14 SCOB [2020] HCD

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 3179 of 2006
Md. Akram Ali and others
…..Petitioners
(Plaintiffs-Respondents)
-Versus-
Khasru Miah and others
….. Opposite parties
(Defendants-Appellants)

Mr. Tabarak Hossain with
Ms. Urmee Rahman, Advocates
For the Defendants-Appellants-Petitioners
Mr. Khalequzzaman with
Mr. Minal Hossain, Advocates
For the Plaintiffs-Respondents-Opposite parties

Judgment on : 01/06/2020

Present:
Justice Muhammad Khurshid Alam Sarkar, J.

Partition Suit or Title Suit, Ubi Jus ibi remedium, Section 54, Order 20, Rule 18 and Order 26, Rule 13, Joint tenants;
Simply remanding back the suit for proper evaluation of the much-discussed documentary evidences, there shall not be an effective adjudication of the suit.

Since in a partition suit, a person approaches the Civil Court with a grievance of not being able to enjoy his/her property absolutely or independently or peacefully and, in responding to the plaintiff's case, if the defendant questions the very title of the plaintiff, in that scenario, it is incumbent upon the Court to assess and determine the plaintiff's title, right and interest in the suit land.

If the plaintiff does not make proper prayer in the plaint, the suit must not be dismissed on the said ground; rather it would be the duty of the Court to frame appropriate issue/s on the basis of the pleadings and submissions put forwarded by all the parties to the suit and proceed with the suits towards its effective disposal.

JUDGMENT

Muhammad Khurshid Alam Sarkar, J.

1. An application under Section 115(1) of the Code of Civil Procedure, 1908 (CPC), at the instance of the plaintiffs-respondents-petitioners, engendered the instant Rule, which was issued on 20.08.2006 in the following terms:

> Let the record be called for and a Rule issue calling upon the opposite party No. 1 to show cause as to why the Judgment and Decree dated 10.04.2006 passed by the Second Joint District Court, Sylhet in Title Appeal No. 9 of 2002 allowing the appeal and sending back the suit on remand upon setting aside the Judgment and Decree dated 30.10.2001 passed by the Assistant Judge, Biswanath, Sylhet in Title Suit No. 61 of 2000 decreeing the suit in part, should not be set aside and or pass such other or further Order or Orders as to this Court may seem fit and proper.

Pending hearing of the Rule, let operation of the impugned Judgment and Decree dated 10.04.2006 passed in Title Appeal No. 9 of 2002 be stayed.

2. The background facts of issuance of this Rule are that the present petitioners and the opposite party No. 38, as plaintiffs, filed the Title Suit No. 61 of 2000 in the Court of Assistant Judge, Biswanath, Sylhet for partition of the suit land to get a saham (share in the land) of 0.1401 acres of land out of 0.41 acres of land described in the schedule to the plaint stating, *inter alia*, that the S.A. recorded owner of the suit plot No. 57 appertaining to Khatian No. 354 is Saifa Bibi, who died leaving behind 4 sons, namely, Abdul Mosobbir, Abdul Kaium, Abdul Mukit and 'Tular Bap' and 2 daughters, namely, Momina Bibi and Aymona Bibi (hereinafter referred to as "the Daughters"). Plaintiffs claim to have purchased the suit land from one of Saifa Bibi's son, named, Abdul Mosobbir and also from the heirs of Saifa Bibi's Daughters. The defendants Nos. 2-4 purchased their properties from Saifa Bibi's other 3 sons, namely, Abdul Kaium, Abdul Mukit and 'Tular Bap'. Defendant No. 1 got the land from the defendant Nos. 2-4 by executing an exchange deed dated 07.10.1999 and the defendant No. 1, after taking possession of the defendant Nos. 2-4's land, is now trying to grab more land than what he is entitled to. The plaintiffs on 10.07.2000 approached the defendant No. 1 to make partition of the land, but the defendant No. 1 and the other defendants did not pay heed to the same. Since the plaintiffs are entitled to a saham in respect of their share, they instituted this suit for partition.

3. Defendant No. 1 contested the suit by filing a written statement contending, *inter alia*, that S.A. recorded owner Saifa Bibi got the suit land against her dower money. She also inherited some other property as an heir of her husband late Idris Ali. All the properties left by Idris Ali and Saifa Bibi were divided among their heirs by way of mutual partition wherein the Daughters (Momina and Aymona) were not given any property from the suit land, but they were allocated their appropriate shares from other properties. Therefore, the heirs of the Daughters do not have any right to sell property from the suit Khatian to the plaintiffs. Moreover, two of the heirs of Momina and Aymona executed a *'Na-Dabi Patra'* (deed of waiver) in favour of the defendant No. 1 stating that they shall not claim any property from the suit plot. It was the further case of the defendants that by a registered deed of exchange, they got 0.31 acres of land and have been enjoying the same to the knowledge of all co-sharers, including the plaintiffs and no one ever raised any question on the ownership of the defendant No. 1 in the last more than one and half years.

4. During the course of trial, the plaintiff examined 5(five) witnesses (PWs) and the defendants examined 5 (five) witnesses (DWs) and while the plaintiffs produced documentary evidence by marking them as Exhibit 1-2 series and 3-4 series, the defendants produced documentary evidence upon marking them as Exhibit Ka, Kha, Ga series, Gha, Uma series and Cha series. The trial Court decreed the suit in part by granting saham of 0.1162 acres of land out of the claim of 0.1401 acres of land to the plaintiffs by the Judgment and Decree dated 30.10.2001 holding that although it was the case of the defendants that the heirs of Saifa Bibi divided the suit land by way of mutual partition where Saifa Bibi's Daughters were not allotted any saham from the suit land, however, the defendants failed to produce any documentary or oral evidence in support of such mutual partition and they could not prove which land was given to the Daughters (Momina and Aymona) and, as such, the mutual partition being not proved, the Daughters are entitled to get their shares from the suit land; that the plaintiffs claimed little more land than what they are entitled to get from the shares of 1(one) son and the Daughters of Saifa Bibi. Therefore, they are entitled to get a decree in part; defendant No. 1 would not get any more than the shares what the 3(three) sons were entitled to get.

5. Being aggrieved the opposite party No. 1, as the appellant, preferred Title Appeal No. 09 of 2002 in the Court of District Judge, Sylhet, which on transfer was heard by the Second Joint District Judge Court, Sylhet. The learned Judge of the Appellate Court by his Judgment dated 10.04.2006 allowed the appeal and, upon setting aside the Judgment and Decree passed by the trial Court, sent back the suit on remand with a direction for passing a fresh Judgment upon giving the parties an opportunity to get necessary steps in the light of the appellate Court's findings that the Daughters of Saifa Bibi got shares in other lands, not in the suit land; that there are some other joint properties which should be included in the plaint; that defendant No. 1 can claim a case of adverse possession regarding the excess land he is possessing in the light of the decision reported in 45 DLR 451; that the trial Court committed an error in deciding the partition suit violating the general principle of partition suit which requires incorporation of all the joint properties in a partition suit and giving decision basing on a cited decision of the Hon'ble Appellate Division given by way of an exception to the general rule for partition, which does not fit in the instant case.

6. Ms. Urmee Rahman, the learned Advocate appearing for the plaintiffs-petitioners, takes this Court through the Judgments passed by the trial Court and the appellate Court and submits that both the Courts below concurrently came to the findings that there is no common interest of the plaintiffs and defendant No. 1 in any other land except the suit plot, yet the appellate Court sent the case on remand to the trial Court which has resulted in an error in passing the impugned decision occasioning a failure of justice. She, then, refers to the case of Abdul Kader Khalifa Vs Suja Bibi and others 52 DLR (AD) 34 and the case of Mir Shariatullah Vs Abdur Rahman 8 DLR 645 and submits that it is the settled principle of law that where the parties to the suit have no common interest in a particular property, such property does not need to be included in the schedule of the partition suit. Her second count of submission is that the appellate Court made out a third case of adverse possession in favour of the defendant No. 1 which is beyond the pleadings as because the defendant No. 1 did not set up a case of adverse possession and as such the impugned Judgment is perverse in the eye of law. In support of the above count of submission, she refers to the cases of Noropoma Ritchel Vs Mohammad Abdul Jalil 41 DLR 467, Bijoy Kumar Sarabidya Vs Government of Bangladesh 5 ADC 44 and Lal Banu & others Vs Md. Yasin Abdul Aziz 42 DLR 335. By placing the facts of the case of Shah Alam and others Vs Masuma Khatun & other 45 DLR 541, she submits that though the appellate Court relied very much on the afore-cited decision in remanding the suit, but the case of 45 DLR has no manner of relevance in the instant case inasmuch as the facts are completely different from the facts of the present case. Her third count of submission is that the appellate Court sent the case on remand to the trial Court in a whimsical manner which is not in conformity with the provision of the law engraved in the CPC and hence the appellate Court's Judgment is liable to be set aside, because it is a settled principle of law that when the trial Court after framing the issues and giving parties an opportunity to adduce evidence disposes of the suit on merit, the appellate Court cannot remand the case back to trial Court for disposal on merit afresh. In support of her above count of submissions, she refers to the case of Hosne Ara Begum & others Vs Montaj Ali and others 55 DLR (AD) 20 and Madinullah Miah Vs Abdul Mannan 54 DLR 507. By referring to the case of Begum Syeda Marguba Khatoon Vs Dewan Shafiur Reza Chowdhury & another 30 DLR 179 and the case of Zehad Ali Vs Kharshed Ahamed and others 41 DLR 336, she submits that mere disagreement with the findings of the trial Court is no ground for the appellate Court to send the case back on remand when the evidence on record is sufficient to decide the matter finally. Lastly, she submits that the impugned decision is not a proper Judgment of reversal in the light of the provision of Order 41 Rule 23

of the CPC and, therefore, the same is liable to be set aside and, accordingly, she prays for making the Rule absolute towards upholding and maintaining the trial Court's decision.

