

Present:
Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Mansur Alam

First Appeal No. 168 of 2013

In the Matter of:

Memorandum of appeal from the
original order.

-and-

In the Matter of:

Mosleh Uddin Ahmmed (Mehedi) and
others.

.....Defendant-appellant.

-Versus-

Nurun Nahar (Ami) and others.

.....Plaintiff-respondents.

Mr. Sherder Md. Abul Hossain with
Mr. Md. Toufique Hossain, Advocate

..... For the appellants.

Mr. Md. Yusuf Ali, Advocate

.....For the respondents.

Heard on 30.04.2025, 14.05.2025,
30.07.2025 and
Judgment on 06.08.2025.

Sheikh Abdul Awal, J:

This appeal at the instance of the defendant-appellants is directed against the judgment and decree dated 07.03.2013 passed by the learned Joint District Judge, 1st Court, Cumilla in Title (Partition) Suit No. 6 of 2007 decreeing the suit.

Material facts relevant for disposal of this appeal, briefly, are that Mahbubul Hossain and 4 others as plaintiffs filed the

instant partition suit praying for Saham of 26 decimals of land out of the scheduled land. The plaint case in brief is that one, Moharaja Bir Bikram Kishore Manikya Bahadur was the original owner of the suit schedule property No.1. The predecessors of the defendant Rahmatunnesa Bibi and plaintiff Md. Azhar Uddin got settlement through deed No. 2582 and 2581 dated 19.09.1932 of the land in question and possessed the same, who made two buildings of 3000 square feet and one tin-shed house of 2000 square feet over the suit land and started living thereon. Thereafter, Rahmatennessa died leaving behind 2 sons namely, Md. Abdus Sattar & Abdur Rahman and one daughter Habiba Khatun and thereafter, the said sons and daughter possessed the suit land in ejmali. Thereafter, Abdus Sattar died leaving behind defendant No.1 (wife), defendant Nos. 2-4(sons), defendant Nos. 5-8 (daughters) and Abdur Rahman died leaving behind defendant Nos. 9-14 and 15-22 (sons and daughters of Abdur Rahman). Habiba Khatun mutated her name by way of joma kharij case No. 304/1978-79 regarding 6 decimals of land, who died leaving behind her 4 sons (defendant Nos. 1-4) and 1 daughter (defendant No.5). The plaintiffs by constructing a building has been living on the suit land and lastly on 15.04.2006 asked the defendants for amicable partition in a vain and hence, the suit.

The defendants entered appearance in the suit and filed written statement denying all the material allegations made in the plaint stating, inter-alia, that the suit is misconceived, incompetent and not maintainable in law, the plaintiffs have/had no right, title and possession over the suit land. The defendants

claimed that the predecessor of the plaintiffs Habiba orally exchanged her total share with her brother Abdur Rahman which was oral exchange and exchanged land was not the suit land. The defendants further claimed that all the properties of their predecessors were not brought under the schedule of this suit land and the suit is bad for defect of parties and hotchpot. The plaintiff filed the suit on false averments and as such, the suit is liable to be dismissed.

The learned Joint District Judge, 1st Court, Cumilla on the pleadings of the parties 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 of the parties were brought into hotchpot.
- iv. Whether the plaintiffs have/had right, title and possession over the suit land in ejmali?
- v. Whether the plaintiffs are entitled to get a decree, as prayed for?

At the trial plaintiff side examined as many as 2 witnesses and exhibited some documents while the defendants also examined 2 witnesses namely, DW-1 and DW-2 to prove their respective cases.

The learned Joint District Judge, 1st Court, Cumilla after hearing the parties and on considering the materials on record by his judgment and decree dated 07.03.2013 decreed the suit in favour of the plaintiff-respondents.

Aggrieved thereby, the Defendants have preferred this appeal.

Mr. Sherder Md. Abul Hossain, the learned Advocate appearing for the defendant-appellants in the course of argument takes us through the evidence and materials on record and then submits that plaintiff filed the present partition suit praying for Saham of 26 decimals out of the scheduled land and contesting defendant No. 10 by filing written statements stated that Habiba Khatun, the mother of the plaintiff and Abdur Rahman, the father and Abdus Sattar, the uncle of the defendant No. 10 were siblings (brothers and sisters), they amicably partitioned their property and as such, Habiba Khatun obtained 12 decimals of land in Plot No. 496 and 14 decimals of land in Plot No. 497 and filed Mutation Case No. 304/78-79, Exhibit Nos. ২,২ (১). He father submits that the defendant No. 10 Abdur Rahman and Abdus Statter had 119 decimals of land which was recorded in S.A. Khatian No. 189, plot No. 359 under Mouza Kamalpur, District Brahmanbaria, it is in record that Habiba Khatun in exchange of 26 decimals of land of separate Mutation Khatian No. 220 took 26 decimals of land from S.A. Khatian No. 189, plot No. 359 under Kamalpur Mouza by oral exchange in the year of 1882 and ceased her co-ownership with her brothers in the suit land and after the death of Habiba Khatun the plaintiffs transferred that 26 decimals of land to another person by registered exchange deed No. 2712 dated 18.04.1987 (Exhibit No. ৩) although the trial court without considering the case of the defendants as to exchange made by Habiba Khatun wrongly decreed the suit. He father submits that the plaintiff filed this

partition suit without including all the ajmali property into hotchpot in suppressing the fact that they have already transferred their property to Abdur Rahman (father of defendant Nos. 9-12), the plaintiffs have no title, interest and co-ownership in the suit property and the suit is not maintainable.

