

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

Present:

Mr. Justice Md. Badruzzaman.

And

Ms. Justice Aynun Nahar Siddiqua

First Appeal No. 282 of 2007.

Hazi Abdul Malek Islamia College, Khulna

..Appellant.

-Versus-

Md. Nurul Islam and others

...Respondents.

Mr. H.M Borhan, Advocate

... For the appellant

Ms. Sanchita Siddique, Advocate

... For the respondents.

**Heard on: 30.06.2026, 07.07.2026, 09.07. 2026,
13.07.2026,27.07. 2026, 28.07.2026, 29.07.2026
and 04.08.2026.**

Judgment on: 11.08.2026.

Md. Badruzzaman, J:

This appeal is directed against the judgment and decree dated 07.08.2007 (decree signed on 14.08.2007) passed by the learned Joint District Judge, First Court, Khulna, in Title Suit No. 25 of 2000, whereby the suit was decreed in preliminary form.

At the time of admission of the appeal, operation of the impugned judgment and decree was stayed until disposal of the appeal.

As relevant for the purpose of disposal of this appeal, it may be noted that respondent Nos. 1 to 10, as plaintiffs, instituted the aforesaid suit seeking a decree for partition of 3.52 acre suit property described in the schedule to the plaint, claiming a total share of 2.9350 acres land contending inter alia that that out of the suit land

1.70 acres of land under S.A. Khatian No. 12 was originally owned and possessed by Sajem Mollah and Abdul Khalek. While Sajem Mollah was owning and possessing his share, he transferred 0.28 acre of land by a registered sale deed No. 1779 dated 4.03.1963 [Exhibit-2] in favour of plaintiff No. 1. On the same date, he transferred another 0.28 acre of land by a separate registered sale deed No. 1788 in favour of defendant No. 2. Subsequently, Abdul Khalek transferred 1.14 acres of land by registered sale deed No. 6681 dated 22.08.1966 and No. 6783 dated 26.8.1966 [Exhibits 2(Ka) and 2 (Kha)] in favour of Haji Abdul Malek, the predecessor-in-interest of plaintiff Nos. 1-9. After the death of Haji Abdul Malek, plaintiff Nos. 1 to 9 inherited the said property. Thereafter, plaintiff No. 1, by a registered sale deed No. 998 dated 26.04.1999 [Exhibit-3], transferred 0.1650 acre of land in favour of plaintiff No. 10. Thus, plaintiff No. 1 acquired title to 0.1150 acre of land under S.A. Khatian No. 12 by way of purchase and 0.1425 acre by way of inheritance from his father. Plaintiff Nos. 2 to 7 each acquired title to 0.1425 acre of land, while plaintiff Nos. 8 and 9 each acquired title to 0.07125 acre of land. Plaintiff No. 10 acquired title to 0.1650 acre of land by way of purchase. Accordingly, the plaintiffs acquired title to 1.41 acres of land under S.A. Khatian No. 12.

On the other hand, out of 1.82 acres of land under S.A. Khatian No. 11, Abdus Sobhan Fakir was the owner of 0.61 acre, while Haji Abdul Malek was the owner of 1.21 acres. Abdus Sobhan Fakir transferred 0.61 acre of land by a registered deed of gift being deed No. 1844 dated 26.05.1959 [Exhibit-4] in favour of his two sons, Abu Bakkar Siddique and Abu Zafar Fakir. Abu Bakkar Siddique transferred 0.3050 acre of land in favour of Haji Abdul Malik, the predecessor-in-

interest of plaintiff Nos. 1 to 9, by a registered sale deed. The said transfer was challenged by his brother, Abu Zafar Fakir, by filing Pre-emption Miscellaneous Case No. 117 of 1963, and the property was ultimately acquired by Abu Zafar Fakir pursuant to the judgment passed in the said pre-emption case. Thereafter, Abu Zafar Fakir transferred 0.3050 acre of land by registered sale deed No. 9905 dated 2.05.1983 [Exhibit-6(Ka)] in favour of Haji Abdul Malek. He also transferred another 0.3050 acre of land by registered sale deed No. 18388 dated 30.10.1978 [Exhibit-6] in favour of Asia Khatun, the wife of Haji Abdul Malek. After the death of Asia Khatun, plaintiff Nos. 1 to 9 inherited her share as her sons and daughters. During his lifetime, Haji Abdul Malek transferred 0.3050 acre of land in favour of defendant No. 1, Haji Abdul Malek Islamia College, by a registered deed of gift being deed No. 13870 dated 12.09.1985 [Exhibit-7], and delivered possession thereof to defendant No. 1. Plaintiff Nos. 1–9 inherited a total of 1.5151 acres of land from their parents, Haji Abdul Malek and Asia Khatun from S.A Khatian No. 11.

