

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

First Appeal No. 134 of 2015

In the matter of:

Fazal being dead, his heirs Halima Begum and
others

... Defendants-Appellants.

-Versus-

Ahasanullah and others

...Plaintiffs-Respondents.

Mr. Md. Abdus Sabur Khan, Advocate

...For the Appellants.

Mr. Subrata Shaha, Senior Advocate with

Ms. Ayesha Akhter, Advocate

... For the respondent nos. 1-2.

Heard on 25.06.2025 , 02.07.2025 and 09.07.2025
Judgment on 12.11.2025

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Bashir Ullah, J.

At the instance of the defendant nos. 1,2 and 4-13 in Title Suit No. 70 of 2008, this appeal is directed against the judgment and decree dated 01.10.2014 passed by the learned Joint District Judge, First Court, Munshiganj, decreeing the same against defendant nos. 1-2 and 4-6 on contest and *ex parte* against the rest.

The precise facts leading to preferring this appeal are:

The present respondents as plaintiffs filed the aforesaid suit praying for a decree of declaration of title, partition in the suit land described in the

schedule to the plaint and further declaration that R.S. record No. 187 is erroneous by seeking following reliefs:

“(ক) নালিশী সম্পত্তিতে বাদী পক্ষ ৯.৫০ শতাংশের মালিক মর্মে ঘোষণা করিতে;

ক.ক) নালিশী সম্পত্তিতে বাদী পক্ষের দাবীকৃত ৯.৫০ শতাংশ বাবদ লগু পৃথক ছাহাম দেওয়ার;

(খ) প্রাথমিক ডিক্রীর নির্দিষ্ট সময়ের মধ্যে পক্ষগণের মধ্যে আপোষে বন্টনা না হইলে আদালত যোগে সার্ভে কমিশনার নিয়োগ করিয়া সম্পত্তির পরিমাপ করতঃ নক্সা অংকণে পক্ষগণের লগুমত সাহাম নির্ধারণ করিয়া আদালত যোগে বাদীগণের বন্টনের সাহাম বুঝাইয়া দিতে এবং মেয়াদ অন্তে ডিক্রী চূড়ান্ত করিতে সম্যক আদালতের ব্যয় দেওয়াইতে;

খ.খ) নালিশী আর.এস ১৮৭ নং খতিয়ানে বাদীগণের পূর্ববর্তী তারা মিয়া ৯.৫০ শতাংশ ও ১১.(আট) আনা অংশে মালিক থাকিলেও উক্ত খতিয়ানে তাহার অংশে ✓ ১০ গন্ডা লিপি হওয়ায় আর.এস ভুল ও অশুদ্ধ মর্মে ঘোষণা দিতে;

গ) আইন ও ইকুইটি মতে ও আদালতের ন্যায় বিচারে বাদীগণের আর যে সকল প্রতিকার ভাজন হয়, তাহার আদেশ প্রদান করিতে আজ্ঞা হয়।”

The case of the Plaintiffs, in short, is that the suit land measuring 19 decimals appertaining to C.S. *Khatian* No. 129, C.S. Plot No. 109, under Mouza- Munshigonj, District-Dhaka originally belonged to one Bechu Munshi, Chand Miah and Tara Miah and was recorded in their names in the C.S. record, Bechu Munshi holding on 8 *annas* share while Chand Miah and Tara Miah each held 4 *annas*.

Bechu Munshi died, leaving behind four sons, namely Samed Ali, Yeakub Ali, Abul and Abdul Jabbar and each of them inherited 2.375 decimals of land. Chand Miah died, leaving behind his father Samed Ali and Samed Ali in his own right got 2.375 decimals of land and from Chand Miah inherited 4.75 decimals and in total inherited 7.125 decimals. Yeakub Ali, died leaving behind his one son and one daughter, namely Elim Chand and Sona Ban and Elim Chand got 1.59 decimals of land and Sona Ban got .79 decimal of land and thereafter, Elim Chand sold 2.00 decimals of land to Tara Miah by sale deed No.8264 dated 15.11.1947 and delivered possession to him.