7. Per contra, Mr. Minal Hossain, the learned Advocate appearing for the defendant-opposite party, contends that in view of the fact that Saifa Bibi had inherited some other lands on top of owning the suit land of 0.41 acres of land and after her death her 4 sons and 2 daughters inherited the same; that by amicable partition, while 4 sons got the suit land with a share of .1025 each, the Daughters were given their respective sahams from the other lands of Saifa Bibi; that the defendant Nos. 2-4 purchased some land of the suit property and exchanged 0.31 acres of land with defendant No. 1 which is in north portion of the suit land and defendant No. 1 was possessing the same within the knowledge of all, including the plaintiff, therefore, the trial Court committed an error in not considering the fact of partitioning the suit land among the four sons of Saifa Bibi and subsequent sale of their respective portions among themselves and exchange of 0.31 acres of land therefrom. He next submits that since all the successors of Saifa Bibi have every right, title and interest in her entire left-out land, therefore, one particular plot cannot be partitioned within some co-sharers without bringing every co-sharer in all the land, so that Saifa Bibi's entire properties are included in the suit. He forcefully submits that it is the general provision for a partition suit that the whole properties of the person from whom the contending parties are claiming their respective sahams must be brought in the hotchpotch and this general provision cannot be avoided and, which is why, the appellate Court rightly has sent the suit on remand with necessary instructions to pass a fresh Judgment. He lastly submits that since there is a dispute regarding title among the parties, the plaintiffs ought to have prayed for declaration of their title in the suit land and, as a consequential relief, could have prayed for dividing the suit land by metes and bounds; but they instituted 'Partition Suit', instead of filing a 'Title Suit'. In elaborating his above count of submission, he professes that partition suit is filed for partitioning of a joint estate or co-ownership or tenancy-in-common among the co-sharers or co-owners who do not raise any dispute with regard to any one's title but, here in this suit, the plaintiffs and the defendants are not joint tenants or co-owners, because the four sons of Saifa Bibi are no more owning or possessing any piece or part of the suit land as co-owners and, for the aforesaid reason, the plaintiffs ought to have instituted a Suit for Declaration of Title, instead of filing a Partition Suit. In support of above submissions, he refers to the cases of Mobinnessa Vs Khalilur Rahman 37 DLR (AD) 216, Md. Shahidul Alam Khan Vs Md. Gulzar Alam 36 DLR 290 and Shashi Kumar Vs Sreemati Kusum Kumari Debi 34 DLR 127.

8. After hearing the learned Advocates for both the sides, perusal of the Judgments of the Courts below in tandem with the papers and documents contained in the Lower Court Record (LCR) and upon examining the statutory provisions as well as the case-laws placed before this Court, it appears to me that for a fair and effective disposal of this Rule, the followings issues are needed to be adjudicated upon by this Court : (1) whether there is any legal requirement to name a suit as 'Partition Suit', 'Title Suit', 'Other Class Suit' etc, and whether due to wrong nomenclature of a 'Title Suit' as a 'Partition Suit' or vice-versa, a Civil Suit could be questioned to be not maintainable, (2) whether in any type of Civil Suit, if a relevant prayer is omitted or a wrong prayer is made, the suit is liable to be dismissed, (3) in a suit for partition, (a) whether it is a mandatory duty for the plaintiff to make a specific prayer for declaration of her/his title in the suit land or, in other words, what should be the ideal form of prayer/s in a suit for partition, (b) whether all the properties of the persons from whom the contending parties have inherited or purchased their claimed portion of land are to be brought in the hotchpotch, (c) whether the footing of a joint tenant, a co-owner and a co-tenant are the same; in other words, what are the core features to be looked into a suit for partition of

immovable property, (4) what are the principles governing the issue of 'sending a suit on remand' and (5) what are the laws regarding 'adverse possession'?

9. The instant suit was filed in the Court of Assistant Judge, Biswanath, Sylhet with a prayer for partition of the plaintiffs' claimed portion of 0.1401 acres of land. The suit was named by the learned Advocate for the plaintiffs as 'Partition Suit' and the Sheristadar (an administrative aid/officer of the Court) numbered the suit as T.S. No. 61 of 2000. No prayer was made by the plaintiffs for obtaining a declaration from the Court as to their title on the suit land. Let me now see whether because of naming the suit as 'Partition Suit', has there been any illegality warranting dismissal of the suit.

10. In order to know about the laws regarding 'institutions of suit', I find the provisions of Order IV of the CPC to be relevant, which provides that (i) a suit must be instituted through presenting a 'plaint' to the Court or its authorized officer and (ii) the particulars of the suit shall be recorded in the 'Register of Civil Suits'. Since Order VII of the CPC provides the details of a plaint, thus, in quest for names of suits, the same was also looked at by me. From a concurrent reading of the provisions of Orders IV and VII of the CPC, no one would get a clue about the nomenclature of a suit, except having a hint from Order VII, Rules 2 & 3 of the CPC that a particular type of suit should contain some specific averments, such as, *'in money suits: where the plaintiff seeks the recovery of money'* (Order VII, Rule 2) and *'where the subject-matter of the suit is immovable property'* (Order VII, Rule 3).

11. In an effort to trace out the legal back-up of characterization of the suits with different names, I went through the Civil Courts Act, 1887 together with the 'Manual of Practical Instructions for the Conduct of Civil Cases' issued by the High Court of Judicature at Fort William in Bengal in 1935, but neither the Act nor the Manual do contain any provision regarding naming of a civil suit. Then, I ventured to sort through the Civil Rules and Orders (popularly known as CRO) which are framed for the purpose of regulating the rules, procedures and working system of the subordinate Courts and I found a number of its provisions to be apposite for disposal of this case. Chapter 2 of the CRO deals with presentation and registration of plaint and I find rules 47 to 49 of the CRO to be relevant for the purpose of my on-going examination. And, from a minute perusal of the above provisions of the CRO, it appears that there are 'classifications of suits' (not - naming the suits), as shown in the specimen slip in rule 48, and for each class of suits there shall be separate volumes in addition to maintaining the General Register of suits and Filing Register of Suits, as stated in rule 49(2) and in the Note thereto. But no name or class of the suits is provided in the above-mentioned provision of the CRO. To this end, I felt that the 'Registers' might contain the names and classifications of the suits as spelt out in the preceding provisions and, accordingly, I looked at the relevant Chapter of the CRO which deals with the Registers. On carrying out further searching the CRO, I found out that Chapter 33 of the CRO contains the provisions regarding 'Registers' and rules 752 & 757, which are incorporated in this Chapter, appear to be apropos for adjudication of the present issue. After conducting a long searching hereinbefore, for the first time, rule 757(1) of the CRO while accouters two names of the suits, namely, (i) Title Suit and (ii) Others Suit, it also furnishes two classes of suits, which are (i) Suits for money and (ii) Suits for movables. Given that the 'Note' underneath the rule 752 states that the Registers are self-explanatory, I also looked at the two Forms mentioned in rule 757, namely, Register No. (R)1(i) and Register No. (R)1(ii), and it transpires that there are as many as 34 columns in both the Registers and while column No. 2 is allotted for 'Number of Suit', not a single column of the remaining columns speak about the naming or classification of suits.

12. In an expectation for obtaining further information on naming and classification of suits, I continued to go through the remaining provisions of the CRO and, out of them, only rule 769 appeared to me to be a bit beneficial for the purpose of the on-going scrutiny. Since the provisions of rule 769 require the subordinate Courts to file the 'Returns'/'Annual Statement', I was inquisitive to be familiar with their contents which are supposed to be contained in Form Nos. (S)11, as per the narrations made in rule 769(2). The aforesaid Forms mention about (i) Suit for money, (ii) Suit for movable property, (iii) Suit for recovery of rent under the Rent Law, (iv) Suit for enhancement of or abatement of rent under the Rent Law, (v) Suit for ejectment or recovery of possession under the Rent Law, (vi) Other Suits under the Rent Law, (vii) Suit for immovable property, (viii) Suit for specific relief, (ix) Mortgage Suits and (x) Other Suits not falling under any of the previous heads. The above-mentioned Forms do not supply the names of the suits except one (Mortgage Suit). However, at least, the information as to classification of many types of suits became surfaced from a codified-law. In fact, there is mentioning about the different nature of suits in Section 16 of the CPC, albeit the provisions of Section 16 of the CPC are not meant for providing the different class of the suits. Section 16 of the CPC seeks to show a suitor the appropriate Courts where a suit with regard to any immovable property should be filed. However, it apparently discloses the fact that there are many types of civil suits.

13. So, from the above marathon exercise (for apparently a trivial issue though) necessitating perusal of the overlong provisions of the CPC as well as that of the CRO and, side-by-side, upon glancing at the relevant Forms under the nomenclature of 'Filing Register of Suits', 'General Register of Suit', Return/Annual Statements prescribed by the CRO for the purpose of their mandatory use by the subordinate Courts, it appears that the law does not make any provision as to what would be the name of a suit for its particular nature. The plaintiff or the engaged Advocate of the plaintiff has simply been asked by the provisions of rule 48 of the CRO to write the 'classification of suit' in the 'slip of paper', which is required to be affixed to the top left-hand corner of the plaint's first-page. The purpose for obtaining the information as to classification of suits in the 'slip of paper' is to ease the administrative functions of the Court, so that the Court can record the said information in its 'Registers' and 'Annual Statements'. While the classification of suits, as reveals from the provisions of Section 16 of the CPC, rule 757(1) of the CRO and Form Nos. (S)11, & (S)12 appended to the Part 2 of the CRO, are amply useful for the aforesaid administrative purpose, naming the suits again by the litigants or Sheristadar as Title Suits, Money Suits, Mortgage Suits, Rent Suits, Eviction Suits, Other Class Suit etc appears to me to be pleonasm. Because since it is a well-established practice of drafting a plaint that at the very beginning of the averments of the plaint there should be a 'cause title'; meaning a brief statement about the reason for institution of the suit, that information should be sufficient for the Nazarat Section of the Court for classifying the suit as 'Suit for declaration of title', 'Suit for specific performance of contract', 'Suit for recovery of rent, etc. If there is really a need of naming the suit, the litigants, Advocates and Courts may use the simple expressions of 'Civil Suit' for all classes of substantive suits and 'Civil Miscellaneous Case' for all types of civil miscellaneous proceedings, such as, preemption case, application for restoration of the suit or any other miscellaneous application arising out of the substantive suit and, if the aforesaid practice is ushered/introduced, there would be no need to carry out further scrutiny by the Sheristadar or by the Court as to naming the suit appropriately, as happened in this case. In the case in hand, although the plaintiffs' Advocate had named the suit as 'Partition Suit', however, the Sheristadar recorded the suit as 'Title Suit'.

