IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL APPELLATE JURISDICTION)
Present
Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

First Appeal No. 459 of 2014

IN THE MATTER OF:
Md. Abdul Kadir being dead his legal heirs:
Mst. Sona Banu and others
... Defendant-Appellants
Versus
Md. Amanulla and others
... Plaintiff-Respondents
Mr. Md. Mosiul Alam, Advocate
... For the Defendant-Appellants
Mr. Mohammad Mosfequs Salehin, Advocate
... For the Plaintiff-Respondents

Judgment on: 01.07.2025

Md. Riaz Uddin Khan, J:

This appeal is directed against the judgment and decree dated 21.07.2014 passed by the Joint District Judge, 1st Court, Gazipur in Title Suit No. 36 of 2009 decreeing the suit.

Facts in a nutshell, for disposal of this appeal, is that the Respondents being Plaintiffs filed a suit for partition being Title Suit No. 36 of 2009 before the 1st Joint District Judge, Gazipur stating *inter alia* that the suit land measuring 6.27 acres of South Salna mouza under Gazipur district appertaining to C.S. Khatian no. 173, Dag no.1699 was recorded in the name of Musti Sheikh. Subsequently during SA operation the said land measuring 6.27 acres was recorded in the name of Aroz Ullah Sarker in S.A. Khatian no. 462, Dag no-1699 and thereafter the same was recorded in R.S. Khatian no- 520, dag nos. 3225, 3226 & 3227 in the names of Shoriut Ullah and others. After the

death of Musti Sheikh, his successors Md. Aman Ullah and others became the owners of the said 6.27 acres of land and they are in possession. Thereafter, Md. Aman Ullah and others executed a registered Power of Attorney being no. 12046 dated 13.05.2008 in the name of Advocate Md. Solaiman Mollah under certain terms and conditions in relation to the said land. Meanwhile, Md. Shafi Ullah Sarker (defendant no.10) being successor of S.A. recorded owner filed Title suit no. 1842 of 2008 before the 1st Assistant Judge, Gazipur challenging the registered power of attorney no.12046 dated 13.05.2008 for declaration that the same was not binding upon him. Then both the parties have executed a solenama under certain terms and condition and the learned court dismissed the suit on 13.11.2008 as per the solenama. Since the property in question had not been divided by metes and bounds, the successors of the C.S. recorded owner, the plaintiffs, on 10.01.2009 requested the defendant no.45 and some other defendants for partition of the land in question who denied the request. Then the plaintiffs came to know that S.A. and R.S Khatian were prepared wrongly and they have collected the certified copies of said khatians on 04.02.2009 from the concern office. Then the plaintiffs filed the suit for partition of 5.27 acres of land and for further declaration that the S.A. and R.S. Khatian are incorrect along with a declaration that sone registered deeds in favour of the defendants have no binding effect on them.

The defendant no.10, Md. Shafi Ullah Sarker and defendant nos.61 to 71 contested the suit by filing separate written statements stating *inter alia* that C.S. Khatian no. 173 (Ka) was recorded in the name of Musti Sheikh; then Musti Sheikh's property located in South Salna

mouja was auctioned due to arrears of rent, after which Aroz Ullah Sarkar purchased the property in question through auction and acquired ownership of the property. Later on the learned court handed over the possession in favor of Aroz Ullah Sarker and for this reason his name was duly recorded in S.A. Khatian No. 462. That some property not scheduled in the plaint of Musti Sheikh in C.S. Khatian No. 35 was recorded in the names of his successors vide S.A. Khatian No. 82, Mouza- Deshipara, Gazipur. Thereafter, the suit land was recorded in the names of the successors of Aroz Ulla. The further case of the defendant nos.61-71 is that the defendant-Appellants purchased the property from the successors of Aroz Ullah Sarker and others through registered deeds and got possession and mutated their names and they are in possession of the property in question without any intervention of the plaintiffs.

To prove their respective case the plaintiffs adduced 3 witnesses while the defendants also adduced 4 witnesses. The plaintiffs produced CS, SA and RS Khatian only while the defendants alongside the SA & RS Khatian also produced series of registered deed and rent receipts. After conclusion of trial having heard all the parties the learned Joint District Judge decreed the suit by his impugned judgment and decree.

Being aggrieved by and dissatisfied with the said judgment and decree the defendant nos.61 to 71 preferred this first appeal.

