

Present:

***MR. JUSTICE S.M. EMDADUL HOQUE***

Civil Revision No. 770 of 2012.

IN THE MATTER OF:

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

A N D

IN THE MATTER OF:

Akbor Ali Sarder.

..... contesting defendant No.2-respondent-Petitioner.

-Versus –

Md. Fazlul Karim Sarder and others

..... plaintiff-appellant-opposite parties.

Mr. G.M. Azizur Rahman Hoque, Advocate

..... for the petitioner.

Mr. Md. Sagir Hossain, Advocate

..... for the opposite party No.1

**Heard On: 18.01.2024 and Judgment on: 24.01.2024.**

On an application of the petitioner Akbor Ali Sarder under Section 115(1) of the Code of Civil Procedure the Rule was issued calling upon the opposite party Nos.1-12 to show cause as to why the impugned judgment and decree dated 20.11.2011 (decree signed on 27.11.2011) passed by the Additional District Judge (In-charge), 1<sup>st</sup> Court, Satkhira in Title Appeal No.59 of 2005 reversing the judgment and decree dated 09.03.2005 (decree signed on 16.03.2005) passed by the Assistant Judge, Ashasuni, Satkhira in Title Suit No.87 of 1999 suffers from an error of law resulting in an erroneous decision occasioning failure of justice and should not be revised or set-aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule, in short, is that the opposite party Nos. 1-3, 11 and 12 as plaintiff Nos. 1-3, 5 and 6 and one Sakauddin Gazi the predecessor of opposite party No. 4-10 as plaintiff No. 4 filed Title Suit No. 87 of 1999 in the court of learned Assistant Judge, Ashasuni, Satkhira for declaration of title in respect of the suit land measuring 4.38 ½ acre of land as described in (kha) schedule to the plaint and further declaration that the S.A. record prepared in the name of the parties is illegal, wrong and erroneous contending inter alia that the C.S. khatian No. 300 appertaining to 5.58 acres of land belonged to C.S. recorded tenant Kalim Sarder who died leaving 4 (four) sons Dhonai Sarder, Hasin Sarder, Moniruddin Sarder and Joinal Sarder. Joinal Sarder died unmarried leaving behind 3 brothers and thereafter Hasin Sarder died leaving 1 (one) son Zohor Sarder. Donai Sarder while was owner and in possession of his share of land took 4 (four) taka as loan from Zafor Ali Sarder and Asiruddin Sarder and for security of the said loan Dhonai Sarder made a registered kabala in favour of them on 09.03.1948 and thereafter Dhonai Sarder repaid the said loan money and took return the original kabala from them with making an endorsement on the original kabala deed. Thereafter Dhonai Sarder died leaving only brother Moniruddin Sarder and Moniruddin Sarder died leaving one son Madar Sarder. In this way Zohor Sarder got 1.89 acres of land in the suit khatian and Madar Sarder got 3.72 acres of land. Zohor alias Zafor Sarder while

became owner and in possession of his share of land gave settlement of 15 decimal of land by registered patta on 26.12.1950 to Madar Sarder, (the predecessor of plaintiff No.1 and 2). He also gave settlement for 90 decimal of land to Madar Sarder by registered patta dated 25.06.1951 and thereafter Zafar Sarder also sold 20 decimal of land to Jobber Sarder by registered kabala dated 29.08.1951 and Jobber Sarder sold the same to Madar Sarder by registered kabala dated 01.03.1952. Zohor Sarder again gave settlement of 10 decimals land to Madar Sarder by registered patta dated 01.11.1951 and he also sold 12 decimals of land to Karamot Ali Gazi by registered kabala dated 03.12.1951 and Keramot Ali gifted the said land to the plaintiff No.3 by registered deed of gift dated 20.11.1995. Keramot Ali also sold some land to the plaintiff No.1 by registered kabala dated 20.04.1954. Zohor Ali also sold 1.9 decimals of land to Mohor Ali Sarder and Siraj Sarder. Madar Sarder got 3.72 acres of land by inheritance and 54 decimals of land by transfer and in this way he got in total 4.26 acres of land. Thereafter he sold 54 decimals of land to Sohorjan by registered kabala dated 22.09.1960 and thereafter Sohraj sold 17 decimals of land to the plaintiff No.1 by registered kabala dated 10.06.1969 and she also sold 13 decimals of land to the plaintiff No.2 by registered kabala dated 23.02.1970 and again sold 8 ½ decimals of land to the plaintiff No.4 by 2 (two) registered kabala dated 15.10.1977 and

22.06.1978. Said Sohorjan again sold 6 decimals of land to the plaintiff No.5 and 6 by registered kabala dated 03.10.1977.