14. Be that as it may, if the plaintiff or the engaged Advocate fills in the line 'class of suit' engraved in the 'slip of paper' by taking into consideration the reason/purpose of institution

of the suit, which are outlined in Section 16 of the CPC, in other words, if the 'classification of suit' is written in the 'slip paper' on the basis of *'the facts constituting the cause of action'* and *'the relief which the plaintiff claims for',* as required by the law, namely, Order VII, Rule(1)(e) and Order VII, Rule(1)(g) respectively, to be set out in the plaint, then, the plaintiff's or the Advocate's obligation is deemed to be fulfilled. However, in compliance with the prevailing practice, when the plaintiff/Advocate names the suit as Partition Suit, Title Suit, Money Suit etc and, subsequently, upon carrying out scrutiny by the Sheristadar or by the Court if it appears to be mismatched with the class of the suit, usually, the Sheristadar of the Court or the learned Judge puts a befitting name relying on the plaint's averments plus prayer. It follows that when a suit is named by the plaintiff or Advocate as Partition Suit or Title Suit or Money Suit or Other Class Suit etc, s/he is required to do so by taking into consideration the averments regarding grievances for institutions of the suit in tandem with the prayers made therein. However, given that neither is there any coherent customary practice for designating a suit with a particular name, nor is there any mandatory legal provision requiring that a suit must be marked by a particular name, therefore, in my view, if a plaint is filed with a name mismatching with the plaint's averments and prayers i.e. with a wrong/unsuitable name, it cannot be a ground for non-maintainability of a suit.

15. With the above conclusion on the issue of naming of suits, I may take up the issue No. 2, namely, as to whether a suit is liable to be dismissed for making a wrong/inappropriate prayer or for not making prayer at all, since, evidently, in this suit no prayer was made by the plaintiffs for ascertainments of their title on the suit land. It is the requirement of the law, namely, Order VII, Rules 1 (e) & (g) of the CPC that the plaintiff must state his/her grievance in the plaint and, further, the plaintiff must seek the aspired relief. To this end, I find it pertinent to look at the provisions of Order VII, Rule 7 of the CPC. From the provisions of Order VII, Rule 7 of the CPC, it appears that the law binds a plaintiff and defendant to pray for relief in specific terms. In view of employment of the words *'……. the plaint <u>shall</u> contain ……'* in Order VII, Rule 1(g) and the words in Order VII, Rule 7 '……. *every plaint <u>shall</u> state specifically the relief which the plaintiff claims either simply or, in the alternative* ……..', the first presumption by this Court, without searching for and resorting to any case-laws, is that the above provisions are to be applied mandatorily. However, in the backdrop of not providing any consequence for failure to make specific prayer, it is incumbent upon this Court to find out whether the Court would be competent to grant a relief which has not been specifically asked for by the Court and what types of reliefs fall within the purview of 'general or other relief' as enshrined in Order VII, Rule 7 of the CPC.

16. In quest for an appropriate answer, upon skimming through a catena of case-laws of this subcontinent, which includes our jurisdiction, Privy Council and Indian jurisdiction, it appears to me that the principles laid down in the cases of Richard Ross Skinner Vs Kunwar Naunihal Singh (1913) LR 40 IA 105 (MANU/PR/0070/1913 – relevant para 17) and Kedar Lal Seal and another Vs Hari Lal Seal AIR 1952 SC 47- have consistently been followed by all the Apex Courts of this sub-continent till date.

17. In the case of Richard Ross Skinner Vs Kunwar Naunihal Singh (1913) LR 40 IA 105, it was opined by their Lordships of the Privy Council that although the plaintiff must ordinarily adhere to the claim as brought, the Court will depart from strict enforcement of this rule, where it is satisfied that justice will not be done between the parties if the suit was dismissed on a technical ground, with the prospect of further litigation for the determination of a controversy then substantially ripe for settlement.

18. In the case of Kedar Lal Seal and another Vs Hari Lal Seal AIR 1952 SC 47, the Indian Supreme Court held that:

> I would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to the other side, however clumsily or inartistically the plaint may be worded. In any event, it is always open to a Court to give plaintiff such general or other relief as it deems just to the same extent as it had been asked for, provided that occasions no prejudice to the other side beyond what can be compensated for in costs.

19. So, when a grievance or complaint or dispute is placed before a Court, the Court's primary duty is to consider its substance, which may be derived from not only the averments and prayer, but also from the evidence led by the parties at the trial. Because, considerations of form cannot override the legitimate considerations of substance. From the averments and/or prayer (pleadings), if it transpires that a plea is not specifically made but it is covered by an issue by implication, and it appears to the Court that other side would not be prejudiced; in other words, it is within the knowledge of the other side that the said plea was involved in the trial, then, the mere fact that the plea was not expressly taken in the pleadings would, in my opinion, not necessarily debar a party from relying upon it if it is satisfactorily proved by evidence. No doubt, it is the general rule that any relief should be based on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the general rule as to expressly taking a particular matter in the pleadings should be considered by the Court to be purely formal and technical. Therefore, the substance of the question is that when the question relates to the title of both the parties and evidence has been led about it and both the parties are aware of the same, the mere technicality that the issue was not expressed in the averments and prayer i.e. in the pleadings - is of formal nature, and that technicality should not be allowed to preclude the Court from granting the relief. That is to say, the vital question for the Court should be in dealing with such a situation is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that shall directly violate the provisions of the CPC. Because, to allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would cause prejudice resulting in injustice to another. All that I wish to state here that the settled principle on this point is that the Court cannot grant relief to the plaintiff in a case for which there was no foundation in the pleadings and which the other side was not called upon or had no opportunity to meet.

20. In this suit, the plaintiffs have merely made a prayer for partition of the suit land along with a prayer for granting 'general and other relief' using the stereotyped expressions of 'as the Court thinks fit and just'. Now, I need to go through the averments made in the plaint and written statement, evidence led by the parties and the trial Court's Judgment to see whether the question of declaration of the plaintiffs' title are covered up by the principles laid down hereinbefore on the provisions of Order VII, Rule 7 of the CPC. In other words, whether by the averments made in the plaint and by the evidence led by the parties at the trial, any surprise was sprung by the plaintiff upon the defendant; meaning that whether it was within the knowledge of the defendants that the question of title of the parties are going to be adjudicated upon in this suit.

21. From a careful perusal and examination of the averments made in the plaint, it is apparent that the plaintiffs have categorically raised the issue of their title in the suit land and,

in response thereto, defendant No.1, who is the only contesting defendant in this suit, has dealt with the issue of title in his written statement. Accordingly, the trial Court also having framed a specific issue on the question of title declared that the plaintiffs have got title and interest of 0.1162337 acres of land in the suit plot (নালিশা দাগে .১১৬২৩৩৭ একর সম্পত্তিতে বাদীপক্ষের স্বত্ত ও স্বার্থ আছে মর্মে সিদ্ধান্ত স্থাপিত হলো). The above scenario, thus, leads me to hold that although the plaintiffs missed/omitted to make specific prayer as to obtaining a declaration of their title from the Court in the plaint, but the trial Court has made an appropriate declaration as to the title of the plaintiffs and the defendants on the basis of the pleadings and the evidence led by both the parties.

22. The above conclusion leads me to embark upon the examination of the issue No. 3, namely, (a) what should be the ideal form of prayer in a suit for partition i.e. in addition to making a prayer for partition of the suit land, what are the other prayers the plaintiff needs to make and, in particular, whether seeking declaration of title by the plaintiff is necessary, (b) whether all the properties of the persons from whom the contending parties have inherited or purchased their respective portions of land are to be brought in the hotchpotch and (c) whether the footings of a joint tenant, a co-owner and a co-tenant are the same; in other words, I need to know what are the nuclei of a suit for partition.

23. Since there is no separate/independent procedural or substantive law for exclusively dealing with a suit for partition, the present suit is an usual Civil Suit under Section 9 of the CPC, like any other suits of civil nature and, therefore, its features depend on the particulars contained, averments made and the relief sought in the plaint as well as in the written statements. The scheme of Section 9 of the CPC is that when a natural/juristic person would find a dispute in the way of her/his enjoyment of any right of a civil nature, s/he is entitled to institute a civil suit in a competent Civil Court unless its cognizance is either expressly or impliedly barred by a statute. Section 9 found its placement in our CPC in terms of the doctrine *Ubi Jus ibi remedium*.

24. In course of dealing with the suits for partition of movable/immovable properties involving/requiring interpretations of the numerous civil laws, such as, the CPC (in particular, Section 54, Order 20, Rule 18 & Order 26, Rule 14 of the CPC), the Partition Act, 1893, (particularly its Sections 2, 3, & 4), the Transfer of Property Act, 1882 (particularly its Sections 44 to 47), the Suits Valuation Act, 1886 (particularly its Section 3, 8, 9 & 11), the Court Fees Act, 1870 (particularly its Section 7 and Article 17 of Second Schedule), the Estates Partition Act, 1897 (repealed), the Specific Relief Act, 1877 (particularly its Section 39 to 44 & 52 to 57), the Registration Act, 1908 (in particular its Section 17), the Limitation Act, 1908 (particularly its Article 127 of First Schedule) and various provisions of the State Acquisition and Tenancy Act, 1950 (SAT Act), the common-law jurisdictions, over the period of time, have set out some principles on the topic of 'Partition Suit'.

25. In an expectation to garner the nitty-gritty of the suit for partition, I contrived to sequentially look at all the above laws. In pursuance thereof, at first, I went through the provisions of Section 54 of the CPC. [After a minute reading of the above law, my understanding is that the above law impliedly provides provisions for declaration of title in a suit for partition. Moreover, since the Court is required to pass a decree, there is apparently a mandate upon the Court to deal with the issue of title of the plaintiff on the suit land.

