

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

First Appeal No. 395 OF 2014.

Md. Hazrot Ali and others .

...Appellants.

-Versus-

Mst. Khudu Khatun and others .

....Respondents.

Mr. Md. Faruk Hossain with

Mr.Monsur Rahman Sarker, Advocates

... For the appellants.

Mr. Md. Zakir Hossain, Advocate

... For the respondents.

**Heard on: 08.01.2024, 10.01.2024,17.01.2024,
18.01.2024 and 24.01.2024.**

Judgment on: 25.01.2024,

Md. Badruzzaman, J

This appeal is directed against judgment and decree dated 26.05.2014 passed by learned Joint District Judge, 1st Court, Meherpur in Title Suit No. 99 of 2011 decreeing the suit in-part in preliminary form.

Facts, relevant for the purpose of disposal of this appeal, are that the respondents as plaintiffs instituted Title Suit No. 99 of 2011 in 1st Court of Joint District Judge, Meherpur for a decree of partition of 11.14 acre land claiming a *saham* of eight anna share measuring 5.57 acre land out of the suit land stating, *inter alia*, that total 11.14 acre land of C.S Khatian No. 207 appertaining to several C.S plots were owned and possessed by Khodabox in seven anna share, Sadhu Bewa in one anna

share, Hoidar Sarder and Ukil Sarder in four anna share each and accordingly, C.S Khatian No. 207 was prepared and finally published in their names. While Khodabox was owning and possessing his share died leaving behind mother Sadhu Bewa and one sister Najiran and they inherited the share of Khodabox. Najiran died leaving behind mother Sadhu Bewa, one son Hafiz Uddin and three daughters namely Sakina, Ijran and Jaharan and they inherited the share of Najiran as per Mahomedan Law of inheritance. While Sadhu Bewa was owning and possessing her own share along with her shares got by way of inheritance from Khoda Box and Najiran died leaving behind one grand-son Hafiz Uddin and three grand-daughters Sakina, Ijran and Jaharan. While Hafiz Uddin was owning and possessing his share by way of inheritance from Najiran and Sadhu Bewa died leaving behind four daughters (plaintiff Nos. 1-4), three sisters (plaintiff Nos. 5-7) and one wife Badshajadi. Badshajadi, thereafter, died leaving behind plaintiff Nos. 1-4 as four daughters. In the aforesaid way the plaintiffs become owner of 5.57 acre land out of total 11.14 acre land C.S Khatian No. 207 and have been owning and possessing the same in *ejmali* with the defendants. Since the defendants denied to partition the suit land by metes and bounds, the plaintiffs filed the instant suit for partition.

Defendant Nos. 1-14, appellants contested the suit by filing joint written statements contending, *inter alia*, that the suit is not maintainable in its present form and suffers from bad for defect of parties. Their positive case is that Khodabox, who was owner in possession of seven anna share in the suit holding died leaving behind mother Sadhu Bewa, sister Najiran and paternal uncle's son Hoider Sarder. Accordingly, the plaintiffs are not entitled to eight anna share as heirs of Sadhu Bewa and Najiran. It has also stated that Haidor Sarder

and Ukil Sarder were owners in possession of total eight annas share in 11.14 acre land. The contesting defendants are heirs of Hoidar Sarder. They also stated that C.S. recorded tenant Khodabox and Sadhu Bewa transferred a major portion of land from suit C.S Khatian by registered sale deeds to Rahim Box Mondol, Jahir Uddin Mondal, Golam Mondal, Alom Sarder and Mahtab Sarder and while they were owning and possessing in their purchased land S.A. Khatian No. 224 and R.S. Khatian No. 1077 were prepared and finally published in their names but the plaintiffs did not implead them as parties to the suit and accordingly, the suit is bad for defect of parties and the same is liable to be dismissed.

During trial, the plaintiffs as well as contesting defendants adduced oral and documentary evidence to prove their respective case. Both parties produced C.S, S.A and R.S Khatian in respect of the suit property which were marked as exhibits.