Samed Ali died, leaving behind three sons, namely Hossain Ali, Sukur and Tara Miah and three daughters, Abeda, Shaheda and Ashia and his three sons each got 1.59 decimals of land and his three daughters each got 0.79 decimals of land. Subsequently, Ashia orally gifted 0.19 decimals of land to Tara Miah, 0.20 decimals to Sukur Miah, 0.20 decimals to Hossain Ali, 0.10 decimal to Abeda and 0.10 decimal to Shaheda. Hossain Ali sold 1 decimal of land by sale deed No.7802 dated 31.01.1961 to Tara Miah. Thus, Tara Miah got 4.75 decimals from his grandfather and 1.59 decimals from his father and 2.00 decimals by deed No. 8264 and 1 decimal by deed No. 78020, 0.19 decimal of land from Ashia, and accordingly, he acquired total stands at 9.53 decimals of land. Thereafter, Tara Miah executed *Heba-bil-Ewaz* being No.7341 dated 25.11.1977, in favour of his two sons, namely Abdus Sattar and Abdul Jabbar. Abdus Sattar gifted 4.75 decimals of land by *heba* deed No.3165 dated 09.08.2005 to his son Ahsan Ullah and delivered possession and since then, the

plaintiffs have been enjoying and possessing the suit land by constructing houses and by planting trees.

The said suit land as mentioned in the schedule of the plaint had not been partitioned by mets and bounds and as such the father of the plaintiff Nos. 1 and 2 had filed Title Suit No. 36 of 1991 in the Court of the then Subordinate Judge, Munshigonj and the said suit was dismissed for not taking steps. Subsequently, the plaintiffs for the first time came to know about the wrong recording in R.S. record on 10.02.2008 and as such they prayed for a declaration of title in order to remove the cloud on the plaintiffs' right in the suit land.

In the suit, defendant nos.1-85 were made parties as they are the recorded tenants in the suit land. The heirs of Sukur Ali (defendant Nos. 1 to 13) are the owners of the 2.56 decimals of land. The successors to Jabbar Ali have been made defendant nos. 14-31, 67-75 who are the owners of 2.38 decimals of land and the successor to Abdul, namely defendant Nos. 32-40, 46-55, 81-85 are the owners of 2.38 decimals of land. The successor of Abeda Begum, namely defendant Nos. 41-45, 59-66, are the owners of .09 decimal of lands, the defendant No. 56 namely Saheda is the owner of .09 decimal of land and the successors of the sisters of Elim Chand were made defendant Nos. 76-81 and they are the owners of 0.80 decimal of land. The plaintiffs came to learn on 10.02.2008 that the R.S. Record is erroneous. Consequently the plaintiffs instituted the suit on 25.02.2008.

Defendant Nos. 1-2 and 4-13 entered appearance and contested the suit by filing written statement denying all material averments made in the plaint stating *inter alia* that the suit is not maintainable in its present form

and nature, barred by limitation and barred by *hotchpot*. It is further stated that Delbar Bepari was the owner of 19 decimals of land under C.S. *Khatian* No.129 and C.S. Dag No.109. After his expiry, his only son Bechu Munshi became the owner of the suit land; but during the preparation of the C.S. record it was recorded in the name of his two grandsons, namely Chand Miah and Tara Miah which was wrong and incorrect. Chand Miah and Tara Miah never possessed eight annas shares of the suit land. Bechu Munshi died, leaving behind four sons namely Samed Ali, Abdul Jabbar, Abdul and Yeakub Ali and each of them inherited 4.75 decimals of land. Yeakub Ali died, leaving behind one son namely Elim Chand. Abdul died, leaving behind four sons and one daughter, namely Abdul Gafur, Noor Hossain, Abul Hossain, Shahid Ullah and Surja Ban. Abul Hossain, Shahid Ullah and Surja Ban sold their respective shares to their brother Noor Hossain. Thus, Noor Hossain became the owner of 3.695 decimals of land. Noor Hossain died, leaving behind his wife Banu Bibi, four sons namely Mobarak, Mokazal, Tofazzal, Kamal and four daughters Hosneara, Begum Bibi, Raushan Ara and Aklima. Abdul Gafur son of Abdul died, leaving behind four sons Shahab Uddin, Nazim Uddin, Rahman and Salam and two daughters namely Ashrafun and Bediy Bibi. Thereafter, Nazim Uddin died, leaving behind his sons namely Rajib, Romel and Rafique and daughter Nazma. Abdul Jabbar son of Bechu Munshi died, leaving behind 2 sons, namely Alek Chand and Abdul Kader and one daughter namely Shambu Begum. Alek Chand became the owner of 1.90 decimals, Abdul Kader became the owner of 1.90 and Shambu Begum became the owner of .95 decimal of land. Abdul Kader died, leaving behind one son Hanif Member

and one daughter Lutu Begum. Shambu Begum gifted her 0.95 decimal of land to Hanif Member. Hanif Member died, leaving behind 6 sons namely, Siraj, Mizan, Motaleb, Jahangir, Mosharaf, Jahedul and 2 daughters namely Kulsum and Momena. Abdul Jabbar's son Alek Chand died, leaving behind one wife, 4 sons namely Akkash, Bahanul, Badal, Sariatul and 2 daughter's namely Sahar Banu and Rahima. Alek Chand's son Akkash died, leaving behind wife Ambiya, 3 sons namely, Kalam, Salam and Abu Bakkar. Samed Ali, son of Bechu Munshi died, leaving behind 3 sons, namely Tara Miah, Sukur Miah and Hossain Ali and 3 daughters, namely Abeda, Ashiya and Shahinur. Chand Miah was also son of Samed Ali who died in childhood. Each son got 1.055 and each daughter of Samed Ali got .53 decimal of land.

