

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

**First Appeal No. 62 of 2022**

**In the matter of:**

Saidur Rahman Chowdhury being dead his heirs:  
1(a) Sabera Ferdous and others.

... Appellants

-Versus-

Shah Nawaz Hossain, Father: late Haji Ashad Ali  
Sikder and Mother: late Nur Banu, Village- East  
Gomatali, Post Office- Pokkhali, Police Station-  
Cox's Bazar Sadar, District- Cox's Bazar. At  
Present: Bithi Villa, Holding No. 1000, Nursery  
Road, Paschim Chowdhury Para, Ward No. 08,  
Municipal Area, Cox's Bazar and others.

... Respondents.

Mr. Shaikh Mohammad Zakir Hossain, Senior  
Advocate with

Mr. MMG Sarwar with

Mr. Md. Ferdous Ala Alpha, Advocates

... For the appellants

Mr. M. A. Wadud Bhuiyan, Senior Advocate  
with

Mr. A. M. Mahbub Uddin, Senior Advocate,

Mr. Muhammad Azizul Islam and

Mr. Md. Nasir Uddin, Advocates

... For the respondent nos. 1-4, 27-28(a)-28(e)

Mr. Mohammed Ziaul Hoque with

Ms. Nusrat Jahan, Advocates

... For the respondent no. 26

**Heard on 22.01.2025 and 29.01.2025.**  
**Judgment on 05.02.2025.**

**Present:**

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

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

At the instance of the defendant no. 1 in Other Class Suit No. 256 of 2019, this appeal is directed against the judgment and decree dated 21.10.2021 passed by the learned Joint District Judge, Cox's Bazar in the said suit decreeing the same in preliminary form on compromise with defendant nos. 23, 24 and 25(ka)-25(umo) and *ex parte* against the rest including the present appellant who was defendant no. 1 in the suit.

The precise facts leading to preferring this appeal are:

The present respondent nos. 1-4 as plaintiffs filed the aforesaid suit for partition in the suit land seeking following reliefs:

- “(ক) নিম্ন ১নং তপশীলের সম্পত্তি বিভাগ বন্টন করতঃ ১(ক) নং তপশীলোক্ত জমিতে তথা স্থানে নির্মিত ফ্ল্যাট বা রিয়েল এস্টেটের হারাহারি মোতাবেক অংশ বাদীগণের অনুকূলে পৃথক বিভাগের প্রাথমিক ডিক্রী হয়,
- (খ) উপরোক্ত ক নং প্রার্থনা মোতাবেক মাননীয় আদালত কর্তৃক বাদীগণকে প্রদত্ত ছাহাম/বিভাগ মাননীয় আদালতের নির্ধারিত সময়ে বিবাদীগণ আপোষে বাদীগণকে বিভাগ করিয়া না দিলে আদালতযোগে সার্ভেজানা এডভোকেট কমিশনার নিয়োগক্রমে সরজমিনে তদন্ত পূর্বক বাদীর বর্তমান দখল বজায় রাখিয়া প্রাথমিক ডিক্রীর মর্ম মতে চূড়ান্ত ডিক্রী দেওয়ার আজ্ঞা হয়,
- (গ) মামলার যাবতীয় ব্যয় বাদীগণের অনুকূলে এবং প্রতিদ্বন্দ্বিতাকারী বিবাদীগণের বিরুদ্ধে ডিক্রী হয়,
- (ঘ) আইন, ন্যায় নীতি ও বিজ্ঞ আদালতের ন্যায় বিচারে বাদীগণের মামলা প্রমান ও অবস্থা মতে আর যে যে প্রতিকার পাইতে পারে তাহাও বিবাদীগণের বিরুদ্ধে এবং বাদীগণের অনুকূলে ডিক্রী হয়।”

In the said suit, the present appellant as well as the respondent nos. 5-30 impleaded as defendant nos. 1-27. The summons upon all the defendants were found to have served.

During the proceeding of the suit, the defendant nos. 23, 24 and 25(ka)-25(umo) filed a compromise petition on 20.10.2022 with the sole plaintiff seeking a decree on compromise and on that very date, plaintiff witness no. 1 (shortly, P.W-1) was examined for the plaintiff and for the compromising defendants that is, defendant nos. 23, 24 and 25(ka)-25(umo) a single witness being defendant witness no. 1 (D.W-1) was also examined and the next date was then fixed on 10.11.2020 for passing judgment on compromise as well as *ex parte*. Following the said order and after several occasions fixed for filing written statement by the defendant no. 1, the trial court ultimately vide impugned judgment and decree dated 21.10.2021 decreed the suit on compromise with defendant nos. 23, 24 and 25(ka)-25(umo) and *ex parte* against the rest directing the compromising defendants to deposit the court fees according to *saham* they got within 21 days. Ultimately, an Advocate Commissioner was appointed to implement the said compromise decree who on 23.05.2022 submitted report allocating *saham* as per compromise decree that is, among plaintiff and the defendant nos. 23, 24 and 25(ka)-25(umo) and thereby, final decree was passed on 21.07.2022. However, being aggrieved by and dissatisfied with the judgment and decree so passed on compromise dated 21.10.2021, the defendant no. 1 on 28.04.2022 preferred this appeal.

