

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Appeal No. 298 of 2013

In the matter of:

Musa and others
... Appellants

-Versus-

Abdul Bari and others
... Respondents

Mr. Md. Akhtaruzzaman, Advocate with
Mr. Md. Sumon Ali, Advocate
...For the appellants

None appears
...For the respondents

**Heard on 19.02.2025, 20.02.2025
and Judgment on 20.02.2025**

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of the heirs of the defendant No. 4, Jalal Ahmed, in Title Suit No. 222 of 2011, this appeal is directed against the judgment and decree dated 11.07.2013 passed by the learned Joint District Judge, 5th court, Dhaka in the said Title Suit No. 222 of 2011 (formerly, Title Suit No. 285 of 1999) filed for partition in the suit land, measuring an area of 0894 *ojutangsho* of land filed by the plaintiffs herein the respondent nos. 1-11 prayed for saham decreeing the suit. Mentionable, the above suit was heard and disposed of along with Title Suit No. 223 of 2011 (earlier Title Suit No. 56 of 1999) which was filed by the predecessor of the respondent

nos. 12-19, Abul Kashem who was the defendant no. 1 in the suit and that very suit was filed for declaration to the effect that the judgment and decree passed in Title Suit No. 284 of 1967 is illegal, inoperative and not binding upon the said defendant no. 1 and both the suit were heard simultaneously. The suit filed for partition by the predecessor of the present respondent nos. 1-11 namely, Shamsunnahar, Setara Begum, Sultana Parveen, and Kawsar Parveen in short is that, one A,F,M Nur Mohammad in course of an execution case being money decree execution case 27 of 1955 purchased the land so belonged to one, Nibaron Mohon Das, in the name of his second wife, Fatem Begum and one son of his first wife, Abul Kashem on 03.01.1957 and accordingly said Nur Mohammad acquired title and possession in respect of land described in 'kha' schedule to the plaint. When Nur Mohammad started enjoying title and possession over the said property by virtue of auction purchase, he then filed a suit being Title Suit No. 284 of 1967 in the then subordinate judge 1st court, Dhaka for declaration that he auction purchased in the said land in *benami* for his second wife, Fatema Begum and son, Abul Kashem and also sought declaration of title in the said property and ultimately the said Nur Mohammad got a decree though ex parte vide judgment and decree dated 12.02.1968 (decree drawn on 15.02.1968). Subsequently Nur Mohammad vide a deed of heba dated 16.08.1983 transferred the entire property of land he got vide exparte decree in favour of her second wife, Fatema Begum. Subsequently, Fatema Begum while enjoying title and possession over that gifted property, died leaving behind the defendant nos. 2 and 3 as her two sons and four daughters, the plaintiffs and her husband and thereby the father of the plaintiffs, namely, Nur Mohannad got ¼ th share in schedule

'kha' and defendant nos. 2 and 3 got $\frac{3}{16}$ th share and the plaintiffs got $\frac{3}{32}$ th share in the suit property and they then started enjoying title and possession in the suit land in *ejmali*. Subsequently, Nur Mohammad died leaving behind the defendant no. 1 as his son, born out of his first wife and two sons of his second wife, and four daughters of his second wife herein the plaintiffs and accordingly those heirs of Nur Mohammad that is defendant nos. 1-3, got $\frac{1}{20}$ th share and the plaintiffs $\frac{1}{14}$ th share as his heirs and started enjoying title and possession in their respective share in *emjali* in 'kha' schedule land and thereby the plaintiffs thus entitled to $\frac{1}{10}$ th share in the said schedule of land. In the aforesaid manner the plaintiffs kept on enjoying title and possession over the suit property as per the share as stated herein above in respect of 'ka' and 'kha' schedule land. It has further been stated that, the property so have been described in 'kha' schedule of land has never been partitioned through meats and bounds for which they could not take any step to improve the said property and while they went to the defendants No. 1 requesting him to partition the suit land on 15.04.1989, he denied to do so and hence the suit.

On the contrary, the defendant no. 2 entered appearance in the suit and filed a written statement denying all the material averment so made in the plaint contending *inter alia* that, the defendant no. 1, Abul Kashem by arranging funds from his maternal uncle obtained the suit property along with his father, Nur Mohammad (also father of the plaintiff nos. 1-4 as well as defendant nos. 2-3) and thus he (defendant no. 1) is entitled to 8 *ana* share in the entire suit property. It has further been stated that, the

summons of Title Suit No. 284 of 1967 had never been served upon the defendant no. 1 and therefore he admitted the case of the defendant no. 1 in the suit.

