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

First Appeal No. 381 of 2009
In the Matter of:
Memorandum of appeal from the original decree.
-and-
In the Matter of:
Mossammat Maleka Begum and others.
.....Defendant-appellants.
-Versus-
Most. Jarina Begum and others
...Plaintiff-respondents.
Mr. S.M. Obaidul Haque, Advocate
……. For the appellants.
Mr. Md. Sajjad Ali Chowdhury, Advocate with
Mr. Md. Fazla Rabby, Advocate
.....For the respondent Nos. 1 and 2

Heard on 07.11.2024 and 14.11.2024
and Judgment on 27.11.2024.

Sheikh Abdul Awal, J:

This first appeal at the instance of the defendant-appellants is directed against the judgment and decree dated 28.10.2009 (decree signed on 02.11.2009) passed by the learned Joint District Judge, 1st. Court, Rangpur in Other Class Suit No. 10 of 2002 decreeing the suit.

Material facts of the case, briefly, are that respondents as plaintiffs filed Other Class Suit No. 10 of 2002 in the Court of learned Joint District Judge, 1st Court, Rangpur for declaration of title and partition of .58$^{1}/_{2}$ acre land out of 1.17 acre land as described in the "Ka" schedule to the plaint. The plaintiff-respondents' case in short is that Tufan Sheikh was owner in possession in 50 acre land in Plot 3374 and 0.67 acre land in Plot

3464 corresponding to CS Khatian 1060 (Exhibit- Kha) and the land in total was 1.17 acre. Tufan Sheikh died leaving behind 2 daughters named Azizon and Mofizon. Md. Asan is the husband of Azizon and he was entrusted for preparation of SA record of the land in question but he deceived Mofizon and prepared the SA record in respect of the entire suit land in the name of his wife Azizon. Mofizon, who was the mother of plaintiff No. 1, she maintained in joint possession in the suit land. In this background after the death of Mofizon her heirs being plaintiffs 1-8 having been possessed the suit land, who went to the Tahsil Office on 25.05.2000 for payment of rent but Tahsilder informed that they could not pay the rent because the SA record was prepared in the name of Azizon. Soon thereafter the plaintiffs demanded partition on 27.05.2000 but the defendants refused to do so and hence the suit for declaration of title and partition.

Defendant-appellant Nos. 2-4 entered appearance in the suit and filed written statements denying all the materials averments made in the plaint stating inter alia that the suit is not maintainable in its proper form and manner. The suit is bad for defect of parties, all properties are not brought into hotchpotch. The suit is barred by section 42 of the Specific Relief Act. The defendants' case in brief is that Tufan Sheikh was the owner in possession over 1.17 acre land and he died leaving behind 1 son and 2 daughters Azizon and Mofizon and his son died without any issue. Mofizon as daughter of Tufan Sheikh as well as the predecessor of the plaintiffs died leaving behind 1 son Mozaffar and 1 daughter named Jorina. Mofizon died before 15.07.1961. Tufan Sheikh during his lifetime settled the suit land in favour of his only daughter Azizon on 25th Kartik 1360 B.S. and delivered possession to her and accordingly, SA Khatian 1036 was prepared. Plaintiffs have/had no title and possession in the suit

land. Upon request of the plaintiffs some local persons asked Azizon to give share to her sister and accordingly she gave eight anna shares in favour of Jorina and Mozaffor in SA Khatian 1319 (Exhibit- Kha) which covers an area of 60 acre. Azizon sold 33 decimal to defendant-1, Azizon also transferred 81 decimal of land out of 1.17 acre of land in favour of defendants 3-4 by virtue of a Heba bil Awaz document dated 29.11.1973 (Exhibit- Gha). Accordingly defendant Nos. 3-4 mutated their names and having been maintaining possession upon payment of rent, Exhibit- Uma series. Azizon also made a gift for the rest 36 decimal of land in favour of her son Aziruddin defendant-1.In this way the defendants have been maintaining title and possession in the suit land. The plaintiffs filed the suit on false averments, which is liable to be dismissed. During pendency of the suit defendant No. 3 died and his heirs were duly substituted, who also filed a written statement adopting the earlier written statements.

On considering the pleadings of the parties the learned trial Judge framed as many as 5 issues such as maintainability of the suit, defect of parties, hotchpotch, whether plaintiffs have right title and interest in the suit land, whether the plaintiffs can get any reliefs, as prayed for.

At the trial the plaintiffs examined 3 witnesses and defendants examined 4 witnesses and adduced some documentary evidence to prove their respective cases.

