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

CIVIL REVISION NO. 3209 OF 2011

In the matter of:
An application under Section 115(1) of the Code of Civil Procedure, 1908.

AND

In the matter of:

Saleha Khatun and others

.... Petitioners

-Versus-

Rezaul Haque and others

....Opposite-parties

Mr. Abdul Hoque with
Mr. Md. Masud Rana, Advocate

... For the petitioners

Mr. Md. Esa, Advocate

…For the opposite party no. 7-19 and 22-24

Mr. Md. Yousub Ali, Advocate

...For the opposite party nos. 47,53,54,55 and 101

Heard on 23.04.2024, 10.11.2024, 08.12.2024, 09.12.2024, 10.12.2024 and 15.12.2024.

Judgment on 15.12.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J:

This matter has been referred by the Hon'ble Chief Justice of Bangladesh vide his order dated 18.04.2024.

At the instance of the petitioner nos. 1-67 who are the successor-in-interest of plaintiff nos. 1-18 in Other Class Suit No. 01 of 1972 field before the then subordinate judge, Rangpur for partition of the suit land described in schedule 'ka' and 'kha' to the plaint for an area of 14.71 $\frac{1}{3}$ acres of total land of 58.33 acres. The suit was then on transfer to the court of the then learned subordinate judge, Nilphamari on being set up new District and renumbered as Other Class Suit No. 7 of 1983. Subsequently, on transfer to the court of learned Joint District Judge, 2nd court, Nilphamari it was again renumbered as Title Suit No. 9 of 1994 and lastly re-numbered as Title Suit No. 1 of 2003 in the court of learned Joint District Judge, Nilphamari, this rule was issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 09.05.2011 passed by the learned Additional District Judge, Nilphamari in Other Class Appeal No. 67 of 2009 dismissing the appeal and thereby affirming the judgment and decree dated 13.07.2009 passed by the learned Joint District Judge, Nilphamari in Title Suit No. 01 of 2003 dismissing the suit should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The short facts so figured in the plaint of the aforesaid Title Suit are:

The suit properties so described the scheduled ‘ka’ to the plaint originally belonged to the predecessor of both the plaintiffs and defendants namely, Amirullah. Subsequently, Amirullah died leaving behind 3 sons Velsa Mahmud, Sohorullah, Topor Pramanick and one daughter, Mohirun Bibi. Then Velsa Mahmud died leaving behind wife, Anowara and 2 sons, Badil Pramanik and Shadil Pramanik. Then Shadil Pramanik died leaving his mother, Anowara and wife, Ajimon and 2 sons, Johiruddin and Bachol Sheikh and 2 daughters defendant no. 7 and Jafran Bibi. After the demise of Ajimon Nessa, her property was inherited by her father, the defendant no. 7. Then Anowara Bibi died leaving behind son, Badia and on the demise of Badia, his property was inherited by his son, Kulto Mamud and Thila Pramanik and wives, Atomai and Asuran while Jila Pramanik died during the life time of his father.

Then Asiran died leaving behind defendant no. 18 and that of Azimuddin on the passing of Atormai.

Thereafter, Zahiruddin died leaving behind two wives, Atormai and Kaltimai, two daughters, Fazrabi and defendant no. 1 Fatema Khatun, brother Bacha Mia and sister defendant no. 7, Myo Bibi and Zafran Bibi. After the demise of Bacha Mia, his property was inherited by his wife,defendant no. 14, Abeda Khatun and 2 daughters Sakina and Suroton and two sisters Myo Bibi and Azfran. Then Sultan died leaving behind son, defendant no. 6 and defendant, Abdul Hamid. Then Zfran died leaving behind 2 sons, plaintiff nos. 8-9 and three daughters, plaintiffs nos. 10-11 and Saleha Khatun, Then Azimuddin died leaving behind his wife, plaintiff no. 15 and two sons, plaintiff nos. 8-9 and 5 daughters,

plaintiff nos. 10-14. Then Saleha died leaving behind her husband, plaintiff no. 16 and father, Azimuddin . Fozar Bibi died leaving her husband Ismail, two daughters, plaintiff nos. 17-18 and sister, defendant no. 9. Kaltimai died leaving behind two sons, defendant nos. 11-12 and two daughters, defendant nos. 10 and 13. Then Mahirunessa died leaving nephews, the defendant nos. 2-5 and in that way the plaintiff got $\frac{4157}{64512}$ shares to 12.61 $\frac{18}{21}$ acres of land which has been described in schedule 'ka to the plaint .

