In the Supreme Court of Bangladesh
High Court Division
(Civil Appellate Jurisdiction)

First Appeal No. 207 of 2013

In the matter of:

Sadrul Huq being dead his legal heirs
Ziaul Haque and others.
……. Defendant-Appellants.
Vs.
Farhana Firdousi and another.
..Plaintiff-Respondents.
Mr. A.F. Hassan Ariff, learned senior counsel with
Mr. Mufti Md. Abdullah and
Dr. Md. Abu Saleh Patwary
Appearing virtually as Amici Curiae.
Mr. Surojit Bhattacharjee, Advocate
(Appearing Virtually).
…For the Appellants.
Mr. M. Ali Murtaja, Advocate
(Appearing Virtually).
….For the Respondent No.1.

Present (Physically in Court Room):
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Ahmed Sohel

Heard on 08.08.2021, 09.08.2021, 16.08.2021, 17.08.2021, 06.09.2021 and 19.09.2021.
Judgment on: 26.09.2021.

SHEIKH HASSAN ARIF, J

1. This appeal, at the instance of the defendant Nos.1 and 2 in Title Suit No. 14 of 2009, is directed against judgment and decree dated 14.02.2013 passed in the

said title suit by the Second Court of Joint District Judge, Sunamgonj thereby decreeing the partition suit in favour of the plaintiff-respondent No.1.

2. **Back Ground Facts:**

2.1 Facts, relevant for the disposal of the appeal, are that the respondent No.1, as plaintiff, filed the said Title Suit No. 14 of 2009 before the Second Court of Joint District Judge, Sunamgonj seeking a decree of partition in respect of properties mentioned in the first schedule to the plaint and thereby seeking shaham in respect of .09 acre land out of the said first schedule land as mentioned in second schedule to the plaint.

2.2 The case of the plaintiff, in short, is that the property mentioned in the first schedule under S.A Plot No. 1890 and 1891, under S.A Khatian No. 315 along with other lands originally belonged to Gonga Charan Biswas. On his death, defendant Nos. 4-9 became owner of the said property by inheritance. That the said defendant Nos. 4-9, while in possession as owner, transferred .05 acre and .04 acre land under S.A Dag No. 1890 vide two

registered kabala, namely Kabala No.4792 dated 01.12.1987 and Kabala No.4916 dated 07.12.1987. Thereafter, the said defendant Nos. 4-9 sold the remaining land under S.A Plot No. 1890, namely in total 27 decimal land, in favour of defendant Nos.1-3 vide different kabalas. That the land under S.A plot No. 1891 under S.A Khatian No. 315 along with other plots were also sold by defendant Nos. 4-9 in favour of defendant Nos. 1 and 2 vide different registered kabala. Accordingly, the said properties were recorded in the name of defendant Nos. 1-3 during revisional survey primarily under Tasdik Khatian No. 3048, under Plot No. 3098.

2.3 That upon proposal of marriage between the plaintiff and defendant No.3, as came through common relatives, the plaintiff and defendant No.3 got married to each other vide registered kabinnama dated 11.07.2005 with a fixed dower of Tk. 5,00,001. That out of the said fixed dower, Tk. 2,00,000/- was shown to be realized as against ornaments and furniture, Tk. 2,00,001 remained to be paid on demand. That, as against the remaining dower

of Tk. 1,00,000/-, defendant No.1 (father of defendant No.3) transferred .09 acre land under S.A Plot No. 1890, as mentioned under second schedule to the plaint, by writing at Clause No.16 of the kabinnama. That in Clause No.11 of the kabinnama, defendant No.1 signed as a witness. That the said .09 acre land is under common possession of the plaintiff along with defendant Nos.1 and 3. That the plaintiff has not yet got the said Tk. 2,00,001/- as against the dower on demand. That while the plaintiff and defendant No.3 were in conjugal life, defendant No.3 left for England and stopped any communication with the plaintiff since February 2008. Under such circumstances, when the plaintiff contacted defendant No.1 (father of defendant No.3), defendant No.1 told the plaintiff that defendant No.3 would never take plaintiff to England. The plaintiff then demanded the remaining portion of the dower including the said .09 decimal land, which was refused by the defendant No.1. Under such circumstances, the plaintiff filed the said suit seeking saham in respect of the said .09 decimal land.

