Debnath being dead his heirs: Manik Debnath and others

... Petitioners

-Versus-

Sree Jitendra Debnath and others

... Opposite parties

Mr. Mohi Uddin Ahmed, Advocate

.... For the petitioners.

Mr. Shasti Sarker with

Mr. Kamal Hossain Talukder, Advocates

.... For the opposite party Nos.1-4.

**Heard and Judgment on 19.11.2024.**

This Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 24.11.2021 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Netrakona in Other Appeal No.196 of 2020 affirming the judgment and decree dated 28.09.2020 passed by the learned Assistant Judge, Khaliajuri, Netrakona, in Other Suit No.51 of 2018 should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that the petitioners as plaintiffs instituted above suit for declaration of title for 5 decimal land and recovery of khas

possession for 5 decimal land out of above 15 decimal respectively appertaining to plot No.572.

It was alleged that 94 decimal land including above disputed land belonged to Horendra Chandra Das and others who transferred the same to the predecessor of the plaintiffs namely Nogendra Chandra Debnath and predecessor of defendant No.1-3 namely Jogendra Chandra Debnath and defendant No.4 three brothers by registered kabala deed dated 11.08.1969 and they were in possession in above land by amicable partition. Plaintiff's father died leaving the plaintiffs as his heirs who were in possession in the disputed land but the defendants have fraudulently prepared B.S. Khatian of the above land in their names and on the basis of the same denied title of the plaintiffs and during pendency of this suit forcibly dispossessed the plaintiffs from 5 decimal land of schedule No.2.

Defendant Nos.1 and 3-4 contested the suit by filing a joint written statement alleging that predecessor of the plaintiffs and defendant Nos.1-3 and defendant No.4 were three brothers and they jointly purchased 94 decimal land from Jogendra Chandra Debnath and Horendra Chandra Das and others by registered kabala deed dated 11.08.1969. By above amicable partition disputed land was allotted in the share of the defendants and they are in peaceful possession in the same and BRS Khatian has been rightly

prepared in their names and the defendants did not dispossess the plaintiffs from 5 decimal land.

At trial plaintiffs examined 3 witnesses and defendants examined 4. Documents produced and proved by the plaintiffs were marked as Exhibit Nos.1-3 and those of the defendants were marked as Exhibit Nos."Ka" - "Gha".

On consideration of the facts and circumstances of the case and evidence on record the learned Assistant Judge decreed the suit.

Being aggrieved by and dissatisfied with above judgment and decree defendants preferred Other Class Appeal No.196 of 2020 to the District Judge, Netrokona which was heard by the learned Joint District Judge, 2<sup>nd</sup> Court who dismissed the appeal and affirmed the judgment and decree of the trial Court.

Being aggrieved by and dissatisfied with the above judgment and decree of the Court of Appeal below above appellants as petitioners moved to this Court and obtained this Rule.

Mr. Mohi Uddin Ahmed, learned Advocate for the petitioners submits that it has been admitted by the plaintiffs both in their plaint and evidence of PW1 Jitendra Deb Nath that 94 decimal land including disputed 15 decimal land was purchased jointly by the father of the plaintiffs and the defendants and they were in possession in above land by amicable partition. Since plaintiffs and defendants are admittedly co-sharers and the disputed land has not been partitioned by meets and

bounds this suit at the instance of one co-sharer against the other co-sharers for declaration of title and recovery of possession for joint property is not maintainable in law.

On the other hand Mr. Shasti Sarker, learned Advocate for the opposite party Nos.1-4 concedes that since admittedly the defendants and plaintiffs are co-sharers and the disputed property has not been partitioned by metes and bounds the learned Advocate for the plaintiffs erroneously drafted the plaint of this case as a suit for declaration of title and recovery of khas possession against the co-sharers instead of a suit for partition. Above mistake or error was committed by the appointed Advocate due to lack of professional skill and efficiency and for above error of the appointed Advocate the plaintiffs should not be made to suffer and since the plaintiffs are entitled to maintain a suit for partition the impugned judgment and decree may be set aside and this suit may be remanded to the trial Court for retrial after giving the plaintiffs an opportunity to convert this suit into a suit for partition.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

At paragraph No.2 of the plaint it has been stated that the predecessor of the plaintiffs namely Norendra Chandra Deb Nath and predecessor of defendant Nos.1-3 Jogendra Chandra Deb Nath and defendant No.4 Anil Chandra Deb Nath are three brothers and they jointly purchased 94 decimal land including disputed 15 decimal by

registered kabala deed dated 11.08.1969 and they were possessing above land by amicable partition. Above statement of the plaintiff has been corroborated by PW1 Jitendra Deb Nath in his evidence at trial. He stated that the disputed property was acquired by Norendra, Jogendra and Anil and they were in possession in above land by amicable partition.

It is well settled that in a civil proceedings admission can be made either in the pleadings or in the evidence and an admitted fact does not require further prove by evidence.

Admittedly plaintiffs and defendants are co-sharers for the disputed property and above property has not been partitioned by metes and bounds. As such the plaintiffs and defendants are lawful owners of every inch of above ejmali property. As such a co-sharer of an ejmali property cannot maintain a suit for declaration of title and recovery of possession against another co-sharer. The proper remedy of an aggrieved co-sharer is to bring a suit for partition. In a suit for partition all disputes between the co-sharers as to the extent of title and possession and other related issues are finally determined.

In view of above facts and circumstances of the case and evidence on record I find substance in the submissions of the learned Advocates for respective parties that the plaint of this suit was drafted erroneously and the same is not maintainable in law in its present format and the plaintiffs should have brought a suit for partition.

A co-sharer of a joint property is at liberty to bring a suit for partition at any point of time. The learned Advocate for the opposite party Nos.1-4 rightly pointed out that the erroneous drafting of the plaint and designing of this suit as a suit for declaration of title and recovery of possession instead of a suit for partition was done by the appointed Advocate and the plaintiffs did not have any contribution to the same and the plaintiffs should not be made to suffer for above erroneous drafting of the suit.

In above view of the materials on record I hold that the ends of justice will be met if the impugned judgment and decree passed by the learned Joint District Judge is set aside and the suit is remanded to the trial Court for retrial after giving the plaintiffs an opportunity to amend the plaint to convert this suit into a suit for partition and after giving reasonable opportunity to the defendants to amend their written statement or file an additional written statement and then proceed to dispose of the suit on merit.

Hence, I find substance in this revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute.

The impugned judgment and decree dated 24.11.2021 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Netrakona in Other Appeal No.196 of 2020 affirming the judgment and decree dated 28.09.2020

passed by the learned Assistant Judge, Khaliajuri, Netrakona, in Other Suit No.51 of 2018 is set aside and above suit is remanded to the trial Court for retrial after giving the plaintiffs an opportunity to amend their plaint to convert this suit into a suit for partition and providing sufficient opportunity to the defendants for submission of additional written statements and then proceed with the trial of the case in accordance with law.

However, there is no order as to costs.

Send down the lower Courts records immediately.

*MD. MASUDUR RAHMAN*  
*BENCH OFFICER*