Further, the suit land so described in 'kha' schedule to the plaint originally belonged to the predecessors of both the plaintiffs and defendants, Velsha Sheikh. On the demise of Velsa, his property was then inherited by the predecessor of defendant nos. 1-6, Kaltu Mahmud, Plaintiff nos. 7-19, defendant nos. 7-9, defendant nos. 11-12, and defendant nos. 10 and 13 and accordingly all the properties was duly recorded in the khatian in their name.

The plaintiffs in the month of Poush, 1377 BS while asked the defendant to partition the suit land, then denied to do so, and hence the suit.

On the contrary, defendant nos. 1-6 and defendant no 14 contested the suit by filing a joint written statement denying all the material allegation so made in the plaint. It is the definite case of the said defendants that, the predecessor of the plaintiffs nos. 1-6, Kalu Pramanik had no title and ownership in the case holding as he in his life time transferred his entire share of land. Only, to harras those defendants, the

suit has been filed by the plaintiffs. It has lastly been asserted in the written statement that the suit land has long been partitioned among the parties (plaintiffs and defendants) amicably and they are enjoying their respective share of lands and accordingly the suit is liable to be dismissed with costs.

On the basis of the pleadings of plaintiffs and defendant nos. 1-6, 14, defendant nos. 6-13, 15 and 17, the learned judge of the trial court framed as many as 4 different issues and the plaintiffs in support of his case examined 4 witnesses and exhibited a host of documents which were marked as exhibit 1 series. On the contrary, defendants did not adduce a single witnesses nor produce any document to prove their case. Ultimately, the then learned Subordinate Judge, 2nd court, Nilphamari vide judgment and decree dated 12.02.1995 dismissed the suit (then Other Class Suit No. 3 of 1994) on contest against the defendant nos. 1-6 and 14 and ex parte against the rest. Challenging the said judgment and decree, the predecessor of the present petitioners at first filed an appeal being Title Appeal No. 40 of 1995 before the learned District Judge, Nilphamari which was on transfer heard by the learned Additional District Judge, Nilphamari and the learned judge then vide judgment and decree dated 26.06.2002 allowed the appeal though sent back the case on remand to the trial court allowing both the plaintiffs and defendants to adduce witnesses and to cross examine the witness of the plaintiff by the defendants. Accordingly, re-trial was held before the learned Joint District Judge, Nilphamari by registering the suit as Title Suit No. 1 of 2003. Since neither the plaintiffs nor the defendants came forward to take

the opportunity either to adduce any witness by the plaintiffs vis-à-vis cross examine the plaintiff's witnesses by the defendant, the trial court again dismissed the suit by his judgment and decree dated 03.07.2009.

Challenging the said judgment and decree, the plaintiffs as appellants then preferred an appeal being Other Class Appeal No. 67 of 2009 before the learned District Judge, Nilphamari and the Additional District Judge, Nilphamari on transfer took up the said appeal for hearing. The learned Additional District Judge after considering the materials on record, then vide judgment and decree dated 09.05.2011 dismissed the appeal against the defendant nos. 1/2 (kha)-2(cha)/3(ka)/4/59(kha)-5(gha)/6/14 and exparte against the rest. However, the learned judge gave saham to the defendant nos. 9,15,17,18(ka)/49 in respect of 4.32 acres of land.

Against the said judgment and decree, two sets of Civil Revision was filed by the plaintiffs as petitioners that is, instant Civil Revision No. 3209 of 2011 and another set of defendants respondents filed Civil Revision No. 3370 of 2011. However, both the revisions were heard by this court on 21.05.2014 presided by Mr. Justice Sharif Uddin Chaklader and Mr. Justice Abu Taher Md. Saifur Rahman and ultimately discharged both the rules.

