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

Present:

Mr. Justice Md. Badruzzaman.

And

Ms. Justice Aynun Nahar Siddiqua

First Appeal No. 149 of 2020.

Md. Nur Islam and others

...Appellants.

-Versus-

Bodu Mia and others

....Respondents.

Mr. Abul Khair, Advocate

… For the appellants

Mr. Abul Kalam Chowdhury with
Mr. Iqbal Kalam Chowdhury, Advocates

… For the respondents.

Heard on: 18.01.2026, 27.01.2026, 28.01.2026, 02.02.2026 and 26.02.2026.

Judgment on: 08.03.2026.

Md. Badruzzaman, J:

This appeal is directed against judgment and decree dated 27.01.2020 passed by learned Joint District Judge, 1st Court, Noakhali in Title Suit No. 65 of 2012 decreeing the suit.

Facts, relevant for the purpose of disposal of this appeal, are that respondent Nos. 1-6 as plaintiffs instituted the above mentioned suit praying for a decree of two declarations, one for a declaration of title to 2.50 acre suit land and another declaration that the registered sale deed No. 5956 dated 25.04.2012 purportedly executed by defendant Nos. 4-7 transferring the suit land in favour of defendant Nos. 1-3 is collusive, inoperative, void, without consideration and not binding upon the plaintiffs contending, *inter alia*, that 2.43 acre land appertaining to Petty Survey Khatian No. 617 originally belonged to Bechu Mia who

transferred the same to Sayera Khatun by registered sale deed No. 7508 dated 04.12.1957. The consideration money was paid by Sayera Khatun from her own purse. While Sayera Khatun was owning and possessing said land transferred it to plaintiff Nos. 1, 6 and Hanif Mia & Hosen Ahmed by three registered deeds of sale Nos. 1225, 1226 and 1227 dated 30.01.1974 and handed over possession thereof to them. Thereafter Hosen Ahmed by registered deed of sale No. 4347 dated 07.04.1997 transferred .77 acre land to Seraj Mia who thereafter transferred the same to plaintiff No. 5 Mozammel Hoque vide registered sale deed No. 634 dated 19.01.2003 and handed over possession thereof to him. Hosen Ahmed again transferred .13 acre land to Plaintiff No. 2 by registered deed of gift No. 7306 dated 10.06.2008 and handed over possession to him. On the other hand, Hanif Mia transferred .60 acre land to plaintiff Nos. 2-4 by registered sale deed No. 1660 dated 28.01.1995 and handed over possession thereof to them. During Diyara Survey 2.43 acre land was increased to 2.50 acre and recorded in Plot No. 2383. Though Sayera Khatun purchased the suit land by registered sale deed No. 7508 dated 04.12.1957 but her name was not recorded in Diyara Khatian rather it was wrongly recorded in the name of her husband Serajul Hoque but for such wrong records the title of Sayera Khatun was not affected. Taking the advantage of wrong records, the heirs of Serajul Hoque and Sayera Khatun namely defendant Nos. 4-7 made a collusive deed of sale being No. 5956 dated 25.04.2012 in favour of defendant Nos. 1-3 for which a cloud has been cast upon the title of the plaintiffs and accordingly, they were constrained to institute the present suit. It has been further stated that the defendants have or had no right, title or interest to the suit property. Though in the title deeds two Diyara Plot

being Nos. 2383 and 2384 were mentioned but the plaintiffs have been owning and possessing the suit land appertaining to Plot No. 2383. During recent survey .87 acre land was recorded in the name of plaintiff No. 6 in D.P Khatian No. 677 of hal plot No. 5142, 1.02 acre land was recorded in the name of plaintiff Nos. 1-4 in hal plot No. 5143 of D.P Khatian No. 1232, .13 acre land in the name of plaintiff No. 2 in D.P Khatian No. 2103 of Plot No. 5141 and .63 acre land in the name of plaintiff No. 4 in D.P Khatian No. 1415 of Plot No. 5140. In the aforesaid way .15 acre land was increased and total 2.65 acre land was rightly recorded in the name of the plaintiffs in different D.P Khatians. The defendants did not file any objection under rule 30 or 31 of the State Acquisition and Tenancy Rules against the record-of-rights prepared in the name of the plaintiffs and the plaintiffs after getting mutations from the Government Revenue Office paid rents and have been owning and possessing the suit land by erecting a Hower Ghar in the middle portion of suit Plot No. 2383 and the rest by way of cultivation.