Madar Sarder gave 61 decimal of land in favour of his wife Ayesa Bibi by registered deed dated 18.08.1960. Ayesa Bibi sold the same to the plaintiff No.2, 5 and 6. Madar Sarder also sold 1.68 ½ decimals of land to the plaintiff NO.2 by registered kabala dated 04.03.1985. The plaintiff NO.2 sold 33 decimals of land to the plaintiff No.4 by registered kabala dated 26.05.1988. Madar Sarder while became owner and in possession of remaining land measuring 1.4 ½ acre died leaving 2 sons, the plaintiff No. 1 and 2.

The plaintiffs have been possessing the suit land but at the operation of S.A. record the suit land was wrongly prepared in the name of some defendants with the names of predecessors of plaintiffs and in fact the S.A. record should be prepared in the name of predecessors of the plaintiffs.

Earlier the land of this khatian was auction sold but it was not made properly and as such the plaintiffs are in possession of the suit land all alone.

Sheikh Abdul Malek as plaintiff filed Title suit No. 565 of 1961 in the court of 3<sup>rd</sup> Munsif, Satkhira in respect of the suit land impleading the predecessors of the plaintiffs and defendants and it was ultimately dismissed on compromise on 07.06.1963 admitting the title of the

present plaintiffs. Now on the basis of the erroneous S.A. record the defendants threatened to the plaintiffs so that they would dispossess the plaintiffs from the same and also transfer the same. Hence the suit.

The suit was contested by the defendant No. 2 and the defendant Nos. 1 and 4-9 jointly contested the suit by filing a written statement contending inter alia that the land of C.S. khatian No. 300 was put into auction sale for arrear of rent of the ex-land lord and the said auction land was purchased by ex-land lord decree holder sottrodhor and took possession of the same and thereafter he settled the entire land to Madar Sarder, the predecessor of plaintiff Nos. 1 and 2 Zohor alias Zafor Sarder, Nizamuddin Gazi, Iman Ali Sarder and Sirajudding Sarder and delivered possession of the same to them. Abdul Malek Sheikh filed Title Suit No. 565 of 1961 claiming Title of the suit land but when he came to know that the title of the same was to the defendants of the said suit, then a compromise petition was filed on 31.05.1962 and accordingly the said suit was disposed of admitting the title of Madar Sarder, Zafor Sarder, Nizamuddin Gazi, Iman Ali and Sirajuddin. Zohor Sarder died leaving the defendant Nos. 2-9.

At the time of S.A. operation the record was correctly prepared in the name of Madar Sarder, Zafor, Nizamuddin, Iman Ali and Sirajuddin and as in the said title suit No. 565 of 1961 it was admitted by Madar

Sarder that he and 4 others took settlement from Sottrodhor and as such the suit is liable to be dismissed with cost.

Thereafter the trial court framed 6 (six) issues for determining the case of the parties.

At the trial the plaintiffs and defendant Nos. 10, 11, 17-19 filed a Solenama deed on 18.10.2000 and 22.10.2000. The defendant Nos. 2, 4-9 filed an application on 08.11.2001 for not to accept the Solenama deeds. Subsequently the plaintiffs and defendant Nos. 1, filed another Solenama deed dated 09.10.2001.

At the trial the plaintiff side examined 2 witnesses and also filed a series of documents to prove their right and title and the defendant side also examined 3 witnesses and exhibited series of documents to prove their cases.

The trial court after hearing the parties and considering the evidence on record dismissing the suit by its judgment and decree dated 09.03.2005.

Being aggrieved the plaintiffs preferred Title Appeal No. 59 of 2005 before the learned District Judge, Satkhira. The said appeal was heard and disposed of by the Additional District Judge, 1<sup>st</sup> Court, Satkhira, who after hearing the parties and considering the evidence on record allowed the appeal by its judgment and decree dated 20.11.2011.



occasioning failure of justice. He further submits that both the courts after consideration of the evidence on record found that the plaintiffs have right in respect of some portion of the suit land and the plaintiffs and defendants all are the co-sharers of the suit land and no evidence that the suit land was partitioned by meets and bounds among the parties in such a case the trial court rightly dismissed the suit since without any partition the suit is not maintainable, whereas the appellate court without any amendment of the pleadings and prayer for partition allowed the said appeal setting-aside the judgment of the trial court.