Elim Chand was son of Yeakub Ali and owned 4.75 decimals of land. He mortgaged 2.23 decimals of land to one Tara Miah by deed No. 8264. Subsequently, Elim Chand sold 3 decimals of land to Hasan Ali and Habiya Khatun, wife of Sukur Miah by deed No. 4616 dated 07.05.1949. Deed No. 8264 is merely a document. Elim Chand died, leaving behind 2 sons Yanush Miah and Nuru Miah and 2 daughters namely Mamataz and Feli Bibi. Yanush Miah sold 1 decimal of land to Sukur Miah by deed No. 1702 dated 04.03.1980. Nur Miah, Mamataz Begum and Feli Bibi of heirs of Elim Chand were not made parties in the suit.

Hossain Ali purchased 1.5 decimals of land from Elim Chand and earlier he got from his father Samed Ali 1.0533 decimals of land thus, he acquired 2.5533 decimals. Thereafter, he sold 1.5 decimals of land to Md. Sukur Miah by deed No. 7803 dated 31.10.1961. Then Hasan Ali again

sold 4 decimals of land then Sukur Miah by deed No. 94 dated 07.01.1987. Samed Ali's daughter Abeda, Ashia gifted 1.06 decimals of land to Sukur Ali. Sahanur also sold 1 decimal of land to Md. Sukur Miah by deed No. 930 dated 23.03.1988 though she was entitled to sell 0.53 decimal. Thus, Sukur Miah acquired 6.196 and his wife Halima Khatun acquired 1.50 decimals of land total 7.696 decimals. Sukur Miah and Habiya Khatun died, leaving behind 6 sons namely, Fazal, Rahmani, Islam, Alauddin, Awlad and Anwar and 3 daughters namely, Razia Begum, Nurzahan Begum and Zahanara Begum. Thereafter, Ali Islam died, leaving behind his wife Rahima, 2 sons namely, Jamil and Econ and daughter Rina Akter. They mutated their names under Mutation Case No. 943/2002-2003 dated 21.06.2003. Though they are owners of 7.696 decimals of land but they are enjoying and possessing 8.56 decimals of land by paying rent.

During the preparation of C.S. record of right it was wrongly recorded in the name of Chand Miah and Tara Miah; Chand Miah and Tara Miah never owned and possessed the suit land and during the preparation of S.A. record of right it was recorded in the name of Sukur Miah two *annas*, Hossain Miah two *annas*, Tara Miah two *annas*, Habiba Khatun two *annas*, Abdul four *annas*, Abdul Kader two *annas*, Abdul Malek two *annas* and thereafter during preparation of last R.S. record of right under R.S. *Khatian* No.187 it was recorded in the name of Sukur Miah 2 *annas* 10 *gondas*, Hossain Miah 2 *annas* 10 *gondas* and Tara Miah two *annas* and 10 *gondas* and in the name of other co-sharers. The property had not been partitioned by metes and bounds amongst the co-sharers. The defendants are the owners of 8.56 decimals of land and as such, they prayed for a

saham of 8.56 decimals of the suit land by depositing court fees amounting to Taka 200/-.

In order to dispose of the suit, the learned Judge of the trial Court framed as many as 06 (six) different issues. To support the case, the plaintiffs examined as many as 05 (five) witnesses while the defendants also examined 05 (five) witnesses. The plaintiffs and the defendants also produced several documents which were also marked as exhibits '1-6' and exhibits 'Ka-Cha' series respectively.

Upon hearing the parties and on perusal of the pleadings and evidence, the learned Joint District Judge, First Court, Munshigonj decreed the suit on contest against the contesting defendant nos. 1-2 and 4-6 and *ex parte* against the rest and allotted *saham* of 9.1066 decimals of land in favour of the plaintiffs and 2.56 decimals of land in favour of defendant Nos. 1 to 11.

Being aggrieved by and dissatisfied with the said judgment and decree dated 01.10.2014 the defendants as appellants preferred this appeal before this Court.

Mr. Md. Abdus Sabur Khan, the learned Advocate appearing for the appellants upon taking us to the impugned judgment and decree as well as the documents so appended to the paper book at the very outset contends that the plaintiffs have failed to establish their case through credible oral and documentary evidence but the learned Joint District Judge passed the impugned judgment and decree on the basis of misconception of law and facts which is bad in law and as such the impugned judgment and decree dated 01.10.2014 is liable to be set aside.