The trial Court, after hearing the arguments of the parties, decreed the suit in-part in preliminary form vide impugned judgment and decree dated 26.5.2014 allotting a *saham* of 4.54 acre land in favour of the plaintiffs without allotting any *saham* to the defendants. The contesting defendants have challenged said judgment and decree of the trial Court in this appeal. It is to be noted that after passing of the preliminary decree on 26.05.2014, final decree was drawn up on 29.05.2014.

In course of hearing of this appeal, the plaintiff-respondents filed an application praying for sending the suit back on remand to the trial Court for holding fresh trial contending, *inter alia*, that some admitted co-sharers were not impleaded as parties to the suit and the plaintiffs tried to implead them in the suit, though at belated stage, but the trial

Court without considering the merit of the case rejected the application and due to wrong advice of the conducting lawyer, the plaintiffs could not challenge the order before any higher forum. But for proper adjudication of the matter those left out co-sharers should be brought on record and accordingly, for ends of justice, the suit should be sent back on remand to the trial Court for fresh trial by giving the plaintiffs an opportunity to amend their plaint; otherwise, the plaintiffs will suffer irreparable loss and injury. The defendant-appellants did not file any counter affidavit against the application for remand.

Mr. Monsur Rahman Sarker, learned Advocate appearing with Mr. Md. Faruk Hossain learned Advocate for the appellants submits that admittedly, the suit was bad for defect of parties which has been found by the trial Court but while allotting *saham* to the plaintiff the trial Court abruptly deducted .51 acre land from the share of the plaintiffs without ascertaining the share of the left-out-co-sharers. Learned Advocate further submits that since admittedly, after purchase by Rahim Box Mondal and others to the extent of a major portion of a land from the suit jote and their names have been prepared and finally published in the S.A. and R.S Khatian, in particular, since R.S. Khatian No. 1077 was prepared and finally published in respect of 1.36 acre land out of the suit land in the name of Rahim Box Mondal and others, the trial Court committed a gross illegality in deducting only .51 acre land out of said 1.36 acre land from the *saham* of the plaintiffs. Learned Advocate further submits that since the suit is bad for defect of parties the trial Court should have dismissed the suit without allotting any *saham* to the plaintiffs and accordingly, interference is called for by this Court.

As against the above contention Mr. Md. Zakir Hossain, learned Advocate appearing for the plaintiff-respondents submits that after filing of this appeal, final decree has been drawn on 29.5.2014 but the appellants did not challenge the final decree and as such, this appeal is not maintainable. Learned Advocate makes an alternative submission that some admitted co-sharers of the suit jote have not been impleaded as parties to the suit and the plaintiffs filed an application for impleading those left-out co-sharers as parties to the suit by way of amendment of the plaint but the trial Court rejected the application on 07.04.2014 without any valid reason and the plaintiffs should have challenged the order before the higher forum but due to wrong advice of the conducting lawyer of the trial Court they could not challenge the same before the higher forum but for proper adjudication of the suit the left out co-sharers should be impleaded as parties to the suit and accordingly, for end of justice, the suit should be sent back on remand to the trial Court for holding fresh trial by giving the plaintiffs an opportunity to implead those left out co-sharers as parties to the suit.

In reply to the submission of the learned Advocate for the respondents, as to maintainability of this appeal, learned Advocate for the appellants submits that an appeal against preliminary decree is maintainable without challenging the final decree and the appellate Court is competent to give consequential directions regarding the final decree. In support of his contention, learned Advocate has referred to the case of Zakir Hossain and others vs. Md. Shahnewaz and others 66 DLR (AD) 98.

We have heard the learned Advocates, perused the pleadings of the parties, application for amendment of the plaint dated 07.04.2014, order passed by the trial Court dated 07.04.2014, application for

remand, the impugned judgment and decree, the evidence, oral and documentary, and other relevant documents.