The trial court on consideration of the facts and circumstances of the case and evidence on record decreed the suit by the impugned judgment and decree dated 28.10.2009.

Being aggrieved the unsuccessful defendants preferred this first appeal before this court.

Mr. S.M. Obaidul Haque, the learned Advocate appearing on behalf of the appellants contends that the learned Judge of the trial court had a misconception of law as to the principles of hotchpotch and defect of parties thereby committed an error of law in coming to a finding that the plaintiffs are entitled to get a decree in respect of 58.5 decimals of suit land . Mr. S.M. Obaidul Haque further contends that Law is by now well settled that Plaintiff in order to succeed must establish his own case to obtain a decree and weakness of defendant's case is no ground for passing a decree in favour of the plaintiff and in this case, it is on record that the plaintiffs to prove their suit for declaration of title and partition could not adduce any documentary evidence at all and admittedly in this case the plaintiffs did not bring all the joint properties into hotchpotch inasmuch as PW-1 stated in his deposition that- বাবুল মিয়া, আব্বাস মিয়া, নজরুল ইসলাম বরাবর আমার স্বামী ৩৩ শতক সম্পত্তি হস্তান্তর করিয়াাছি । সি, এস ১৩১৯ খতিয়ানের সম্পত্তি দাবী করি নাই এবং অত্র মামলা হচপটে আনি নাই । উপরোক্ত ব্যক্তিদের অত্র মামলায় পক্ষ করি নাই । although the trial court below without considering all these vital aspects of the case most illegally decreed the suit.

The learned Advocate further submits that the defendants claimed Mofizon died before Muslim Family Laws Ordinance, 1961 came into force on 15.07.1961 and in this context PW- 1 herself admitted in cross on 23.02.2005 that " আমার স্বামীর ৩-৪ বছর বয়সে আমার শ্বাশুড়ী মফিজন নেছা মারা গিয়াছে । আমার স্বামী ৫০ বৎসর বয়সে মারা গিয়াছে । আজ হতে ৮ বৎসর আগে মারা গিয়াছে । সেই হিসাবে আজ হতে ৫৪ বৎসর আগে মফিজন নেছা মারা গিয়াছে । " which suggests that Mofizon died in 1951 and as such, the plaintiffs being heirs of Mofizon Nesa have acquired nothing as per Muslim Family Laws Ordinance, 1961 and the findings of the trial court that defendants could not prove the date of death of Mofizon is contrary to the evidence on record. Finally, the learned Advocates

submits that the defendant-appellants filed written statement on 02.06.2004 in which in paragraph 9 the Heba-bil-Awaz document dated 21.11.1973 was introduced and the original of the document dated 21.11.1973 marked in evidence as Exhibit- Gha but the plaintiffs did neither challenge the said registered document by amendment of their pleadings nor prayed any relief against such document and it is on record that this is not only a suit for partition simpliciter but also a suit for declaration of title and until and unless title is ascertained and declared in accordance with law, the partition can't be given. He adds that the Exhibit- Gha stands as a bar against the relief of the plaintiffs because law is settled that a registered document carries presumption until the same is rebutted by cogent and reliable evidence and in the instant case there is no pleading on behalf of the plaintiff-respondents against "Exhibit- Gha" and as such "Exhibit- Gha" remains unharmed and stands good and unless "Exhibit- Gha" is dislodged the instant suit for declaration of title and partition can't be decreed but the learned trial Court did not consider it thereby wrongly decreed the suit upon fanciful consideration and as such at any rate the impugned judgment and decree is liable to be set-aside. The learned Advocate for the appellants to fortify his submissions has relied on the decisions reported in 39 DLR 237 and 8ADC760.

Mr. Sazzad Ali Chowdhury, the learned Advocate appearing on behalf of the plaintiff-respondent Nos. 1 and 2 supports the impugned judgment, which was according to him just, correct and proper. He submits that admittedly the plaintiffs are co-sharer and they are in ejmali possession and as such, they are entitled to get decree for partition and title. The learned Advocate for the plaintiff-respondent Nos. 1 and 2 to fortify his submission has relied on the decision reported in 10 BLC170.

These are the points which were argued by the learned Advocates for the respective parties. Now, to deal with the contentions raised by the parties before us it would be convenient for us to decide first how far the learned Joint District Judge, 1st Court, Rangpur was justified in decreeing the suit.