Challenging that very judgment and decree dated 21.05.2014 only the plaintiffs-appellants-petitioners of Civil Revision No. 3209 of 2011 preferred an appeal being Civil Petition for Leave to Appeal No. 3009 of 2014 before the Appellate Division which was ultimately disposed of sending back Civil Revision No. 3209 of 2011 before this court to dispose

of the revision on setting out certain terms vide judgment and order dated 02.05.2016. Hence, the matter has been taken up for hearing.

Mr. Abdul Hoque, the learned counsel appearing for the petitioners upon reading out the judgments of the courts below including the High Court Division as well as Appellate Division, at the very outset submits that, the appellate court below has committed an error of law innot decreeing the suit on taking into account of the case of the plaintiffs in its proper perspective and wrongly gave saham to some defendants in respect of 4.32 acres of land.

The learned counsel in his second thought of submission also contends that, though the total area of undivided land is 58.33 acres and the plaintiffs claimed an area of 14.71 $\frac{1}{3}$ acres of land and evidence to that effect was led yet the trial court as well as the appellate court below did not take into consideration of the evidences and materials on record and therefore the judgment and decree passed by the learned judges of the courts below cannot sustain in law.

The learned counsel further contends that, a series of documents have been produced by the plaintiffs-petitioners in support of acquiring their title in the suit land as the admitted successor-in-interest of Amirullah and Velsa Mahmud on whose name CS and SA record was prepared in the name of their predecessor but without taking into consideration of that vital documents, the learned judge in a very whimsical manner dismissed the suit.

The learned counsel further contends that, though it is the definite case of the defendants that they are also the successor-in-interest of the

CS recorded tenant, Amirullah and Velsa Mahmud and claimed that the suit property had earlier been amicably partitioned among the plaintiffs and defendants but that does not *ipsofacto* debar the plaintiffs to get their rightful share in the suit land in the event of denying partition of the suit land.

The learned counsel further contends that, it is the normal practice prevailed in our rural areas where a joint family use to enjoy title and possession in an undivided land amicably, which has just been asserted by the defendants in their written statement but since the plaintiffs have disclosed a definite cause of action on denying their share in the suit land by the defendants, so the plaintiffs are entitled to get their share as prayed in the plaint. Insofar as regards to giving saham to some of the defendants being defendant nos. 9,15,17 18(ka) and 49 by the appellate court below, for the first time, the learned counsel by taking us to exhibit nos. 1(Na) ১(ন)', 1(ta), ১(ত), and 1(tha), ১(থ) also contends that, though in the application filed by those defendants prayed for saham, which has been annexed as of annexure-B to the revision, claiming to be the SA recorded tenant of SA khatian Nos. 492 and 292 but the name of the predecessor of those defendants have not been mentioned in SA khatian no. 489 and though some of the name of their predecessor appeared in SA khatain no. 492 and 292 however though they in their application claimed to have acquired 4.54 acres of land but fact remains there has been no specification for that *saham* that is, in which plot and in which khatian those defendants will get saham of 4.54 acres of land and in spite of such indistinct claim, the learned judge of the appellate court below gave

saham in respect of 4.32 acres of land so on that score as well, the impugned judgment cannot sustain in law. When we pose a question to the learned counsel for the petitioners whether mere producing documents render the trial court to decree the suit until and unless those are proved, the learned counsel then very frankly concedes that the plaintiffs actually could not prove their case through oral evidences though there has been no denying that the plaintiffs and the defendants are the successor-in-interest of Monirullah as well as Velsa Mahmud having no disagreement to that effect among the parties to get *saham* yet the learned judge of the trial court did not take into account of that very facts and finally prays for making the rule absolute by setting aside the impugned judgment and decree.

Though one, Mr. Md. Esa, the learned counsel appeared for the opposite party nos. 7-19 and 22-24 but at the time of hearing of the rule, he did not turn up to oppose or support the rule.