26. Then, I looked at the provisions of Order 20, Rule 18 of the CPC, which is extracted below:

> Order 20, Rule 18 of the CPC: Decree in suit for partition of property or separate possession of a share therein: Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then, -
> (1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of Section 54;
> (2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required. (underlined by me).

27. The above law apparently dictates the Court to declare the rights of the parties to a partition suit, although it does not furnish any guideline for the Court as to what would be the contents of the pleadings of the parties and how to determine the title of the parties to a partition suit. The above law also seeks to provide the provisions as to the duties of the Court after passing a decree in a suit for partition of property. My overall understanding about the provisions of Order 20, Rule 18 is that since it is obvious that the Court has to pass a decree, the assessment and determination of title of the plaintiff in the suit property is a must-to-do work for the Court.

28. Then, comes the provisions of Order 26, Rule 13 of the CPC, which is reproduced below:

> Order 26, Rule 13 of the CPC: Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by Section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

29. It is to be noticed from the above law that nothing has specifically been provided to ascertain the title of the parties to a suit for partition. It is a provision for the Court to appoint a Commissioner, usually an architect, engineer or draughtsman or Advocate, for effecting partition or separation, following passing a preliminary decree in a suit for partition. However, the Court, without stating about the right, title and interest of the parties of the suit, cannot seek assistance of the Commissioner towards execution of the final decree.

30. Then, I took up the Partition Act and from a minute reading of the relevant provisions of the Partition Act, namely, Sections 2, 3 & 4, it appears that Section 2 states about the power of the Court to order sale of the suit property, instead of dividing the same, at the instance of the fifty percent or more sharers of the property; Section 3 prescribes the procedures when the sharers undertake to buy the suit property and Section 4 sets out the provisions to deal with a situation when the suit property is a dwelling house and the transferee, being not a family member, files a partition suit before the Court. So, although there is no provision in the Partition Act stating what should be the salient features of a partition suit, but the Court is impliedly shouldered with a duty to ascertain the right, title and interest of the plaintiff/s and defendant/s.

31. Thereafter, I embarked upon examination of Section 44 of the TP Act. From a minute perusal of the provisions of Section 44 of the TP Act, my understanding is that a transferee of the undivided property is entitled to enjoy the right of joint possession or to enforce its partition which the transferor was enjoying, subject to the conditions delineated in the second

part of the same Section as well as in Section 4 of the Partition Act. So, here in this law, a duty is cast upon the Court to adjudicate upon the right of enjoyment upon the title and interest of the transferee when s/he approaches the Court for enforcement of partition of the property. Although this right to enjoy the property by the transferee is dependent on the provision of the second part of Section 44 of the TP Act, the resolution of the dilemma, however, is provided in Section 4 of the Partition Act. From a plain perusal of the other relevant provisions of the TP Act, namely, Sections 45, 46 and 47 of the TP Act (for the sake of brevity, extractions of Sections 44, 45, 46 and 47 of the TP Act are avoided), it appears to me that Section 45 is about joint purchase of property; if at the time of jointly purchasing the property, shares are not specified, then, the presumption is that all of them own equal shares in the property. Section 46 of the TP Act is about transfer of immovable property for consideration by persons having distinct interests and when there would be a dispute about whether the transferors were entitled to get the equal share or proportionately to the value of their respective shares, the Court would have to adjudicate upon the issue of title. And Section 47 states that when several co-owners transfer a share without specifying as to the portion of shares from each of the transferors, the transfer would take place as per the proportion of the shares the transferors hold in the property.

32. Then, from a concurrent reading of Sections 3, 8, 9 & 11 of the Suits Valuation Act together with the provisions of Section 7 & Article 17 of the Second Schedule of the Courts Fees Act, I find the solution of the problem as to whether in a suit for partition of joint property by a person, claiming to be in joint possession thereof, jurisdiction is determined by the value of the share of the plaintiff in the property or the value of the joint property as a whole.

33. Thereafter, comes the relevant provisions of the SR Act. Sections 39 to 41 of the SR Act empowers the Court to cancel entirely or partially any written instrument, Section 42 equips the Court with a discretionary power of declaration as to legal status or right of any person which is made binding upon the parties of a suit by the provisions of Section 43, Section 44 is regarding appointment of receivers and by the provisions of Sections 52 to 57 of the SR Act, the Courts have been bestowed with the arms of granting various types of injunctions.

34. Section 17(1)(f) of the Registration Act makes it compulsory to register the 'Instrument of Partition' of immovable property effected by persons upon inheritance according to their personal laws.

35. The provisions of Article 127 of the First Schedule of the Limitation Act provides that then a person is excluded from joint family property, s/he may approach the Court to enforce her/his right to share therein within twelve years from the time when the exclusion became known to the plaintiff.

36. Lastly the provisions of the SAT Act were looked into to see whether any substantive or procedural law are provided to deal with the 'Partition Suits'. Section 89(5) of the SAT Act imposes a duty upon the Registering Officer as to serving notice upon the co-shares; Section 116 and 117 of the SAT Act contain the words 'separation' and 'amalgamation' upon providing specific meanings and their implications. By these two provisions, the co-shares have been made competent to apply to the Revenue Officer for 'amalgamation' as well as for 'separation' and, pursuant to allowing the aforesaid application, the power of execution of a partition/division has been vested in the Revenue Officer by demarcating the portion of land by remaining physically present in the partitioned-land. By Section 143(B) of the SAT Act,

after the death of a person, an instrument of partition prepared amicably by the inheritors shall be effective if the same is signed by all the concerned and duly registered.

37. After wrapping up the examination of the above relevant provisions of the CPC, Partition Act, TP Act, Suits Valuation Act, Court Fees Act, SR Act, Registration Act, Limitation Act and SAT Act, the conclusion to be arrived at is that since in a partition suit, a person approaches the Civil Court with a grievance of not being able to enjoy his/her property absolutely or independently or peacefully and, in responding to the plaintiff's case, if the defendant questions the very title of the plaintiff, in that scenario, it is incumbent upon the Court to assess and determine the plaintiff's title, right and interest in the suit land. Even, if the plaintiff is not opposed/encountered by the defendant as to title on the suit land, it would be a prudent performance for a Court to examine the source/basis of the plaintiff's as well as defendant's ownerships in the suit land and thereby determine the title of the plaintiff and the defendant/s. Because, it would not only be useful and helpful for the Court-appointed Commissioner or the Collector to proceed further with the suit towards execution of the decree, but it would also help to curb multiplicity of suits. That is to say, in a suit for partition or separation of a share, irrespective the defendant's challenge as to the plaintiff's share in the suit land, the Court, at the first stage, would decide whether the plaintiff has a share in the suit property and whether s/he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) of the CPC and termed as 'preliminary decree' under Order 20 Rule 18(2) of the CPC. The consequential division/separation by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Order 20, Rule 18(1) of the CPC and is the subject matter of the final decree under Order 20, Rule 18(2) of the CPC. A pivotal point to be noted from the wordings employed in Section 54, Order 20, Rule 18 and Order 26, Rule 13 that there is no provision in the law for filing an execution case in the suit for partition. Therefore, in a suit for partition, once the Court passes the preliminary decree (i.e. make a declaration as to saham of the plaintiff/s and defendant/s), it is incumbent upon the Court to proceed with the separation (i.e. the ministerial or administrative act) of the plaintiff's saham from other parties of the suit, without expecting/waiting for a formal application from the parties of the suit. It is to be noticed from the provisions of the CPC that the Legislature has used two different expressions, namely, 'partition' and 'separation' throughout the provisions of the CPC. Because, 'separation of share' is a species of 'partition'. When all joint tenants or co-owners or co-tenants get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several cotenants/co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother. Therefore, unless the other parties of the suit wish to be separated, only the plaintiff's properly would be separated by the Court's final decree.

38. So, the answer to the question, posed hereinbefore as to whether it is a mandatory requirement to pray for declaration of the plaintiff's title in a suit for partition is that - in a suit for partition, alongside making a prayer for declaration of plaintiff's title/share in the suit properties, there should also be a prayer for separation or division of the plaintiff's share by metes and bounds, and the Court shall frame, at least, three issues for disposing of a suit for partition. The said three issues are: (i) whether the person seeking division has got any title or

interest i.e. a share in the suit property/properties, (ii) whether s/he is entitled to the relief of division and separate possession and (iii) how and in what manner the property/properties should be divided by metes and bounds?

39. However, if the plaintiff does not make proper prayer in the plaint, the suit must not be dismissed on the said ground; rather it would be the duty of the Court to frame appropriate issue/s on the basis of the pleadings and submissions put forwarded by all the parties to the suit and proceed with the suits towards its effective disposal. Also, after perusing the pleadings of both the sides and hearing the contending parties at the stage of framing issues, if it surfaces that more Court fees are to be paid or excess Court fees have been paid, the Court shall pass necessary Order under Section 8B or under Section 11(2) of the Court-Fees Act, 1870. In any event, the Court shall not dismiss the suit on the ground of payment of insufficient Court-fees without first affording an opportunity to the plaintiff to correct it. However, in the event that because of the defendant's prayer to the Court in its written statement for her/his saham if the valuation of the suit increases and a question as to jurisdiction of the Court arises, the Court is obligated to examine its position as to whether the aggregate value of the shares/sahams (value of the plaintiff's claimed share plus value of the defendant's claimed share) of the plaintiff and the defendant is crossing the jurisdictional value of the Court. Also, a suit is not liable to be dismissed merely for non-mentioning the relevant provisions of law; for example, if the plaintiff ignores to state in its Cause-Title that 'this is a suit for partition of the suit land upon obtaining a declaration of title in the suit land and, pursuant thereto, for getting a separate saham in the suit land under Section 9 of the CPC read with Section 42 of the SR Act and Section 44 of the TP Act' and so on. In that scenario, the Court should not throw away the suit on the ground of lacking the aforesaid expressions.

40. Now, let me take up the issue No. (3)(b), namely, whether all the properties of the person/s from whom the parties of a partition suit have inherited or purchased their claimed portion of land should be brought in hotchpotch and issue No. 3(c), namely, whether the footings of a joint tenant, a co-owner and a co-tenant are the same; in other words, what are the core features to be looked into a suit for partition of immovable property. Because, I need to address the issue as to whether all the property of Saifa Bibi ought to have been brought in the hotchpotch. To deal with this issue, I find that it would be useful to know, at first, about the 'partition', 'partition suit', and when and how do they take place.