On the contrary, the predecessor of the present respondent nos. 12-19, the defendant no. 1, Abul Kashem also contested the suit by filing a joint written statement denying all the material averments so made in the plaint contending inter alia that, after the demise of his (defendant no. 1) mother he took shelter in the house of his maternal uncle and due to giving ill advice by his step mother Fatema Begum to his father Nur Mohammad, he at some point of time left the house of his father, Nur Mohammad and then all the expenses for his livelihood were borne by his maternal uncle and ultimately he obtained his metric examination in the year 1953 and being overwhelmed with his excellent result, the relatives of his maternal uncle gifted him taka 1,200/- and by arranging other funds, he auctioned purchased the suit land along with his father in Money decree Execution Case No. 27 of 1955. It has further been stated that, though his father subsequently filed a suit being Title Suit No. 284 of 1967 claiming himself to be the sole owner of entire auction purchased land however the summons of that suit had not been served upon him and thereby his father, Nur Mohammad got an ex parte decree in that suit on 12.02.1968 though Nur Mohammad did never get possession in the entire purchased land. It has further been stated that though subsequently said Nur Mohammad transferred entire land to his second wife, Fatema Begum through *heba* deed dated 11.08.1983 but Fatema Begum also did not get possess in the suit property and enjoy the same. It has lastly been stated that the said *heba* deed is totally collusive, inoperative and not binding upon him and by

virtue of that very deed of *heba*, the present plaintiffs who are the daughters of Nur Muhammad did never get any title and possession over the suit property and the suit filed for partition is liable to be dismissed.

On the contrary, the predecessor of the present appellants namely, Jalal Ahmed made as defendant no. 4 in the suit contested the same though prayed *saham* by filing written statement denied all the material statement so made in the plaint contending *inter alia* that, the property so have been described in schedule 'kha' originally belonged to Gonga Charon Das and Nibaron Mohon Das in equal share and accordingly CS record was prepared in their name in CS khatian No 10493 appertaining to plot no. 282 measuring an area of 894 *ojutangsho* of land though in that CS khatian, there have been other 4 plots however in all those plots, Gonga Charon and Nibaron Mohon have got equal share that is, 8 *ana* share each and in plot no. 282 the holding number is, 8, Ishore Das lane. Subsequently by Money Decree Execution Case being No. 27 of 1955, the property belonged to Nibaron Mohon Das was put on auction sale that is, in respect of 447 *ojutangsho* of land including the structures standing thereon and it was purchased by Nur Muhammad in the name of his second wife, Fatema Begum and son, Abul Kashem. Another CS recorded tenant that is, Gonga Charaon Das subsequently died leaving behind Norandra Chandra Das where there remains a homestead and while Norandara Chandara Das had been enjoying title and possession over his 447 *ojutangsho* of land, sold out 112 *ojughagsho* of land including the homestead thereon to one, Shahajada Miah by sale deed dated 18.04.1969 and the rest 335 *ojugangsho* of land was obtained by one, Pathu Miah by way of adverse possession in the year 1950 and since then he has been enjoying title and

possession by taking electricity line and paying all other utility bills in respect of that property and by residing thereon and subsequently SA record was prepared in his name and that property was then enlisted at holding no. 8/1, Ishore Das land. Thereafter by virtue of sale deed dated 11.05.1983, the defendant no. 4 purchased rest 335 *ojutangsho* land and the structure standing thereon and got possession over the said purchased property. Thereafter said Pathu Miah filed a suit being Title Suit No. 127 of 1983 in the court of the then subordinate Judge, 1st court, Dhaka impleading the predecessor of the present plaintiffs, Fatema Begum, her husband A.F. Nur Muhammad and the defendant nos. 2 and 3 where the defendant no. 1 of the instant suit that is, Abul Kashem, was impleaded as defendant no. 1. Actually during pendency of the suit, the defendant no. 4 purchased 335 decimals of land from Pathu Miah and subsequently he was made as defendant no. 4 by order dated 21.11.1983 and the said suit was ultimately decreed on 16.04.1989 and it was decided in the title suit that the defendant no. 4 is the lawful owner of 335 *ojugahgsho* of land in holding no. 8/1 Ishor Das lane. However against the judgment and decree so passed, no appeal has ever been preferred either by the present plaintiffs or by the defendant nos. 1-3. After purchasing the said property on 11.05.1983, the defendant no. 4 mutated his name in the *khatian* on 25.05.1983 and accordingly RS khatian was also prepared in his name and in view of the preparation of RS record, the defendant no. 4 also kept on paying all the utility bills including the land development tax (খাজনা) to the respective department. However, during pendency of the suit, the said defendant no. 4 again purchased rest 112 *ojutangsho* of land from Shahajada Miah by registered sale deed no. 757 dated 01.03.1998 and that very sale deed was

also exhibited as exhibit no. F-1 and accordingly the defendant no. 4 prayed for a *saham* in respect of 447 *ojutangsho* of land.

