

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

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 309 of 1998

IN THE MATTER OF:

Shaikh Mosharraf Hossain being dead his heirs:
Shaikh Refazul Hoque and others

... Plaintiff-Appellants

-Versus-

Shaikh Nurul Hoque and others

... Defendant-Respondents

None appears

Judgment on: 26.08.2025

Md. Riaz Uddin Khan, J:

This appeal is directed against the judgment and decree dated 25.03.1998 passed by the Subordinate Judge, 2nd Court, Satkhira in Title Suit No. 180 of 1994 dismissing the suit.

The facts in brief for disposal of this first appeal is that the appellants as plaintiffs filed Title Suit No.180 of 1994 before the Subordinate Judge, 2nd court, Satkhira for declaration of title of Kha scheduled land measuring 3.82 decimals out of Ka scheduled land measuring 6.19 decimals appertaining to CS Dag Nos. 1435, 1432, 1283 and 1412 under CS Khatian Nos. 645, 169 and 415 of Mouza Joradia under Satkhira district. The plaintiffs case is that those properties were purchased by their predicesor Sohiluddin by his own money and own interest and at the time of purchase Sohiluddin lived in separate mess. The further case of the plaintiffs is that during SA operation those lands were recorded in the names of the plaintiffs and two brothers of their father as 1/3 share to the

plaintiffs and each brothers of their father which is wrong. Though the plaintiffs are in possession of the suit land but on the strength of the wrong SA record the defendants on 03.01.1988 threatened the plaintiffs to dispossess from the suit land, hence the suit.

Defendants 1 to 5 contested the suit by filing joint written statement contending *inter alia* that the suit land were purchased by 3 brothers, namely Sohiluddin, Elahadad and Jabed Ali by their own money and interest in equal share from the joint income of their joint family but those were in the name of eldest brother Sohiluddin as the head of the family or managing member of the family. During SA operation in presence of plaintiffs, especially the plaintiff No.2 who was most educated amongst them, the SA record was prepared in the names of the plaintiffs (as sons of Sohiluddin) and their two uncles Elahadad and Jabed Ali, the predecessors of the defendants. Sohiluddin had a daughter namely Jahida Khatun, co-sharer with the plaintiffs as their sister who subsequently died leaving behind one son Alauddin and one daughter Paru Bibi but in the SA Khatian Jahida Khatun was wrongly left out. The defendants' further case is that the plaintiffs were aware of the SA record from the very beginning of its preparation and the plaintiff no.2 submitted a statement regarding his amount of landed properties as per President's Order No.96 of 1972 to the concerned authority vide no.231/77-78 and in that statement the plaintiff no.2 admitted his share as per SA record of the suit properties. The defendants are in possession of the suit land and question of threatening of dispossess of plaintiffs from the suit land does not arise at all, hence, the suit is liable to be dismissed.

To prove their case the plaintiff no.2, Lokman Ali examined himself as PW-1 supporting the plaint case and

Meraj Ali and Nazrul Islam as PWS-2 & 3 respectively. While on the other hand Defendant no.2, Emdadul Haque examined himself as DW-1 in support of their pleadings and Nesar Ali and Jalal Uddin as DWs-2 & 3 respectively. Both the plaintiffs and defendants produced documents in support of their respective case which were marked as exhibits by the trial court.

After conclusion of trial considering the evidence on record the trial court dismissed the suit by the impugned judgment and decree on the finding that the suit is barred by limitation, bad for defect of parties and also on merit as the plaintiffs could not prove their title and possession over the suit land.

Being aggrieved by and dissatisfied with the impugned judgment and decree the plaintiffs filed the instant first appeal before this Court.

No one appears to support or oppose the appeal when the matter was taken up for hearing, though it was appearing in the list for several dates. Considering that the appeal is an old one of the year 1998 which was earlier once dismissed for default and readmitted and at present law permits this court to dispose of the appeal on merit in absence of the parties, we are inclined to dispose of the same by this judgment.