In the aforesaid way the plaintiffs have been owning and possessing a total of 2.9350 acres of land under the aforesaid two khatians by way of inheritance and purchase. They have also been paying rents after having their names mutated in the concerned revenue records.

In the deed of gift [Exhibit-7] executed in favour of defendant No. 1 by Hazi Abdul Malek, an area of 0.61 acre of land was mentioned in the schedule. However, the area of land described in the boundaries of the schedule was 0.3050 acre. Defendant No. 1 never acquired 0.61 acre of land by virtue of the said deed of gift. The institution of defendant No. 1 is situated over 0.3050 acre of land

under S.A. Khatian No. 11, out of the suit lands, and the remaining land is fallow land. There is no playground within the suit lands. The Settlement Officers, instead of recording 0.3050 acre of land in the name of defendant No. 1, erroneously recorded 0.61 acre of land in D.P. Khatian No. 559. Although the plaintiffs requested the defendants on 06.04.2000 to effect partition of the suit properties, they refused to do so. Hence, the plaintiffs instituted the present partition suit.

Defendant No. 1, the College, by filing a written statement, contended that the suit is not maintainable in its present form and manner, it is bad for defect of parties, non-inclusion in the hotchpotch, and absence of any cause of action. It has been stated that Islamia College was established on 25.05.1984 in Khulna with the objective of imparting Islamic education through the initiative and participation of devout Muslims, particularly the educationist Abdul Gaffar Sahib and the wealthy and philanthropic businessman Abdul Malek. Abdul Malek acquired and possessed extensive properties in his own name as well as in the names of his wife and his minor sons and daughters. Thereafter, in accordance with his previously declared oral commitment, he donated .61 acre of land out of the total 1.82 acres comprised in S.A. Khatian No. 11, Plot No. 195 of the suit mouza in favour of the defendant college by a registered deed of gift being deed No. 13870 dated 12.09.1985 [Exhibit-7] and simultaneously delivered possession thereof. He also contributed Tk. 1,50,000/- (Taka one hundred fifty thousand) in cash to the college fund. He gifted and handed over possession of an 2.0594 acres of land including .61 acre land for the present college campus. He also constructed, at his own cost, a boundary wall

around the said 2.0594 acres for the protection of the college. As a portion of the donated .61 acre of land was low-lying, financial assistance was obtained from the office of the Deputy Commissioner to fill the land, whereupon a playground was developed. Since then, the students of the college have been continuously using the said playground. Until his death, Abdul Malek repeatedly declared before the public that he would execute a registered deed of gift in favour of the college. However, before he could execute the deed, he suddenly passed away.

Plaintiff Nos. 1-9, being the sons and daughters of Abdul Malek, and his wife, were merely benamdars of Abdul Malek. They had neither the financial capacity to acquire the suit property nor do they possess such capacity even at present. They never had, nor do they presently have, any right, title, interest or possession in the suit property. It has further stated that extensive development works have already been completed within the college campus comprising the property donated by Abdul Malek with financial assistance from the office of the Deputy Commissioner. Moreover, the Ministry of Education of the Government has constructed a new academic building on the said land at a cost of Tk. 37,50,000/- (Taka thirty-seven lac fifty thousand). Taking advantage of the death of Abdul Malek, the plaintiffs, motivated by unlawful greed, instituted the present false, baseless, and vexatious suit. Accordingly, the suit is liable to be dismissed with costs.