In order to dispose of the suit the learned judge of the trial court framed as many as 6 different issues while the plaintiffs of the suit examined 4 witnesses and produced several documents which were marked as exhibit nos. 1-7 while the defendant no. 4 examined a single witness and those of the defendant nos. 1-3 examined 3 witnesses in support of their respective cases. However, the learned judge upon taking into consideration of the evidence and materials on record, vide impugned judgment and decree, decreed the suit as prayed by the plaintiffs as well as the defendant nos. 1-3. Though the Title Suit No. 223 of 2011 so initiated by the predecessor of respondent nos. 12-19 that is, Abul Kashem, defendant no. 1, was dismissed. Being aggrieved by and dissatisfied with the said judgment and decree passed by the trial court dated 11.07.2013, the heirs of defendant no. 4 as appellants then preferred this appeal.

Mr. Md. Akhtaruzzaman, along with Mr. Md. Sumon Ali, the learned counsels appearing for the appellants upon taking us to the impugned judgment and decree and taking us through the documents so appeared in the paper book at the very outset submits that, the learned judge has erred in law in not taking into consideration of the case of the defendant no. 4-that is the predecessor of the present appellants in its proper perspective and had the case of the defendant no. 4 considered, the impugned judgment and decree would have been otherwise. To supplement the said submission, the learned counsel further submits that the predecessor of the present appellants that is, late Jalal Ahmed, had no objection with regard to the property so obtained from Nibaron Mohom

Das who had admittedly eight *ana* share in CS khatian no. 10493 appertaining to plot no. 282 but the claim of the present appellants is totally different from that of the claim of the plaintiffs of the suit, who acquired the property from another CS recorded tenant, Nibaron Mohon Das so under no circumstances can the plaintiffs of the suit claim the property left by Gongu Chandra Das out of the said CS plot but without taking into consideration of that material facts, the learned judge of the trial court has taken a very wrong view by giving *saham* to the plaintiffs and the defendant nos. 1-3 in respect of total 0894 *ojutangsho* of land and thereby committed a grave illegality.

The learned counsel further contends that, if the learned judge of the trial court had ever taken into consideration of the CS khatian No. 10493 which has been marked as exhibit-1 it would have been crystal clear that, the property of plot no. 282 belonged to by both Gongu Charan Das and Nibaron Mohon Das in equal share so the predecessor of the plaintiffs and the defendant nos. 1-3 can hardly get the share left by Nibaron Mohon Das as they claimed to have acquired the property as successor in-interest of Noor Mohammad who claimed to have auction purchased 447 *ojutangsho* of land of Nibaran Mohon Das in Money Execution Case No. 5 of 1955 dated 03.12.1955 but what ever their claim might be, the present appellants, that is the heirs of defendant no. 4 had got no interest with that, rather the predecessor of the present appellants, Jalal Ahamed got 447 *ojutangsho* of land from the inheritor of Gongu Charon Das.

The learned counsel by taking us to the decree passed in Title Suit No. 284 of 1967 where the quantum of share of the predecessor of the plaintiffs, A.F Nur Muhammad has been shown as eight *ana* share out of

CS plot no. 288 appertaining to CS khatian no. 10493 so if the learned judge of the trial court ever took into consideration of the said decree, he would not never decreed the suit in respect of entire 0894 *ojutangsho* of land in favour of the plaintiffs and defendant nos. 1-3.

The learned counsel by referring to the cross examination of the plaintiff witness no. 1 (PW 1) also contends that, in cross examination, by the successor-in-interest of the defendant no. 4, who were 4 (kha) to 4 (yeo) amongst others stated that eight *ana* share out of the suit plot belonged to Gongga Charon and eight *ana* share to Nibaron Chandra which is the definite case of the defendant no. 4 that has also been asserted in his written statement having no reason to disbelieve acquiring title by the defendant no. 4 in the suit land but the learned judge of the trial court clearly omitted in describing the case of the defendant no. 4 as per his written statement in his judgment let alone took into consideration of the testimony so made at his instance in the suit.

The learned counsel lastly contends that, the plaintiffs as well as the defendant nos. 1-3 can only get their respective share out of 447 *ojutangsho* of land left by Nibaron Mohan Das but under no circumstances can they get their share from entire land, that is 0894 *ojutangsho* of land since they have just asserted the case of the plaintiffs and defendant nos. 2-3 in acquiring 447 *ojutangsho* of land from Nibaron Mohon Das and then the judgment and decree passed by the trial court can never be sustained and prayed for allowing the appeal on setting aside the impugned judgment and decree.

