Bench:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice A.K.M. Zahirul Huq

First Appeal No. 118 of 2008

Md. Nurul Islam Bhuiyan being dead his heirs: 1(ka) Md. Shariful Islam Bhuiyan Sharif and others

..... appellants

-Versus-

Badiuzzaman Bhuiyan being dead his heirs: 1(ka) Anjumanara Begum and others

..... respondents

Mr. Alal Uddin with Ms. Rabaya Sultana,
Sazia Afreen and Zinia Akter, Advocates

..... for the appellants

Mr. Mr. Nikhil Kumar Saha, Senior Advocate

..... for respondents 1(ka)-1(cha)

Judgment on 09.07.2025

Bhishmadev Chakrabortty, J:

This appeal, preferred by the heirs defendant 1, is directed against the judgment and preliminary decree dated 30.06.2004 passed by the Joint District Judge and Arbitration Court, Dhaka in Title Suit No. 53 of 1997 decreeing the suit for partition in preliminary form.

The plaint case, in brief, is that the lands described in schedules 1 to 8 to the plaint originally belonged to Siddique Bhuiyan. He died before preparation of CS record leaving behind his second wife Salma Khatun, two sons Jarjis Bhuiyan and Ares Bhuiyan alias Anwaruddin Bhuiyan and 2 daughters Serajunnessa and Samirannessa from his first wife and another daughter named Lal Banu from his second wife. Lal Banu died leaving behind her mother Salma Khatun and the above

consanguine brothers and sisters. Salma Khatun transferred her entire share to Jarjis and Anwar though a kabala dated 27.01.1925. Jarjis Bhuiyan died in 1958 leaving behind his wife Karimunnessa, 4 sons Nurul Islam, Bodiuzzaman, Hafizul and Mazharul and 5 daughters Wahedul Akter, Shahida Akter, Nurun Nahar Begum, Anwara Begum and Salina Akter. Shamirunnessa transferred her entire share of schedule 1 to Bodiuzzaman, Hafizual and Mazaharul through a deed of gift dated 27.11.1978. Serajunnessa died leaving behind her 3 sons and 2 daughters namely Abdul Rakib, Abdus Sabur, Abdur Rab, Mahatab Banu and Rahamat Banu. Abdul Rakib gifted his entire share of schedule 1 to plaintifs 1, 2 and 3 through a deed dated 01.02.1983. Abdus Sabur sold out 52 decimals of land of schedule 1 to Shamaruddin and others and gifted remaining 35 decimals to Hafizul Islam through a deed dated 24.02.1983. Mahtab Banu gifted her entire share to plaintiffs 1, 2 and 3 through *heba-bil-ewaz* dated 30.11.1978. Rahmat Banu made an oral gift in respect of her share to 4 sons of Jarjis Bhuiyan. Anwar Bhuiyan and Jargis Bhuiyan acquired the property of schedule 2 which is the share of plaintiffs in Title Suit No. 40 of 1969. Anwar gifted his share in schedule 2 to plaintiffs 1, 2 and 3 and defendant 1. The properties in schedule 3, 4 and 5 were self-acquired of Jargis Bhuiyan. Anwar Uddin acquired the properties of schedule 6 and 7 through his own income. He transferred his share of schedule 1, 8 annas share of schedule 2 and entire share of schedules 6 and 7 to plaintiffs 1, 2 and 3 and defendant 1. Karimunnessa gifted 30 decimals of land to her 5 daughters and remaining properties in