He next contends that the predecessor of the plaintiff No.1, Abdus Sattar Mia and plaintiff No. 2 instituted Title Suit No. 36 of 1991 before the learned Sub Ordinate Judge, Munshiganj seeking partition which was dismissed for default. Thereafter, Abdus Sattar Mia and Abdul Jabbar Mia, plaintiff No. 2 filed Miscellaneous Case No. 13 of 1994 which was also dismissed but no further steps were taken by them. Consequently, the judgment passed in Title Suit No. 36 of 1991 remains in force. Since the parties involved are the same relating to the same suit land, Title Suit No. 70 of 2008 is barred by the principle of *res judicata*.

He further contends that, in Title Suit No. 36 of 1991, the cause of action was shown on 10.02.1991, but after 17 years, the plaintiff filed Title Suit No. 70 of 2008 showing cause of action occurred on 10.02.2008 and prayed for a declaration of title and partition, which is barred by limitation. Moreover, the plaintiffs have knowledge about S.A. and R.S. record, notwithstanding they showed the cause of action on 10.02.2008, but the Court below decreed the suit upon misconception of law.

Referring to Exhibit-2, deed No. 8264, Exhibit-3, deed No. 7342 and Exhibit-4, deed No. 7802 the learned counsel argues that the evidence clearly shows that the suit property was previously partitioned and there is no necessity for another partition and as such, no cause of action arose to make partition of the said suit property again and hence, the suit is not maintainable in its present form.

The learned counsel further contends that, the heirs of Sonaban, daughter of Yeakub Ali, Elim Chan's son Nuru Miah and his daughter

Mamataj Begum and the heirs of Feli Bibi were not made parties to the Suit, so the suit is bad for defect of parties and not maintainable.

He next argues that PW2 and PW3 in their respective evidence admitted that the defendants have been in possession for approximately 10-11 decimals of the suit land but the trial Court failed to address that crucial admission, in the impugned judgment though it is now well settled that in a suit seeking declaration of Title with partition, possession must be proven without which a Court cannot grant title or ownership to the Plaintiff. Since the plaintiffs are not in possession of the suit land and hence, the judgment and decree passed by the trial Court is not tenable in the eye of law.

The learned counsel argues that the defendants-appellants have been paying rent for 8.56 decimals of suit land and the relevant documents were produced before the trial Court as exhibits and at that time no objection was raised from the plaintiffs-respondents. On the contrary, the plaintiffs failed to produce any rent receipt, DCR etcetera to prove their title and possession and as such the appeal will be allowed.

He further contends that the suit land originally belonged to one, Delbor Ali and Delbor died, leaving behind Mohammad Toki; Toki died, leaving behind Bechu Munshi, but C.S. *Khatian* was wrongly recorded in the name of Tara Mia and Chand Mia for four *annas* each and Bechu Munshi for eight *annas*, but the plaintiff did not prove the C.S. record. The plaintiff produced an index (Exhibit-5) where no description of property was mentioned and nowhere it is found that Bechu Munshi transferred the property to his grandsons, Chand Mia and Tara Mia but the trial Court after

considering Exhibit-5, opined that Bechu Munshi transferred the suit property and as such the judgment and decree is liable to be set aside.

He next submits that, the trial Court did not give *saham* to the defendants as per their claim rather, it gave 2.56 decimals of land as *saham* instead of 8.56 decimals of land which is a misreading of the evidence and as such the judgment and decree is liable to be set aside.

He further contends that, as per C.S. *khatian*, the appellants were the owners of 8.56 decimals of land out of 19 decimals of land, but the trial Court, in its judgment and decree gave the plaintiff 9.1066 decimals of land and gave *saham* to the defendant Nos. 1-11 for 2.56 decimals of land that is, $9.1066 + 2.56 = 11.66$ in total but the rest 8.34 are unspecified and did not allot any *saham* to any of the defendants and as such the judgment and decree is liable to be set aside.

He further contends that, the appellants are the heirs of Sukur Mia, son of Samed Ali. They owned and possessed 1.59 decimals as heirs of Sukur Mia. The appellants are entitled by deed No. 7808 1.50 decimals, deed No. 94 1.05 decimals, deed No. 930 1.06 decimals, deed No. 1702 1.00 decimals and deed No. 4616 1.50 decimals Total $(1.59 + 1.50 + 1.05 + 1.06 + 1.00 + 1.50) = 7.70$ decimals but the Court below gave *saham* 2.56 decimals of land which has no legal basis.