Defendant No. 2 also filed a separate written statement contending, inter alia, that Sajem Mulla, while in lawful ownership and possession of 0.56 acre of land of S.A Plot No. 194 of S.A Khatian No. 12, transferred 0.28 acre thereof in favour of Defendant No. 2 by

registered sale deed No. 1788 dated 04.03.1963 and delivered possession thereof. Thereafter, upon mutation of his name and recording of the said land in D.P. Khatian No. 161, defendant No. 2 has been owning and possessing the suit land. The plaintiffs have no right, title, interest or possession in the said 0.28 acre of land. Defendant No. 2 has been possessing the same by cultivating paddy thereon. Accordingly, he prayed for dismissal of the suit.

During the trial, the plaintiffs examined one witness in support of their case, whereas Defendant No. 1 examined four witnesses. In addition thereto, both parties adduced documentary evidence, which were admitted into evidence and marked as exhibits. Upon consideration of the oral and documentary evidence on record, the trial Court, by the impugned judgment and decree, decreed the suit and allotted 2.9350 acres of land in favour of the plaintiffs. Being aggrieved thereby, Defendant No. 1 has preferred the instant appeal.

Mr. H. M. Borhan, the learned Advocate appearing for the appellant, at the very outset, submitted that the suit involves complicated questions of title and, therefore, a simple suit for partition is not maintainable. According to him, the defendant acquired a specific and demarcated portion of the land from the predecessor-in-interest of the plaintiff Nos. 1-9 by way of gift and, therefore, the parties are not co-sharers in the suit holding. He further contended that the trial Court failed to address these vital legal issues and, instead, erroneously adjudicated upon the complicated questions of title involved in the suit.

Learned Advocate further submitted that the original owner, Haji Abdul Malek, by a registered deed of gift dated 12.09.1985, transferred 0.61 acre of land in favour of the defendant-college by

describing the land with specific boundaries. Upon acquiring title and possession of the said property, the defendant-college mutated its name in the revenue records, had its name recorded in the latest survey, and has since been possessing the property by regularly paying rent to the Government.

The learned Advocate further submitted that, during his lifetime, Haji Abdul Malek made an oral gift in favour of Defendant No. 1 in respect of 2.0594 acres of land, inclusive of the 0.61 acre of land transferred by the registered deed, and delivered possession thereof. Pursuant to such delivery of possession, defendant No. 1 constructed buildings, developed a playground, and raised other permanent structures on the said land. He contends that the trial Court failed to consider these material facts and the evidence on record in their proper perspective.

The learned Advocate finally submitted that the trial Court, without properly considering the oral and documentary evidence and other materials on record and upon a misconception of the law, illegally decreed the suit. He, therefore, submitted that the impugned judgment and decree are liable to be set aside and that interference by this Court is warranted.

Mis. Sanchita Siddique, the learned Advocate appearing for Mr. Qumrul Haque Siddique, the learned Advocate for the plaintiff-respondents, submitted that the question of title, whether complicated or otherwise, can be adjudicated upon in a suit for partition.

The learned Advocate further submitted that, since defendant No. 1 acquired undivided land by way of gift from the predecessor-in-

interest of the plaintiffs, it became a co-sharer in the suit holding and properties. Therefore, the present suit for partition is maintainable.

The learned Advocate further submitted that although, in the schedule to the gift deed (Exhibit-7) executed and registered by Haji Abdul Malek in favour of defendant No. 1, an area of 0.61 acre of land has been mentioned, Haji Abdul Malek had transferable interest only in respect of 0.3050 acre of land, as the remaining 0.3050 acre of land was the self-acquired property of his wife, Asia Khatun, by virtue of sale deed No. 18388 dated 30.10.1978 (Exhibit-6).

She further submitted that the schedule to the said deed specifically describes the measurement and boundaries of the land measuring 0.3050 acre. Therefore, the trial Court rightly held that, by the deed of gift dated 12.09.1985, Haji Abdul Malek transferred 0.3050 acre of land in favour of defendant No. 1, and that defendant No. 1 thereby acquired title to only 0.3050 acre of land.

The learned Advocate finally submitted that, upon proper consideration of the oral and documentary evidence and other materials on record, the trial Court rightly decreed the suit. Therefore, no interference by this Court is called for.

In support of her submissions, the learned Advocate has referred to the decisions in the cases of *Shashi kumar Vs. Nagendra Nath*, reported in 2 BLD 36; *Md. Sultan Mia and others Vs. Hazera Bibi*, reported in 4 BLD (AD) 23; and *Cinmoy Chowdhury and another Vs. Mridul Chowdhury and others*, reported in 55 DLR (AD) 115.