On the contrary, Mr. Md. Yousub Ali, the learned counsel appearing for the opposite party nos. 47,53,54,55 and 101 who are the defendant nos. 9,15,17, 18(ka) and 49 supported the judgment so passed by the appellate court below and simply prayed for affirming the judgment and decree passed by the appellate court below sustaining 4.32 acres of land for those defendants.

Be that as it may, we have considered the submission so advanced by the learned counsel for the petitioners and that of the opposite party nos. 47,53,54,55 and 101, perused the revisional application and all the judgments passed earlier including the impugned judgment and decree as

stated herein above. Apart from that, we have also gone through the evidence so have been adduced and produced by the plaintiffs vis-a-vis the plaint itself. On going through the plaint we find that several amendments were made since filing of the suit back in the year 1971 and by way of last amendment allowed vide order no. 52 dated 03.02.1987 we find that the total quantum of claim (suit) land has been reduced to 12.61 $\frac{18}{21}$ from the original claim of 16.89 $\frac{4}{21}$ so described in schedule 'ka' and 'kha' to the plaint. And by that amendment made on 03.02.1987 a separate paragraph being paragraph no. 23 (ka) was inserted and thereby a prayer was also made in the following manner:

(ক) আর্জির বর্ণিত বিভাজ্য ক তপসিলের জোত সমূহে বাদী পক্ষের একত্রে ১২.৬৯ একর অংশ এবং খ তপসিলের সম্পত্তি সমূহ ২. $\frac{১০}{৩}$ অংশ ভাগ বাটোয়ারা ডিক্রি প্রচার করিতে।

The said prayer appears to have been made in line with the break down made in the fag end of paragraph no. 23(ka) as stated above. Now, if we compare the prayer portion with that of the above break down regarding the suit land we also find explicit difference about the exact claim in respect of the suit land and for that obvious reason, the learned Additional District Judge while disposing of Title Appeal being No. 4 of 1995 vide judgment and decree dated 26.06.2002 have given the opportunity to the plaintiffs-petitioners to substantiate the modified claim by sending the case back on remand. However, after the case was sent back on remand, neither the plaintiffs nor the defendants bothered to take any steps curing the defects of the pleading by leading evidence

compelling the learned Joint District Judge to pass judgment and decree dated 13.07.2009 making following observation:

> *"বিগত ১৩.০৩.২০০৮ইং তারিখ থেকে অর্থাৎ ৯৫নং আ মোকদ্দমাটি ১১০ নয আদেশ পর্যন্ত উভয়পক্ষের সময়ের প্রার্থনার পরিপ্রেক্ষিতে যুক্তি তর্কের জন্য এবং বিভিন্ন তদবিরের জন্য ধার্য্য থাকে । এত সুযোগ পাওয়ার পরও পক্ষগণ উহা গ্রহণ না করায় বাদীর মোকদ্দমাটি পূর্ব বৎ রয়েছে । অথাৎ বিগত ১২.০২.১৯৯৫ইং তারিখে বিজ্ঞ বিচারিক আদালত যে রায় প্রদান করেছিলেন অর্থাৎ নালিশী জমিতে বাদীপ দখলের ইস্যুটি বাদীপ পরিস্থিতিরই সৃষ্টি হয়ে অর্থাৎ নালিশী জমিতে বাদীপ অপ্রমানিত রয়ে গেল ।"*

Though against that judgment, the plaintiffs as appellants finally preferred Title Appeal No. 67 of 2009 still the plaintiffs did not bother to take any steps to cure the defects asserting title and possession in the suit land they prayed for partition as per amendment. Though they could do even in the appellate court below under the provision of section 107 of the Code of Civil Procedure.