It is worthwhile to mention here that, this matter has been appearing in the list on a series of occasions for hearing even at the top of the list with

the name of the learned counsel for the parties and yesterday we heard the learned Advocate for the appellants for entire court hour and today we took up this matter and continued hearing, but no one for the respondents bothered to turn up to oppose the appeal. Order book of this appeal also shows that, this matter had earlier been fixed in different benches and on series of occasion, the matter was heard but ultimately it has not been disposed of.

Be that as it may, we have considered the submission so advanced by the learned counsel for the appellants, perused the material documents appeared in the paper book and that of the impugned judgment and decree challenged in this appeal. At the very outset, we express our utter dismay to find how the learned Joint District Judge could pass the impugned judgment in such a slipshod and casual manner. Because, record shows that, the predecessor of the present appellants who was the defendant no. 4 in the suit, in the midst of the proceedings of the suit, impleaded as defendant no. 4 and then filed written statement claiming 335 *ojutangsho saham* in the suit land and subsequently during proceedings of the suit, by filing a title deed dated 01.03.1998 (which has been marked as exhibit -F1) showing purchase of 112 *ojutangsho* of land from one, Shahjada whose name SA record was prepared and ultimately prayed for *saham* for 447 *ojutangsho* of land in total, yet the learned judge in the fag end of the judgment very whimsically found that : “-য-হুত আরজির তফসিল বর্নিত নালিশী ভূমি এ,এফ,এম, নূর মোহাম্মদ ও ফাতেমা বেগমের ত্যাজ্যবিভের সম্পত্তি এবং ৪ নং বিবাদীর দাবীকৃত সম্পত্তি আরজির তফসিল ভুক্ত করা হয় নাই তাই ৪নং বিবাদী-ক প্রার্থীত ম-ত ছাহাম প্রদা-নর কোন আইনগত সু-যাগ নাই।”

There has been no gainsaying the facts that the present appellants who are the heirs of defendant no. 4 has no claim over the property left by one of the CS recorded tenant, Nibaron Mohon Das rather they claimed the property left by another co-sharer of CS recorded tenant named, Gonga Chandara Das. In the examination-in-chief and the cross examination of the DW 1, the geneology of acquiring title by the defendant no. 4 has not been denied yet in schedule 'kha', the plaintiffs claimed entire 0894 *ojutangsho* of land which they can never claim in view of exhibit no. 1 as well as the decree passed in Title Suit No. 284 of 1967 (exhibit no. 3). So if those very two material documents had ever taken into consideration by the learned judge of the trial court, he would have never committed such error in distributing *saham* to the plaintiffs and defendant nos. 1-3 for total area of 089 *ojutangsho* of land. So the materials on record as well as the testimony of the plaintiffs and defendants clearly manifest that, the plaintiffs and the defendant nos. 1-3 are not entitled to get their share as stipulated in the impugned judgment that is, in total 0894 *ojutangsho* land rather they can get their respective share that is, from 447 *ojutangsho* of land. Further, on going through the impugned judgment, we also find that, though the learned judge of the trial court framed as many as 6 different issues but in the entire judgment none of the evidence of the witnesses either of the defendant nos. 1-3 or of the defendant no. 4 has ever discussed so the observation and finding to the effect that “যে-হুত আরজির তফসিল বর্ণিত নালিশী ভূহিম এ, এফ, এম, নূর মোহাম্মদ ও ফাতেমা বেগমের ত্যাজ্যবিভের সম্পত্তিএবং ৪ নং বিবাদীর দাবীকৃত সম্পত্তি আরজির তফসিল ভুক্ত করা হয় নাই তাহ ৪নং বিবাদীকে প্রার্থীত মতে ছাহাম প্রদানের কোন আইনগত সু-যাগ নাই।” is totally absurd and shows non-application of

judicial mind of the learned judge of the trial court which can never be sustained.

Given the above facts and circumstances, we don't find any shred of merit in the impugned judgment and decree which is liable to be set aside.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and decree dated 11.07.2013 passed by the learned Joint District Judge, 5th court, Dhaka in Title Suit No. 222 of 2011 (earlier Title Suit No. 285 of 1999) is thus set aside.

The appellants are entitled to 447 *ojutangsho* of land out of 894 *ojutangsho* of land so described in schedule 'kha' to the plaint.

Accordingly the plaintiffs are entitled to get $\frac{19}{40}$ th share and rest by the defendant nos. 1-3 out of 447 *ojutangsho* land and the defendant nos. 4kha) to 4(eo) (8(ঞ)-8(ঞঞ)) herein the appellants will get rest 447 *ojutangsho* land as stated above.

The parties to the suit are at liberty to get their respective *saham* amicably in default, they can get their respective *saham* through the process of law.

Let a copy of this judgment and decree along with the lower court records be communicated to the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.