We have heard the learned Advocates appearing for the respective parties, perused the pleadings, the evidence adduced by the parties, the impugned judgment and decree, and other materials available on record.

Considering the pleadings of the parties, the trial Court framed the following issues for determination:

- (i) Whether the suit is maintainable in its present form and manner?
- (ii) Whether the suit is bad for defect of parties?
- (iii) Whether all the properties have been brought into the hotchpotch of the suit?
- (iv) Whether the plaintiffs have valid and legal right, title and possession in the suit land?
- (v) Whether the plaintiffs are entitled to the reliefs as prayed for?

Upon consideration of the evidence and other materials available on record, the trial Court decided all the issues in favour of the plaintiffs and decreed the suit as prayed for.

Now, we are required to consider whether the findings arrived at by the trial Court are based on the evidence and materials available on record and are in accordance with the provisions of law.

In deciding the issue of maintainability of the suit, the trial Court observed that there was no impediment in law to proceed with the suit in its present form and manner and, upon such consideration, held that the suit was maintainable.

Before entering into the merits of the case, we deem it appropriate to consider, at the outset, whether the present suit simpliciter for partition is maintainable in law.

A partition suit presupposes a relationship of co-sharership. Therefore, the court must often examine title to determine: whether the parties are co-sharers; what share each party possesses and whether a transfer, gift, inheritance, or settlement affects the

quantum of share. Such inquiry is merely ancillary to the main relief of partition. The court does not pronounce a comprehensive declaration of ownership against rival claims. The title issue is examined only to the extent necessary for allotting shares.

In a suit based on joint ownership, questions of title and the nature of transactions may arise and may be decided incidentally while determining the shares of co-owners. In *Md. Sultan Mia and others vs. Hazera Bibi and others*, reported in 4 BLD (AD) 23, a Five-Judge Bench of the Hon'ble Appellate Division held that "*a question of title can incidentally be gone into a partition suit.*"

The situation, however, would be different where the very foundation of the plaintiff's title is under challenge. For example: (i) where the defendant denies that the plaintiff is a co-sharer at all; (ii) where the record-of-rights stands exclusively in the name of the defendant; (iii) where rival title deeds are set up by the parties; (iv) where the plaintiff's title is clouded by adverse claims; or (v) where determination of title requires cancellation of documents, declaration of title, or adjudication of intricate questions relating to succession or transfer. In such circumstances, the question that arises for consideration is whether such complicated and substantial questions of title can be effectively adjudicated upon in a simple suit for partition.

In *Shahi Kumar vs. Nagendra Nath*, reported in 2 BLD 36, a learned Single Judge Bench of the High Court Division held that, the Court has ample jurisdiction to decide questions of title, independent of the question of partition, where such determination is necessary for the purpose of ascertaining and allocating the respective shares of the parties. A suit for partition may involve disputed questions of

title, and any attempt to avoid deciding such issues would only result in unnecessary multiplicity of proceedings.

In *Rezaul Karim and others vs. Md. Shamsuzzoha and others*, reported in 49 DLR (AD) 68 = 17 BLD (AD) 179 = 2 MLR (AD) 16, the Hon'ble Appellate Division held, *"in a suit for partition, the Court will no doubt consider the title of the plaintiffs to the suit land in some details more than in a suit for permanent injunction, but it cannot, in either case, convert itself into a Court for determination of the respective titles of the parties if a serious dispute emerges from the pleadings as to the title of the plaintiffs to the partible property and if it is not possible to effect partition without formally determining the plaintiffs' title to the property claimed in the partition suit."*

In *Jyotirmoy Datta and others vs. Mritunjoy Datta and others*, 16 BLT (HCD) 446, the High Court Division applied the Appellate Division's principle laid down in *Rezaul Karim* (supra) and held that a complicated question of title involved in a partition suit cannot be settled in a simple suit for partition without seeking a declaration of title.

In 55 DLR (AD) 115, *Chinmoy Chowdhury and another vs. Mridul Chowdhury and others*, the Appellate Division took note of the observation made in 49 DLR (AD) 68, *Rezaul Karim*, that *"in a suit for partition, the Court will no doubt consider the title of the plaintiffs to the suit land in some details more than in a suit for permanent injunction."* Nevertheless, their Lordships held that *"in a suit for partition, all incidental questions of title, however complicated it may be, can be decided and finally disposed of"* by the Court.