41. In the absence of a definition of the word 'partition' and 'partition suit' in any statute, it may be profitable to look at the Black's Law Dictionary. According to Black's Law Dictionary, "*The act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests*." James W. Eaton, in his treatise *Handbook of Equity Jurisprudence* 571 (Archibald H. Throckmorton ed., 2d ed. 1923) describes 'partition' in the following words:

> Partition is the segregation of property owned in undivided shares, so as to vest in each co-owner exclusive title to a specific portion in lieu of his undivided interest in the whole. The term 'partition' is generally, but not exclusively, applied to real estate. All kinds of property may be partitioned by the voluntary acts of the owners. In the case of real estate, this is usually accomplished by a conveyance or release, to each co-tenant by the others, of the portion which he is entitled to hold in severalty. But, even when no actual conveyance is made, a voluntary written agreement for a partition will be enforced by conveyance. And a part partition may be made of lands owned by tenants in common, provided each party takes and retains exclusive possession of the portion allotted to him.

42. My understanding about the partition is that a partition is a division of a property held jointly or in common by several persons, so that each person gets a share and becomes the owner of a separate share to which each of the parties is entitled in law as applicable to them, in an expectation of acquiring a right of dealing with the property in any manner as s/he may so desire; meaning that s/he can retain, sell, transfer, exchange, or gift the property as its absolute owner. Given that each divided property gets a new title and each sharer gives up his interest in the property in favour of other sharers, thus, a partition is a combination of surrender and transfer of certain rights in the estate except those which are easement in nature.

43. Let me now deal with the question as to when/why and how a partition can be done. In order to get a clearer answer, one must know what is the meaning of the expressions 'tenant', 'tenancy', 'joint tenancy', 'co-owner', 'tenancy-in-common' and 'hotchpotch'.

44. In the State Acquisition and Tenancy Act, 1950, the definition of the word 'tenancy' has not been provided directly; but the word 'tenant' has been defined in Section 2(27) of the aforesaid Act describing the 'tenant' as the holder of the land paying rent to the Government. Black's Law Dictionary defines 'tenancy' as '(1) *The possession or occupancy of land under a lease; a leasehold interest in real estate,* (2) *The period of such possession or occupancy and* (3) *The possession of real or personal property by right or title, esp. under a conveying instrument such as a deed or will'*. Black's Law Dictionary also provides the meaning of joint tenancy, which is extracted below:

> Joint Tenancy: A tenancy with two or more co-owners who are not spouse on the date of acquisition and have identical interests in a property with the same right of possession. A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share (in some states, this right must be clearly expressed in the conveyance- otherwise, the tenancy will be presumed to be a tenancy in common).

45. A.C. Freeman, in his treatise *Cotenancy and Partition 71* (2d ed. 1886) describes joint tenancy in the following words:

> As joint-tenancy was a favorite of the common law, no special words or limitations were necessary to call it into being. On the other hand, words or circumstances of negation were indispensable to avoid it. Whenever it was shown that property had vested in two or more persons, by the same joint purchase, there arose at once, both in law and in equity, the presumption that it vested as an estate in joint-tenancy. This presumption is liable to be overthrown in equity by proof of circumstances from which the Court may infer that the parties intended a several rather than a joint estate.

46. Thomas F. Bergin & Paul G. Haskell, in his authoritative book *Preface to Estates in Land and Future Interests 55* (2d ed. 1984), states about the joint tenancy in the following language:

> The rules for creation of a joint tenancy are these: The joint tenants must get their interests at the same time. They must become entitled to possession at the same time. The interests must be physically undivided interest, and each undivided interest must be an equal fraction of the whole- e.g., a one-third undivided interest to each of three joint tenants. The joint tenants must get their interests by the same instrument- e.g., the same deed or will. The joint tenants must get the same kinds of estates- e.g., in fee simple, for life, and so on.

47. Black's Law Dictionary also provides the meaning of 'tenancy-in-common'. The meaning is given below:

> Tenancy-in-common: A tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship.

48. A. C. Freeman, in his book *Cotenancy and Partition* 67 (2d ed. 1886), states about the tenancy-in-common in the following language.

> If there be a doubt whether an estate was, at its creation, a joint-tenancy or a tenancy in common; or if, conceding the estate to have been a joint-tenancy at its creation, there be a doubt whether there has not been a subsequent severance of the jointure – in all such cases equity will resolve the doubt in favor of tenancy in common.

49. Thomas F. Bergin & Paul G. Haskell, in writing about tenancy-in-common in his treatise *Preface to Estates in Land and Future Interests* 54 (2d ed. 1984) makes the following opinion:

> The central characteristic of a tenancy in common is simply that each tenant is deemed to own by himself, with most of the attributes of independent ownership, a physically undivided part of the entire parcel.

50. Let me now be acquainted with the terminology 'hotchpotch'. When various properties are put together or blended for the purpose of achieving the portion of property to be distributed among the beneficiaries or legal heirs as per the laws of the concerned country; in other words, in order to divide the properties, which are presently enjoyed by the different individuals by virtue of inheriting or purchasing from a single person/source, 'hotchpotch' is the process of combining and assimilating of the said properties. Although the terminology may seem to be a jargon to the commoners, however, it is widely used in legal parlance in the suits for partition in all over the common-law jurisdiction.

51. After knowing about the meanings of the aforesaid terms of 'tenant', 'tenancy', 'joint tenancy', 'co-ownership', 'tenancy-in-common' and 'hotchpotch' as well as having been acquainted with the term 'partition', on which a brief discussion has been made hereinbefore, it has now become easier for this Court to state as to when/why and how a partition can be done.

52. A partition can be carried out amicably with the consent of all co-sharers or co-tenants. If the partition is done by mutual consent, the joint tenants or the co-owners or co-tenants shall execute the partition deed, which is required to be registered at the office of the Sub-registrar of the place where the property is situated. The deed should in particular mention the date from which the partition is effective, the names of the parties and their respective shares. Partition of movable property is usually done among the family members only. However, partition of immovable property can be done among the joint tenants as well as among the co-owners or tenants-in-common. When a partition deed for a property is executed to divide the property among the family members, it is called a partition among the co-owners. And when the bondage/relation of the parties is such that they do not belong to the same family; meaning that the parties have not inherited from the same predecessor, but the property's record of right is being maintained in the same Account (Khatian) by the concerned Government office/revenue office, and/or the parties are possessing the land contagious to each other, they are known as co-tenants.

53. When one or more joint tenants or co-owners want the property to be partitioned, but the other/s are not agreeable to partition of the said property, a suit for partition is required to be filed in the appropriate Court of law. Also, when a co-tenant wishes to enjoy the property by metes and bounds claiming exclusive ownership and possession of a particular portion/place/position, but the other co-tenant/s raises objection either with regard to quantum of land or with respect to the spot/location of the land, they would be compelled to seek relief from the Court. And, when a joint tenant or co-owner or co-tenant would approach the Court, a question germane to this scenario surfaces; whether s/he would be required to inscribe in the schedule/s of the plaint the entire lands of the person/s from whom the parties of the suit inherited or subscribed the claimed lands.

54. In an endeavour to dig up and ascertain the proper answer to the above question, I decided to read as many case-laws of our jurisdiction, Indian jurisdiction, Pakistani jurisdiction and of Privy Council concerning suits for partition of property as possible, including the decisions referred to by the learned Advocates of both the sides, and I find that it is a rule of equity that the entire properties held and possessed jointly or in-common in a suit for partition should be included in the schedules of the plaint, and the aforesaid rule can be loosened in a suit where the partition can be done without taking into consideration the other properties and, of course, without causing any prejudice to any party. The above rule of equity, as opposed to a rule of law, although has been emanated from the judicial pronouncements of the Apex Courts of the common-law jurisdiction in course of dealing with the partition of the properties among the family members of all the religions, including the Hindu, Muslim, Christian, Buddhist, however, its application to the maximum extent has been found, mainly, in the case-laws on the suit for partition among the Hindu family members. It is to be borne in mind that the principles of Hindu Law being different, the *ratio* laid down by the Courts of this sub-continent in dealing with the suits for partition among the Hindu family members shall not be applicable in a suit where the parties are Muslims. While a Hindu family member can be found as a party in a suit for partition in any of the following three categories; joint tenant, co-owner and co-tenant, however, a Muslim can be a party in a suit for partition either as a co-owner or as a co-tenant. Given that the Mahomedans are never joint in estate but only tenants-in-common whether they live together or not, they are not obliged to sue at a time for a partition of the entire properties in which they have interest. There is, thus, nothing to preclude one of the co-owners or co-tenants of several items of property from seeking a partition of one of such items of property. Under the Mahomedan Law, the estate of a deceased person devolves on his/her death on his/her heirs and each of the heirs becomes entitled to his/her definite fraction of every part of the estate. It is therefore futile to describe a suit, in which one heir claims to receive his/her share of the property of the deceased from another heir, as a suit for partial partition and to say that therefore the suit is not maintainable.