Defendant Nos. 1-3 jointly and defendant Nos. 8-9 jointly contested the suit by filing separate written statements. The case of the defendants is more or less same. In their written statements, they contended that the suit is not maintainable in its present form; that there is no cause of action of the suit; that the plaintiffs have no right title or interest to the suit property and it has been filed only for harassing the defendants. Their positive case is that Bechu Mia was the original owner of 2.43 acre land who transferred the same vide registered sale deed No. 7508 dated 04.12.1957 in favour of Serajul Haque. Though in the sale deed dated 04.12.1957 the name of Sayera Khatun was shown as the vendee but the consideration money was paid from the purse of Serajul Hoque and Sayera Khatun was mere a

benamder of Serajul Hoque and she never got possession of the suit land and while Serajul Hoque was owning and possessing the suit land Diyara Khatian No. 404 was prepared and finally published in his name and while he was owning and possessing the suit land died leaving behind three sons namely Nazir Ahmed, Abdul Wadud and Zafor Ahmed and one daughter Anowara Khatun and while they were owning and possessing the same transferred it to defendant Nos. 1-3 vide registered sale deed No. 5956 dated 15.04.2012 and handed over possession thereof to them and while defendant Nos. 1-3 after getting possession erected dwelling house in .64 acre land and have been owning and possessing the rest by way of cultivation, the plaintiffs by showing sale deed dated 04.12.1957, recently threatened the defendants to dispossess them from the suit land and as such, the defendants filed Title Suit No. 465 of 2012 before the learned Senior Assistant Judge, Noakhali for declaration of benami transaction and the said suit is still pending. The plaintiffs in collusion with the employees of Land Survey Directorate managed to have recorded their names in the recent D.P Khatians against which the defendants filed Appeal Nos. 22787 of 2012, 22788 of 2012, 22789 of 2012, 22790 of 2012 and 22791 of 2012 under rule 31 of the State Acquisition and Tenancy Rules which are still pending. The plaintiffs or their predecessors did not purchase any land from the suit khatian from Sayera Khatun and the title deeds by which the plaintiffs are claiming title to the suit land are collusive, without consideration and ineffective deeds. Sayera Khatun died on 10.04.1972 and as such, there was no occasion by her to transfer the suit land in favour of the plaintiffs or their predecessors in 1974. While the defendants have been owning and possessing the suit land and cultivated Soyabean crops in a portion thereof the plaintiffs

cut and take away the Soyabean crops against which the defendants filed Case No. 89 of 2012 before the Village Court of Char Jabbor Union Parishod who, upon taking evidence, directed the plaintiffs to pay Tk. 14,000/- as compensation to the defendants by order dated 31.05.2012. While the plaintiffs tried to dispossess the defendants from the suit land defendant No. 2 as petitioner filed Petition Case No. 917 of 2012 before the learned Additional District Magistrate, Noakhali under section 145 of the Code of Criminal Procedure in which the Additional District Magistrate directed the Officer-in-charge of Char Jabbor Police Station for holding inquiry and investigation who, upon investigation through Sub-Inspector, found the defendants in possession of the suit land and accordingly, submitted report before the Additional District Magistrate who restrained the plaintiffs from dispossessing the defendants from the suit land. The plaintiffs in collusion with the revenue staffs managed to get mutation of the suit land and obtained Mutation Khatian Nos. 1778, 1577, 1799 against which the defendants filed Objection Case No. 149 of 2012-2013 and upon hearing, the Assistant Commissioner (Land) Suborna Chor, Noakhali vide order dated 12.09.2012 cancelled the mutations of the plaintiffs. It has further stated that while defendant No. 3, Rahima Khatun was owning and possessing .57 acre land by purchase transferred the same by registered deed of gift No. 622 dated 02.09.2013 in favour of defendant Nos. 8-9 and handed over possession thereof to them. In the aforesaid way defendant Nos. 1, 2 and 8, 9 have been owning and possessing 2.4250 acre land and as such, the suit is liable to be dismissed.

Upon considering the pleadings of the parties, the trial Court framed issues and then both parties adduced evidence, oral and documentary and upon considering the evidence of the parties decreed

the suit vide impugned judgment and decree which have challenged by the defendants in this appeal.