schedules 1 to 5 were gifted to her 3 sons plaintiffs 1, 2 and 3. Mazharul Islam transferred 1 decimal of land of CS plot 245 described in schedule 5 to the plaint to Hafizul Islam through a deed of exchange. Jargis Bhuiyan purchased ·69 acres from plot 370 of mouja Uttar Khan but the sellers had ownership of ·45 acres only. Meher Afroz and Gul Maher, sisters of Fazlul Karim owned 12 decimals of land. They sold it to Anwar and Rafiqul Islam and the latter sold it to plaintiffs 1, 2, 3 and defendant 1. Meher Afroz died leaving behind her son Rejaur Rahman who sold his share of 12 decimals to the plaintiffs. Thus the plaintiffs became owners of 21 decimals in schedule 8. The parties have been possessing suit properties in *ejmali* without partition by metes and bounds. The plaintiffs requested the defendants to partition the property but they refused to do so, hence this suit for partition. Subsequently, the plaintiffs amended the plaint and brought the fact that Abdul Hakim owned 3.70 acres of land in schedule 4. He transferred a part of land of CS Khatian 198 to Shamsuzzaman and Jahanara Begum through a will. He died leaving behind 3 sons Shamsuzzaman alias Arju Miah, Kamruzzaman alias Kowkat Miah and Nuruzzaman alias Benu Miah and one daughter Jahanara Begum. Abdul Hakim also sold 79 decimals of land from CS Khatian 178 to Jargis Bhuiyan through a registered *kabala* dated 18. 06. 1928. Jargis Bhuiyan purchased the aforesaid land in the name of Abdur Rakib, his sister's son as his benamder. Abdul Rakib Khan did not claim the land and died leaving behind defendants 42 to 44. Jahanara Begum transferred 1.65 acres to

Jargis Bhuiyan through a registered *Kabala* dated 24.05.1952. Shamsuzzaman also transferred 26 decimals to Jargis Bhuiyan through another register *Kabala* dated 02.10.1952 and in his name SA khatian has been prepared. RS Khatian has been prepared in the name of Nurul Islam and others, the heirs of Jargis Bhuiyan. The plaintiffs have been jointly possessing their shares in schedule 4 property and only that schedule is required to be partitioned.

Defendant 1 Nurul Islam Bhuiyan, son of Jargis Bhuiyan filed written statement in the suit. In the written statement he admitted that the land originally belonged to Siddique Bhuiyan who had sons, wives and daughters as stated above. He is the son of Jargis Bhuiyan but he denied the statements made in some paragraphs of the plaint. He stated that the suit is bad for defect of parties and all the properties left by Jorgis Bhuiyan and Anwar Bhuiyan were not brought into hotchpotch. He prayed for dismissal of the suit but further prayed that if the suit is decreed he is entitled to 3.42 acres from schedule 1, 1.04 acres from schedule 2, 0.65 and 0.52 acres from Schedules 3 and 4 respectively, 0.01 acre from schedule 5, 0.69 and 0.22 acres from schedules 6 and 7 respectively and 0.145 acres from schedule 8.

Defendants 4 and 5 filed a set statement of written admitting the statements made in paragraphs 1 to 5 of the plaint. However, they denied the statements made in the remaining paragraphs and claimed *saham* in the suit land of 1 anna and 11.5 gondas share and further claimed 0.03 acre of property through gift from Karimunnessa.

Defendants 23 and 24 also filed written statement denying most of the statements made in the plaint. They claimed shares in the lands described in schedules 1, 2, 3 and 6 as well as properties not mentioned in the schedule to the plaint. They claimed .12 acres which they received as a gift from Karimunnessa. In total they claimed 2.9033 and .5384 acres and in addition to that *saham* in the lands of Uttar Khan mouja.

Defendants 25 to 41 filed written statement denying the statements made in the plaint. They claimed that their predecessor Abdul Hakim was the owner of CS Khatian 178 plots 1610, 1611 and 1612 measuring 3.70 acres described in schedule 4 to the plaint. After the death of Abdul Hakim they inherited the land as legal heirs and have been possessing the same.

On the pleadings the trial Court framed five issues. In the trial, the plaintiffs examined three witnesses and submitted documents exhibits-1 to 8. On the other hand defendants 25 to 41 examined two witnesses DWs1 and 2 and defendants 23 and 24 examined one witness. However, the Joint District Judge, Court 1, Dhaka decreed the suit granting *saham* only to the plaintiffs for 2.70 acres from schedule 4 giving rise to this appeal by the heirs of defendant 1. After passing preliminary decree an Advocate Commissioner was appointed to allocate *saham* who examined as DW 3 and his report was exhibit-X.