The appellants in their memorandum of appeal took as many as nine grounds including some formal grounds contending *inter alia* that in view of the admitted fact that the plaintiffs and the defendants are co-related and that the land in dispute was purchased by the father of the plaintiffs on different dates but the same has been recorded in SA Khatian equally in the names of the plaintiffs and 2 brothers of the plaintiffs' father which is wrong. That the trial court after examining pleadings

and depositions of the parties came to a wrong conclusion that though the suit land was purchased by the father of the plaintiffs but as a managing member of the family. That the trial Judge at the time of hearing arguments from defendants side considering illegally the cited DLR-14 Page 253 and in that decision it was mentioned that, "The Mohamedan Law-concept of Joint Family- Section 57- In the Mohamedan Law there is no presumption, as in the Hindu Law, that the acquisition of several members of a family living and messing together are for the benefit of the earlier family. But if during the continuance of the family properties are acquired in the name of the managing member of the family and these are possessed by all the members jointly the presumption is that these are properties of the family and not the properties of the members in whose name the properties stand." That the trial Judge illegally came to a conclusion about the decision cited in 14 DLR as it is applicable only for the Hindu family and not for Muslim family members. That the trial court most illegally and whimsically came to a conclusion that Sohiluddin was managing partner and while he was serving in Calcutta he earned money by business and he purchased the property in his name while he was a managing partner of a joint family. That the trial Judge most illegally held and improperly assessed the evidences of the PWs as well DWs. That the judgment and decree passed by the learned Subordinate Judge is otherwise bad in law. These are the grounds taken by the plaintiff-appellants in their memorandum of appeal.

We have perused the memorandum of appeal along with the Lower Court records including the plaint, written statements, the depositions of the parties and the exhibited documents.

It appears from record that the trial court after examining the pleadings of plaintiffs and defendants and after considering the evidence on record came to a conclusion that the land in question purchased by the father of the plaintiffs in his name while he was manager of the family. It further turns out from the impugned judgment that the trial judge observed that on that point both the parties failed to produce tangible evidence.

The trial court referred two judgments one cited by the plaintiffs and another by the defendants namely 6 DLR 365 and 14 DLR 253 without mentioning the names of the parties to the case. We have verified the decision reported in 6 DLR 365 (Farrokh Ahmed Vs Abul Khair and others) but we could not find out the decision allegedly reported in 14 DLR 253. We have minutely examined each and every reported case of the 14 DLR but it turns out that there is no existence of such case and the learned trial judge without going through the citation quoted it capriciously.

It is very unfortunate and inconceivable that a judge without checking and going through the judgment of the superior court referred by the learned advocates can cite it in an imaginary quotation/observation, when there was no existence of such lines/observations at all and it is more astonishing when there is no such judgment at all. Nowadays, it is a new phenomenon not only in our country but all over the world including India/UK/Australia the judges take help from AI (Artificial Intelligence) like ChatGPT/Perplexcity etc. for reference and in our opinion there is no harm in it but in that case or in the case of any reference made by the learned advocate, the judge must verify/check and cross-check its authenticity very carefully and personally and after full satisfaction shall quote the observation(s) made in the judgment referred to

if is relevant. In case of any reference/citation of the judgment of the superior Court the judge must refer the names of the parties and the citation may be reported or unreported, it has the same force.