2.4 The suit was contested by defendant Nos.1 and 2 (parents of defendant No.3) denying the material statements in the plaint and thereby contending that the defendant No.1 never wrote anything on the kabinnama in question as regards transfer of the said .09 decimal land and that the kabinnama was registered even before solemnization of the marriage between the plaintiff and defendant No.3. That the defendant Nos. 1 and 2 purchased the said land along with other lands under S.A Plot No. 1890 and 1891 and they have muted 15 decimal land vide Mutation Case No. 84/ 90-91 and 11 decimal land vide Mutation Case No. 70/ 2007. That the suit land is the purchased land of these defendants and that they have residence thereon. That the defendant No.1 signed the kabinnama out of innocence and the kazi of the marriage in question was brought by the father of the plaintiff. That the defendant No.1 had already transferred .09 decimal land from other plot in favour of the plaintiff. That the statement at Clause No.16 in the kabinnama was written by the kazi concerned under the influence of the plaintiff's father as regards transfer of .09 decimal land under S.A Plot No.

1890 and that the defendant No.1 never transferred any such land through the said kabinnama.

2.5 Upon such contesting pleadings, the Court below framed issues in the following terms:

(1) Whether the suit is maintainable in its present form?

(2) Whether the suit suffers from defect of parties?

(3) Whether the plaintiffs have right, title, interest and possession in the suit land?

(4) Whether all properties have been brought into the common hotchpotch of the partition suit?

(5) Whether the plaintiff is entitled to get a preliminary decree of partition?

2.6 During trial, the plaintiff produced three witnesses (P.Ws. 1-3) and certain documentary evidences which were marked as Exhibits 1-5. On the other hand, the defendant No.1 deposed himself as D.W.1 and produced certain documentary evidences which were marked as Exhibits Ka-Cha series. Thereupon, the Court below, after hearing the parties, decreed the suit in favour of the plaintiff and, accordingly, gave saham of the said .09 decimal land mentioned in schedule 2 in favour of the

plaintiff. Being aggrieved by such preliminary decree, the defendant Nos.1 and 2 have preferred this appeal, but have not sought any order of stay for staying operation of the judgment passed by the Court below.

2.7 The appeal is contested by plaintiff-respondent No.1 through learned advocate Mr. M. Ali Murtaja.

3. **Submissions:**

3.1 Mr. Surojit Bhattacharjee, learned advocate appearing for the appellants, after placing the entire impugned judgment and the nikahnama in question, namely Exhibit-3, submits that the statement in Clause-16 of the kabinnama could not be proved by the plaintiffs before the Court below to be the statement of the defendant No.1 and as such, according to him, the Court below committed gross illegality in decreeing the suit and, thereby, giving saham in favour of the plaintiff in respect of the property mentioned in Clause 16 of the said kabinnama. He further submits that even if the statement at Clause No. 16 of the kabinnama is taken to be proved by the plaintiffs, the plaintiff cannot claim any saham in the property in question inasmuch as that such statement, even if made

by defendant No.1, did not transfer any immovable property as per the provisions of Section 123 of the Transfer of Property Act, 1882. By referring to Exhibit-3 again, learned advocate for the appellants submits that the said statement in Clause- 16 of the kabinnama cannot be taken to be a contract for sale either, as any contract for sale of immovable property has to be registered in view of the mandatory provisions under Section 17A and 17B of the Registration Act, 1908, as amended by vide Act No. 25 of 2004.

3.2 Mr. Bhattacharjee further submits that in view of the provisions under Rule 19 of the Muslim Marriage and Divorce Registration Rules, 1975, the nikahnama is registered between two parties, namely husband and wife. Therefore, only these two parties may give commitment as regards dower. Therefore, according to him, even if it is found that the father of the husband, namely defendant No.1, who was a mere witness in the marriage, declared anything or transferred anything by way of the said kabinnama, such transfer cannot be implemented as because he was not a party to the

marriage. He further submits that it is the husband who is responsible for anything as against dower and as such defendant No.1, being admittedly not the husband or party to the marriage, cannot be held responsible for payment of any dower or any portion of dower.