Apart from that, we have very meticulously gone through the impugned judgment and decree passed in Other Class Appeal No. 67 of 2009 where the learned Additional District Judge, Nilphamari has very exhaustively discussed the evidences in particular, the evidence made by PW 2 and found that the plaintiffs have utterly failed to led their case in line with the plaint rather that PW 2 in his deposition asserted the claim of the defendants who asserted in their written statement stating that, by way of amicable partition, both the plaintiffs and the defendants have been

enjoying their respective share in the suit land. In that regard though the learned counsel for the petitioners submits that, in spite of such assertion, the plaintiff will not be deprived of getting their saham in the suit property. But we are not at one with such submission, because the plaintiffs claimed a huge quantum of land measuring an area of 16.89 $\frac{4}{21}$ acres and there have been scores of schedules described in the plaint and in every schedule the plaintiffs claimed a certain portion of land. So mere producing documents and making it exhibits will not *ipsofacto* prove the claim of the plaintiffs until and unless they could support their entitlement to each and every portion of land as per the description made in the plaint through oral evidence as well. Furthermore, PW 2 in his deposition both in his chief and cross-examination cannot say how and under what basis the plaintiffs have claimed such portion of land in the schedules which has elaborately been discussed by the appellate court below in the judgment under challenge. Also, though by way of amendment, total claim of the plaintiffs shown at 12.61 $\frac{18}{4}$ acres of land but in paragraph 25(ka) of the prayer if the plaint it has been stated to be 12.61 and 2.10 $\frac{1}{3}$ even then, from the judgment of the appellate court below we further find that the PW 2 clearly asserted that, they had transferred 9 *bigas* of land. So, if that 9 *bigas* of land was transferred out of the total quantum of the suit land, then what has been reduced by way of amendment even cannot stand.

Now let us examine how the *saham* so have been given to the defendant nos. 9, 14,15, 17, 18(ka) and 49 by the appellate court below

can be sustained. On going through SA khatian no. 492 (exhibit-1ক) we find that, out of 5 defendants only the name of Moniruddin, Fatema Khatun and Sakina are there and total area under that SA khatian is 34 decimals, of land and out of that 34 decimals what is the claim of those defendants is totally absent. Similar shortcomings are also there in respect of SA khatian no. 489 exhibit ১(খ) where we find the name of only Fatema Khatun and Moniruddin and more surprisingly in respect of SA khatian no. 292 (exhibit ১(খ)) there has been no name of SA recorded tenant and those of successor-in-interest that is the defendants nos. 9, 14,15, 17, 18(ka) and 49. Then again, while giving *saham* in respect of 4.32 acres of land to those defendants, what the appellate court below has observed in the fag end of the impugned judgment has got no nexus with the claim made by the defendant in their application praying for *saham* (annexure-B to the revisional application). So obviously we don't find any basis of the observation vis-à-vis finding in regard to giving *saham* of 4.32 acres of land to the defendant nos. 9,14,15,17,18(ka) and 49. So in absence of any specific assertion in regard to giving *saham* to those defendants, we find patent illegality of the appellate court below and on that score as well the impugned judgment cannot be sustained.

It is the universal proposition, the plaintiff has to prove his/ her own case without depending on the weakness of the defendants case. In the written statements the defendants have very robustly asserted that the predecessor of the plaintiffs have no title and possession in respect of the land mentioned in slot 7 and 8 out of 7 slots of the suit property and that of the right, title and ownership of Velsa Mahmud from whom the

plaintiffs claimed to have got suit property. So onus thus shifted to the plaintiffs to disprove such assertion of the defendants. But on going through the evidence adduced by 3 PWs that is, PW 2 to PW 4 we don't find the plaintiff could substantiate their claim in respect of the suit land rather what those PWs stated in their respective testimony, clearly went against their pleading which has elaborately been discussed by the appellate court below in his judgment calling for no repetition here.

Regard being had to the above facts, circumstances discussion and observation we don't find any illegality in the impugned judgment and decree passed by the appellate court below so far as regards to affirming the judgment of the trial court below which is thus liable to be sustained. However, the finding of the appellate court below in regard to providing *saham* to the defendant nos. 9,14,15,17,18(ka) and 49 are set aside.

Overall, the rule is discharged however without any order as to costs.

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

Md. Bashir Ullah, J:

I agree.