On scrutiny of the record, it appears that the respondents as plaintiffs filed Other Class Suit No. 10 of 2002 in the Court of learned Joint District Judge, 1st Court, Rangpur impleading the appellants as defendants praying the following reliefs:

ক) নালিশী ক তপশিল বর্ণিত জমিতে বাদীগনের স্বত্ব স্বামিত্ব অধিকার আছে মর্মে বিজ্ঞাপনী ডিক্রী বাদীগনের বরাবরে দিতে।

(খ) বাদীগনের নালিশী 'ক' তপশিলের ১.১৭ শতক মধ্যে বাদীগনের প্রাপ্ত অংশ বাবদ ৫৮$^{1}/_{2}$ শতক পৃথক ছাহামের নিমিত্তে প্রাথমিক ডিক্রী দিতে,

(গ) আদালতের অনুগ্রহ কাল মধ্যে প্রাথমিক ডিক্রী মোতাবেক পক্ষগন আপোষে পৃথক ছাহাম বন্টন করিয়া লইতে অপরাগ হইলে বিবাদীগনের নিকট হইতে বাদীগনের অংশ আদালতের কমিশনারের মাধ্যমে বুঝিয়া দিবার আদেশ দিতে,

(ঘ) বাদীগন আইনও ইকুটিমুলে আর যে সকল পরিবর্ধিত সংশোধিত প্রতিকার পাইতে হকদার হয়েন তাহারও ডিক্রী দিতে,

(ঙ) মোকদ্দমার ব্যয়ভারের ডিক্রী দিতে হুজুরের মর্জি হয় ।

It further appears that the defendant Nos. 2-4 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 proper form and manner. The suit is bad for defect of parties, all ajmali properties are not brought into hotchpotch. The suit is barred by section 42 of the Specific Relief Act. At the trial the plaintiffs examined 3 witnesses and defendants examined 4 witnesses and adduced some documentary evidence to prove their respective cases. The trial court on consideration of the

facts and circumstances of the case and evidence on record decreed the suit by the impugned judgment and decree dated 28.10.2009.

The learned trial Judge found that the death Certificate of Tufan Sheikh “Exhibit- “Chha” (ছ) was collusively obtained after filing of the suit and there is no proof to show that Mofizon died before 15.07.1961 and also found that the settlement as claimed by the defendants was not proved in evidence.

On scrutiny of the record, it is found the defendants claimed that Mofizon died before the Muslim Family Laws Ordinance, 1961 came into force on 15.07.1961 and in this context PW- 1 herself admitted in cross on 23.02.2005 that " আমার স্বামীর ৩-৪ বছর বয়সে আমার শ্বাশুড়ী মফিজন নেছা মারা গিয়াছে। আমার স্বামী ৫০ বৎসর বয়সে মারা গিয়াছে। আজ হতে ৮ বৎসর আগে মারা গিয়াছে। সেই হিসাবে আজ হতে ৫৪ বৎসর আগে মফিজন নেছা মারা গিয়াছে। " and this admission of PW-1 speaks that Mofizon died in 1951 and as such the plaintiffs being heirs of Mofizon Nesa have acquired nothing but the learned trial judge did not consider it from a correct angle and thus the findings of the learned trial Court that defendants could not prove the date of death of Mofizon was uncalled for and thus the learned trial Judge erred in law in decreeing the suit upon wrongful consideration.

Now, let us advert to the evidence of PWs and DWs for having a better view of the dispute in question. P.W – 1 stated in his evidence that - বাবুল মিয়া, আব্বাস মিয়া, নজরুল ইসলাম বরাবর আমার স্বামী ৩৩ শতক সম্পত্তি হস্তান্তর করিয়াছে। সি, এস ১৩১৯ খতিয়ানের সম্পত্তি দাবী করি নাই এবং অত্র মামলা হচপটে আনি নাই। উপরোক্ত ব্যক্তিদের অত্র মামলায় পক্ষ করি নাই।This witness also stated that নাঃ দাগের সম্পত্তিতে সারমিন সরোয়ার , আঃ রশিদ, সাদিয়া শহীদ বরাবর বিবাদীরা জমি বিক্রী করিয়াছে। উপরোক্ত ব্যক্তিরা নাঃ দাগের জমিতে বসবাস করিতেছে। তাদের এই মামলার পক্ষ করি নাই। মামলার বাড়ী হইতে আমার বাড়ী দূরত্ব কতখানি বলিতে পারব না। P.W - 2 stated in his evidence that বাদী, বিবাদী