Finally, he submits that the impugned judgment and decree is bad in law and thus liable to be set aside and the appeal be allowed.

Per contra, Mr. Subrata Shaha, the learned Advocate appearing for respondent Nos. 1-2 vehemently opposes the contention advanced by the learned Advocate for the appellants and contends that it is admitted that

Title Suit No. 36 of 1991 was dismissed for default and no steps were taken thereafter. Since the suit was not dismissed on the merit after a full hearing, *res judicata* does not operate as a bar to file a subsequent suit.

He further argues that upon having knowledge from the certified copy of the R.S. record on 10.02.2008 that the record was incorrect, the cause of action arose afresh and they instituted the suit and the same is not barred by limitation.

Mr. Shaha next contends that the S.A. and R.S. records were not prepared following C.S. record and hence the trial Court very correctly observed that S.A. and R.S. records are wrong and inaccurate and as such the appeal is liable to be dismissed.

He further contends that PW2 and PW3 have successfully proved that the plaintiffs have been in possession of the suit land and DW1 also testified that Chan Miah and Tara Miah possessed 50% of the suit land and thus there is no illegality or infirmity in the impugned judgment and decree and hence the appeal is liable to be dismissed.

He next contends that C.S. *Khatian* No. 129 was recorded in the names of Bechu Munshi in 8 annas share and also in the names of Chand Miah and Tara Miah in 4 annas share each in respect of 19 decimals of land; i.e. Bechu Munshi got 9.50 decimals of land and Chand Miah and Tara Miah each got 4.75 decimals of land. Chand Miah and Tara Miah were the grandsons of Bechu Munshi and their father's name is Samed Ali. Bechu Munshi died leaving behind 4 (four) sons namely Samed Ali, Yeakub Ali, Abdul and A. Jabbar to succeed him.

Mr. Saha next contends that after the death of Bechu Munshi, his 9.50 decimals of land devolved upon his 4 (four) sons namely Samed Ali, Yeakub Ali, Abdul and A. Jabbar in equal shares and each of them got 2.375 decimals of land. C.S. recorded tenant Chand Miah, son of Samed Ali, was the owner of 4.75 acres of land out of 19 decimals of land in his share who died issueless leaving his father Samed Ali to succeed the aforesaid 4.75 decimals of land. In the aforesaid way, Samed Ali got 2.375 decimals of land from his father and 4.75 decimals of land from his deceased son namely, Chand Miah i.e. Samed Ali became the owner of $2.375+4.75= 7.125$ decimals of land. It is to be specifically noted that defendant No.5 Anwar Hossain as DW1 admitted in his cross examination that "সামেদালী বেচু হতে ও পুত্র চান্দ মিয়া হতে মোট ৭.১৩ শতক মালিক ছিল।"

Mr. Saha further contends that Samed Ali died leaving behind 03 (three) sons, namely Hossen, Sukur and Tara and 3 (three) daughters, namely Abeda, Shaheda and Ashia and this fact has also been admitted by the defendants in their written statement. After the death of Samed Ali, his 3 sons got 1.5833 decimals of land each and 3 daughter's got .79 decimals of land each.

Mr. Saha next contends that in the aforesaid way, Tara Miah got 4.75 decimals of land as C.S. recorded tenant in respect of his 4 *annas* share and he also got 1.5833 decimals of land from his father Samed Ali. Moreover, Tara Miah purchased 2 decimals of land by a registered deed bearing No. 8264 dated 15.11.1947 (Exhibit-2) from Elim Chand, son of Yeakub Ali, who is the son of Bechu Munshi. But Elim Chand actually got 1.5833 decimals of land from his father namely, Yeakub Ali, as Yeakub Ali had a

daughter namely, Sonavan and as such Tara Miah though purchased 2 decimals of land from Elim Chand, but he actually got 1.5833 decimals of land. Ashia got .79 decimal land from her father Samed Ali and she transferred .19 decimal land by way of gift to Tara Miah, 0.20 decimal land to Sukur Miah, 0.20 decimal of land to Hossen Ali, 0.10 decimal land to Abeda and 0.10 decimal of land to Shaheda. Tara Miah also purchased 1 decimal of land by a registered sale deed bearing No.7802 dated 31.01.1961 (Exhibit-4) from Hossen Ali (son of Samed Ali) and it is to be noted that the father of defendant Nos. 1-7 namely Sukkur Chand Miah was an attesting witness in the aforesaid deed.

In the aforesaid way, Tara Miah became the owner of 4.75 decimals + 1.5833 decimals + 1.5833 decimals + 0.19 decimals + 1 decimal of land that is 9.1066 decimals of land in total and the trial Court has thus rightly allotted 9.1066 decimals of land in favour of the plaintiffs.

