

Present:

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

First Appeal No. 412 of 2013

In the Matter of:

Memorandum of appeal from the original order.

-and-

In the Matter of:

Siraj Miah being dead his legal heirs Akbar Hossain and others.

.....Defendant-appellants.

-Versus-

Ataur Rahman being dead his heirs Siddika Begum and others

.....Plaintiff-respondents.

Mr. Md. Aminul Islam, Advocate

..... For the appellants.

Mr. Mrinal Kanti Biswas with

Mr. Chowdhury Morshed Kamal Tipu,
Advocate.

.....For the respondent Nos. 1-3.

Heard on 01.12.2024, 10.12.2024 and

Judgment on 10.12.2024.

Sheikh Abdul Awal, J:

This First Appeal at the instance of the defendant-appellant is directed against the judgment and preliminary decree dated 17.01.2001 (decree signed on 23.01.2001) and final decree dated

23.06.2013 (decree signed on 25.08.2013) passed by the learned Joint District Judge, 2nd Court, Sylhet in Title Suit No. 82 of 1989 decreeing the suit on contest against defendant Nos. 1-7, 10-12 and ex-parte against the rest defendants.

The relevant facts briefly are that the respondents as plaintiffs filed Title Suit No. 82 of 1989 in the Court of the then learned Subordinate Judge, 2nd Court, Sylhet praying saham of .63 acre (6.73 decimals) out of 70 decimals of schedule land as described in schedule of the plaint.

Defendant Nos. 8-9 and 11-16 entered appearance in the suit and filed written statements denying all the material averments made in the plaint stating, inter-alia, that the suit is not maintainable in its present form and manner, the suit is bad for defect of parties, the plaintiffs have/had no right, title and possession over the suit land and as such, they are not entitled to get any saham whatsoever and the suit is liable to be dismissed.

At the trial plaintiff side examined 3 witnesses and defendant side examined 2 witnesses and both the parties exhibited some documents to prove their respective cases.

The learned Joint District Judge 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 barred by limitation?
- iii. Whether the suit is bad for defect of parties?
- iv. Whether the suit is bad for any hots-potch?

v. Whether the plaintiffs are entitled to get saham as prayed for?

vi. Whether the plaintiffs are entitled to get any other relief?

The learned Subordinate judge upon hearing the parties and on considering the materials on record by his judgment and decree dated 17.01.2001 (decree signed on 23.01.2001) decreeing the suit on contest against defendant Nos. 1-7, 10-12 and ex-parte against the rest defendants.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree dated 17.01.2001 (decree signed on 23.01.2001) and final decree dated 23.06.2013 the appellant preferred this appeal before this Court.

Mr. Md. Aminul Islam, the learned Advocate appearing for the appellant submits that in this case the Advocate Commissioner submitted 2 perfunctory report and it is apparent from his report that he gave excess saham of preliminary decree beyond law inasmuch as the suit was decreed for 6.73 decimals of land and the Advocate Commissioner gave saham of 6.80 decimals and the learned trial Judge most illegally accepted the same, which occasioned a failure of justice. This is the sole ground urged by the learned Advocate for the defendant-appellants.

Mr. Mrinal Kanti Biswas with Mr. Chowdhury Morshed Kamal Tipu, the learned Advocates appearing for the respondents, on the other hand, supports the impugned judgment and decree as well as 2 consecutive reports submitted by the Advocate Commissioner, which were according to him just, correct and proper. He submits that the Advocate Commissioner found some

more land with suit land, who stated the same in his report as to giving saham of 6.80 decimals. The learned Advocate further submits that the instant appeal is misconceived and not maintainable in law inasmuch as it is on record that before accepting the report the defendant appellants filed an application against the said Advocate Commissioner's report although the said application was rejected as no one appears to press the said application on repeated calls. The learned Advocate further submits that the matter did not end there, the unsuccessful defendants again filed a review application before the learned Joint District Judge, who after hearing the application rejected it by order dated 12.06.2013 but against the said rejection order the defendants did not file any Revision, who finally filed the instant first appeal challenging the preliminary and final decree.

Having heard the learned Advocates for both the sides and perused the memo of appeal along with other materials on record including the Advocate Commissioner's reports.

On scrutiny of the record, it appears that the Advocate Commissioner in his report allotted saham to the plaintiffs 0.0673 acres although in the chita 0.0680 acres saham was given (wherein 0.0007 acres excess) and it is shown in the chita that total quantum of the 2nd scheduled land was 0.1779 acres instead of 0.1700 (0.0079 acre in excess) which explained by the Advocate Commissioner in his report in the following language that-

“আরজীর ২য় তপশীলে ০.১৭ একরের উল্লেখ থাকিলেও সরজমিনে ০.০০৭৯ একর বেশী রহিয়াছে। উল্লেখ্য যে, নাঃ ভূমির এস.এ ৯২৮৮ দাগের সংলগ্ন পূর্বে এস.এ ৯২৯৪ দাগ 'ছড়া রকম'

ভূমি সরজমিনে বিদ্যমান রহিয়াছে উক্ত ছড়ার কিছু ভূমি থাকায়
নালিশা সরজমিনে কিছু ভূমি বাড়তি রহিয়াছে।”

It further appears that the Advocate Commissioner allotted residue saham 0.0235 acres to the defendant Nos. 3 and 4 and also allotted separate saham 0.0566 acres to the defendant Nos. 8-9, 11-16. These defendants were satisfied with their allotted saham inasmuch as they did not raise any objection. The excess allotted 0.0007 acres to the plaintiff does not affect the saham of the defendants.

However, at the end of the day the learned Advocate for the defendant appellants submits with force that the property in question is ejmali property possessed by others, brothers, cousins and other close relatives and if the excess saham beyond decree is allowed that will abolish a part of the only homestead of defendant Nos. 8-9.

To this, Mr. Mrinal Kanti Biswas submits that the plaintiff respondents in no way cause any damage of the building of defendant Nos. 8-9 whatsoever.

In reply, Mr. Aminul Islam submits that if the plaintiffs are not allowed to cause any damage of building of the appellants, they will have no objection against the impugned judgment and decree.

Considering the facts and circumstances of the case as revealed from the materials on record, we are inclined to direct the plaintiff respondents not to do any damage of the building of defendant Nos. 8-9 and 11.

However, Mr. Mrinal Kanti Biswas undertakes that he will inform this direction to his client forthwith. In the facts and circumstances of the case there will be no order as to costs.

In the result, the appeal is disposed of with the aforesaid direction.

Send down the LC Records at once.

Md. Mansur Alam, J:

I agree.