55. From my extensive research on the case-laws regarding suit for partition of our jurisdiction and that of the Privy Council, Indian jurisdiction and Pakistani jurisdiction, it appears to me that, on the issue of inclusion of the entire properties of the joint tenants or co-owners or co-tenants in a suit for partition, the followings are the well-settled principles: (1) there is no existence of joint tenancy in the Mohammedan Law/Muslim Law; only Hindu coparceners are joint in estate. Mohammedans are only co-owners or tenants-in-common; (2) there is substantially no difference in respect of the subject-matter of a suit for partition amongst Muslim co-owners or Hindu co-owners, where they hold property as tenants-in-common; (3) a suit for partition of even one item of such property is maintainable as Section 44 of the TP Act heralds that an undivided share in immovable property can be transferred,

provided that the partition can be effected without much inconvenience to the other co-owners or co-tenants. In other words, in the case of tenants-in-common, whether such tenants are Muslims or Hindus, one of them is not obliged to sue for the partition of all the items of the property in which they are interested, inasmuch as each of them is entitled to his definite share in every item of the property, unless the partition sought for results in inconvenience to the other tenants-in-common; (4) as per the provisions of the Mahomedan Law, although all the legal heirs of a Muslim deceased do not inherit the property of equal share, for example, deceased's each daughter gets half of the share of each son and so on, however, as the co-owners, each of them, having notionally held their respective portions under the Shariah Law till a division/partition is done by metes and bounds, are competent to sell their respective portion of definite share from each of the plot; (5) a co-owner is legally not barred to transfer his/her entire share from one plot or one item of the properties left by the deceased if the rest of the co-owners consent to such transfer, either by standing as witness/es of the transfer-deed or by executing a registered deed announcing and confirming their consents; (6) if one of the co-owners transfers a quantum of land from a plot without the consent/s of other co-owners and, subsequently, it is revealed that the transferred-land is more in quantum than what s/he is entitled to inherit in the said plot, then, a scenario of application of hotchpotch rule arises to find out (i) what was the total quantum of land of the deceased, (ii) the quantum of land inherited by each of the legal-heirs, (iii) whether any heir has already transferred more land in measurement than s/he is entitled to inherit, (iv) whether there was any verbal arrangement among the co-owners to waive his/her due share in a particular plot, either in lieu of another land in other plot/s or in exchange of monetary transaction or by taking any other type of benefit and (v) how to mitigate the scenario; (7) the rule that the suit for partition must cover the entire property held jointly by the parties is merely a rule of equity and convenience and (8) a suit for partition must embrace only the property/properties in which the parties have community of interest and unity of possession.

56. After delineating the principles on the issue under surgery/scrutiny, I now need to revert to the facts of this suit to find out (i) whether the contesting parties of this suit are joint tenants or co-owners or tenants-in-common, towards adjudication of the issue as to whether the present suit is maintainable with the single plot (i.e. the suit land) of the deceased Saifa Bibi, who has died leaving behind some other properties as well; if it is found that the suit is maintainable with this single plot and, also, the suit land is partitionable and separable without causing any inconvenience to others, then, (ii) the next question would be whether the facts of the present suit warrant application of the hotchpotch rule for resolution of the issues encapsulated in the principle No. 6 set out in the penultimate paragraph and, accordingly, whether the Court is under any obligation to track down the properties which have community of interest and unity of possession.

57. It is evident from the facts of the suit that the parties of this suit are not the members of Hindu family and, thus, the principle regarding joint tenancy is not applicable here in this suit. Also, the plaintiffs and the defendant No. 1 (the only contesting defendant in the suit) are not the descendants of Saifa Bibi and, hence, they cannot be seen as the direct co-owners. By virtue of being purchasers of land from the legal heirs of Saifa Bibi in the single plot i.e. in the same tenancy, the nature of relationship between the plaintiffs and the respondent No. 1 is of co-tenancy and, that is why, they are co-tenants/tenants-in-common. Also, since there is no issue as to separation/division of any property which is being used jointly (such as dwelling house, ponds, wall etc), this suit is not going to yield any botheration for other co-tenants. So, according to the principle laid down hereinbefore, the parties of the suit being co-

tenants they are very much competent to approach the Court for partition and separation of a single plot of Saifa Bibi and, on this count, it is held that this suit is very much maintainable.

58. The pertinent question that is to be adjudicated upon, at this juncture, thus, is that whether the partition and separation of this single plot can be carried out without referring and taking into consideration of other plots of late Saifa Bibi. In other words, whether the community of interest and unity of possession exist only in the suit land alone, or whether they do exist in some other specific lands left by Saifa Bibi or in the entire land left by Saifa Bibi.

59. It is an admitted fact in this suit that Saifa Bibi is the owner of this suit land of 0.41 acres and it is also evident from the exhibits submitted by the defendant No. 1 that there are some other lands (more or less 4 to 5 acres) owned by Saifa Bibi. Saifa Bibi died leaving behind 4 sons (Abdul Matin, Abdul Qaium, Abdul Mukit and Musabbir) and two daughters (Aymona Bibi and Momina Bibi) and, accordingly, in the suit land while each of the sons shall be entitled to $\frac{1}{5}$ (one fifth) being 0.0820 acres of land, the two daughters shall get $\frac{1}{10}$ (one tenth) each of a quantum of 0.0410 acres land. However, without following the aforesaid usual provisions of Sharia Law, all the four brothers, having claimed themselves to be the owner of $\frac{1}{4}$ (one fourth) sharers each in the suit land measuring a land of 0.1025 acres, have sold out the entire suit property of 0.41 acres. While three sons of Saifa Bibi (Abdul Matin, Abdul Qaium and Abdul Mukit) transferred 0.3075 acres of the suit land by two registered deeds being Nos. 3480 dated 27.07.1978 & 13317 dated 26.04.1979 in favour of the defendant No. 1's previous owners, the remaining one son of Saifa Bibi (named, Musobbir) sold 0.1025 acres from the suit land to the plaintiffs by the registered deed No. 4395 dated 29.09.1979.

60. To make the above-mentioned dealings and transactions of the descendants of Aymona Bibi and Momina Bibi a bit more descriptive, it may be exposed here that on 12.04.2000 two descendants of Saifa Bibi's daughter Aymona (i.e. *Aymona's two daughters named – Nuruna Bibi & Rabeya Bibi*) sold 0.0205 acres of land to the plaintiffs claiming themselves to be the half-owners in Aymona's share of 0.0410 acres of land, on 05/07/2000 one group of the descendants of Saifa Bibi's one daughter (i.e. *Aymona's grand children – Aymona had two sons, named - Gani & Mahmud, and two daughters, named, Nurun Bibi & Rabia Bibi; this group of seller is the children of Aymona's son – late Gani)* sold 0.0137 acres of land claiming themselves to be the $\frac{1}{3}$ (one third) sharer in Aymona's 0.0410 acres of land and on 10.09.2000 (during pendency of this suit) two of the descendants of Momina, Saifa Bibi's daughter, (*it is worthwhile to mention here that Momina had two daughters, named - Saleha & Moududa and, here, after Saleha's death, Saleha's sole minor daughter and her husband are the sellers*) sold 0.205 acres of land to the plaintiffs, (although the trial Court adjudged that Saleha is entitled to $\frac{1}{3}$ of her mother's - Momina's share of 0.0410 i.e. 0.0137 acres of land). On the other hand, one of the sons (named-Mahmud) of Aymona Bibi (i.e. *Saifa Bibi's daughter's son*) and one of the daughters of Momina Bibi (i.e. *Saifa Bibi's another daughter's daughter*) executed a registered deed of waiver No. 2169 dated 25.06.2000 confirming that their respective predecessors, namely, Aymona Bibi and Momina Bibi (who are the daughters of Saifa Bibi) have not taken any share from the suit land.

61. Now, the question comes up for consideration as to whether the four sons of the deceased Saifa Bibi were competent to transfer the land from a plot more in quantum than what the said four sons were entitled to inherit from that single plot. As per the principles laid down hereinbefore, the answer would be in the affirmative subject to the trial Court's findings to the effect that the two daughters of Saifa Bibi were allotted their respective due shares of the suit land from other properties left by Saifa Bibi. In other words, a duty is cast upon the trial Court to examine the title and shares of Saifa Bibi's two daughters (Aymona Bibi & Momina Bibi) in the suit land.

62. Let me now see what were the cases of the respective parties of this suit, and the manner and style adopted by the trial Court for examining and determining the title and shares of Saifa Bibi's two daughters and what were the trial Court's findings.

63. Out of 5 (five) PWs, PW-1 is the plaintiff No. 2 who through his cross examination made the following testimonies; "Defendant Nos. 2-4, having purchased the $\frac{3}{4}$ (three fourth) of the suit land from Abdul Mukit, Abdul Matin and Abdul Qaium, are in possession of the same". ("আঃ মুকিত, আঃ মতিন ও আঃ কাইয়ুম আমার ভূমির উত্তর সীমানা হতে চলে যাবার পর ঐ জায়গায় ২-৪ নং বিবাদী আসে এবং তারা অনুমান তিনপোয়া ভূমিতে ভোগ-দখলকার হন। ২-৪ নং বিবাদী তাদের খরিদা দলিলের সাকুল্য ভূমিতে দখলে আছে"।) With regard to possession in the suit land by Saifa Bibi's two daughters (Aymona Bibi and Momina Bibi), this PW1 stated that they used to enjoy their land through sharecropping and the name of the sharecropper is Nuruddin of village Makorgaon (সৈফা বিবির মেয়েরা বর্গাদার মাধ্যমে ভোগ-দখল করত। তাদের বর্গাদার ছিলেন মাকরগাঁয়ের নুরউদ্দিন). But the afore-stated sharecropper (Nuruddin) was not produced as a witness by the plaintiffs before the trial Court to substantiate the above statements as to possession of Saifa Bibi's two daughters in the suit land. Out of the remaining 4 (four) PWs, only PW-2 and PW-3 (who are apparently not acquainted with the estate of Saifa Bibi, albeit claimed themselves to be the neighbors to the suit land) made some scanty statements regarding Saifa Bibi's two daughters' possession in the suit land, but that too are inconsistent with that of PW-1.

64. It was the case of the defendant No. 1 that there was an amicable settlement among the 4 (four) brothers and 2 (two) sisters that all the brothers (four in number) will get the suit plot. In substantiating his claim, he himself deposed before the Court as DW-1 by exhibiting the sale-deeds executed by the sons of Saifa Bibi. Among the 5 (five) defense witnesses, the DW-2 is the grand son-in-law of Saifa Bibi. He is the one who, along with his two full brothers (defendant Nos. 2-4), bought 0.3075 acres of land 21 (twenty one) years ago from his father-in-law (Abdul Qaium) and two uncles-in-law (Abdul Mukit & Abdul Matin) and, thereafter, sold out the entire 0.3075 acres of land to the defendant No. 1. It is evident from the testimonies of this DW-2, contained in the LCR, that acquisition and possession of 0.3075 acres of land by the defendant No. 1 has categorically been corroborated by this DW-2, and by an independent witness, DW-3, without being shaken by the crosses conducted/fired by the plaintiffs' counsel.