It is worthwhile to mention here that soon after preferring this appeal, the plaintiffs-respondent nos. 1-4 filed an application for appointing a

receiver in the suit property however, this court vide order dated 21.05.2024 kept the said application on record. Thereafter, in the event of dispossession of the appellants by the plaintiffs-respondents, they filed an application for temporary injunction in mandatory form in the suit property taken over by the said respondents in the aftermath of changes of regime on 05.08.2024. However, after hearing, this court vide order dated 05.09.2024 allowed the said application and passed an order of *status quo ante* directing the plaintiffs-respondent nos. 1-4 to restore possession of the suit land in favour of the appellants within 7(seven) days. However, challenging that very order, the plaintiffs-respondents travelled to the Appellate Division by filing a civil petition for leave to appeal no. 3128 of 2024 and the Appellate Division vide order dated 18.11.2024 disposed of the appeal by retaining the order of *status quo* which was earlier passed by the learned Judge-in-Chamber and directed this court to dispose of the First Appeal on merit. Hence, we take up this appeal for hearing.

Mr. Shaikh Mohammad Zakir Hossain, the learned senior counsel appearing for the appellants at the very outset submits that under the provision of section 107 of the Code of Civil Procedure, this court is competent enough to dispose of the appeal as of trial court by taking into account of all factual aspects of the case.

The learned counsel then contends that, since the predecessor of the present appellants got the suit property by way of *Osioinama* and obtained necessary permission from the Ministry of Housing upon purchasing the suit land from A. K. Mohammad Hossain, one of the sons of Asod Ali

Sikder, so the defendant no. 1 acquired indefeasible title and possession over the suit property.

The learned counsel in his second leg of submission also contends that, since the alleged compromise decree was not obtained with the prior permission of the Ministry of Housing so the alleged compromise decree has not been effective.

The learned counsel further contends that since the compromise decree was obtained collusively by the plaintiff with some of the defendants without giving an opportunity to the defendant no. 1 to contest the suit so the said compromise decree and *ex parte* decree passed vide impugned judgment and decree cannot be sustained in law.

At this, when we pose a question to the learned counsel whether the defendant no. 1 can challenge the preliminary decree when the final decree has already been passed, the learned counsel then contends that since before passing the final decree instant appeal was preferred so there has been no illegality in it.

The learned counsel finally submits that, since the decree impugned here was not a contesting one against the defendant no. 1, so this court may send the case on remand to the trial court for holding re-trial giving opportunity to this appellants to contest the suit and dispose of the same on merit. In support of his such submission, the learned counsel then placed his reliance in the decision reported in 25 DLR (SC) 90 and prays for allowing the appeal setting aside the *ex parte* judgment and decree passed against the defendant no. 1-appellants.

On the contrary, Mr. M. A. Wadud Bhuiyan along with Mr. A. M. Mahbub Uddin, the learned senior counsels appearing for the respondent nos. 1-4, 27-28(a)-28(e) who are the plaintiff and defendant nos. 23, 24 and 25(a)-25(umo) in the suit very robustly opposes the contention taken by the learned counsel for the appellants and submits that since the suit was decreed on compromise in presence of the predecessor of the present appellants who was defendant no. 1 in the suit, which is also evident from order no. 12 dated 10.11.2020, so there has been no scope to assail the judgment and decree passed on compromise with these respondents.

The learned senior counsel next submits that, from the order sheet passed in Other Class Suit No. 256 of 2019 appeared in the paper book, it shows that on several occasions, the defendant no. 1 took adjournment to file written statement but ultimately failed to do so, so there has been no scope for the defendant no. 1-appellants even to challenge the judgment and decree passed *ex parte*.

The learned counsel further contends that on two several occasions, the trial court ordered to serve summons upon all the defendants including the defendant no. 1 even though at the very inception of filing the suit, the defendant no. 1 entered appearance yet the defendant no. 1 did not bother to contest the suit by filing written statement compelling the trial court to fix the suit for passing judgment *ex parte* against the defendant no. 1, so the submission now placed by the learned counsel for the appellants on factual aspect before this court cannot be taken into consideration in absence of any written statement filed by the defendant no. 1 before the trial court.