3.3 As against above submissions, Mr. M. Ali Murtaja, learned advocate appearing for the plaintiff-respondent, submits that anyone can give commitment on behalf of the husband to pay the dower money and, in this case, since the father of the husband, namely defendant No.1, declared transfer of the land in question in favour of the plaintiff as against the remaining portion of Tk. 1,00,000/- of the dower money, the Court below has rightly decreed the suit and thereby gave saham in respect of the said property in favour of the plaintiff.

4. **Deliberations, Findings and Orders of the Court**:

4.1 Some important questions with religious sensitivity have arisen in this appeal, namely:

(1) Whether the father of the husband may pay the dower money or may under-take to pay the dower money or portion of dower money on

behalf of his son (husband) given that as per the law, namely Muslim Marriage and Divorces (Registration) Rules, 1975, he is not directly a party to such marriage?

(2) Whether on behalf of a party to the marriage, any person may undertake to transfer land instead of the dower money or what may be the form of dower?

(3) Whether such transfer of land by the father of the husband as against dower or portion of dower, as made at Clause 16 of the nikahnama, may be effected and enforced under the Muslim Law and the law of the land?

4.2 Considering such religious sensitivity and complex issue of law of the land, we have requested two Islamic scholars of Bangladesh Islami Foundation and a senior counsel of this Court to assist us as Amici Curiae. Accordingly, on our request, Mr. Mufti Md. Abdullah, Mufti Bangladesh Islamic Foundation, Baitul Mukarram, Dhaka and Dr. Md. Abu Saleh Patwary, Muffassir and Deputy Director, Bangladesh Islamic Foundation, Baitul Mokarram, Dhaka have provided assistance by their scholarly views through virtual connectivity. After their

such assistance, Mr. A.F. Hassan Ariff, learned senior counsel, has also assisted us as Amicus Curiae to resolve the issue of law of the land as against such religious context. In addition to their oral submissions, both the above named Islamic Scholars have also submitted their opinion in writing.

4.3 It may be noted that the opinion of both the scholars were unanimous and we have not found any major difference in between their opinion. According to them, a dower may be in any form: cash, kind or in the form of property or any other valuables, and it is the right of the wife and obligation of the husband to pay or transfer the dower in favour of the wife at the time of marriage or thereafter. According to them, it is the dictate of Allah as well as Hazrat Muhammad (SM) that the dower must be paid by the husband and unless and until it is paid, it will remain as the loan or liability on the husband.

4.4 The said scholars have further stated unanimously that the liability to pay dower may be under-taken by the father, brother or any relatives or anyone else on behalf

of the husband and it could be paid in the form of cash, valuables and land etc. The gist of their opinion is that any property or valuables, which are valid in Islam, may take the form of dower and anyone can undertake to pay or transfer such dower.

4.5 From the above opinion of the said islamic scholars, it appears that the landed property, being a valid property under Islam, may take the form of dower under Islamic principles, and anyone, including the father of the husband, may undertake to pay or transfer such dower. Therefore, it appears that the landed property in question was rightly taken to be a form of portion of dower to be transferred in favour of the plaintiff and that the father of the husband, namely defendant No.1, was allowed under the Islamic law to undertake or to transfer the said land in lieu of certain portion of the said dower money in favour of his daughter-in- law. Probably, considering this aspect of the Islamic principle, Clause-16 of the nikahnama has been incorporated in the standard nikanama form, which runs as follows:

"১৬।বিশেষ বিবরণ ও পক্ষগণের মধ্যে চুক্তিসূত্রে নির্ণীত মূল্যসহ কোন সম্পত্তি সম্পূর্ণ দেনমোহর বা উহার অংশ বিশেষের পরিবর্তে প্রদত্ত হইয়াছে কিনা?----------

১৭. বিশেষ শর্তাদী থাকিলে ----------"

4.6 Admittedly, the appellant (defendant No.1) signed the said nikahnama as a witness, although he is disputing the statement made by him under Clause No. 16. Now the question is even if he has made such statement as regards transfer of .09 decimal land in favour of the plaintiff, whether such transfer may be valid transfer under the law of the land.