Mr. Alal Uddin, learned Advocate for the appellants taking us through the materials on record submits that defendant 1 after filing written statement and replying to the plaintiffs' interrogatories died in the year 2000. His heirs, the present appellants were not substituted in the suit. Although it appears in the order of trial Court that at the last stage of trial of the suit the appellants appeared but in fact they did not appear to contest the suit and the judgment and decree was obtained by the plaintiff *ex parte* against them. He then submits that the plaintiffs obtained the decree in respect of 2.70 acres of land described only in schedule 4 fraudulently by practicing fraud upon the Court. The decree passed by the trial Court is beyond the prayer made in the plaint. He adds that defendant 1 submitted replies to the interrogatories of the plaintiffs and named some persons who were needed to be impleaded as defendants but the plaintiffs did not take any step to that effect. He submitted particulars of other properties of the co-shares required to be brought into hotchpotch but inspite of that those were not included in the schedule of the plaint. Mr. Alal refers to the Advocate Commissioner's report and submits that the commissioner found that the daughters of Jargis Bhuiyan did not make any claim over the lands of schedule 4 and admited that defendant 1 is in its possession. Therefore, the decree passed by the Court below giving total land of schedule 4 to the plaintiffs is not valid in the eye of law. He finally submits that the trial Court ought to have disposed of the suit bringing all the properties of 8 schedules into hotchpotch and failing to do so erred in law resulting in a flawed

judgment which requires interference of this Court. Therefore, the judgment and decree of the trial Court would be set aside and the suit be sent on remand for fresh trial.

Mr. Nikhil Kumar Saha, learned Senior Advocate for respondents 1(Ka)-1(Cha) opposes the appeal and supports the judgment and preliminary decree passed by the trial Court. He then takes us through the issues framed in the suit and submits that the trial Court duly addressed the issues and decreed the suit granting *saham* to the plaintiffs of 2.70 acres in schedule 4 to the plaint. He refers to the case reported in 51 DLR (AD) 155 and submits that in a suit for partition all *ejmali* properties of the co-shares must be brought into a hotchpotch to resolve the dispute between the parties once for all. The trial Court decided the issues discussing the evidence of witnesses and the documents submitted before it in respect of disputed property of schedule 4. Therefore, no illegality has been committed in decreeing the suit and as such the appeal would be dismissed.

We have considered the submissions of both the sides and gone through the materials on record. It appears that the plaintiffs instituted the suit for partition of landed property described in different 8 (eight) schedules to the plaint measuring 36.45 acres. The plaintiffs claimed 12 annas 7 gandas 3 karas and more or less 1 kranti share in schedule 1; 0.35 acres in schedule 2; 12 annas 7 gandas 2 karas 2 krantis in schedules 3, 4 and 5; 12 annas 15 gandas 1 kara 1 kranti in schedules 6 and 7 and 12 annas and 0.21 acres in schedule 8. These appellants'

predecessor, defendant 1 filed written statement in the suit and prayed for its dismissal and in case of passing decree therein he claimed for *saham* of 7.61 acres. Some other sets of defendants who filed written statement also prayed for *saham*.

In the record it is found that during pending of the suit defendants 25–41 were transposed to plaintiffs 6-22 while the names of some other plaintiffs were struck off. A preliminary decree was passed in that stage of the suit but it was subsequently recalled and set aside. Thereafter, on 06.02.2002 the previously transposed plaintiffs were re-transposed as defendants 25 to 41 but nothing is found about the fate of struck off plaintiffs. The plaintiffs filed an application on 14.01.2004 for amendment of the plaint. In the application they incorporated new facts regarding Abdul Hakim's ownership in respect of schedule 4 and sought for striking out schedules 1, 2, 3, 5, 6, 7 and 8 and confined their claim only on schedule 4. The total land under schedule 4 is 3.70 acres out of which the plaintiffs prayed for saham of 2.70 of acres which is partible land of the schedule. No other amendment in the related paragraphs of the plaint was sought and the statements in other paragraph of plaint remained as it is, as if they are seeking partition in the lands of all the schedules. The prayer for amendment was not in compliance with the settled provisions of law which was required for effective disposal of the partition suit. The statement made in the paragraphs of the plaint including paragraph 22 where the plaintiffs claimed shares in the properties of all schedules

remained intact. Although the aforesaid application was allowed and an order was passed amending the plaint but practically no correction was made in the original plaint. The Court passed decree only on schedule 4 allocating *saham* as claimed by the plaintiffs. But the preliminary decree was drawn up including all the schedules of the plaint.