During hearing of this appeal the plaintiff-respondents filed an application for amendment of the plaint (affidavit sworn in on 16.02.2026) to introduce some facts and addition of a prayer in the plaint seeking a decree of setting aside *ex-parte* judgment and decree dated 30.05.2016 (decree signed on 07.06.2016) passed in Title Suit No. 465 of 2012 by learned 1st Additional Assistant Judge, Noakhali contending, *inter alia*, that the plaintiffs were illiterate village people and were not aware of the facts of passing the said *ex-parte* decree and that their engaged lawyer did not give proper advise to contest or challenge said decree but for proper adjudication of the matter in dispute the proposed amendment is necessary.

The defendant-appellants filed counter-affidavit against the application for amendment of the plaint contending, *inter alia* that during pendency of this suit the defendant appellants filed said Title Suit No. 465 of 2012 against the present plaintiffs praying for a decree of declaration that sale deed No. 7508 dated 04.12.1957 was a benami transaction and this fact have been stated in their written statement submitted on 20.01.2013 but the plaintiffs did not contest the suit by filing written statement and allowed to proceed with said title suit and accordingly, the suit was decreed *ex-parte* vide judgment and decree dated 30.05.2016 and during trial of this suit the defendants produced the certified copies of the plaint, judgment and decree which were marked as exhibit Ga series. Not only that when D.W.2 produced certified copies of the judgment and decree of Title Suit No. 465 of 2012 he was cross-examined by the engaged advocate of the plaintiffs who put a suggestion that the summons of said suit was not served upon the

plaintiffs which he denied. So, the plaintiffs were all along aware of the *ex-parte* judgment and decree passed in Title Suit No. 465 of 2012 and after laps of ten years they have filed application for amendment of the plaint challenging the *ex-parte* decree and as such, the same is barred by limitation under Article 95 of the First Schedule of the Limitation Act and accordingly, the proposed amendment cannot be allowed.

Mr. Abul Khair, learned Advocate appearing for the respondent appellants submits that the plaintiffs could not prove their title to and exclusive possession in the suit land and as such, they are not entitled to any decree of declaration of title to the suit land as well as declaration that the defendants' kabala was illegal or ineffective. Learned Advocate further submits that the plea of the defendants that Sayera Khatun was the benamder of Serajul Hoque in respect of the suit land has been proved in Title Suit No. 465 of 2012 by a competent Court vide *ex-parte* judgment and decree dated 30.05.2016 and said decree is binding upon the plaintiffs as it was not challenged within the period of limitation and as such, the proposed amendment for a decree of setting aside the *ex-parte* decree on the basis of application dated 16.02.2026 is barred by limitation in view of the provisions under Article 95 of the Limitation Act and thereby, the application for amendment of plaint is liable to be rejected.

Learned Advocate further submits that the recent D.P Khatians in respect of the suit land were collusively prepared in the name of the plaintiffs against which the defendants filed appeals under rule 31 of the SAT Rules wherein the Surveyor, upon field survey, found possession of the defendants in the suit land and accordingly, the Settlement Officer cancelled the D.P Khatians prepared in the name of the plaintiffs. Learned Advocate further submits that in the proceeding

before the Village Court and Additional District Magistrate the possession of the defendants has been proved. Moreover, though the plaintiffs in collusion with the Government officials got their names mutated but those mutations were cancelled in Case No. 149/2012-2013 by the Assistant Commissioner (Land) and as such, the plaintiffs have no record-of-rights or mutation in respect of the suit land but the trial Court upon non-consideration of the evidence and misconception of law came to erroneous findings that the plaintiffs have mutation and record-of-rights and that record-of-rights being documents of possession the plaintiffs are in possession in the suit land. Learned Advocate further submits that as a whole the trial Court, upon misreading and non-consideration of evidence and misconception of law came to erroneous findings and decision and illegally decreed the suit.