4.7 The admitted position is that the nikahnama was registered on 11.07.2005, i.e., after the enforcement of the Amending Act No. 25 of 2004 thereby incorporating Sections 17A and 17B in the Registration Act, 1908. Therefore, according to Mr. A.F. Hasan Ariff, learned senior counsel, such transfer, being not registered under the Registration Act, 1908, would become void as per the said Act and Transfer of Property Act, 1882. According to him, such statement of defendant No.1

may also not be taken as a contract for sale of land, as, after such amendment, such contract of sale in respect of immovable property has to be registered mandatorily and in case of non-registration, such contract would become void. However, by referring to the provisions of the Family Court Ordinance (Ordinance No. 18 of 1985), in particular Sections 3 and 5 of the said Ordinance, he submits that the proper recourse, as should have been taken by the plaintiff, was to file a suit for dower before the Family Court.

4.8 In this regard, we have examined the provisions of the Family Court Ordinance, 1985. It appears from the relevant provisions of the said Ordinance that the same is a special law by which a special Court, namely Family Court, has been established and that the provisions of the said law have been given overriding effect over any other law found to be inconsistent. As per Section 5 of the said Ordinance, the jurisdiction of the Family Court has been conferred relating to or arising out of all or any of the following matters, namely (a) dissolution of marriage (b) restitution of conjugal rights (c) dower (d)

maintenance (e) guardianship and custody of children. Therefore, it appears that a wife is entitled to file a suit claiming a decree of dower before the Family Court established under the Family Court Ordinance, 1985. The term ‘dower’ has not been defined either by the Muslim Family Law Ordinance, 1961 or by the Family Court Ordinance, 1985. However, Section 10 of the Muslim Family Law Ordinance, 1961 provides that where no details about mode of payment of dower are specified in the nikahnama for the marriage contract, the entire amount of dower shall be presumed to be payable on demand.

4.9 Now, in Exhibit 3, namely the nikahnama in question, the mode of payment of dower has been stated clearly, namely that the total dower money is Tk. 5,00,001/- and Tk. 2,00,001/- out of the said Tk. 5,00,001/- was determined as the dower on demand and Tk. 2,00,000/- was determined as portion of dower money realized as against ornaments and furniture. At Clause-16 of the said nikahnama (Exhibit 3), a statement is claimed to have been made by the defendant No.1 (father of the

husband), who has admittedly signed the nikahnama as a witness, as regards transfer of 9 decimal land. The entire clause-16 in exhibit-3 along with the said statement is quoted below:

> "১৬।বিশেষ বিবরণ ও পক্ষগণের মধ্যে চুক্তিসূত্রে নির্ণীত মূল্যসহ কোন সম্পত্তি সম্পূর্ণ দেনমোহর বা উহার অংশ বিশেষের পরিবর্তে প্রদত্ত হইয়াছে কিনা? বাবত নং ১০০০০০/=(স্টেশন সাব রেজিষ্ট্রার দিরাই-সুনামগঞ্জ। আমি ছদরুল হক, আমার খরিদা দলিল নং-৪৭৯২ তাং ১/১২/৮৭ ইং ও দলিল নং ৪৯১৬ তাং ৭/১২/৮৭ ইং মোট পরিমান (৫+৪) =৯ নয় শতাংশ জায়গা, থানা-দিরাই, জেলা- সুনামগঞ্জ, মৌজা-চান্দপুর, জে,এল, নং ৯৯, খতিয়ান নং সাবেক-৩১৫, ডি,পি, খতিয়ান-৬২৮ সাবেক দাগ-১৮৯০ বর্তমান দাগ-৩০৯৮ বাড়ী রকম ভূমি আমার পুত্র বধুকে দিলাম।"

