

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

Present:

Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 271 OF 2013

Abu Ahammad and another

----- Defendant-Appellant -Petitioners

=Versus=

Nur Alam and others

----- Plaintiff-Respondent-Opposite Parties

Mr. Md. Asad Ullah with

Mrs. Nasima Akhter, Advocates

----- For the Petitioner

Mr. Garib Newaz with

Ms. Maksuda Akhter, Advocates

----- For the Opposite Party No. 2

Judgment on: 29.05.2018

At the instance of the present defendant-appellant-petitioners, Abu Ahammad and another, this Rule has been issued calling upon the opposite party Nos. 1-3 to show cause as to why the impugned judgment and decree dated 17.09.2012 passed by the learned Joint District Judge, 2nd Court, Feni in Title Appeal No. 35 of 2010 disallowing the appeal and affirming the judgment and decree dated 25.02.2010 passed by the learned Senior Assistant Judge, Sagolnaya, Feni in Title Suit No. 18 of 2010 decreeing the suit should not be set aside.

During the hearing of the above Rule an application has been filed by the present defendant-appellant-petitioners for sending the suit on remand by setting aside the judgment and decree passed by the courts below.

As the Rule and the applications are co-related these are taking together for a decision by this judgment and order.

The relevant facts for disposal of this Rule and the applications are that the present opposite party Nos. 1 and 2 as the plaintiffs filed the Title Suit No. 18 of 2010 in the court of the learned Senior Assistant Judge, Sagalniagh, Fani claiming partition of the suit land measuring 1.44 acres out of total 6.12 acres situated in M.R.R. No. 284 Khatain No. 178, mouja- Monipur (Parshuram) Police Station- Sagolnaya, District- Feni. The plaint contains that Chan Miah and Mongazi were the C.S. recorded owners of land measuring 1.67 acres in equal share. In course of time Mongazi sold some land who died leaving behind 1st wife Haridhan and a daughter thereof Joydhan Bibi and also the 2nd wife Shadhaner Nesa and also a son Nur Mostafa (plaintiff No. 1) and a daughter Hayeter Nesa (plaintiff No. 2). All of the said heirs of Mongazi got proportionate land as per Sharia Law and the suit land measuring 1.44 acres was published in the name of plaintiffs and they in possession. The present plaintiffs-opposite parties claimed their saham measuring 1.44 acres.

The present petitioners as the defendants contested the suit by filing the written statement denying the claim of the plaintiffs. It is further contended that the suit land was originally owned by one Mohammad Hanif alias Hamid measuring total land 5.62 acres. He built a Mosque upon 8 decimals, therefore, 5.54 decimal was owned and possessed by him and he died leaving behind 3 sons namely Hason Ali, Chan Miah, Mongazi and two daughters Motijan Bibi and Golapjan Bibi

as his heirs who got their respective sahams as per Sharia Law. However, the said Hason Ali died leaving behind his son Wahed Ali (minor), therefore, his name did not appear in the record, eventhough, Chan Miah, Mongazi, Wahed Ali, Motijan and Golapjan are in possession of the suit land as the co-owners and successors of the said Hanif.

After hearing the parties the learned Senior Assistant Judge, Sagolnaya, Feni decreed the suit in a preliminary form by his judgment and decree dated 25.02.2010. Being aggrieved the present petitioners as the appellants preferred the Title Appeal No. 35 of 2010 in the court of learned District Judge which was heard by the learned Joint District Judge, Court No. 2 on transfer who by his judgment and decree dated 17.09.2012 affirmed the judgment of the trial court. This revisional application has been filed challenging the legality of the said impugned judgment and the present Rule was issued thereupon.

Mr. Md. Asad Ullah, the learned Advocate, appearing along with the learned Advocate Mrs. Nasima Akhter for the present petitioner, submits that the present defendant-petitioners were made parties in the instant partition suit as the suit land was recorded in S.A. and R.S. in the name of the present petitioners as the co-owners but the present petitioners as the defendant could not claim their proportional saham in the suit despite the fact that they are in possession and they have entitlement upon the suit land due to ignorance of the learned engage Advocate in the learned trial court and appellate court below which was the legal right of the petitioners in a partition suit, as such, the

preliminary decree passed by the trial court should be heard afresh by sending the suit on remand for the ends of justice as prayed by filing an application in this revisional court.

The Rule has been opposed by the present opposite party No. 2 and also opposed the application filed for sending the suit on remand.

Mr. Garib Newaz, the learned Advocate, appearing along with the learned Advocate Mrs. Maksuda Akhter for the opposite party No. 2, submits that the learned trial court and the appellate court below after considering the evidence adduced and produced by the parties came to a concurrent finding by allocating saham of land measuring $1.46\frac{1}{2}$, as such, no error has been committed by the learned courts and no interference is called for from this court.