The learned counsel by referring to the provision of order VIII, rule 10 of the Code of Civil Procedure, also contends that if no written statement is filed then the court has got no other option but to pass judgment and decree *ex parte* which has rightly been done against the defendant no. 1 through impugned judgment and decree.

The learned counsel further contends that since the defendant no. 1 did not raise any objection about the compromise decree made between the plaintiff and the defendant no. 23-25 so the claim made thereon is barred by principle of waiver and estoppel.

When we pose another question to the learned senior counsel with regard to the submission of the learned counsel for the appellants to send back the case on remand for holding retrial, the learned counsel then contends that, since the defendant no. 1 did not file any written statement and by the time, the suit was disposed of drawing a final decree by giving possession to the compromising parties to the suit, so at this stage, there has been no scope to send back the case on remand however, the defendant-appellants can take resort to separate proceeding to get redress however having no scope to send back the case on remand.

In the same vein, Mr. Mohammed Ziaul Hoque, the learned counsel appearing for the respondent no. 26 by adopting the legal assertion taken by the learned senior counsels for the respondent nos. 1-4, 27-28(a)-28(e) only adds that since from the record, it shows that, the defendant no. 1 got ample opportunity to contest the suit and there has been no sufficient cause not to file written statement by him, so there has been no illegality in the

impugned judgment and decree passed *ex parte* against him which is liable to be sustained.

Be that as it may, we have considered the submission so advanced by the learned senior counsel for the appellants and those of the learned senior counsels for the respondent nos. 1-4, 27-28(a)-28(e) as well as the learned counsel for the respondent no. 26 and perused the impugned judgment and decree in particular, the orders of the suit appeared in the paper book.

As stated hereinabove, from the orders passed in the suit, we find that the defendant no. 1 that is, the predecessor of the present appellants at the very inception that is, on 24.10.2019 entered appearance in the suit and filed application for adjournment to file written statement and till the end of the suit that is, decreeing the suit on compromise with some of the defendants and *ex parte* against him, the said defendant remained present before the court. Even, we find from order dated 10.11.2020, the defendant no. 1 was given last chance to file written statement still the said defendant did not bother to avail that opportunity having no scope for the trial court but to fix the suit for *ex parte* hearing and to pass *ex parte* decree against the defendant no. 1 in view of the mandatory provision delineated in order VIII, rule 10 of the Code of Civil Procedure. However, law permits the defendant no. 1 to challenge the *ex parte* decree either by preferring appeal or by filing a Miscellaneous Case under order IX, rule 13 of the Code of Civil Procedure. But to succeed, in both the forums, it has to be proved by the defendant, that summons had not been duly served upon him/her or there has been sufficient cause for the defendant not to appear or file written statement on the date fix for it, for which the suit was thus posted



for passing decree *ex parte*. But none of the said aspects is applicable here given the admitted fact that the defendant no. 1 entered appearance in the suit at its initial stage and prayed for adjournment for filing written statement. In the memorandum of appeal however no reason has been assigned why on the date of passing the impugned judgment, the defendant could not file written statement in spite of providing him last chance earlier. So on that score, we don't find any shred of illegality in the impugned judgment and decree.

Further, since in presence of the defendant no. 1-appellants, the compromise deed was submitted by the plaintiff and defendant nos. 23, 24 and 25(ka)-25(umo) before the trial court and even in presence of the defendant no. 1, the witnesses of the compromising parties were taken when no objection was raised by him, so we don't find any plausible reason to challenge the compromise decree by the defendant no. 1-appellants here as well.

Also, from the report of the Advocate commissioner dated 23.05.2022, we also find that possession of the suit properties was handed over in terms of the compromise decree among the plaintiff and the defendant nos. 23-25 and ultimately final decree was drawn. Though the learned counsel for the appellants very strenuously submits that the suit may be remanded to the trial court giving them opportunity to contest the suit. But we are not at one with such submission, because it will tantamount to deprive the compromising parties to the suit to reap the benefit they accrued by the time through comprising themselves which has already been carried out by handing over possession.

Anyway, we have also perused the decision cited by the learned counsel for the appellants and find it distinguishable with the facts described in the case in hand as the same does not align with the facts and circumstances of the instant case because in the instant case, the suit was decreed on compromise among the plaintiff and some of the defendants even in the presence of the defendant no. 1-appellants.

Given the above facts and circumstances, we are not inclined to interfere with the impugned judgment and decree which we find to have passed legally and thus liable to be sustained.

Resultantly, the appeal is dismissed however without any order as to costs.

At any rate, the interim order passed by this court stands set aside as the same has lost its efficacy on the back of dismissing the instant appeal.

Let a copy of this judgment along with the lower court records be transmitted to the learned Joint District Judge, Cox's Bazar forthwith.

**Md. Bashir Ullah, J.**

I agree.