Finally, Mr. Sherder Md. Abul Hossain submits that the trial court found 119 decimals of land under S.A. Khatian No. 189, Mouza Kamalpur, Brahmanbaria (exhibit No. ৩) was prepared in the name of Abdur Rahman (father of defendant No. 9-12) and Abdus Satter and the plaintiff transferred 26 decimals of land from that khatian by exchange deed No. 2712 dated 18.04.1987 (exhibit No. ৪) stating that they obtained the property by inheritance from their mother but the trial court ignored that transfer in observing that it is not proved that Habiba Khatun obtained that land by exchange without considering statements of the DW-1 and DW-2 and as such, the impugned judgment and decree is liable to be set-aside and the suit is liable to be dismissed.

Mr. Md. Yusuf Ali, the learned Advocate appearing for the plaintiff respondents, on the other hand, supports the impugned judgment and decree, which was according to him just correct and proper. He submits that the defendants claimed that predecessor of the plaintiffs Habiba orally exchanged her total share with her brother Abdur Rahman which was an oral exchange and exchanged land was not the suit land and it is on record the defendants also failed to prove their oral exchange. In this regard the learned Advocate for the respondents referred a decision reported in 19 DLR 192 wherein their Lordships

observed that "Deed of exchange without Registration passes no title" and as such oral exchange cannot be a basis for any valid title.

Having heard the learned Advocate for the appellants and respondents, perused the memo of appeal and other materials on record including the impugned judgment, the only question calls for our consideration in this appeal is whether the trial Court committed any error in finding that during trial the plaintiffs have been able to prove their case and the defendant could not prove their oral exchange as well as right, title and possession in the suit land.

On scrutiny of the materials on record, it appears that suit was for partition. It is admitted by both the plaintiffs and defendants that they are the heirs of Rahmatermesssa, and it is also admitted by the defendants that the plaintiffs' case is the owner of 1/5 share of suit land, total suit land 1.30 acres and as per amicable settlement in the year 1973 the mother of the plaintiff mutated 12 decimal from dag No. 496 and 14 decimals from dag No. 497, vide Mutation Case No. 304/1978-79 and new Mutation Khatian No. 220 was opened in her name and she possessed the suit land by paying Rent to the Government up to the year 1416 B.S. without any objection of the defendants which proves her title and possession in the suit land. The defendants claimed that the predecessor of the plaintiffs Habiba orally exchanged her total share with her brother Abdur Rahman which was an oral exchange and exchanged land was not the suit land. The defendants also failed to prove their oral exchange by adducing any documentary evidence. In the case of Javed Ali

Bepari Vs. Abdul Bari Bepari and ors reported in 19 DLR 192 wherein it has been held that-

The learned Advocate has also contended that the lower appellate Court erred in law in holding that there could not be any oral exchange could not create title in view of the provisions of section 118 of the Transfer of Property Act. For the reasons that there was exchange, it would not follow that it was a valid exchange was not effected by a registered instrument, it would not create any interest in favour of the defendants if the exchange had been relating to the case land. It was not according to law and no valid title could be created on the basis of the oral exchange.

From the above, it is clear that oral exchange is not according to law and no valid title can be created on the basis of the oral exchange.

Further, the plaintiff respondents to prove their right, title and possession exhibited mutation, rent receipt, R.S. khatian of the suit land. PW-1 and PW-2 both of them categorically stated in their respective evidence as to right, title and possession of the plaintiffs in the suit land. Moreover DW-2 also admitted the possession of the plaintiff in the suit land. Weighing the evidence of both the parties, we find that the evidence of plaintiff side is credible and tenable in Law.

The learned trial Judge upon a lengthy consideration of the facts and law involved in the case observed as follows:

ইতোমধ্যে আলোচনায় প্রতিষ্ঠিত হয়েছে যে, বাদীপক্ষ নালিশী ভূমিতে এজমালিতে স্বত্বদখলকার। সুতরাং নালিশী ভূমি সংক্রান্তে বাদী পক্ষ আদৌ নিঃস্বত্ববান নয় এবং তারা উত্তরাধিকার সূত্রে নালিশী ভূমিতে এক পঞ্চমাংশ হিস্যায় স্বত্ব দখলকার। তাছাড়া বর্তমান মোকদ্দমাটি পক্ষ দোষ ও হচপট দোষে বারিত নয় মর্মে ও ইতোমধ্যে সিদ্ধান্ত গৃহীত হয়েছে। বিবাদী পক্ষের দাবী মতে মৌখিক এওয়াজ বদলও তারা প্রতিষ্ঠিত করতে সক্ষম হয় নাই। এইপ্রেক্ষিতে বর্তমান আকারে ও প্রকারে অত্র মোকদ্দমাটি চলতে আইনগত বা অন্য কোন রূপ বাধা আছে মর্মে অত্রাদালতের কাছে প্রতীয়মান হয় না।

This being purely a finding of fact based on proper assessment of the evidence on record. We on consideration of the materials on record and the impugned judgment of the trial court find no legal infirmity or illegality in the impugned judgment and decree dated 07.03.2013. Therefore, we find that submission of Mr. Sherder Md. Abul Hossain has no legs to stand. The reasonings given by the learned Additional Joint District Judge, 1st Court, Cumilla appear to us to be proper and sound and we do not find any reason to differ from it.

In the result, the appeal is dismissed. The impugned judgment and decree dated 07.03.2013 passed by the learned Joint District Judge, 1st Court, Cumilla in Title (Partition) Suit No. 6 of 2007 decreeing the suit is hereby maintained. In the facts and circumstances of the case there will be no order as to costs.

Send down the LC Records at once.