Mr. Abul Kalam Chowdhury, learned Advocate appearing for the plaintiff-respondents in support of the impugned judgment and decree submits that the trial Court, after evaluation of the evidence of the parties and proper appreciation of facts and circumstances of the case, came to its findings and decision and rightly decreed the suit. Learned Advocate further submits that the defendants could not prove benami transaction by adducing sufficient evidence and the *ex-parte* decree passed in Title Suit No. 465 of 2012 was a collusive decree and on the basis of that decree the defendants' plea of benami transaction has not been proved. Learned Advocate further submits that due to ignorance, the plaintiffs failed to amend the plaint for setting aside the *ex-parte* decree during trial and as such, the application for amendment should be allowed to add a prayer for setting aside the *ex-parte* decree which will not change the nature and character of the suit rather it will help

the Court to resolve the real controversy between the parties. Learned Advocate further submits that after purchase, the plaintiffs have been owning and possessing of the suit land by mutating their names and paying rents and the recent D.P Khatians in respect of the suit land have been prepared in the name of the plaintiffs which are document of possession and as such, the trial Court rightly held that the plaintiffs could prove their possession in the suit land.

We have heard the learned Advocates, perused the pleadings of the parties, the evidence adduced by them, the impugned judgment and decree, the application for amendment of the plaint, counter-affidavit filed by the defendant-appellants and other materials available on record.

Before enter into the merit of the case, we would consider the application for amendment of the plaint by which the plaintiffs sought to introduce some facts and add a prayer for setting aside the *ex-parte* judgment and decree dated 30.05.2016 passed in Title Suit No. 465 of 2012 on the ground of being obtained by fraud. For ready reference the proposed amendment is quoted below:

> "After paragraph 5, ৫(ক)" would be inserted,
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> "৫(ক)। বাদী পক্ষের অত্র মোকদ্দমা দায়েরের পর ১-৩ নং বিবাদীগণ ১ম অতিরিক্ত সহকারি আদালতের ২০১২ ইং সনের ৪৬৫ নম্বর নালিশি ভূমি বাবত দেওয়ানী বিনাম ঘোষণার প্রার্থনায় তঞ্চক মতে মিথ্যা উক্তিতে ৩০-০৫-২০১৬ ইং তারিখে এক একতরফা, □োগা□োগী, অকার্ট্রকর ডিক্রীর ঘটনা করে। গ্রাম্য, অশিক্ষিত বাদীগণ তদীয় নি□ুক্তিয় আইনজীবী হইতে □থা□থ উপদেশ না পাওয়ায় উক্ত তঞ্চক ডিক্রী challenge করিতে পারে নাই। আইনের কুট তর্ক নিবারনাথে উক্ত তঞ্চক ডিক্রী রহিত হওয়া আবশ্যক তাহাতে ন্যায় বিচারের সুবিধা হইবে।"
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> After paragraph 6 (গ) another prayer ৬ (গ) (১) would be inserted -

৬(গ) (১)। নোয়াখালী ১ম অতিরিক্ত সহকারি জজ আদালতের ২০১২ ইং সনের ৪৬৫ নম্বর মোকদ্দমার বিগত ৩০-০৫-২০১৬ তারিখের একতরফা রায় এবং ০৭-০৬-২০১৬ তারিখের ডিক্রী বেআইনী, তঞ্চক, যোগাযোগী, অকার্যকর মর্মে রদ এবং রহিত করার ডিক্রী দানে মর্জি হয়."

For the cause of inordinate delay in challenging the *ex-parte*, it has been stated in the application that the plaintiffs were illiterate village people and their learned Advocate did not give them proper advice and as such, they could not challenge the ex-parte judgment and decree. In the application they stated nothing about their date of knowledge of the ex-parte judgment and decree.

Article 95 of the First Schedule of the Limitation Act stipulates the period of limitation of filing a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud and said period is three years which begins to run when the fraud become known to the party wronged. This suit comes under section 39 of the Specific Relief Act. An *ex-parte* decree can be set aside by filing application under Order IX rule 13 of the Code of Civil Procedure and the limitation for filing such application is 30 days from the date of *ex-parte* decree or where the summons has not been duly served, 30 days from the date when the defendants came to know about the *ex-parte* decree.

In this case the plaintiffs did not avail the forum under section 39 of the Specific Relief Act by filing a suit or under Order IX rule 13 of the Code of Civil Procedure for setting aside the *ex-parte* decree but they by way of amendment of the plaint have sought to add a prayer in their plaint seeking for a decree setting aside the *ex-parte* decree on the ground of fraud which comes under section 39 of the Specific Relief Act. Now question arises whether the proposed amendment of plaint by

way of addition of a prayer for setting aside the *ex-parte* decree on the ground of fraud is barred by limitation.