Mr. Md. Mosiul Alam, the learned advocate for the defendant-appellants at the very outset submits that the plaintiffs filed the suit through Power of Attorney authorizing an advocate with ulterior motive to contest the suit with regard to property of CS recorded tenant Musti

Sheikh of South Salna Mouza as a test case though admittedly they themselves contesting another suit regarding the other property of Musti Sheikh situated at Deshipara Mouza.

The learned advocate then submits that the trial court misdirected itself on the finding that the defendants did not exhibited any documents but the defendant No. 62 Md. Mozaffar Hossain as DW-2 has deposed before the court on behalf of defendants No. 61-71 and submitted various deeds and documents, such as, sale deeds, S.A and R.S Khatian, DCR, Rent Receipt etc and those have been marked as exhibit nos. A series, B series, C and D series which is evident from deposition of DW-2. The court below in his judgment mentioned "বিবাদী পক্ষ দলিলাদি দাখিল করলেও তাহা প্রর্দশনী হিসেবে চিহিত করার নাই।' Hence, it is clear that the court below has totally failed to apply his judicial mind and consider the documents of the defendants and as such passed the wrong judgment, which is liable to be set aside.

The learned advocate next submits that the plaintiffs claimed the suit land only on the basis of CS record, which was prepared in favor of their predecessor Musti Sheikh, without having any possession over the suit property showing any supporting document to that effect; as such the suit for partition without praying for declaration of title and recovery of possession is not maintainable.

Mr. Alam further submits that the S.A and R.S. record of the suit property have been prepared in the name of Aroz Ali and his successors respectively namely Kofiluddin, Rafia Khatun, Faizunnesa, Abdul Kader, Sonaban and others. The defendant-appellants are the present owners and possessors of the suit land by way of purchase from the aforesaid recorded owners and since long they are in

possession by paying rent to the government; hence, the defendant-appellants have acquired a good right, title and interest over the suit property. Admittedly the plaintiffs are not residing in the suit land. They are habitants of different distant places. On the other hand admittedly the defendants are in the possession of the suit land by erecting dwelling house thereon and also paying rent to the government. Admittedly there are the graves of SA recorded owner Aroz Ali Sarker and his wife which shows that Aroz Ali was in possession of the suit land and accordingly SA Khatian was rightly recorded in his name and in that view, the defendants and their vendors/predecessors have been enjoying the suit land more than 50 years.

The learned advocate further submits that the defendant-appellants have submitted their title deeds and other documents in favor of their title and possession and also examined 3 witnesses in favour of their possession. On the other hand the plaintiffs examined 3 witnesses amongst them only independent witness PW-2-Anwar Hossain stated in his deposition that 'বিবাদীরা আরয উল্লার ওয়ারিশ। কাদের কোন দাগে এটা আমার জানা নাই। আরয উল্লাহ। এস এ মালিক, কাগজে তাদরে একটা বাড়ি। বাস্তবে ৪/৫ টা বাড়ি। যারা আরয উল্লাহর কাছ থেকে জমি কিনেছে বাড়ি গুলো তাদের।' As such the possession of the defendant nos.61-71 in the suit land is clearly established.

Mr. Alam, the learned advocate for the appellants next submits that the suit land is now possessed by the present defendant-appellants, who have got the same by way of purchase before 30 years from the RS recorded owners and after purchase they have mutated their names in the record and also paying rent and as such acquired good title and interest over the suit land. Though the Court below framed issue regarding possession of the suit land, but did not discuss possession either oral or documentary.

The learned advocate further submits that the plaintiffs made compromise with defendant no.10, grand-son of Aorz Ali with regard to 23 decimals land but did not mention the reason. Actually, defendant no.10 has no right, title and possession over the suit land as his father Sariat Ulla Sarker transferred his entire share of the suit land which he got from his father SA recorded tenant Aroz Ulla to the appellants. Defendant no.10 was supposed to be the custodian of the auction deed of his grand-father Aroz ulla but in collusion with the plaintiffs did not produce the same to defraud the purchasers, the appellants and in lieu of that got 23 decimals land on compromise. The trial court passed the compromised decree without considering that aspect of the case. The trial court also missed the vital fact that the plaintiffs claimed that they requested the defendant no.45 for partition of the ejmali property but nowhere in the plaint they have state that defendant no.45 or any other defendants have any title or possession over the suit land. Then, how the plaintiffs suit for partition is maintainable when according to PW-1 no defendants are in joint possession in the suit holding/khatian, the advocate submits.