He next contends that, Tara Mia transferred $9\frac{1}{2}$ decimals of land in favour of his two sons, namely A. Sattar (father of plaintiff No. 1) and A. Jabbar (plaintiff No. 2) by a registered *heba* deed being No.7341 dated 25.11.77 (Exhibit-3). But as Tara Mia was the owner of 9.1066 decimals of land, the learned Judge of the trial Court rightly held that A. Sattar and A. Jabbar actually got 9.1066 decimals of land. Subsequently A. Sattar transferred his share of land to plaintiff No.1 by a *heba* deed being No.3165 dated 09.08.2005 (Exhibit-6). The learned Judge of the trial Court rightly held that plaintiff No. 1 got 4.55 decimals of land. In the aforesaid way, plaintiff Nos. 1 and 2 got 9.1066 decimals of land and the trial Court correctly allotted them the aforesaid land in their *saham*.

With those submissions, the learned counsel finally prays for dismissing the appeal by affirming the judgment and decree passed by the trial Court.

We have heard the learned counsels for both parties, perused the impugned judgment and decree, the memorandum of appeal, as well as other materials on record.

Ongoing through paragraph 12 of the plaint, it appears that the plaintiff No. 1, Abdus Sattar Mia and plaintiff No. 2 instituted Title Suit No. 36 of 1991 before the learned Sub Ordinate Judge, Munshiganj, seeking partition which was dismissed for default. Thereafter, Abdus Sattar Mia and Abdul Jabbar Mia, plaintiff No. 2 filed Miscellaneous Case No. 13 of 1994 which was also dismissed. No further steps were taken by them. So, the appellant claimed that since the judgment passed in Title Suit No. 36 of 1991 remains in force and since the parties involved therein are same in respect of the same suit land, then Title Suit No. 70 of 2008 is barred by the principle of *res judicata*. On the other hand, it appears from the written statement that the defendants prayed for *saham* of 8.56 decimals of land instead of dismissal of the suit. So, it is our considered view that since Title Suit No. 36 of 1991 was not dismissed on merits after a full hearing, *res judicata* will not operate here as a bar to file a subsequent suit. Moreover, the cause of action to file a partition suit always subsists.

The learned Counsel for the appellant contends that, in Title Suit No. 36 of 1991, the cause of action was shown on 10.02.1991, but after 17 years the plaintiff filed Title Suit No. 70 of 2008 showing cause of action occurred on 10.02.2008 by praying for a declaration of title and partition

which is barred by limitation. We find that Title Suit No. 70 of 2008 is also filed for declaration to the effect that the preparation of R.S. record is wrong so, the plaintiffs showed the cause of action on 10.02.2008 when their title was denied and moreover the defendants also prayed for *saham* in the partition suit hence the partition suit is well maintainable.

The learned counsel for the appellant contends that the heirs of Elim Chand were not made parties and as such the suit is barred by defect of parties. However, we find that Elim Chand sold 2.00 decimals of land to Tara Miah by deed No. 8264 dated 15.11.1947 and since he has no interest in the suit land, there is no need to make party of the heirs of Elim Chand. So the question of defect of parties does not arise.

We also find that the plaintiffs instituted the suit challenging R.S. record No.187 but the trial Court framed issue No. 5 mentioning whether S.A. and R.S. records are wrong or not and consequently observed that S.A. and R.S. records are wrong. It was the duty of the defendants to show in accordance with their claim that the C.S. record having the presumption of correction was wrong. The defendants failed to establish that C.S. record is wrong.

Further, it appears from Annexure-Ga series that 8.56 decimals of suit land was mutated in the name of defendants-appellants, Fazal Karim and 8 others under Mutation Case No. 943 of 2002-03 dated 21.06.2003 and Duplicate Carbon Receipt (DCR) was issued on 29.06.2003 in their names and they paid rent for 1401-1409 and 1416 BS respectively. When Annexure-Ga series were produced before the trial Court and marked as exhibits by the defendants, no objection was raised by the plaintiffs.

The plaintiff asserted that the suit land, measuring 19 decimals originally belonged to one, Bechu Munshi, who gifted 9.5 decimals thereof to his grandsons, Chand Mia and Tara Mia. Consequently, C.S. *Khatian* No. 129 was prepared in the names of Bechu Munshi, Chand Mia and Tara Mia, both sons of Samed Ali. PW1, Ahsan Ullah and PW2, Mobarak Hossain, in their respective examinations-in-chief, corroborated this assertion. PW1 stated that Bechu Munshi has gifted 50% share, that is 4.75 decimals each, to Chand Mia and Tara Mia by deed No. 4525 of 1910. He further deposed that the volume of the said deed was unavailable; however, he produced an index relating thereto, which was exhibited and marked as Exhibit-5. At the time of producing Exhibit-5, the defendants did not raise any objection.