In their written statement filed on 20.01.2013, the defendants pleaded that they instituted Title Suit No. 465 of 2012 against the plaintiffs praying for a decree of declaration of benami transaction. In spite of such information the plaintiffs did not appear in that suit and the suit was proceeded in accordance with law and ultimately decreed *ex-parte* vide judgment and decree dated 30.05.2016. Defendant No. 1 on 31.10.2019 deposed as D.W.2 and produced certified copies of the plaint, judgment and decree passed in Title Suit No. 465 of 2012 which were marked as exhibits-Ga, Ga (1) and Ga (2) on 31.10.2019 and he was cross-examined by the plaintiffs. In cross-examination the learned Advocate for the plaintiffs gave suggestion that summons of said suit was not served upon the present plaintiffs (defendants of said suit) which he denied. But during trial of this suit the plaintiffs by way of amendment of the plaint did not challenge said decree or make out a case that the decree was obtained by fraud. Moreover, in the present application for amendment of the plaint the plaintiffs stated nothing about the date of their knowledge about the *ex-parte* decree. Since the defendants in their written statement filed on 20.1.2013 categorically disclosed the fact of filing Title Suit No. 465 of 2012 and then produced the certified copies of the plaint, the *ex-parte* judgment and decree on 31.10.2019 (which were marked as exhibits in this suit) and that the learned advocate for the plaintiffs cross-examined DW2 on this point it is to be presumed that the plaintiffs were well conversant about the filing of the suit as well as the *ex-parte* decree from the very beginning or at least since 31.10.2019. But they did not challenge said decree until they filed this application by swearing affidavit on 16.02.2026 and

accordingly, the proposed amendment of plaint dated 16.2.2026 for addition of a prayer for a decree setting aside the *ex-parte* decree dated 30.5.2016 on the ground of fraud is barred by limitation in view of the provisions under Article 95 of the First Schedule of the Limitation Act. In view of the above, the application for amendment of the plaint is rejected.

Now we would proceed to discuss the merits of the case considering the evidence of the parties. To prove their respective case the plaintiffs adduced four oral witnesses and on the other hand, the defendants adduced four oral witnesses. Both parties produced documentary evidence which were marked as exhibits.

It is the case of the plaintiffs that Bechu Mia was the owner of 2.43 acre land. Ownership of Bechu Mia in respect of 2.43 acre land is admitted by both parties. The plaintiffs contended that Bechu Mia transferred 2.43 acre land by registered sale deed No. 7508 dated 04.12.1957 in favour of Sayera Khatun and Sayera Khatun paid consideration money from her own purse. On the other hand, the contention of the defendants is that Sayera Khatun was a mere benamder of Serajul Hoque and the consideration money of said 2.43 acre land was paid by Serajul Hoque from his own purse. Both parties produced certified copy of said sale deed dated 04.12.1957 which was marked as exhibit-2 = exhibit-Kha. In the recital of the deed, it was stated that Serajul Hoque paid the consideration money. Moreover, the case of benami transaction was declared in Title Suit No. 465 of 2012 by a competent Court declaring that the transaction made by sale deed dated 4.12.1957 was a benami transaction and the said decree is still in force. Though the plaintiffs contended that the said decree was collusive but they could not adduce any evidence to substantiate their

plea. Accordingly, it has to be concluded that Sayera Khatun was the benamder of Serajul Hoque. In that view of the matter, the contention of the defendants that Serajul Hoque was the owner of the suit property by dint of sale deed dated 4.12.1957 and during Diyara Survey, Diyara Khatian No. 404 in respect of the suit land has been rightly prepared and finally published in the name of Serajul Hoque stands valid.