Mr. Alam finally submits that the Court below decreed the suit only for simple partition without declaring anything regarding the S.A. and R.S. record which are still remaining correct in favour of the appellants and as such, the impugned judgment and decree cannot be sustained in law which is liable to be set aside.

Mr. Mohammad Mosfequs Salehin, the learned advocate for the plaintiff-respondents submits that admittedly the suit land was recorded in the name of Musti Sheikh, the predecessor of the plaintiffs and the defendant-appellants

did not raise any question before the subordinate court that the plaintiffs are not successors of the C.S. recorded owner.

The learned advocate then submits that regarding the property in question the Plaintiff-Respondents Md. Aman Ullah and others executed registered power of attorney in favor of Advocate Md. Solaiman Mollah (PW-1) which was challenged in Title Suit No. 1842 of 2008 filed by defendant no.10, one of the successors of Md. Aroz Ullah Sarker, before the court of First Assistant Judge of Gazipur which was dismissed on compromise and nobody challenged that power of attorney in the appropriate court. The appellants are raising question about the power of attorney in the present partition suit on the allegation of ulterior motive having no basis.

The learned advocate further submits that Title suit no. 36 of 2009 was filed against 71 defendants amongst them defendants nos. 1-34 are successors of Aroz Ullah Sarker whose name was wrongly recorded in S.A. Khatian and the defendant nos. 35-44 are successors of Musti Sheikh who did not contest the suit, and defendants nos. 61-71 are purchasers who purchased the property in question form Aroz Ullah and his successors. Thus the present suit for partition is neither barred by defect of parties nor limitation.

Mr. Salehin next submits that Plaintiff-Respondents filed the partition suit through their nominated attorney and prayed for partition upon 5.27 acres out of 6.27 acres of land; a compromise was executed with defendant no. 10, Md. Shafi Ullah (successor of Aroj Ullah Sarkar) regarding 23 decimal of the land through a Solenama.

The learned advocate further submits that the Plaintiff-Respondents being successors of C.S. recorded owner are in possession of land in question and referring the depositions of PW-2, DW-1, DW-2 and DW-4 the learned advocate submits that the defendant No. 10 and defendant Nos. 61-71 have failed to prove the correctness of S.A. Khatian and R.S. Khatian. Since the defendant have claimed about auction but did not produce any documents before the court in this connection. If the S.A Khatian is not proven as correct, then R.S. khatian and subsequent deeds, mutation, Rent receipt will not get any value as per law. As per the depositions of PW-2, DW-1, DW-2 & DW-4 there are 4-22 houses on the disputed lands. That means there are no structures on the remaining lands. The plaintiff-respondents are in possession and they have their own establishment. The 23 decimal of land where the graveyard is located has been compromised with defendant no. 10, Md. Shafi Ullah.

Elaborating the background of record of right, the learned advocate submits that the Bengal Tenancy Act, 1885 recognizes right over land of landholders, tenure holders and tenants and rayat. There was no recorded and legally recognized record of rights before the enactment of Bengal Tenancy Act, 1885 (hereinafter referred to as BT Act). The Cadastral Survey (C.S.) Khatiyan was initiated in 1888 under the BT Act, 1885 and C.S. presumes to be correct until proven otherwise. That presumption of the C.S. Khatian did not lose its weight because of absence of evidence as to its basis. There is a presumption of correctness of C.S. record of rights. The oldest record of rights being the Cadastral Survey (C.S.) prepared under section 103B(5) of the BT Act, 1885 also got a high