চিনি। নাঃ জমি চিনি। বাদী .৫৮$^{1}/_{2}$ জমি নিয়া মোকদ্দমা করিয়াছে। আমি স্থানীয় পৌর কমিশনার। নাঃ জমির ব্যাপারে বাদী আমার মধ্যস্থতায় শালিশ করিয়াছিল। বিবাদী শালিশ মানে নাই। বাদীনি ২৭-৫-২০০০ ইং তারিখে বিবাদীদের নিকট নাঃ জমি বিভাগ বন্টন করিয়া দিবার জন্য বলিয়াছিল। P.W - 3 stated in his evidence that বাদী বিবাদী চিনি। নাঃ জমি চিনি। আমি বিবাদীর স্বামীর নিকট ১৯৮৫ সালে .১১ শতক খরিদ করিয়া ভোগ দখল করিতেছি।

DW - 1 stated in his evidence that বাদীর দাবী অংশাতিরিক্ত। সত্য নয় যে, নালিশী জমি বাবদ প্রস্তুতকৃত এস.এ. খতিয়ান ভ্রমাত্মক। সত্য নয় যে, মফিজন নেছা এই সম্পত্তিতে ওয়ারিশ ছিল। সত্য নয় যে, এই সম্পত্তি এজমালী দখলীয় সম্পত্তি। সত্য নয় যে, এই জমিতে বাদীদের স্বত্ব দখল আছে। This witness exhibited documents such as -_১৩৬২ সালের জমিদারী দাখিলা (প্র-ক)। সি, এস, খতিযান ১০৬০, ১৩১৯ (প্র- খ, খ১) এস, এ, খতিয়ান ১০৩৬, ১৩০১ (প্রদ- গ/গ১) ২৯-১১-৭৩ ইং তারিখের ৩৪৫৩৮ নং হেবা বিল এওয়াজ দলিল (প্রদ- ঘ) ৪৯১/৭৬-৭৭ নং মিস কেসের ডি, সি, আর, ও খারিজী খতিয়ান (প্রদ- ৫/৬১) সরকারী খাজনার দাখিলা ১৪ ফর্দ (প্র- চ সিরিজ) মাঠ খতিয়ান ২ ফর্দ । This witness also stated that আমি ৩ (ঘ) নং বিবাদী। আমি তুফান সেখের মৃত সনদ পত্র দাখিল করেছি।

DW – 2_stated that আমি এই মামলার বাদী, বিবাদী ও নালিশী জমি চিনি ৩৩৭৪ দাগে বাড়ির ভিটা আমি এই জমি চিনি। এখানে ৩/৪ নং বিবাদীর বাড়ি ঘর আছে। This witness also stated that_-আমি রেজিঃ অফিসের দলিল লেখক ছিলাম। আমার বাড়ির জমির দাগ নং- ৩৩৬৭, ৩৩৭৪ দাগে আজাহার, আজগর এদের বাড়ি আছে। নালিশী দাগে বাদীদের বাড়িঘর নাই।_DW – 3 deposed in his evidence that আমি এই মামলার বাদী,বিবাদী ও নালিশী ৩৩৭৪ দাগের জমি চিনি। এই জমিতে ৩/৪ নং বিবাদীর বাড়ি আছে। এরা এই দাগে ৪৬ শতক জমি দখল করে। This witness also stated that_-আমি একজন ব্যাংকার ছিলাম। ৩৩৭৪ দাগ ১ খন্ড জমি। এই জমি Square আকার, এই জমি বিবাদীরা দখল করে। DW – 4 stated in his evidence that আমি রংপুর পৌর সভার জন্ম মৃত্যু নিবন্ধক । আদালতের তলব মতে মৃত্যু রেজিষ্ট্রার নিয়ে এসেছি। উক্ত রেজিষ্ট্রারের ৮৬৭ পৃষ্ঠায় ৮১৬৩ নম্বর ক্রমিকে তুফান সেখ এর মৃত রিপোর্ট আছে। ততমর্মে Extract of death Register এর সনদ দিয়েছি। ইহা সেই Extract (প্রদ- ছ) এই উক্ত

রেজিস্ট্রারের আমার স্বাক্ষর (প্রদ-ছ/১) রেজিষ্টারের সাথে Extract এর মিল আছে। This witness also stated that আমি ১৩-১১-১৯৯২ সালে রংপুর পৌর সভার নিবন্ধক শাখায় যোগদান করি। তুফান সেখের মৃত্যুর তারিখ ১৮-৫-১৯৫৯ রেজিষ্ট্রারের অন্তভুক্তির তারিখ ১৪-৬-২০০৯।

From a reading of the entire evidence of PWs and DWs, it appears that the plaintiffs by adducing evidence could not prove their clear title and specific possession in the suit land. DW- 1 deposed the defendants case in details and exhibited a series of documents. In cross examination the plaintiff side could not able to discover anything as to the credibility of this witness on the matter to which he testifies.