Upon perusal of the decisions reported in 49 DLR (AD) 68 and 55 DLR (AD) 115, it appears that divergent views have been

expressed by the Appellate Division as to whether a partition suit is maintainable where complicated questions of title are involved.

Learned Advocate Ms. Shanshita Siddique, appearing for the respondents, submits that, since the decision reported in 55 DLR (AD) 115 is the later decision and specifically considered the earlier decision reported in 49 DLR (AD) 68, the principle laid down in the later decision ought to be followed by this Court.

It is significant that 49 DLR (AD) 68 was decided by a five-Judge Bench, whereas 55 DLR (AD) 115 was decided by a three-Judge Bench. Although the earlier decision was noticed and considered in the latter case, it was neither overruled nor expressly departed from in terms; rather, a divergent view was taken.

The question, therefore, arises as to which of the aforesaid decisions is binding upon and ought to be followed by the High Court Division.

Article 111 of the Constitution provides that the law declared by the Appellate Division shall be binding upon the High Court Division and all courts subordinate thereto. The binding force of a judgment lies in its ratio decidendi. Where conflicting decisions are rendered by Benches of different strengths, judicial discipline requires that the decision of the larger Bench prevail over that of the smaller Bench.

The principle has been authoritatively recognized by the Supreme Court of India in a series of Constitution Bench decisions. In *Central Board of Dawoodi Bohra Community v. State of Maharashtra & ors.*, AIR (2005) SC 752, a Constitution Bench of five Judges, upon considering the earlier decisions in *Pradip Chandra Parija & ors. v. Pramod Chandra Patnaik & ors.*, AIR (2002) SC 296; *Bharat Petroleum*

Corporation Ltd. v. Mumbai Shramik Sangha & ors., (2001) 4 SCC 448; Union of India & ors. v. Raghubir Singh & ors., (1989) 2 SCC 754 and Chandra Prakash v. State of U.P., (2002) 4 SCC 234, summarized the governing principles in the following terms:

“The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.”

It was further held that a Bench of lesser strength cannot doubt or depart from the decision of a larger Bench and, if it entertains such doubt, the proper course is to have the matter placed before the Hon’ble Chief Justice or a Bench of larger strength. A co-equal Bench may express doubt regarding an earlier decision of a co-equal Bench, but cannot itself overrule it.

These principles rest upon judicial discipline, certainty and consistency in the administration of justice and are equally relevant to the interpretation of Article 111 of the Constitution of Bangladesh, which embodies the doctrine of binding precedent. In the absence of any contrary pronouncement of the Appellate Division, the aforesaid decisions of the Supreme Court of India provide persuasive guidance on the question of Bench strength. Thus, where two decisions of the Appellate Division are in conflict, the decision rendered by the Bench of greater numerical strength must prevail, and a smaller Bench cannot overrule or depart from the decision of a larger Bench.

It appears that *Rezaul Karim and others v. Shamsuzzoha and others*, 49 DLR (AD) 68, was decided by a five-Judge Bench, whereas *Chinmoy Chowdhury and another v. Mridul Chowdhury and others*, 55 DLR (AD) 115, was decided by a three-Judge Bench. Accordingly, notwithstanding that the latter decision expressed a divergent view,

the decision in 49 DLR (AD) 68, having been rendered by the larger Bench, is binding upon the High Court Division.

Therefore, in a suit for partition, the Court may examine the plaintiff's title to the suit property in greater detail than would ordinarily be necessary in a suit for permanent injunction. However, where the pleadings disclose a serious, complicated or fundamental dispute as to the plaintiff's title, and the relief of partition cannot effectively be granted without first adjudicating upon such title, a mere suit for partition is not maintainable. In such circumstances, the plaintiff must seek an appropriate declaration of title together with the relief of partition in a properly constituted suit.