presumptive value as to correctness of entries therein as it has also been enjoined under section 144A of the State Acquisition and Tenancy Act, 1950 (hereinafter referred to the SAT Act). The provisional Government of the Pakistan took decision to acquire the interest of the rent-receivers for the purpose of creating relations between tenants and the government directly under the SAT Act, 1950 and this survey is called S.A survey. This khatian was made on the information given by the Zaminder that is why it is called Table survey. It was prepared through speedy manner which made faulty. There is no presumption of correctness in respect of S.A. khatian like the C.S. Khatian under the BT Act, 1885. The presumption attaching of the record of rights prepared under the BT Act, 1885 in view of section 103B(5) does not attach to record prepared under the SAT Act, 1950. Thus the S.A. khatian of land in question was prepared in the name of Aroz Ullah Sarkar most incorrectly and the defendant-appellants have failed to prove the chain of ownership by giving supporting documents as they claim in their written statement. DW-1 and DW-2 admitted that they do not have any papers to support their S.A khatian. The ownership claimed by the appellants is based on the S.A. Khatian which was wrongly prepared in the name of Aroz Ullah Sarkar. The plaintiffs have duly proved that there was no relationship between Musti Sheikh and Aroz Ullah Sarker. The property in question was never transferred to Aroz Ullah, thus as per section 144A of SAT Act the S.A. and R.S khatian was proved as incorrect. The appellants have failed to prove their chain of ownership from C.S. record by giving supporting documents and they are claiming their title from S.A. khatian. Settle Principle laid down

by our apex court that S.A. and R.S. records are not evidence of Title.

The learned advocate for the plaintiff-respondents finally submits that the appellants do not have any right to claim of adverse possession. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner. The properties other than the scheduled properties of Musthi Sheikh amicably partitioned among the successors and the defendant-appellants did not submit any documents before the subordinate court to prove their statement made in Written Statement regarding the other properties of Musti Sheikh. Section 143B of the SAT Act, 1950 supports the amicable partition among the parties. From the provisions of this section it can be construed that the persons who acquired immovable property jointly by inheritance they may get those properties partitioned amongst them amicably and if any of the parties of them denies such amicable partition, being civil right such right can be cognizance by civil court. Thus the Plaintiff-Respondents duly filed the instant partition suit and the trial court rightly decreed the suit. In support of his submissions he cited the following decisions of our Supreme Court: Jupiter Glass Industries Vs. Titas Gas [35 DLR 295]; Dayal Chandra Mondal Vs. ADC (Revenue) [50 DLR 186]; Bangladesh Vs. AKM Abdul Hye [56 DLR (AD) 53]; Guru Charan Mondal and others Vs. Sree Bhaba Sindu Sarkar [13 MLR (AD) 6]; Ayub Ullah Vs. Elias [22 BLC (AD) 29]; Fazlul Haque Vs. Afsar Uddin [77 DLR 240] and Government of Bangladesh Vs. Tenu Miah Tofadar [14 LM (AD) 30].

We have heard the learned advocates for both the parties, perused the memorandum of appeal, applications

along with annexures, impugned judgment and decree and lower court records including depositions of witnesses, exhibited documents as well as other materials on record.

The present appeal has arisen from a suit for partition *simpliciter*. Dictionary meaning of partition is to divide into parts, pieces or sections, or act or process of dividing something into parts. According to Black's Law Dictionary its legal meaning is the divisions of the contents of any real property, usually done when, more of the parties involved fail to agree on a termination of their ownership, usually takes place through the court. By judicial pronouncements also the meaning of partition has been defined. Partition is the division made between several persons of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him. A partition is the adjustment of diverse rights regarding the whole by distributing them on particular portion of the aggregate. This follows from the principle that partition signifies the transformation of joint possession into separate possession. Partition converts joint enjoyment into enjoyment severally. It is the redistribution of pre-existing rights among co-owners and not the acquisition of rights. A suit for partition determines the share of the co-sharers *inter se*. The partition in a suit is an equitable right, and it should be seen while decreeing a partition suit, how much equity can be done to the parties without asking them to go to another suit.

It has been long settled also by referring section 143B of the State Acquisition and Tenancy Act, 1950 (hereinafter referred to as SAT Act) that partition may be effected either of the following two ways: i) by amicable

settlement by the co-owners themselves; or ii) through civil courts in a properly framed suit for partition. It may be mentioned here that an amicable partition may not get effect in the eye of law if dispute arises within limitation period. Because a co-sharer in possession of land less than his share is always entitled to pray for partition by bringing properly framed suit for partition in a competent court, he is entitled to get land partitioned through court and defiantly, a co-sharer in possession of excess land than his share is bound to part with the same.