65. Upon examination of the evidence, both oral and documentary, the trial Court ignored the fact of mentioning the quantum of 0.1025 acres of land in all the 4 (four) registered deeds and held that each of the sons is entitled to a quantum of 0.0820 acres of land and each of the daughters of Saifa Bibi has got her title and share in the suit land to the extent of 0.0410 acres in the suit land. With regard to possession of the suit land i.e. as to who possesses what quantum of land in the suit land, the trial Court failed to pronounce any statements specifically. Rather, the exiguous finding of the trial Court is apparently in favour of the

defendant No. 1 suggesting that he has been possessing the quantum of land which he has acquired from the three sons of Saifa Bibi i.e. 0.3075 acres of land (স্বীকৃতমতে বাদী পক্ষ ও ১নং বিবাদী নালিশ দাগের ভূমিতে খরিদাসুত্রে মালিক এবং ঐ দাগে উভয় পক্ষের দখল স্বীকৃত).

66. From the admitted documentary as well as oral evidence, it appears that the aforesaid four deeds were executed by the four sons of Saifa Bibi nearly 21 (twenty one) years ago containing the following recitals and declarations "….. upon a verbal agreement among other sharers, we have been enjoying our respective portions of land through amicable demarcation of the same…." (….. আমরা মৌরসী জোত স্বত্ব অপর শরীকানদের সহিত আপোষ চিহ্নিত মৌখিক বিল- য় মতে সরজমিনে চিহ্নিতভাবে মালিক ও দখলকার থাকিয়া.....), (*extracted from the exhibit "Cha", which is the registered sale deed No. 13317 dated 26.04.1979*) shows that there was a waiver of shares in the suit land by the two sisters in favour of four brothers. None of these 4 (four) registered deeds have ever been challenged by the two sisters or their descendants alleging that the 4 (four) brothers have sold land more in measurement than what they are entitled to inherit from Saifa Bibi. In other words, the two daughters of Saifa Bibi (Aymona Bibi and Momina Bibi) during their life-time and, after their death, their legal heirs never raised any question that although the 4 (four) sons of Saifa Bibi are entitled to 0.0820 acres of land each as the $\frac{1}{5}$ (one fifth) sharers, but they have sold 0.1025 acres of land portraying themselves as $\frac{1}{4}$ (one fourth) sharers of the suit land. In the light of the fact that all the four sale-deeds are duly registered deeds of 21 years old, a legal presumption as to the authenticity of their contents (including recitals as to verbal agreement among the brothers and sisters as well as mentioning of the quantum of the land to be 0.1025 acres) would be in favour of these deeds, particularly when it is evident that 21 years ago the plaintiffs themselves have accepted/recognized the vendors/sellers as the owners/sharers of $\frac{1}{4}$ (one fourth) of share in the suit land, which comes to a quantum of land of 0.1025 acres. Interestingly, the plaintiffs are getting only 0.1299 acres of land by institution of the instant suit by abandoning the quantum of land of 0.1025 acres which they were enjoying for last 21 years and, now, in summation they are succeeding to add merely 0.0205 acres of land by purchasing 0.479 acres of land (0.0205 + 0.0137 + 0.0137) to their share. From the above-mentioned scenario, a question would inevitably be ruminated in the mind of a sensible human being that whether persons like the present plaintiffs, whom cannot be regarded as simpletons by any stretch of imagination, would pay for around 5 (five) decimals (4.79 decimals) of land, knowing fully well that they would be able to enjoy only around 2 (two) decimals (2.05 decimals) of land.

67. Moreover, out of the descendants through the two daughters of Saifa Bibi, while three groups vide three deeds sold their claimed respective portions of their 0205 + 0137 + 0137 acres, aggregate of which becomes 0.0479 acres of land, to the plaintiffs within a span of a few months time in the year 2000, two of them (i.e. the descendants of Saifa Bibi's two daughters) executed a registered deed of waiver being No. 2169 dated 25.06.2000 stating that their predecessors, namely, Aymona Bibi and Momina Bibi (two daughters of Saifa Bibi) have never claimed shares from the suit land. Although the vendors/executants of this deed No. 2169 did not come forward to substantiate the document, but its scribe as DW-4, having exhibited the deed as exhibit-UMA, confirmed and corroborated that the deed was written as per the instructions of the parties from the aforesaid two descendants of Aymona Bibi and Momina Bibi. It is also evident that none from the three groups of descendants of Saifa Bibi's two daughters made them available before the trial Court to assert that Aymona Bibi and Momina Bibi, who are the grandmother (applicable for two groups) and mother (applicable

for one group) of these three groups of sellers, had never waived their due shares in the suit plot.

68. The discussions on these two pieces of evidence are aimed at showing that the likelihood of having some arrangement between the four sons and two daughters of Saifa Bibi agreeing verbally that the two daughters would waive their claim in the suit plot in exchange for getting larger shares in other plots and, at the same time, the unlikelihood of the claim of title/share by these three groups of descendants of the two daughters of Saifa Bibi in the suit land - should not have been found and held by the trial Court to be without evidential basis; for, since the two sisters themselves never claimed their shares in the suit land in the past 21 years, making claim by the second/third-degree down descendants at such a strikingly belated stage, and that too having been opposed by their own siblings, arouses serious doubt i.e. their claims' veracity eminently becomes shady. While the trial Court was competent to rely on the registered three sale-deeds (two of which were sealed and signed before a few months of institution of this suit and one was done during pendency of this suit) executed by three groups of the descendants of the Daughters of Saifa Bibi, it was also incumbent upon the trial Court to make appropriate findings with regard to the registered deed of waiver No. 2169 dated 25.06.2000 (exhibit-UMA) executed by two legal heirs of the two daughters of Saifa Bibi as well as on the fact of non-challenging four registered deeds of 21 years old by the three groups of descendants through the two daughters of Saifa Bibi. In the case of Jobeda Khatun Vs Hamid Ali 40 DLR (AD) 101, our Appellate Division remanded back the suit (suit for partition) to the trial Court for not taking into consideration a piece of evidence. His Lordship ATM Afjal, J (as he then was) propounded for the Court in the following language:

> It appears from the judgment of the High Court Division that the learned Judges found that the documents produced at the trial by the defendant-appellants (Ext. "Ka" to "Uma") were lawfully admitted into evidence after dispensing with their formal proof and the problem was not with regard to question as to the evidentiary value of those documents in the absence of any oral evidence supporting the defendants' case in the written statement. …….. . (Para – 9)

69. Should this Court now remand back the suit to the trial Court for recording its findings and observations on the above-discussed two documentary evidence? The answer definitely would be in the negative. Given the spurious dealings and transactions of the descendants of Saifa Bibi's daughters plus that of the four sons of Saifa Bibi, I am of the view that mere sifting of the above two items of documentary evidence may not be sufficient to help the trial/appellate Court in unearthing the true position of the three groups of the descendants of Saifa Bibi (through her two daughters) as to whether Saifa Bibi's two daughters had waived their shares in the suit land in lieu of taking shares in other plots or as to whether at the time of buying the property before 21 (twenty one) years, the vendees of the suit land were fallible to the impression insinuated by the four sons of Saifa Bibi that there is a verbal amicable settlement with their sisters.

70. Thus, from the above discussions, this Court is led to hold that there is community of interest and unity of possession in all the properties inherited by the four sons and two daughters from Saifa Bibi.

71. Then, what should be the right course of action for this Court? Since from the preponderance of evidence such as, (a) testimonies of PW-1, DW-2, DW-3, (b) documentary evidence of 4 registered sale-deeds of 21 years old and registered deed of waiver by the two descendants of Saifa Bibi's daughters, coupled with plaintiffs' failure to prove the possession

of the three groups of descendants through Saifa Bibi's daughters, this Court is led to hold that the title in the suit land of the aforesaid three groups of Saifa Bibi's descendants have not been proved on the balance of probabilities, let alone to have been conclusively established.

72. Now, given that the present plaintiffs and the defendant No. 1 would be in a position to claim themselves to be the co-tenants in this tenancy having stepped into the footings/shoes/status of the co-owners, only when the title and shares of Saifa Bibi's four sons/their legal heirs and the title and shares of Saifa Bibi's daughters would be adjudicated, and since the four sons of Saifa Bibi have sold 0.1025 acres of land each, which apparently is suggestive from the above-mentioned evidence that Saifa Bibi's two daughters might have been allotted a quantum of land in other lands, therefore, the said other lands are required to be tracked down in order to see whether Saifa Bibi's two daughters (Aymona Bibi & Momina Bibi) had received their due $\frac{1}{10}$ shares from the remaining other plots and, therefore, in order to be properly enabled to arrive at the sound and proper findings on the issue as to whether the descendants of the two daughters of Saifa Bibi have sold more land in quantum than what the two daughters of Saifa Bibi are entitled to inherit from Saifa Bibi, in other words, for the purpose of determining whether these three groups have their title and shares in the suit land, the entire properties of Saifa Bibi which have been inherited by her four sons and two daughters are needed to be presented before the trial Court/appellate Court.

73. Then, comes issue No. 4, namely, when/at what stage and on what ground a suit requires to be sent back to the trial Court. The appellate Court has been endowed with the power of remand by Section 107(1)(6) of the CPC and, then, Order 41, Rule 23 of the CPC manifests that if the trial Court decrees a suit on a preliminary point and the said decree is reversed in appeal, the appellate Court, upon pinpointing the issues or upon framing the issues under Order 41 Rule 25, may send back the suit to the trial Court. However, by now, the settled rule is that the power of remand may be exercised by the appellate Court exercising the Court's inherent power under Section 151 of the CPC in a fit case, when the facts and circumstances do not attract the stipulations of Rules 23 & 25 of Order 41 of the CPC. And, when the appellate Court fails to exercise the said power, the High Court Division being empowered by its revisional jurisdiction is competent to send back the suit either to the trial Court or to the appellate Court, whichever one appears to the High Court Division to be better equipped and more suitable considering the intricacies as to factual matrix as well as legal issues of a particular suit plus taking into consideration of the length of pendency of the suit.