DW3, Shahinur Begum, in her cross-examination, stated that she had heard that Bechu Munshi had gifted land to his grandsons. She further stated that Chand Mia and Tara Mia enjoyed equal portions of the land. In view of the above, the trial Court has rightly observed that, “বিবাদী পক্ষের ডি.ডব্লিউ-৩ শাহেনুর বেগম তার জেরায় উল্লেখ করেন যে, বেচু মুন্সি নাতিদেরকে জমি দেন শুনেছেন। অপরদিকে বাদী পক্ষ হতে বেচু মুন্সি কর্তৃক চান মিয়া বরাবরে হস্তান্তরিত একটি ইনডেক্স এর কপি দাখিল করা হয়েছে। যা প্রদর্শনী-৫ চিহ্নিত হয়। ডি.ডব্লিউ-৩ এবং প্রদর্শনী-৫ দৃষ্টে বেচু মুন্সি কর্তৃক তার নাতি চান মিয়া ও তারা মিয়া বরাবর হস্তান্তরের বিষয়টি প্রমাণিত হয়। এমতাবস্থায় বিবাদী পক্ষ চান মিয়া ও তারা মিয়ার নামে সি.এস খতিয়ান ভুল ভাবে রেকর্ডভুক্ত হয়েছে মর্মে দাবী করেছেন তা সঠিক নয় মর্মে প্রমাণিত হয়েছে।” It appears from the record that C.S. *Khatian* No. 129 was never challenged by the defendants. So, the suit land ought to be partitioned in accordance with the C.S. record.

According to C.S. record out of 19 decimals of land, Bechu Munshi was the owner of 9.50 decimals, Chand Miah 4.75 and Tara Miah 4.75 decimals of land. After the demise of Bechu Munshi, his 4(four) sons namely Samed Ali, Yeakub Ali, Abdul and Abdul Jabbar got 2.375 decimals of land each. When after demise of Chand Miah, his father namely Samed Ali acquired $(4.75 + 2.375) = 7.125$ decimals and then Samed Ali died leaving behind 3(three) sons namely, Hossain Ali, Sukur, Tara Miah and 3(three) daughters namely Abeda, Shaheda and Ashia and thereby 3(three) sons got 1.5833 decimals of land each and 3(three) daughters got 0.79 decimal of land each. Ashia transferred her land to Tara Miah, 0.19 decimal, 0.20 to Sukur and Hossain Ali and 0.10 decimal to Abeda and Shaheda. Hossain Ali transferred 1 decimal land to Tara Miah by deed No. 7802 dated 31.10.1961 (Exhibit-4). Elim Chand, son of Yeakub Ali sold 2 decimals of land to Tara Miah by deed No. 8264 dated 15.11.1947 (Exhibit-2) though Elim Chand was the owner of 1.5833 decimals. Thus Tara Miah became the owner of $(4.75 + 1.5833 + 0.19 + 1 + 1.5833) = 9.1066$.

Thereafter, Tara Miah gifted 9.50 decimals of land to his 2(two) sons namely, Abdul Sattar and Abdul Jabbar (Plaintiff No. 2) by *heba* deed No. 7341 dated 25.11.1977 (Exhibit- 3). Subsequently, Abdus Sattar gifted 4.75 decimals of land to Ahsan Ullah (Plaintiff No. 1) by *heba* deed No. 3165 dated 09.08.2005 (Exhibit- 6). Since Tara Miah was the owner of 9.1066 decimals of land. So, plaintiff No. 1 is entitled to 4.5533 and plaintiff No. 2 also entitled to 4.5533 decimals. Hence, we find that the trial Court rightly decreed 9.1066 decimals of land in favour of the plaintiffs.

It also appears from the evidence of DW1, defendant No. 5, namely Anwar Hossain who deposed that they are the owners of 8.56 decimals of land and prayed for *saham* of the same. DW2, Mahbub Hossain who is neighbour of the plaintiff and defendants stated in his deposition that there are four rooms belong to Fazal Miah in the suit land. It also appears that PW2, Mobarak Hossain in his cross-examination stated that "আমি নালিশী ভূমিতে পৈত্রিক সূত্রে মালিক হই। ভোগ দখলে আছি। আমরা ৪ ভাই। আমরা শুনছি ৪০ শতকের মালিক নালিশী ভূমির। সত্য নয় যে S.A. ও R.S. পর্চা মিথ্যা। আমার সম্পত্তি ভাইকে দিয়ে দেই মামলার আগে। বিবাদী ফজলকে চিনি। তারা মালিক ২/৩ শতকে। কিন্তু পুরো জায়গায় সাতার ৪/৫ শতক দখলে। ফজল অর্ধেক বাড়িতে দখলে আছে।" So it is very much clear that Fazal that is the defendants owned and possessed some portion of the suit land. PW3 in his examination-in-chief also stated that the defendants also owned and possessed few portion of land.