Further contention of the plaintiffs is that Sayera Khatun sold 2.43 acre land by three registered sale deeds being Nos. 1225, 1226 and 1227 dated 30.01.1974 (exhibit 3 series) in favour of plaintiff Nos. 1, 6 along with Hanif Mia and Hosen Ahmed and handed over possession thereof to them. Even if, it is taken that by exhibit 2, Sayera Khatun acquired title to 2.43 acre land from sabek plot No. 1176 of Khatian No. 617 but from exhibit-3 series it appears that by three sale deeds dated 30.1.1974 Sayera Khatun transferred total 2.43 acre land out of total 4.85 acre land from Plot Nos. 2383 and 2384 of Dyara Khatian No. 404 corresponding to sabek Khatian No. 617 in favour of the plaintiffs and two others. Exhibit 4 is the certified copy of Diyara Khatian No. 404 from which it appears that total 2.50 acre land was recorded in Plot No. 2383 and 2.35 acre land in Plot No. 2384 in the name of Serajul Hoque in eight anna share and two others in eight anna share and accordingly, total 4.85 acre land was recorded in plot Nos. 2383 and 2384 out of which Sayera Khatun transferred 2.43 acre land to plaintiff Nos. 1, 6 along with Hanif Mia and Hosen Ahmed which follows that vide exhibit 3 series 1.2525 acre land was transferred from plot No. 2383 and 1.1775 acre land from plot No. 2384. The plaintiffs could not adduce any evidence to prove that 2.43 acre land was transferred by Sayera Khatun vide three deeds of 30.01.1974. Moreover, by sale deed No.

1660 dated 28.01.1995 (exhibit-6) Hanif Mia transferred .60 acre land out of total 4.85 acre land of Plot Nos. 2383 and 2384 to plaintiff Nos. 2-4. So, it cannot be said that .60 acre land was transferred from Plot No. 2383 alone. Similarly, by sale deed No. 4387 dated 07.04.1997 (exhibit-5) and deed of gift No. 7306 dated 10.6.2008 (exhibit 5 Kha) Hosen Ahmed transferred .64 acre land out of 4.85 acre land of Plot Nos. 2383 and 2384 to Seraj Mia and .13 acre land out of 4.85 acre land of Plot Nos. 2383 and 2384 to plaintiff No. 2. So, as per exhibit-5 Seraj Mia and exhibit 5 Kha plaintiff No. 2 could not acquire title to .64 acre and .13 acre land respectively solely from Plot No. 2383 following which plaintiff No. 5 could not acquire title to said .64 acre land from Seraj Mia by registered sale deed No. 634 dated 19.01.2003 (exhibit-5ka) from Plot No. 2383. Considering the sale deeds dated 30.01.1974 (exhibit-3 series), 28.01.1995 (exhibit-6), 07.04.1997 (exhibit-5), 19.01.2003 (exhibit-5ka) and gift deed dated 10.06.2008 (exhibit-5kha) it is clear that by those deeds only 1.2525 acre land out of 2.43 acre land is covered by plot No. 2383. Accordingly, the plaintiffs are not entitled to claim total 2.43 acre land from Plot No. 2383 leaving Plot No. 2384. Moreover, the plaintiffs sought for a decree of declaration of title to 2.50 acre land of plot No. 2383 but they could produce title deeds in respect of 1.2525 acre land only. On perusal of the impugned judgment, it appears that the trial Court did not at all consider that vide sale deeds dated 30.01.1974 (exhibit-3 series), 28.01.1995 (exhibit-6), 07.04.1997 (exhibit-5), 19.01.2003 (exhibit-5ka) and gift deed dated 10.06.2008 (exhibit-5kha) only 1.2525 acre land out of 2.43 acre land is covered by plot No. 2383 and that the plaintiffs have no right to claim total 2.43 acre land from plot No. 2383 by those deeds but illegally

came to the conclusion that the plaintiffs could prove their title to 2.50 acre suit land of plot No. 2383.

Though the trial Court did not frame any issue, whether the *ex-parte* decree passed in Title Suit No. 465 of 2012 was binding upon the plaintiffs but it nullified the *ex-parte* decree on the ground of being barred by the principle of *res sub-judice* as per section 10 of the Code of Civil Procedure because it was passed in a later suit as well as during pendency of this suit.

Section 10 of the Code of Civil Procedure stipulates that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under the same title where such suit is pending in the same Court or any other Court having like jurisdiction. The object of section 10 of the Code is to prevent the courts of concurrent jurisdiction from simultaneously adjudicating two parallel litigations in respect of the same subject-matter. This is called the principle of *res sub-judice.* But this principle can only be applied when both suits are pending for disposal. This bar to the proceeding of the subsequent suit can be waived by the parties. If a subsequent suit is finally decided before the decision of the previous one, no matter whether rightly or wrongly, after such adjudication by a proper Court of competent jurisdiction, the result of such suit is binding upon the parties unless it is challenged in a proper forum. Moreover, section 10 of the Code enacts a rule of procedure pure and simple and as such a decree passed in contrary to section 10 is not a nullity and cannot be disregarded in another suit as per decision of the case of *Jamani Kanta Roy Chowdhury and ors. vs. Aswini Kumar Haldar and ors.* reported in *12 DLR 755*.