A suit for partition regulated mainly under section 143B of the State Acquisition and Tenancy Act, section 44 of Transfer of Property Act, Order XXVI Rule 13 & 14 of the Code of Civil Procedure subject to Article 144 of the Limitation Act and Court Fees Act. Section 143B of the SAT Act provides that when any recorded owner dies, his/her heirs may amicably effect partition of the property left by said *propositus* among them taking their respective shares, and after such partition, they may register it. As per this section it is a substantive right of a co-sharer raiyat/owner of land to get partitioned thereof. If we minutely read section 143B along with chapter XVII under part-V of the SAT Act it is revealed that partition of lands can be sought for only by those persons who are or whose predecessors were recorded owners in the latest record-of-rights. If the persons who or whose predecessor's name were recorded in the former record of rights, he must seek correction of the wrong latest record first or to seek declaration of title to the suit land. If the present record-of-rights is not in the name of the plaintiff as per his share but actually he has right and title in the said Kkatian/holding, he cannot seek simple partition without

another prayer for declaration of title and both can be sought in a single suit, in view of section 54 of SAT Act read with rules 1-3 of Order II of the Code of Civil Procedure.

In the case of Rezaul Karim and others Vs. Shamsuzzoha and others reported in 49 DLR (AD) 68 our Supreme Court (Appellate Division) observed that *in a suit for partition the court will no doubt consider the title of the plaintiff to the suit land in some details more than in a suit for permanent injunction, but it cannot in either case convert itself into a court for determination of the respective titles of the parties if a serious dispute emerges from the pleadings as to the title of the plaintiffs to the partible property and if it is not possible to effect partition without formally determining the plaintiffs' title to the property claimed in the partition suit*. However, in a partition suit, the plaintiff can establish his title, if necessary. To settle a dispute properly among the co-sharers of joint properties, suit for partition is the best form of suit. It is also known as the mother suit. It has been settled by a catena of decisions by our Supreme Court that all types of disputes may be settled in a single suit for partition, e.g. whether a deed is forged or false, legal or even acted upon, whether a person has acquired title over some land in the jote by adverse possession. Reliance may be placed on the reported case of 16 BLC (AD) 46, 24 BCR (AD) 172, 44 DLR (AD) 147, 6 ADC 74, 1987 BLD (AD) 38, 16 MLR (AD) 216 and 2009 BLD (AD) 43. However, the connotation 'mother suit' signifies only that in a suit for partition *simpliciter* title and shares between the parties in the joint properties can be considered and ascertained, not to giving all sorts of reliefs. Because, when

plaintiff's title is clouded in any way, either by dispossession or by wrong record of latest record-of-rights, in that case a simple partition is not enough, he must seek recovery of possession and/or declaration of title as the case may be. If there is any impediment in getting the relief, the plaintiff must have to pray also for removing those impediments. To our view, the 'mother suit' does not necessarily means to grant all necessary further and/or consequential reliefs in a suit for simple partition.

Only co-owner or co-sharer of a holding/jote/khatian in the land can seek partition. As the law stands today according to sections 81, 82, 143B, 144 and 144A of the SAT Act, 1950, the person in whose name the last record-of-rights has been recorded is the owner of the lands of the holding/jote/khatian until and unless it is proved to be incorrect. In view of section 54 of the SAT Act only this record-of-rights is tantamount to title until and unless it is declared incorrect by competent authority. In view of section 144 and 144A of the SAT Act after publication of latest record-of-rights, the former record-of-rights loses its entity and effect, and all rights and liabilities laid down in part-V of the SAT Act will divest to the holders of latest record-of-rights. It has already been mentioned that to claim that the plaintiff is co-owner in the suit partible property, he must show that he has rightful shares in the suit property in the latest record-of-rights. However, if actually he has right and title in the latest Kkatian/holding, he can seek partition only by another prayer for declaration of title and must state regarding the position of the latest record-of-rights.

In the present suit the plaintiffs claimed partition of the property of CS recorded tenant Musti Sheikh as his successors and on the other hand the defendant-appellants claimed that the property was transferred through auction to one Aroz Ulla Sarker whose name was finally recorded in SA Khatian and CS recorded tenant Musti Sheikh became title less or at least his title has been clouded. Thereafter, successors of that Aroz Ulla sold out all the properties to various persons including the defendant-appellants and their predecessors and handover possession and accordingly their names were recorder in RS Khatian as per section 144 of the SAT Act, 1950. It may be mentioned here that as per section 103B(5) of the Bengal Tenancy Act, 1885 applicable for the then East Bengal (now Bangladesh) CS record has presumptive value of correctness while as per section 144A of the State Acquisition and Tenancy Act, 1950 RS record has presumptive value of correctness. As this stage let us examine section 103B(5) of the BT Act, 1885 and section 144A of the SAT Act, 1950 which run as follows:

Section 103B(5) of The Bengal Tenancy Act, 1885-

> Every entry in a record-of-rights finally published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

Section 144A of the State Acquisition and Tenancy Act, 1950-

> Section 144A. **Presumption as to correctness of record of rights**- Every entry in record-of-rights prepared or revised under section 144 shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

From the plain reading of the above two provisions of the two laws it is crystal clear that language of both the provisions are almost similar. So, both has presumptive value of correctness but it is not absolute rather rebuttable. Now, the question arises in case of dispute which one will prevail. It may be mentioned that by promulgation of SAT Act, 1950 the BT Act, 1885 has been repealed. As per section 144A of the SAT Act the last record-of-rights is the evidence and certificate of possession which usually follows title/ownership unless it is proved incorrect. The burden of proof regarding the incorrectness of such record heavily lies upon who claims so and most importantly by simple showing the CS record the incorrectness of RS record cannot be proved automatically. The claimant must prove it by adducing positive evidence. The latest record of rights excludes the previous record of rights as per section 144A of the SAT Act, 1950. Therefore, when in latest RS Khatian the plaintiffs' or their predecessors' names are total absent, rather it stands in the names of outsiders having no genealogical connection with the previous recorded owners, it can obviously be said that the plaintiffs title to the suit lands has been clouded by such latest record and certainly strong presumption is that they are not in possession of the same. In such case he/they must seek declaration of title and or recovery of possession along with partition of his/their share. In a suit for partition the parties must seek his/their share in the jote or ejmali properties not the amount. In the present suit the plaintiffs did not claim any specific share in the jote/ejmaly properties rather amount measuring 5.27 acres out of 6.27 acres of land without any explanation regarding the rest amount or share.

It is long settled that in a partition suit, the status of a plaintiff and the defendant is almost identical. In other words the plaintiff and the defendant stand in the same position and that a party in a partition suit whether a plaintiff or defendant, is at the same time a plaintiff as well as a defendant and this dual capacity arises from the very nature of a partition proceeding where each party who is a co-sharer be he in the category of the plaintiff or of the defendant is entitled to ask for partition of his share and separate allotment.

In a suit for partition, ejmali possession with co-sharer is not only important but also necessary. However, it is well settled that among co-sharers themselves possession of one co-sharer is possession of all. If the documents show that the defendants has been in possession of the suit land for more than 12 years without any disturbance and SA and RS Khatians also prepared either in their names or their predecessors names, it creates a claim of right of adverse possession. Adverse possession may be acquired by record of rights for long time. But it is the general rule that to claim adverse possession, it must be ascertained notoriously and unequivocally hostile.

Partition suit must be filed within period of limitation of 12 years from the cause of action, that is, when the possession of the defendant becomes adverse to the plaintiff, as prescribed in Article 144 of the Limitation Act, 1908. The general rule is that the suit for partition usually is not barred by limitation but this is not absolute. When the plaintiff is excluded from joint possession of the suit land and it continues for more than statutory period of 12 years, the suit should be barred by limitation as mandated under Article 144 read with section

28 of the Limitation Act. This ouster of possession may occur by excluding his name in the last record-of-rights which has been recorded in the name of stranger having no genealogical connection with the plaintiff and the plaintiff does not challenge the said wrong record published excluding his name within statutory limitation period. Adverse possession cannot be claimed against a co-sharer, though other co-sharer is long time out of possession, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period of 12 years. To claim adverse possession 3 essential condition must be fulfilled: i) denial of right and title of the real owner, ii) knowledge of the real owner and iii) declaration of his right and possession. If this position continues for more than 12 years, adverse possession can be claimed even by a co-sharer. However, adverse possession may be created without express declaration and inferred from the conduct of the parties or whole circumstances of the case. For example, if the property is recorded in the name of X or X mutated his name in denial of real owner/earlier recorded owner and X or his successor sales portion of that property on the strength of that record or mutation and they possess the same and then again their names are recorded in the subsequent record-of-rights and thus continue possession for long period of time beyond the statutory period without concealment and any objection in such case the suit for partition should be barred by limitation. [Reliance may be placed in the case of Chand Mamud Sheikh & another Vs. Mujaffar Ali Sheikh & others reported in 9 DLR 53; in the case of Jogendra Chandra Kapali & others Vs. Arjun Chandra Kapali & others reported in 15 DLR 628 and in the case of