Defendant No. 1 Fazal, Defendant No. 2 Raham Ali, Defendant Nos. 4-13 are Awlad, Anowar, Rezia Khatun, Nurjahan, all heirs of Sukur Miah, Rahima Khatun, Zamil, Econ, Rina Akhter, heirs of Islam, Ridoy and Akhi, heirs of Abu Miah contested the suit by filing written statement. They claim that they are the owners of 8.56 decimals of land but the trial Court gave 2.56 decimals of land in favour of defendant Nos. 1-11.

It appears that Defendant Nos. 1-11 are the heirs of Sukur Miah who is the son of Samed Ali. Samed Ali got 2.375 decimals from Bechu Munshi as heir. Thereafter, Samed Ali got 4.75 decimals of land from his son, Chand Miah. Thus Samed Ali acquired $(4.75+2.375) = 7.125$ decimals of land. Samed Ali died leaving behind 3 sons namely Tara Miah, Sukur Ali and Hossain Ali and 3 daughters namely Abeda, Ashia and Shahinur

(Shahida). Thus, Sukur and his 2 brothers got 1.5833 each and each daughter got 0.79 decimal of land.

Sukur Miah purchased 1.0 decimal from Shahinur Begum by deed No. 930 dated 23.08.1988 (Exhibit-Gha 1) but Shahinur was owner of 0.89 decimal.

Elim Chand inherited 1.5833 decimals of land from his father Yakub Ali but he sold 2.00 decimals to Tara Miah by deed No. 8264 dated 15.11.1947. So, the subsequent deed No. 4616 dated 07.05.1949 (Exhibit-Ka) executed in favour of Hossain Ali and Habiya Khatun for 3 decimals of land is not valid. The contesting defendants claimed that Sukur Miah purchased 1 decimal from Yanush Miah, son of Elim Chand by deed No. 1702 dated 05.03.1980 (Exhibit- Cha) but this deed is also invalid because the father of the executants earlier sold his interest and for such reason, Yunus Mia acquired nothing to transfer by Exhibit-Cha.

Hossain Ali got 1.58 decimals from his father Samed Ali and got 0.20 from his sister Ashia, thus he acquired 1.78 decimals and he sold 1 decimal to Tara Miah by deed No. 7802 dated 31.10.1961 (Exhibit-4) and sold 1.50 decimals to Sukur Miah by deed No. 7803 dated 31.10.1961 (Exhibit-Ka 1). Since, deed No. 7803 was executed subsequently, so Sukur Miah got 0.78 decimal from Hossain Ali.

Sukur Miah purchased 04 decimals from Hossain Ali by deed No. 94 dated 07.01.1987 (Exhibit-Umma) which is totally invalid since at that time Hossain Ali had no ownership in the suit land.

Thus, Sukur Miah got 1.5833 decimals from his father, Samed Ali, 0.20 decimal from Sister Ashia by way of gift, 0.89 decimal from Shahinur

by purchase deed, 0.78 decimal from Hossain Ali in total 3.4533 decimals. So, the heirs of Sukur Miah and Islam are entitled to 3.4533 decimals of land. Thus the judgment and decree passed by the trial Court is liable to be modified.

Since the defendants did not pray for dismissal of the suit rather they sought for *saham* of 8.56 decimals of land by depositing advalorem court fees, so we are of the view that justice will be best served if we modify the impugned judgment and decree giving *saham* of 9.1066 decimals of land in favour of the plaintiffs and 3.4533 decimals of land in favour of the defendants who are the heirs of Sukur Miah and Islam.

Resultantly, the appeal is disposed of with modification, however without any order as to costs.

The plaintiffs would get 9.1066 decimals of land and the heirs of Sukur Miah and Islam would get 3.433 decimals.

The judgment and decree dated 01.10.2014 passed by the learned Joint District Judge, First Court; Munshiganj in Title Suit No. 70 of 2008 is hereby modified.

However, the defendants failed to establish that the C.S. record is wrong and it appears that R.S. *khatian* No. 187 is erroneous.

The parties are directed to make partition for their respective shares as stated herein above amicably within 60(sixty) days failing which they can get their respective *saham* in accordance with law.

Let a copy of this judgment along with the lower Court records be transmitted to the Court concerned forthwith.

Md. Mozibur Rahman Miah, J.

I agree.

Md. Ariful Islam Khan
Bench Officer