He further submits that the appellate court committed serious error in law in not considering that the solenama deed filed by some of the defendants has been objected by the defendant Nos.2 and 4-9 and submits that without ascertaining the title of the parties who made the solenama deed the appellate court treated the said solenama deed as the part of the decree which is clear wrong findings of the appellate court and thus the appellate court committed serious error in law resulting in an error in the decision occasioning failure of justice. He prayed for making the Rule absolute.

Mr. Md. Sagir Hossain, the learned Advocate of the opposite parties submits that since some of the defendants and the plaintiffs made solenama deed and the said solenama deed is binding upon the said defendants and thus the appellate court rightly decreed the suit. He



further submits that though in the instant case the plaintiffs did not file any application for amendment of the pleadings under Order VI Rule 17 of the code of civil procedure praying for partition but since the parties amicably settled the matter in such a case there is no bar to allow the said solenama deed and directing the parties to amicably settled the dispute as per Solenama deed and failing which the matter should be considered by appointing the advocate commission. However, the learned Advocate submits that since both the plaintiff and defendants are the co-sharers of the suit land in such a case the rest defendants who are not the party to the Solenama may claim their Shaham even no bar to file application for partition by the plaintiff but it cannot be said that the judgment of the appellate court is erroneous one.

Mr. Mr. G.M. Azizur Rahman, the learned Advocate conceded the said facts and submits that it is better to send back the suit on remand for disposal of the suit afresh treating the same as partition suit if the parties filed application for amendment of the pleading with a prayer for partition and in such a case the defendant may have right to file additional written statement and court may dispose of the suit in accordance with law.

I have heard the learned Advocates of both the sides, perused the impugned judgment and decree of the courts below, the plaints, the written statement, the solenama deed and also perused the written

objection filed by the defendant No.2 and 4-9 challenging the said solenama deed. It appears that the trial court though rejected the said solenama deed but did not discuss the right and title of the parties elaborately, that how many portion of the land has been entitled by the parties including the defendants who filed Solenama deed.

It appears that both the courts found title of the parties and opined that the parties all are the co-sharers of the suit land in such a case it is better to dispose of the suit treating the same as partition suit.

It is now settled principle that the suit should not be sent back on remand frequently but if it is found that without any additional evidence or evidence the suit should not be decided then the court may send back the suit for remand to dispose of the suit in accordance with law.

Since both the courts found that the parties are the co-sharers and it also appears that a solenama deed was filed by some of the defendants. The appellate court considering the terms and condition of the deed took view that which is just and proper and accordingly decreed the suit and ordered that the Solenama deed to be the part of the decree. In such a case the said decree is binding upon the defendants who made the Solenama deed.

It appears that the defendant No.2 and 4-9 did not file any application against the said solenama deed and in revisional application the learned Advocate submits that which was not proper and the

persons who filed the Solenama has no right and title of the suit as such he prayed for setting aside the Solenama decree.

Considering the facts and circumstances of the case it is my view that it is better to send back the case to the trial court to decided the suit afresh considering the evidence on record. Furthermore for proper consideration of the case the trial court may give scope to the defendant No.2 and 4-9 to contest the said solenama.

The plaintiffs is also entitled to file an application for amendment of the plaint claiming partition. And if such application is to be presented before the trial court then the trial court should consider the said matter afresh in accordance with law. Thus I find merit in the Rule.

In the result the Rule is made absolute. The impugned judgment and decree dated 20.11.2011 and 27.11.2011 respectively passed by the Additional District Judge (In-charge), 1<sup>st</sup> Court, Satkhira in Title Appeal No.59 of 2005 reversing the judgment and decree dated 09.03.2005 and 16.03.2005 respectively passed by the Assistant Judge, Ashasuni, Satkhira in Title Suit No.87 of 1999 both are hereby set-aside.

The suit is sent back on remand to the trial court for disposal of the suit afresh giving the parties opportunities to prove their respective cases and also should consider the application for partition if filed by either parties.

The trial court should keep in mind that the Solenama is binding against its makes if found the terms and condition of the Solenama are just and proper.

Since this is long pending case, the trial court is directed to dispose of the suit as early as possible preferably within 6 (six) months from the date of the receipt of this order.

The order of stay granted earlier by this Court is hereby recalled and vacated.

Send down the lower Court's record at once.

**M.R.**