Fazar Ali & others Vs. Abdul Gani & others reported in 10 BLT 339]. A wrong record-of-rights can be corrected either by- i) a decree for declaration of title and or possession by a civil court as mandated under section 54 of the SAT Act or ii) a decree for correction of the record by Land Survey Tribunal under section 145A of the SAT Act. For that reason, in our view, if the record is wrong, the same cannot be corrected in a suit for simple partition without a declaration of title.

Now, in the light of above position of law let us consider the present case.

It appears from the impugned judgment and decree that the trial court in a very slipshod manner decreed the suit without discussing the evidence on record on the finding that since the defendants could not produce any document regarding the auction, the basis of SA record as claimed by them, the defendants failed to prove their case and as successors of CS recorded tenant the plaintiffs are entitled to get a decree of partition. In deciding so the trial court missed the position of law that plaintiff has to prove his case and cannot stand on the weakness of the defendant’s case.

In the present suit the plaintiffs miserably failed to claim any specific share of the suit holding/khatian rather claimed an amount of 5.27 acres out of 6.27 acres of land. Hence the suit for partition is not maintainable in the present form. The general rule is that in a suit for partition except in exceptional cases, all joint properties must be brought in the hotch-pot, that is, in the schedule of the plaint. Admittedly all the properties of Musti Sheikh have not been brought in the hotch-pot in the present suit. The property situated at Deshipara Mouza

recorded in SA Khatian No.82 in the name of Musti sheikh has not been brought in the schedule of the plaint and plaintiffs could not prove that they have no dispute regarding the land of SA Khatian no.82 rather admitted by plaintiff no.1 (PW-3) that there is a suit/case amongst the heirs regarding the property of Musti Sheikh situated at Deshipara. Therefore, the present suit for partition is not maintainable in its present form for not bringing all the properties of Musti Sheikh into hotch-pot. The plaintiffs claim partition on the basis of CS record but did not claim partition from the latest record-of-rights. We have already observed that only co-owner or co-sharer of a holding/jote/khatian in the land can seek partition. As the law stands today according to sections 81, 82, 143, 143B, 144 and 144A of the SAT Act, 1950, the person in whose name the last record-of-rights has been recorded is the owner of the lands of the holding/jote/khatian until and unless it is proved to be incorrect. In view of section 54 of the SAT Act only this record-of-rights is tantamount to title until and unless it is declared incorrect by competent authority. In view of section 144 and 144A of the SAT Act after publication of latest record-of-rights, the former record-of-rights loses its entity and effect, and all rights and liabilities laid down in part-V of the SAT Act will divest to the holders of latest record-of-rights. It has already been mentioned that to claim that the plaintiff is co-owner in the suit partible property, he must show that he has rightful shares in the suit property in the latest record of rights. However, if actually he has right and title in the latest Khatian/holding, he can seek partition only by another prayer for declaration of title and must state regarding the position of latest record of rights. In the

present suit the plaintiffs did not seek partition of property of latest record-of-rights, that is, RS record which does not stand in their names. In such circumstances the simple suit for partition is not maintainable without declaration of title. Because, since the names of the plaintiffs or their predecessors has not been recorded in SA Khatian admittedly published in 1956 and most importantly RS Khatian, the latest record-of-rights admittedly published in 1970 also did not publish in their predecessors or their names. The plaintiffs have totally failed to show any document of jamindary Dakhila or rent receipts from the government. On the other hand the defendant-appellants though could not produce document of auction but submitted series of rent receipts and registered deeds at least from 30.03.1967 by which Kafil Uddin, son of SA recorded tenant Aroz Ulla Sarker sold lands to Abdul Kadir (defendant no.61) and his wife. The defendants also submitted series of registered deeds of the year 1968, 1971, 1972, 1973, 1977 and up to 2006. They are paying rents of the suit properties to the government exchequer. This is evident from the exhibited and non-exhibited documents with the record. It means, the plaintiffs are not in possession of the suit land at least from 1956 after publication of SA record and the present suit is filed in the year of 2009 after more than 50 years. The plaintiffs failed to establish why they have not taken any initiative against the wrong record of S.A Khatian finally published in the year of 1956 during life time of Musti Sheikh and the present R.S record, the latest record-of rights published in 1970 and why they have come before the Court after more than 50 years. Further, with regard to possession, the plaintiffs claimed in the plaint total