Since the learned Advocate for the respondents has raised the question of maintainability of this appeal we shall decide the issue first. This issue has already been settled by the Indian Supreme Court as well as our Apex Court. In *Taleb Ali vs. Abdul Aziz*, AIR 1929 (Calcutta) 189 (Full Bench), it has been held that an appeal from a preliminary decree is not incompetent even if a final decree is made before the appeal is presented. Nor is it necessary for a party aggrieved by a preliminary decree to appeal both from that decree and against the final decree in order to maintain his appeal against the preliminary decree. In *Saradindu Mukherjee vs. Jahar Lall Agarwalla*, AIR 1942 (Calcutta) 153, it has been held that when no appeal is preferred against the final decree and only the preliminary decree is appealed against but a copy of the final decree has been placed on the record of the appeal it is the duty of the appellate Court in dealing with the appeal to give necessary and consequential directions regarding the final decree. By endorsing above view, our Appellate Division in *Zakir Hossain and others vs. Md. Shahnewaz and others* 66 DLR (AD) 98 held, "if an appeal is filed against the preliminary decree and if the preliminary decree is modified or set aside then the final decree falls through".

The above view of the hon'ble Appellate Division made it clear that mere filing of an appeal against the preliminary decree, without having challenging the final decree, is sufficient because the final decree falls through as soon as the preliminary decree is set aside or modified. In view of the above this appeal is maintainable.

On merit of this case, it is not denial of the fact that total 11.14 acre suit land of C.S Khatian No. 207 appertaining to several plots were

owned and possessed by Khodabox in seven annas share, Sadhu Bewa in one anna share, Hoidar Sarder and Ukil Sarder in four annas share each and accordingly, C.S. Khatian No. 207 was prepared and finally published in their names. The plaintiffs, as successive heirs of Khoda Box and Sadhu Bewa, claimed total eight anna share out of 11.14 acre suit land in their *saham*. On the other hand, the contesting defendants, are successive heirs of Hoidar Sarder claimed that, as paternal uncle's son, Hoidar Sarder inherited share from Khoda Box. They claimed total share of Hoidar Sarder. They raised the issue of defect of parties at the initial stage of the suit contending that the predecessors of the plaintiffs namely Khoda Box and Sadhu Bewa transferred a major portion of land from the suit holding to Rahim Box and others and accordingly, S.A & R.S. Khatians were prepared and finally published in their name or their successors' name. It appears from S.A Khatian No. 224 (Exhibit-Ka/1) that total 11.26 acre land was recorded in the names of Rahim Box Mondal, Golam Mondal and Asiruddin along with others. Moreover, total 1.36 acre land of R.S Plot No. 3256 was prepared and finally published in R.S Khatian No. 1077 (Exhibit-Ka/4) in the names of Rahim Box Mondal, Jahiruddin Mondal, Abdul Jabbar, Sakina Khatun, Mohola Khatun and Toriman Nessa Bewa.

On perusal of the plaint it appears that the plaintiffs did not implead all co-sharers of S.A. and R.S. recorded tenants as parties to the suit. However, the plaintiffs filed an application on 07.04.2014 wherefrom it appears that they by way of amendment of the plaint proposed to implead the heirs of Sakina Khatun, Rahim Box, Jahiruddin, Alam Sarder, Hafiz Golam Mondal as defendant Nos. 15-34 (total 20 persons), who are either S.A. or R.S. recorded tenants or their successors. It appears from the order sheet that the trial Court, after

hearing the parties vide order dated 07.04.2014, rejected the application on the ground that the application has been filed in a belated stage i.e at argument hearing stage. While rejecting the application, the trial Court did not consider the merit of the application which was apparently an illegal order but the plaintiffs did not challenge the order of the trial Court dated 07.04.2014 before any higher forum.