The learned Advocate also submitted that the application filed in this revisional jurisdiction for sending the suit on remand should be rejected because the settle principle is that a party should not be allowed to fillup the Lakhuna for the default or negligence on the part of any party in the suit, as such, he prayed to discharged the Rule by rejected the application.

Considering the above submissions made by the learned Advocates appearing for the parties and also considering the revisional application along with the annexures therein, in particular, the impugned judgment and decree passed by the learned appellate court below and also considering an application filed by the present petitioners for sending the Rule on remand and considering the materials in the lower court records, it appears to me that the partition suit was filed by the

present opposite parties claiming their saham of land measuring 1.44 acres out of total land measuring 6.12 acres and the suit was decreed in a preliminary form. During pendency of the preliminary decree an appeal was preferred by the present petitioners which was dismissed, therefore, both the courts below found in favour of the present plaintiff-opposite parties regarding the saham prayed by the plaintiffs.

It further appears to me that in a long journey of this partition suit the present defendant-petitioners filed only a written statement denying entitlement of the present plaintiff-opposite parties without claiming any saham as required under the provisions of law in a partition suit. The admitted position in the suit was that the present defendant-petitioners were co-owners and their names were recorded in S.A. and R.S. Khatian and record of right was published in their names. Which was produced by the present petitioners in the court but failed to mark as exhibit because of the ignorance on the part of the learned conducting Advocate on behalf of the petitioners. In this regard, I have examined the exhibit mark by the present opposite parties as the plaintiffs being exhibit Nos. 1, 2 3(Ka) regarding the entitlement of the plaintiffs and also exhibit Nos. 'क' - 'ख' in support of the case of the present defendant- petitioners but the most important document being certified copy of S. A. and R.S. porcha which have not been exhibited.

Accordingly, it transpires to me that there are some default on the part of the present petitioners to make the vital document exhibits in order to claim any saham in a partition suit, despite the fact the present petitioners seemed to have a claim upon the total land measuring 6.12

acres in the above mentioned schedule of land fully described in the plaint. However, no saham was sought required under law in a partition suit and no court fee was paid thereabout, as such, the present defendant-petitioners were not allocated any sahams which is a serious default in the present case.

Now the question is whether this default on the part of a party in a partition suit can be cured or should be allowed to be cured by a party. In this regard, the learned Advocate appearing for the present petitioners submits that there are some ignorance on the part of the conducting Advocate of the defendants. The learned Advocate appearing for the opposite parties submitted that a party should not be allowed to fillup the lakhuna which took place for the negligence of a party. In this regard, I have carefully considered the submissions of the respective parties and found that both the courts concentrated only the saham sought by the present plaintiffs-opposite parties without considering the sahams of the defendants who were made parties as the co-owners of the same joth. The courts below could have given opportunities to the present defendant petitioners for claiming their sahams by complying the required formalities to pay court fees as per provisions of law which the courts below failed to apply their judicial mind in disposing of this partition suit.

By opposing the application for sending the suit on remand the learned Advocate for the opposite parties submits that the present petitioners failed to pray in the application as to what kind of amendment they would make in the written statement, therefore, the

application for remand should be rejected. In this regard, I have considered the application itself containing the defaults and unreadable some documents because which were exhibited by the petitioners. Accordingly, I consider that the application for sending the suit on remand merits consideration for the ends of justice.

In view of the above discussions and after perusal of the concurrent judgment and decree passed by the courts below and also the application for sending the suit on remand, I am of the opinion that the decree was passed by the learned trial court in a preliminary form which is a continuation of a proceeding of a partition suit until it is concluded by way of a final decree. Therefore, the learned trial court should re-hear the Title Suit No. 18 of 2010 afresh in order to secure justice for all the parties involved. I am, therefore, inclined to dispose of the Rule.

Accordingly, the Rule is disposed of with the following directions. The Title Suit No. 18 of 2010 is hereby required send on remand for fresh hearing by giving opportunities to all the parties in the said suit.

The judgment and decree passed by the learned Senior Assistant Judge, Sagolnaya, Feni on 25.02.2010 in the Title Suit No. 18 of 2010 in a preliminary form and the judgment and decree passed by the learned Joint District Judge, 2nd Court, Feni in the Title Appeal No. 35 of 2010 are hereby set aside.

The present defendant-petitioners, Abu Ahmed and another, are hereby directed to make the required amendment in the written statement

in order to claim saham within 30 days from the date of receipt of this judgment and order.

The learned Senior Assistant Judge, Sagolnaya, Feni is to conclude the Title Suit No. 18 of 2010 within 6(six) months from the date of receipt of this judgment without allowing any unnecessary adjournment on the part of either of the parties.

The interim order of stay granted at the time of issuance of the Rule upon the impugned judgment and order is hereby recalled and vacated.

The Section is directed to communicate this judgment and order to the court concern and the Section is also directed to send down the lower courts records immediately.