

**In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)
Present:**

Mr. Justice Ashish Ranjan Das

Civil Revision Case No. 4668 OF 2011.

In the matter of:

Md. Golam Mostafa and others.

.....Plaintiff-Opposite parties- petitioners.

Vs.

Md. Abdus Sattar and others.

....Defendant-Petitioners-Opposite parties.

Md. Khalilur Rahman, Adv.

...Plaintiff-opposite parties- petitioners.

No one appears for the defendant-
Petitioners-Opposite parties.

Heard and Judgment on: 08.04.2019.

Ashish Ranjan Das, J.:

This has been an application under Section 115(4) of the Code of Civil Procedure by the plaintiff petitioner with the leave of the court wherein the judgment and order dated 28.06.2007 passed by the learned District Judge, Jamalpur in Civil Revision No. 01 of 2006 allowing the application has been called in question.

Short facts relevant for the purpose is that, the petitioner as plaintiff brought partition suit No.156 of 1990. Upon contest it was decreed in preliminary form. The plaintiff petitioner was awarded a Saham of 21 decimal of land out of 1.2 acres of total divisible land. The matter was taken up for making the decree final. The advocate commissioner reported that the available total divisible land was 41.09 acres and not 1.20 acres. Upon it the plaintiff petitioner moved

an application under Section 151 and 152 of the Code of Civil Procedure. The learned trial court by his order being No.110 dated 24.11.2005 heard all the contesting parties in details and upon a fresh calculation of availability of shares allowed the prayer of the plaintiff decree holder and accordingly modified the preliminary decree.

The contesting defendants did not challenged the correctness of the preliminary decree of partition in appeal nor the righteousness of modification of the preliminary decree by the trial court dated 24.11.2005 was challenged but the aforesaid civil revision application it was raised that since before passing of the preliminary decree among the plaintiff's plaintiff No.10 died and no step was taken for her substitution the decree should abate. The learned District Judge, as it appears in his revisional jurisdiction under Section 115(1) of the Code of Civil Procedure allowed the revision thereby rendering the preliminary decree set aside. This Order with the leave of the court has been called in question under Section 115(4) of the Code of Civil Procedure.

Heard the learned Advocate for the plaintiffs-petitioners and perused the material on record including the L.C.R.

None appears for the opposite parties.

Undenied position is that this petitioner Golam Mostofa and other petitioners as plaintiffs had brought a suit for partition in the court of Assistant Judge being No.156 of 1990 and that was decreed in preliminary form. It also remains not disputed that out of total divisible 1.20 acres of land the plaintiffs were awarded a saham 21

decimals of land in the proceeding of final decree. After investigation the Advocate commissioner found only 1.09 acres of land available for partition. Next the plaintiff petitioners moved an application under section 151 and 152 of the Code of Civil Procedure so that the preliminary decree could be modified as per the report of the Advocate commissioner. The learned Assistant Judge as it appears in doing so vide Order dated 24.11.2005 (Annexure-B) allowed the application and thereby modified shares although the saham of 21 decimals for the plaintiff was not varied.

It also appears that the contesting defendant side did not challenge the bonafide of the preliminary decree of partition in the appeal. Rather against the impugned order the petitioners moved a revisional application under Section 151 and 152 of the Code of Civil Procedure while the defendant moved a revisional application on the ground that the preliminary dated 05.10.1996 has been abated since among the plaintiff No. 10 had died much earlier in 1987. The learned District Judge, Jamalpur found the ground taken by the defendant applicants cogent and by his judgment dated 28.6.2010 allowed the application holding the preliminary decree of partition abated.

Now it has been raised by the learned Advocate for the plaintiff petitioners that in a suit for partition such an abatement is not tenable and secondly it appears from the copy of the application (annexure-c) that allegedly dead plaintiff No. 10 had left plaintiff No.2-11 as her successors who are already on record. This matter was not denied. This being a situation in one hand the order of the court of trial passed

in Suit No. 110 of 2005 modifying the preliminary decree of partition any proceeding of final decree within the mischief of Section 151 and 152 of the Code of Civil Procedure has not practically been called in question discussed or settled in the Civil Revision No. 01 of 2006 of the Court of District Judge, Jamalpur. So, it remains good in law in the finding and decision of the learned District Judge, Jamalpur making the order of the trial court dated 24.11.2005 set aside on the ground of abatement palpably appears not tenable as the suit in respect of plaintiff No.10 did not actually abate.

As a result, the rule is made absolute.

The judgment and order passed by the learned District Judge, Jamalpur dated 28.06.2007 passed in Civil Revision No.1 of 2006 is set aside. Learned Court below is instructed to go ahead in accordance with law.

Communicate the order at once.