possession in denial of the defendants but PW-1 admits possession of only defendant no.10 while PW-2 admitted the possession of the defendants by erecting dwelling house and the plaintiffs resides in their homestead situated at Deshipara mouza and further deposed that Amanullah, one of the plaintiffs with his brothers possessed 1.73 acres of suit land and latter said that his brother resides at Deshipara and sisters at their respective husband's houses. So, the possession as claimed by the plaintiffs orally, are contradictory and admittedly without any supporting documents. The plaintiffs do not recognize the defendants as co-owners of the suit holding/Khatian. As such the plaintiffs and the defendants are not co-sharers of the suit property as it reveals from the pleadings of the parties. We have already observed that Partition suit must be filed within period of limitation of 12 years from the cause of action, that is, when the possession of the defendant becomes adverse to the plaintiff, as prescribed in Article 144 of the Limitation Act, 1908. The general rule is that the suit for partition usually is not barred by limitation but this is not absolute. When the plaintiff is excluded from joint possession of the suit land and it continues for more than statutory period of 12 years, the suit should be barred by limitation as mandated under Article 144 read with section 28 of the Limitation Act. This ouster of possession may occur by excluding his name in the last record-of-rights which has been recorded in the name of stranger having no genealogical connection with the plaintiff and the plaintiff does not challenge the said wrong record published excluding his name within statutory limitation period. Adverse possession may be created without express declaration and inferred from the conduct

of the parties or whole circumstances of the case. In the present suit the entire schedule property was recorded in the name of Aroz Ulla Sarker in the SA Khatian in total denial of earlier CS recorded owner Musti Sheikh during his life time and his successors sold most portion of that property to the predecessors contesting defendant-appellants and others and they possess the same and then again their names are recorded in the subsequent record-of-rights, that is RS Khatian and thus continue possession for long period of more than 50 years beyond the statutory period without concealment and any objection. Admittedly SA khatian no.82 was recorded in the name of Musti Sheikh. In that view of the matter the present suit is hopelessly barred by limitation.

If the contesting parties claim their title to the suit land from the same heading of title, i.e. from same/common predecessor-in-interest, only then it can be said that the parties have community of interest in the suit properties. But if the root of adverse party's title is disputed by any party, then complicated question of title arose and suit for partition *simpliciter* is not maintainable. In other words if there is no community of interest, that is, if disputing parties have no joint ownership or interest in the suit property, rather the contesting parties have adverse claim over the suit property, or parties claim from different heads of title, suit for simple partition is not the option for resolving the dispute. In the instant suit there is no community of interest of the plaintiff in the suit land scheduled for partition with the contesting defendants. Their claims are not from the same/common predecessor-in-interest. Though the plaintiffs claimed it is ejmali property but the

plaintiffs did not claim partition of share among the plaintiffs or defendants who are allegedly are the successors of Musti Sheikh, the CS recorded tenant and even did not state portion of shares amongst the plaintiffs and defendants of the suit holding/jote/khatian. In that view, the plaintiffs have failed to establish the community of interest in the suit holding with the defendants. Moreover, a wrong record-of-rights can be corrected either by- i) a decree for declaration of title and or possession by a civil court as mandated under section 54 of the SAT Act or ii) a decree for correction of the record by Land Survey Tribunal under section 145A of the SAT Act. For that reason, in our view, if the record is wrong, the same cannot be corrected in a suit for simple partition without a declaration of title.

The position of law as it stands today at the time of filing of the suit, the discussions of evidence on record and the reasons as stated above, we are of the firm view that the present suit for partition is not maintainable in its present form as the plaintiffs totally failed to prove their case and the impugned judgment and decree is liable to be set aside. Accordingly, the appeal is **allowed**, however without any order as to cost.

The judgment and decree passed in Title Suit No. 36 of 2009, is thus set aside.

Send down the Lower Court Records at once along with a copy of this judgment.

Md. Iqbal Kabir, J:

I agree.

Ziaul Karim
Bench Officer