Weighing the evidence of both the parties, we find that the evidence in defendant side is credible and tenable in Law. Findings of the trial court that the death Certificate of Tufan Sheikh (Exhibit-Chha (ছ) was collusively obtained after filing the suit and there is no proof to show that Mofizon died before 15.07.1961 are perverse being contrary to the evidence and materials on the record inasmuch as D.W – 4 stated in his evidence that আমি রংপুর পৌর সভার জন্ম মৃত্যু নিবন্ধক । আদালতের তলব মতে মৃত্যু রেজিষ্ট্রার নিয়ে এসেছি। উক্ত রেজিষ্ট্রারের ৮৬৭ পৃষ্ঠায় ৮১৬৩ নম্বর ক্রমিকে তুফান সেখ এর মৃত রিপোর্ট আছে। ততমর্মে Extract of death Register এর সনদ দিয়েছি। ইহা সেই Extract (প্রদ- ছ) এই উক্ত রেজিস্ট্রারের আমার স্বাক্ষর (প্রদ-ছ/১) রেজিষ্টারের সাথে Extract এর মিল আছে।

Furthermore, the trial Court below having failed to consider that the suit was not maintainable for not bringing the entire ejmali property into hotchpotch and bad for defect of parties in spite of fact that PW-1admited in his evidence: বাবুল মিয়া, আব্বাস মিয়া, নজরুল ইসলাম বরাবর আমার স্বামী ৩৩ শতক সম্পত্তি হস্তান্তর করিয়াছে । সি, এস ১৩১৯ খতিয়ানের সম্পত্তি দাবী করি নাই এবং অত্র মামলা হচপটে আনি নাই । উপরোক্ত ব্যক্তিদের অত্র মামলায় পক্ষ করি নাই ।

There is another aspect of the matter to which we think the attention of the trial Court ought to have been drawn. It is found that the defendant-appellants filed written statement on 02.06.2004 in which in paragraph 9 the Heba-bil-Awaz document dated 21.11.1973 was introduced and the original of the said document dated 21.11.1973 was tendered and marked in evidence as Exhibit- Gha but the plaintiffs did neither challenge the registered document by amendment of their pleading nor prayed any relief against such document and it is on record that this is not only a suit for partition simpliciter but also a suit for declaration of title and until and unless title is ascertained and declared in accordance with law partition can't be granted and it transpires that this document stands as a bar against the relief of the plaintiff-respondents because law is settled that a registered document carries presumption until the same is rebutted by cogent and reliable evidence and in the instant case there is no pleading on behalf of the plaintiff-respondents against Exhibit- Gha (Heba-bil-Awaz) and as such Exhibit- Gha remains unharmed and stands good and unless Exhibit- Gha is dislodged the instant suit for declaration of title and partition can't be decreed although the learned Trial Judge erred in law and fact as he failed to properly evaluate the evidence on record thereby reaching a wrong decision that the plaintiffs have been succeeded to prove their case and accordingly decreed the suit against the defendant appellants, which occasioned a miscarriage of justice.

In a suit for partition, Civil Court cannot go into the question of title, unless the same is incidental to fundamentals of claim. In this case it is found no family partition has not ever been made between the parties and plaintiffs' possession and title in the suit property is not clear and specified, who are not entitled to get a decree for partition.

For the foregoing reasons stated above, both on law and fact, we hold that the judgment and decree of the trial Court is liable to be set aside. Consequently, the appeal succeeds.

In the result, the appeal is allowed. The judgment and decree dated 28.10.2009 (decree signed on 02.11.2009) passed by the learned Joint District Judge, 1st. Court, Rangpur in Other Class Suit No. 10 of 2002 decreeing the suit is set-aside and thus the suit being Other Class Suit No. 10 of 2002 is dismissed without any order as to costs.

Since the appeal is allowed, the connected Rule being Civil Rule No. 10(F) of 2010 is disposed of. The order of stay granted earlier by this Court stands vacated.

Let a copy of this judgment along with lower Courts' record be sent down at once.

Md. Mansur Alam, J:

I agree.