It is further found that although defendant 1 filed a written statement denying the statements of the plaint and prayed for dismissal of the suit or in the alternative claimed *saham* in all the eight schedules measuring 7.61 acres where he claimed *saham* for schedule 4 also. But unfortunately he could not contest the suit due to his death before examination of witnesses. It came out in the evidence of PW3, Md. Harej that defendant 1 Nurul Islam Bhuiyan has homestead in schedule 4. The Advocate Commissioner's report exhibit-X proves that defendant 1 is in possession of 1.35 acres out of 2.70 acres of schedule 4 and he has homestead and other structures thereon. The Advocate Commissioner further found that siblings of the defendant 1 gave up their claim over 0.60 acres of schedule 4 for him in exchange of land from other schedules. In view of the above position, the suit ought to have been disposal of in presence of defendant 1. But unfortunately he died during pending of the suit leaving behind the present appellants as heirs and could not adduce evidence to support his claim. The plaintiffs did not take any step for substitution of the aforesaid heirs of defendant 1, appellants herein. It

is found in the record that before pronouncement of judgment the appellants filed a Vokalatnama in the trial Court on 15.05.2004 after examination of plaintiffs' witnesses without impleading them as parties. Thereafter, the witnesses of other defendants were examined. Although the appellants filed an application and sought permission to examine witnesses on their behalf but no order was passed on it and the judgment was delivered on 26.06.2004 decreeing the suit *exparte* against them. Subsequently, an Advocate Commissioner was appointed to execute the preliminary decree. The heirs of defendant 1, the appellants then approached this Court challenging the judgment and decree and obtained an order of stay.

Since, the present appellants, the heirs of defendant 1 and the plaintiffs are all heirs of Jargis Bhuiyan and Anwar Uddin, two brothers and as such they are equally entitled to the shares in the suit properties left by them. The evidence and the Commissioner's report reveals that defendant 1 was in possession in the major part of schedule 4 and he had homestead there and that his sisters relinquished their claim over 0.60 acres for him. Thus it was imperative for the trial Court to dispose of the suit in presence of defendant 1 or in presence of his heirs, the appellants. It was the failure of the plaintiffs to brought the heirs of defendant 1 into the record. The decree allocating *saham* to the plaintiffs in respect of the entire suited 2.70 acres of schedule 4 is in gross violation of the settled principles of allocating *saham* in a suit for partition. It is the

settled principle that in suit for partition all properties must be brought into hotchpotch for lawful distribution and effective disposal of the suit and *saham* should be allocated as per the possession of the claimants. The predecessor of the appellants as well as the plaintiffs claimed lands from different 8 (eight) schedules of the plaint. The plaintiffs admitted that defendant 1 has share in the schedules by inheritance and purchase which also remained intact after amendment of the plaint. Therefore, the order of striking out or deletion of schedules 1, 2, 3, 5, 6, 7 and 8 by amending plaint without amending other related paragraphs was quite wrong and hazardous. The decree passed in the form giving *saham* only to the plaintiffs without any proof and admission of the defendants that other schedules have been compromised amicably is not a valid decree in the eye of law. Therefore, we are of the view that justice would be best served, if the suit is remanded to the trial Court for disposal on merit considering the claim of these appellants and others also, if any. In doing so, we find that the order passed by the trial Court on 18.01.2004 allowing the amendment of the plaint striking out schedules 1, 2, 3 and 5 to 8 cannot be sustained and must be set aside also. But since as per the replies to the interrogations filed by a defendant 1, the left out parties were added as defendants, therefore, the submission made by Mr. Alal that the suit is bad for defect of parties bears no substance.

Accordingly, the appeal is allowed. No order as to costs. The judgment and preliminary decree passed by the Joint District Judge,

Court 1, Dhaka in the aforesaid suit is hereby set aside. Order of stay, if any stands vacated. All steps taken by the Advocate commissioner after passing of the preliminary decree is to be treated as *non est*. The case is send to the trial Court on open remand. The parties will be at liberty to amend the pleading and adduce further evidence, if they desire so. The trial Court shall allow the appellants, the legal heirs of defendant 1 to contest the suit and adduce evidence in support of their claim. The trial Court shall dispose of the suit afresh in accordance with law upon considering claim and counterclaim of the parties relying on the evidence both oral and documentary. With the aforesaid findings, observations and directions the suit is remanded to the trial Court.

The concerned Court is directed to dispose of the suit expeditiously, preferably within 6 (six) months from the date of receipt of this judgment and order.

Communicate this judgment and send down the lower Court records.

A.K.M. Zahirul Huq, J:

I agree.

Jahir/ABO