In the present case, we have already noticed that the main controversy between the plaintiffs and the defendants is that whether the suit properties purchased in the name of Sohiluddin were purchased by the joint family income for the benefit of all 3 brothers or by the income of Sohiluddin for his own benefit. The trial court after considering the oral and documentary evidence came to the conclusion that the suit properties were purchased in the name of Sohiluddin by income of joint family as a managing member for the benefit of all members. We have examined the depositions of PWs and DWs and on this point it is quite conflicting claim. However, from the exhibited documents, particularly the disputed deeds, SA Khatian, rent receipts submitted by both parties and statements of landed properties (Exhibit-E) coupled with the oral evidence it appears that the suit properties were purchased in the name of Sohiluddin, father of the plaintiffs but those properties were possessed by all the members jointly and during the continuance of the family those properties were acquired in the name of the managing member of the family, Sohiluddin. Because, admittedly during SA operation the plaintiff no.2 was adult and other than the suit properties all other properties have been recorded in the names of the plaintiffs and the suit land has been recorded in 1/3 equal share in the names of the plaintiffs (as heirs of Sohiluddin) and Elahadad and Javed Ali, two brothers of Sohiluddin. The rent receipts submitted by the plaintiffs also reveals that they paid rents of 1/3 share of the suit land as per SA Khatian and it is also admitted by the PW-1.

Moreover, the statement of landed properties (Exhibit-E) it appears that the plaintiff no.2 claimed suit properties as per SA record. In such view of the matter, the presumption is that the suit properties are the properties of the family, and not the separate properties of Sohiluddin, in whose name the suit properties stand.

Now, a pertinent question of law has been raised in the instant suit, whether the presumption of joint family property is applicable to a Muslim family. Eminent jurist Sir DF Mulla in his book Principles of Mahomedan Law in inheritance chapter on the heading Joint family and joint family business (some people refer it as section-57, though wrongly, as there cannot be any section in law unless it is enacted by legislature) stated that (1) *when the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law. Further, in the mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family. But if during the continuance of the family properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand.*

The similar question was dealt with by the superior courts of our subcontinent including Bangladesh. In the case of Muhammad Wali Khan Vs Muhammad Mohiuddin Khan and others reported in 24 Calcutta Weekly Notes 321, the Privy Council, while considering the question of this nature, observed as under:

“The four villages in question were purchased by Ali after his father’s death but before the arbitration and were put by him into the name of his eldest son as a provision for him. Now to make out his claim to a share of those the plaintiff must show that the villages were either the property of Allah Baksh which is impossible, as they were not purchased till after his death, or that they were purchased out of what was joint undivided property. But in the first place, as pointed out by the learned subordinate judge, there is no presumption in the case of a Mohammedan such as exists in the case of a Hindu joint family. The succession of a Mohammedan is an individual succession, prima facie, therefore, in the absence of other evidence, property bought by Ali would be property with his own money.”

From plain reading of the above observation it can be safely said that the judicial committee recognised that evidence could be given to show that property purchased by a member of a Muslim joint family was with the fund and for the benefit of the entire family. In the case of Aminuddin Munshi Vs Tajuddin & others reported in AIR 1932 Cal 538 their lordships held the similar view. In the case of Shukrulla & others Vs Mt. Zahura Bibi & others reported in AIR 1932 All 512 their lordships observed that the law does not recognise a Mohammedan joint family as a legal entity, and has not provided rules applicable to the family as such. The rights of its individual members, both as regards the original joint property and its subsequent enlargement, must be determined by an appeal to general law. In the case of Muhammad Syed Ali and others Vs Muhammad Sabed Ali &

others reported in 10 DLR 447 a Division Bench of our the then Dhaka High Court accepted the principle that a property even though bought in the name of a member of a Muslim joint family could be shown, as was in fact, belonging to all members of that family, when the fund for the same was supplied by all the members of that family. The same view was also expressed in the case of Farrokh Ahmed Vs Abul Khair & others reported in 6 DLR 365. In all those decisions their lordships explicitly agreed that when the members of a Muslim family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law. But it is interesting to notice that in all of those cases their lordships further observed that if during the continuance of the family, living in commensality, properties are acquired by the common fund in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, then it must be determined by general law. Considering all those decisions along with some other decisions a Division Bench of then Dhaka High Court in the case of Basiruddin Sarkar Vs Jasimuddin Sarkar & others reported in 24 DLR 243 their lordships held:

It is true that the principles of Muslim law does not recognise the incidents of joint family as applicable to the Hindus and when a member of a Muslim joint family acquired a property the same will not be presumed to be the property of that family. A property acquired by such a member *prima facie* belongs to that member. This, however, does not rule out the possibility of showing that even though such a property is acquired in the name of a member of a Muslim joint family, even then the

same, in fact, is with the fund and for the benefit of all the members of such family. Evidence can be led to prove this fact and if it is so proved then the general principles relating to such purchase must be accepted. As far as it has been brought to our notice, there is no principle in Muslim Law prohibiting the members of a particular family acquiring some property jointly. (underline supplied).

In the case their lordships after discussing some reported cases finally held:

In appropriate cases, however, where the person in whose possession the usufructs of properties belonging to a number of common owners, falls, who applies the same in acquiring some other property, then the same can also be claimed as belonging to all such members. The important question in this regard is as to how the consideration money was obtained and whether under the facts and circumstances, it could be deduced that a joint fund was applied for the purpose. If the evidences so prove, then there is no difficulty in holding that such property acquired with such ejmali fund should belong to the owners of such fund.

If we read together the observations made by their lordships in the abovementioned catena of decisions coupled with the opinion of eminent jurist Sir DF Mulla expressed in his book Principles of Mahomedan Law it can be deduced that the Muslim law does not recognise the concept of joint family as applicable in the Hindu law and when a member of a Muslim family living in commensality, acquired a property, the same will not be presumed to be the property

of that family but acquired by such a member *prima facie* belongs to that member. However, evidence can be led to prove of showing that even though such a property is acquired in the name of a member of a Muslim family, in fact, the same is acquired with the fund and for the benefit of all the members of such family and to prove that it is possessed by all the members jointly. If this fact is so proved then applying the general principles it is the properties of the family, not the separate property of the member in whose name it stands.

In the present case, as has been already noticed, that the plaintiffs could not prove that the suit property was acquired by Sohiluddin by his own fund against the claim of the defendants that the suit property was acquired jointly by 3 brothers, Sohiluddin, Elahadad and Javed Ali by their joint fund but in the name of the eldest brother Sohiluddin as a managing member of the family. On the other hand the defendants proved that the suit property was jointly possessed by all the 3 brothers and accordingly SA Khatian was published. It is also proved that plaintiffs paid rent according to SA Khatian and there is further admission by the plaintiff no.2 in his statement of land properties submitted as per PO No.96 of 1972. The trial court also found that the suit is barred by limitation. We also concur the same view. For the reason that, admittedly plaintiff no.2 (PW-1) came to know about the disputed SA khatan containing suit land in the year 1967. In that view of the matter the instant suit has not been filed within the statutory limitation period. The trial court also found the suit is bad for defect of parties. However, only for non-joinder of parties a suit cannot be dismissed as per provision of Order-I Rule-9 of the Code of Civil Procedure. In the written statement defendants categorically stated

that Sohiluddin had a daughter namely Jahida Khatun, co-sharer with the plaintiffs as their sister who subsequently died leaving behind one son Alauddin and one daughter Paru Bibi. The plaintiffs failed to make them parties claiming that Jahida Khatun gifted her share orally to the plaintiffs but no evidence was led to that effect. In that view also the trial court is correct in the finding that the suit is bad for defect of parties and rightly dealt with the matter in controversy with regard to right, title and interest of the parties. The points rose in the instant appeal, in our firm opinion, has no substance. In view of the above, we do not find any reason to interfere with the impugned judgment and decree passed by the trial court.

In the facts and circumstances discussed above and the position of law, the instant appeal destined to fail for devoid of merits.

In the result the appeal is **dismissed**, however, there will be no order as to cost. The judgment and decree of the trial court dismissing the suit is hereby upheld.

Send down the Lower Court Records at once along with a copy of this judgment.

Md. Iqbal Kabir, J:

I agree.