4.10 Therefore, as per Clause 16 of the said nikahnama, it appears that the father of the husband has transferred the said .09 decimal land, as mentioned in the schedule-2 to the plaint, in favour of the plaintiff. However, the admitted position is that this nikahnama, though registered under the Muslim Marriage and Divorce (Registration) Act and Rules made thereunder, it has not been registered as per the provisions of Registration Act, 1908 and the transfer has not been made as per the

provisions of Transfer of Property Act, 1882. Therefore, such transfer has become void in so far as the Registration Act, 1908 and the relevant provisions of the Transfer of Property Act, 1882 are concerned. Does it mean that the plaintiff does not have any remedy as against the said dower money of Tk. 1,00,000/- in payment of which her father-in-law, namely defendant No.1, transferred certain portion of land in her favour?

4.11 As stated above, as per the opinion of the aforementioned Islamic scholars, such transfer of land is valid dower as per Islamic principle. However, since the land in question is the portion of dower as paid or purportedly transferred in favour of the plaintiff by the father of her husband, this Court is of the view that the forum as chosen by the plaintiff to realize such dower was not the correct forum under the law of the land. As our country has special law, namely Family Court Ordinance, 1985, the provisions of which will have effect irrespective of any contrary provisions in any other law including the Registration Act, 1908 and the Transfer of Property Act, 1882, the plaintiff should have taken

recourse to the provisions of the said special law and should have filed a suit for dower under the provisions of the said Ordinance before the Family Court established under Section 4 of the said Ordinance.

4.12 In this regard, we have also examined the decision of a single bench of this Court as relied upon by the Court below in decreeing the suit, namely the decision of this Court in **Altab Hossain vs. Aziza Begum, 17 BLC (2012) -71**. In the said case, this Court opined that the plaintiff therein could have filed suit for partition seeking saham in respect of total quantity of the property as given by her late husband by the said registered kabinnama as portion of dower. However, transfer in question in that case by way of a registered kabinnama was done on 14.08.1975 i.e. long before coming into force of the aforementioned amendment to the Registration Act and Transfer of Property Act vide Act No. 25 of 2004. Since the newly incorporated provisions under Section 17A and 17B of the Registration Act and the newly incorporated provisions in the Transfer of Property Act did not have existence at that time, or were

not considered in the said case, we are of the view that the decision therein is not applicable in the facts and circumstances of the present case.

4.13 Since the plaintiff in the present case has chosen a wrong forum, namely filed a partition suit before a civil Court having territorial jurisdiction, we are of the view that the plaintiff should be given a chance to withdraw the said suit at this appellate stage to file the same before the Family Court, as established by the Family Court Ordinance, 1985, for seeking a decree of dower in respect of the said property. Since we have already held that the land in question can be treated as dower, we are of the view that the plaintiff should be allowed to withdraw the suit at this appellate stage with a permission to file the same before the correct forum, namely the Family Court established under the Family Court Ordinance, 1985. Since learned advocate appearing for the plaintiff-respondent No.1, in the course of hearing, has made such prayer, we hold that this Court should allow the plaintiff to withdraw the suit with a permission to institute a fresh suit seeking decree of

dower in respect of the said land, as mentioned in schedule 2 to the plaint, before the competent Court, namely the Family Court established under Family Court Ordinance, 1985.

4.14 Accordingly, the impugned judgment and decree are hereby set-aside. Let the suit filed by the plaintiff-respondent No.1 be withdrawn. The plaintiff-respondent No. 1 is permitted to file a fresh suit within a period of 04 (four) months from receipt of the copy of this judgment in respect of the same land, as mentioned in schedule -2 to the plaint, seeking a decree of dower before the Family Court concerned under the Family Court Ordinance, 1985.

5. With the above orders, observation, and directions, the appeal is disposed of.

6. Before we depart, we express our gratitudes to the aforementioned Islamic scholars and learned senior

counsel, who appeared as Amici-Curiae before this Court and assisted us to reach a proper decision.

Communicate this.

Send down the Lower Court Records.

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(Sheikh Hassan Arif,J)

I agree.

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(Ahmed Sohel, J)