It appears from the plaint and the deposition of PW-1 that the plaintiffs claimed a share of 2.9350 acres of land out of the total 3.52 acres in their saham, partly as heirs of their parents, Hazi Abdul Malek and Asia Khatun, and partly by virtue of their purchase. The plaintiffs specifically pleaded that, although gift deed No. 13870 dated 12.09.1985 (Exhibit-7), executed by Hazi Abdul Malek in favour of defendant No.1, described 0.61 acre, the land comprised within the boundaries was in fact 0.3050 acre. According to the plaintiffs, their mother, Asia Khatun, had purchased the said 0.3050 acre by registered sale deed No. 18388 dated 30.10.1978 (Exhibit-6) from Abu Zafar Fakir and, upon her death, plaintiff Nos. 1-9 inherited the same. Their case, therefore, is that Hazi Abdul Malek had no right, title or authority to transfer the said land by the aforesaid deed of gift in favour of defendant No.1. They further alleged that defendant No.1 never acquired 0.61 acre under the said deed and that the Settlement Officers erroneously recorded 0.61 acre in its name in D.P. Khatian No.569 instead of 0.3050 acre.

Defendant No.1, on the other hand, claimed that Hazi Abdul Malek had validly gifted 0.61 acre to it by the deed of gift dated 12.09.1985 and, in all, had gifted 2.0594 acres to the defendant institution. It further contended that the properties allegedly transferred by Hazi Abdul Malek, though standing partly in his own name and partly in the names of his son, Nurul Islam (plaintiff No.1), and his wife, Asia Khatun, were in fact his self-acquired properties and that they were merely benamdars. Defendant No.1 accordingly denied the plaintiffs' title to and possession of the suit land.

The aforesaid pleadings and evidence disclose a serious, complicated and fundamental dispute as to title between the parties. The controversy relates, inter alia, to the ownership of the disputed 2.0594 acres of land, the validity and extent of the registered deed of gift dated 12.09.1985 and the alleged oral gift, the plaintiffs' claim of inheritance and purchase, and the plea of benami ownership. It is thus apparent that the question of title is not merely incidental to the claim for partition; rather, an effective partition cannot be effected without first adjudicating upon and formally determining the respective titles of the parties to the suit property.

It appears from the impugned judgment that the learned trial Judge, instead of first determining the maintainability of the suit in its present form in accordance with the settled principles of law, abruptly held that the suit was maintainable and thereafter proceeded to adjudicate upon the disputed questions of title of the parties. The learned Judge, inter alia, held that the deed of gift dated 12.09.1985 had transferred only 0.3050 acre of land, notwithstanding the description of 0.61 acre therein, and that the plaintiffs had title to 2.9350 acres of land. The learned Judge further found that the

defendants had failed to prove the alleged benami transaction and oral gift and, on that basis, decreed the suit in favour of the plaintiffs.

In view of the serious and fundamental dispute as to title, however, such adjudication could not properly have been undertaken in a suit for partition simpliciter. As held in 49 DLR (AD) 68, although the Court in a partition suit may examine the plaintiff's title in greater detail than in a suit for permanent injunction, a partition suit simpliciter cannot be converted into a proceeding for formal adjudication of a fundamental dispute as to title upon which the very right to partition depends. Where partition cannot effectively be effected without first determining the plaintiff's title, the proper course is to seek an appropriate declaration of title together with the relief of partition in a properly constituted suit.

Accordingly, the learned trial Judge, having undertaken a formal adjudication of the complicated and fundamental questions of title in the present suit for partition simpliciter, travelled beyond the permissible scope of the suit and thereby exercised a jurisdiction not properly vested in it in such a proceeding. The suit, in its present form, was not maintainable and as such ought to have been dismissed on that ground.

Since the suit itself is not maintainable in its present form, we are neither required nor competent to adjudicate upon the merits of the rival claims of title or to determine whether the parties are co-sharers in the suit property. We, therefore, refrain from entering into those questions.

In view of the foregoing discussion, we find merit in the appeal. Accordingly, the appeal succeeds and is allowed.

The impugned judgment and decree dated 07.08.2007, the decree having been signed on 14.08.2007, are hereby set aside. Consequently, the suit stands dismissed.

There shall, however, be no order as to costs.

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

There shall be no order as to costs.

Let the lower Court records (LCR), along with a copy of this judgment, be sent down to the Court below forthwith.

(Justice Md. Badruzzaman)

I agree.

(Justice Aynun Nahar Siddiqua)