On perusal of the impugned judgment it appears that the trial Court took into its notice that the plaintiffs did not implead the R.S. recorded tenants or their successors as parties to the suit. The trial Court resolved the issue of defect of parties as follows:

“বাদীপক্ষের আর্জি ও বিবাদীগণের সাক্ষীদের জবানবন্দি পর্যালোচনায় দেখা যায় যে, এই মোকদ্দমায় আর.এস ১০৭৭ নং খতিয়ানের রেকর্ডীয় প্রজাদের বিবাদীর শ্রেণীভুক্ত করা হয়নি। তবে আর.এস. রেকর্ডীয় ১০৭৭ খতিয়ানের দাগ ৩২৫৬ এর ৫১ শতক সম্পত্তি আর্জির তপশিলভুক্ত করে উহা হতে বাদীপক্ষ বাটোয়ারার দাবী করেছেন। উক্ত ১০৭৭ আর.এস. খতিয়ানের শরীক প্রজা রহিম বক্স মন্ডল, জহির উদ্দিন মন্ডল, আঃ জব্বার, ছখিনা খাতুন, মহলা খাতুন, তরিমন নেছা বেওয়া এদেরকে মোকদ্দমায় বিবাদীর শ্রেণীভুক্ত করা হয়নি। তবে যেহেতু উক্ত খতিয়ানের প্রজাদের বিবাদী করেননি, সেহেতু উক্ত খতিয়ানে বাদীপক্ষের দাবীকৃত অংশ বাদ দিয়ে বাদীগণের অন্যান্য দাবীকৃত অংশ বাবদ ছাহাম পেতে কোন বাধা নেই।”

The aforesaid finding of the trial Court is totally misconceived, illegal and misreading of evidence because total 1.36 acre land was recorded in R.S. Plot No. 3256 of R.S. Khatian No. 1077 in the names of said Rahim Box Mondal and others and said 1.36 acre land has included in the schedule of the plaint as suit land. From the face of it, the trial Court committed gross mistake in deducting .51 acre land out of 1.36 acre land from the *saham* of the plaintiffs without ascertaining the entitlement of the shares of Rahim Box Mondal and others in the suit holding. Since admittedly, Rahim Box Mondal and others were not impleaded as parties to the suit and their shares have not been

ascertained, the trial Court committed gross illegality in decreeing the suit in-part in favour of the plaintiffs by deducting .51 acre land from the suit holding.

We have also considered the prayer of the plaintiff-respondents for sending the suit back on remand.

Admittedly, Rahim Box Mondal and others or their successors are admitted co-sharers of R.S. Khatian No. 1077 and S.A. Khatian No. 224 but they have not been impleaded as parties to the suit. Moreover, their shares have not been ascertained by the trial Court. Since the trial Court, during trial, passed an illegal order dated 07.04.2014 by rejecting the application of the plaintiffs for impleading those left-out co-sharers as parties to the suit but deducted some portion of their land in giving *saham* to the plaintiffs, we are of the view that the suit should be sent back on remand for fresh trial by giving the plaintiffs an opportunity to implead the left-out co-sharers as parties to the suit.

In view of the above, the appeal is allowed, however without any order as to costs. The impugned preliminary judgment and decree dated 26.05.2014 and final decree dated 29.5.2014 passed in Title Suit No. 99 of 2011 are set aside.

The application for remand is also allowed with a cost of Tk. 10,000/- (taka ten thousand) to be paid to the defendant-appellants. The plaintiff-respondents are directed to deposit the amount in the trial Court within 30 (thirty) days from the date of receipt of the copy of this judgment by the trial Court. The defendant-appellants are allowed to withdraw the amount from the trial Court.

Title Suit No. 99 of 2011 is sent back on remand to 1st Court of Joint District Judge, Meherpur for holding further trial by giving the plaintiffs an opportunity to amend the plaint in view of the observation

made in this judgment and then dispose of the suit in accordance with law.

Send down the L.C.R. along with a copy of this judgment to 1st Court of Joint District Judge, Meherpur at once.

(Justice Md. Badruzzaman)

I agree

(Justice Sashanka Shekhar Sarkar)