74. In the light of the findings of this Court that unless and until the entire properties of the deceased Saifa Bibi are tracked down and, then, put on table for the consideration of the Court to see whether the daughters of Saifa Bibi took larger shares in other plots by abandoning their due shares in the suit land, there shall not be a fair adjudication of this suit, this Court is inclined to send this suit back on remand. To this end, a pertinent question clicks as to whether this suit should be sent back to the trial Court or to the appellate Court. Given that the present suit is a 20 (twenty) year-old one, this Court is of the view that if the suit is remanded to the appellate Court with some specific directions upon it, then, there shall be an effective and fair disposal of this Rule.

75. However, taking into consideration the prevalent phenomenon in most of the learned Judges of the lower appellate Courts to remand back the suits for partition on this or that plea by shrugging off their own responsibility of disposing of the suits on merit, this Court, as part of its constitutional duty under Article 109 of the Constitution in tandem with its revisional

jurisdiction under Section 115 of the CPC, proclaims that the appellate Court, in an appropriate suit if required, is not only empowered to take additional evidence, which would not amount to filling up lacuna caused due to the negligence/failure of any party to the suit, but also competent to call for necessary documents and persons by invoking the Court's power under Section 165 of the Evidence Act read with Sections 30, 31, 32 and Order 19 of the CPC. Under the above constitutional duty of superintendence in addition to being invested with the revisional power by the CPC, this Court notifies that when the learned Judges of the subordinate Courts perform their functions as the trial Court's Judge or the appellate Court's Judge, they should not hesitate to resort to the provisions of Section 165 of the Evidence Act, 1872, Sections 30, 31, 32 and Order 19 of the CPC in an appropriate case for the purpose of fair and effective adjudication of a suit. The trial Courts and appellate Courts, under the above provisions of laws, possess ample powers to summon and, if the situation warrants, then, to compel the appearance of any person in the Court and to produce the necessary relevant papers to the Court and take their deposition as Court Witness/es (CW/s), as has been held in the case of STS Educational Group Vs Bangladesh 18 BLC 806 (Para – 41 to 42). In this suit, the appellate Court's duty should be to collect the relevant papers regarding inheritance of Saifa Bibi's entire estate from all the known sources and, upon poring over and scanning through all the documents in connection with the entire property of Saifa Bibi with an aim to assess the ownership of the sellers/vendors of the land sold to the plaintiffs and the defendant No. 1, if the appellate Court considers that in the interest of a fair and final disposal of the suit, some relevant persons should clarify their respective position, the Court shall be competent to ask them to appear before the Court and depose as Court Witness/es (CW/s) and, thereafter, pass appropriate Judgment and Decree commensurate with the findings to be arrived at on the basis of examination of all the papers connected with Saifa Bibi's estate devolved upon her four sons and two daughters.

76. The last issue (as framed by this Court hereinbefore for disposal of this Rule) is about adverse possession. Adverse possession in the context of immovable property means; when a person continuously is in uninterrupted 12 (twelve) years of possession in any immovable property in which s/he does not have the documentary title, s/he is known as the owner of the said property on the basis of adverse possession. If a person intends to obtain a declaration from the Court about his/her title by dint of adverse possession, there must be specific averments in the plaint.

77. It is evident from the written statements that the defendant No. 1 did not make any specific averments as to claiming title in the suit land on the basis of adverse possession, nor is there an alternative prayer by the defendant No. 1 for obtaining a declaration of title based on adverse possession. Furthermore, the defendant No. 1 also did not ask the trial Court to frame an issue on the point of adverse possession and, more so, no evidence was led by the defense in an endeavour to make out a case of adverse possession and, thus, there is hardly any scope for the Court to take a view that although specific prayer is not made, but from the evidence, substance to that effect is present in the suit. Above all, there is always a legal presumption that the co-owners are in constructive possession of the property by virtue of inheriting from the same deceased person and, for that reason, in a suit for partition if adverse possession is claimed, it must be established by the claimant that the other party was totally ousted in assertion of the claimant's hostile title, but in the four corners of the written statements no such assertion was made by the defendant No. 1. Therefore, the findings of the appellate Court on the points of adverse possession are liable to be set aside.

78. In drawing up the conclusion, this Court pronounces that (i) since from the examination of the evidence, it appears that the claim made by the three groups of descendants of Saifa Bibi's two daughters in the suit land after around 21 (twenty one) years, as to having shares of their predecessors (Aymona Bibi and Momina Bibi), - has not been proved on a balance of probabilities, let alone conclusively; (ii) since by simply remanding back this suit for proper evaluation of the much-discussed two pieces of documentary evidence, there shall not be an effective adjudication of the suit; (iii) since the status of both the plaintiffs and the defendant No. 1 are tenants under the tenancy-in-common and their title and shares in the suit land are dependent on the title and shares of the four sons and the two daughters of Saifa Bibi, (iv) since the findings and observations made by the appellate Court on the issue of adverse possession are not compatible with the laws regulating that field, therefore, this suit is remanded back to the appellate Court, namely, Second Joint District Judge Court, Sylhet upon setting aside the appellate Court's Judgment and Decree dated 10.04.2006 passed in Title Appeal No. 9 of 2002, so far as it relates to the findings on the issue of adverse possession, and upon staying the operation of the trial Court's Judgment and Decree dated 30.10.2001 passed in TS No. 61 of 2000 decreeing the suit in part till the time of the disposal of the appeal by the appellate Court, with the following Orders and Directions:

(i) The appellate Court shall direct the plaintiffs, defendant No. 1, the four sons of Saifa Bibi (defendant Nos. 23, 24, 25 and legal heirs of the late son Abdul Qaium) and the descendents through Saifa Bibi's two daughters (Aymona Bibi and Momina Bibi) to submit all the papers and documents together with their descriptions of the entire properties left by Saifa Bibi at the time of her death.

(ii) After receiving all the schedules of the entire land of Saifa Bibi, the appellate Court shall heedfully scrutinize the papers.

(iii) If it appears to the appellate Court that further papers are required for the purpose of effective disposal of the suit, it shall not hesitate to issue summon upon the officials of the concerned land office, sub-register's office, settlement office or any other public office to furnish the requisite papers.

(iv) Upon receiving all the documents of Saifa Bibi's entire properties and, thereafter, by fastidiously carrying out necessary scrutiny of the same, if it appears to the appellate Court that any relevant person should explain his/her position with regard to identification and distribution of Saifa Bibi's properties among her four sons and two daughters, in that event, the appellate Court shall issue summons upon the said person to appear before the Court as Court Witness/es (CW/s).

(v) The appellate Court shall not deal with issue of adverse possession or any other issue, except concentrating on the issue as to whether the two daughters of Saifa Bibi (Aymona and Momina) were given any property from Saifa Bibi's other land in exchange for their due shares in the suit land.

(vi) If it is revealed that Saifa Bibi's two daughters were not given any extra land in other properties in lieu of their due shares in the suit land, in that event, the decree passed by the trial Court shall stand valid and, accordingly, the appellate Court, upon affirming the trial Court's decree, shall remit the LCR to the trial Court with a direction upon the trial Court to proceed with the accomplishment of the remaining tasks in the suit, without waiting for receiving any formal application for passing Final Decree, but by simply notifying both the parties in writing to that effect.

(vii) If it surfaces that Saifa Bibi's two daughters had received their due shares in other plots upon waiving their respective shares in the suit land, in that scenario, the appellate Court shall pass a fresh Judgment and Decree pronouncing the appropriate declaration of the title and shares of the plaintiffs and the defendant No. 1 with reference to the title and shares of their respective vendors.

(viii) It is to be borne in mind by the learned Judge of the appellate Court that only the suit land of 0.041 acres of land shall be partitioned and separated among the four sons and two daughters of Saifa Bibi. The other lands having not been asked for partition by the co-owners (Saifa Bibi's four sons/their legal heirs and two daughters/their descendants), there shall not be any Judgment and Decree for partition of the same. The other lands are being brought into scene simply for the purpose of assessing as to whether Safia Bibi's Daughters have been allotted larger shares therein in exchange for their due shares in the suit land.

79. Before parting with this Judgment, I consider it pertinent to observe here that in the context of prevailing incoherent practice in the sub-ordinate Courts in the different Districts of this country as to naming a 'suit for partition', that is to say, when in some Districts it is marked as a Partition Suit, in some Districts it is characterized as a Title Suit and in some Districts it is branded as a Other Class Suit, 'The Rules Committee of the Supreme Court of Bangladesh' should either recommend the Ministry of Law, Justice and Parliamentary Affairs to undertake a project for updating the CRO towards setting out appropriate rules therein or, in the alternative, the said committee should issue a 'Practice Direction' (PD) with a proper instructions upon the sub-ordinate Courts as to naming of the suits in different names or to use only 'Civil Suit' for all the types of civil suits and 'Civil Miscellaneous Case' for the various proceedings which are known as civil proceedings. Secondly, in course of dealing with suits for partition, I have noticed in a significant number of suits that the trial Courts oftentimes become fallible in arriving at an apparent correct decision due to not being familiar with the following terminologies; 'tenancy' 'joint tenants', 'co-owners', 'co-tenants' 'hotchpotch' and proper application of the afore-said terminologies in a given situation. Therefore, in my humble opinion, the judiciary would be benefitted if the Judicial Administration Training Institute (JATI) includes the relevant useful topics in their courses, so that the tasks of the learned Judges of the trial Courts and appellate Courts become painless and joyous to deal with the suits for partition.

80. With the above Observations, Orders and Directions, this Rule, having made absolute in part and, at the same time, having stayed the Judgment and Decree passed by the trial Court till disposal of the appeal by the appellate Court, is disposed of. However, there shall not be any Order as to costs.

81. The Office is directed to do the followings; (i) to send down the LCR at once to the Second Joint District Judge Court, Sylhet, (ii) to make available a copy of this Judgment for all the learned District Judges of the country, (iii) to place a copy of this Judgment to "Civil Rules & Orders Necessary Amendment Committee of the Supreme Court", (iv) to supply a copy of this Judgment to the Director General of Judicial Administration Training Institute and (v) to present a copy of this Judgment to The Hon'ble Minister of Ministry of Law, Justice and Parliamentary Affairs for his information and necessary action.