Admittedly, the plaintiffs instituted the present suit on 21.5.2012 before learned Joint District Judge, 1st Court, Noakhali against the present appellants praying for a decree of two declarations, one for declaration of title to 2.50 acre suit land and another declaration that the registered sale deed No. 5956 dated 25.04.2012 purportedly executed by defendant Nos. 4-7 transferring the suit land in favour of defendant Nos. 1-3 is collusive, inoperative, void, without consideration and not binding upon the plaintiffs mainly contending that they got title to the suit land through Sayera Khatun and she was not the benander of her husband Serajul Hoque. The present appellants as defendants filed joint written statement in this suit on 20.01.2013, mainly contending that they got title to 2.4250 acre land out of the suit land through Serajul Hoque and that Sayera Khatun was the benander of her husband Serajul Haque. They further contended that they instituted Title Suit No. 465 of 2012 on 4.7.2012 against the plaintiffs of the present suit in the Court of Senior Assistant Judge, Sadar, Noakhali praying for a decree of declaration that Sayera Khatun was the benander of her husband Serajul Hoque. The plaintiffs did not appear in Title Suit No. 465 of 2012 and allowed to proceed with the suit and ultimately it was decreed *ex-parte* vide judgment and decree dated 30.05.2016. During trial of this suit the defendants on 31.10.2019 produced certified copies of the plaint, judgment and decree passed in Title Suit No. 465 of 2012 which were marked as exhibits-Ga, Ga (1) and Ga (2) but the plaintiffs did not challenge said decree or make out a case that the *ex-parte* decree was obtained by fraud. Since the *ex-parte* decree dated 30.5.2016 was passed in Title Suit No. 465 of 2012 by a Court having competent jurisdiction against the plaintiffs declaring that Sayera Khatun was the benamder of Sirajul Haque and they did not

challenge it in any forum, it is binding upon them. Accordingly, the trial Court upon misconception of law wrongly held that the *ex-parte* decree having passed in subsequent suit was barred by the principle of *res sub-judice* as per section 10 of the Code.

There is another aspect of the matter. As per schedule of the plaint the plaintiffs claimed that during Bangladesh Survey 2.50 acre suit land was recorded as .87 acre land of Plot No. 5142 of D.P Khatian No. 677, 1.02 acre land of Plot No. 5143 of D.P Khatian No. 1232, .13 acre land of Plot No. 5141 of D.P Khatian No. 2103 and .63 acre land Plot No. 5140 of D.P Khatian No. 1415. Total area of land covered by those four recent plots is 2.65 acre which means that the plaintiffs in one hand sought for declaration of title to 2.50 acre land but, as per recent survey 2.65 acre land was recorded in four plots in four D.P Khatians. But the plaintiffs did not give any explanation in respect of access .15 acre land or deduct said access land from 2.65 acre land or give any boundary or specification to identify 2.50 acre suit land. So, the suit land is unspecified and vague and as per Order VII rule 3 of the Code of Civil Procedure a decree of declaration of title in respect of an unspecified land cannot be passed and as such, the suit is not maintainable but unfortunately the trial Court has missed this point and erroneously held that the suit is maintainable.

Now, we would consider whether the plaintiffs could prove their exclusive possession in the suit land. They have contended that after their purchase they mutated their names in the Government Revenue Office and paid rents and in support of their mutation and payment of rent produced rent receipts which were marked as exhibit-8-8Uma. Against that the defendants produced the certified copy of an order dated 12.09.2012 passed by Assistant Commissioner (Land) in Objection

Case No. 149/2012-2013 which was marked as exhibit-Cha from which it appears that the plaintiffs mutated the suit land vide three mutation cases out of which two were started in 2010 and another was started in 2007 and by those mutation cases the plaintiffs got Mutation Khatian Nos. 1778, 1577 and 1799 and those Khatians were created from Diyara Khatian No. 404. But as per exhibit-Ka1 Diyara Khatian No. 404 was prepared and finally published in the name of Serajul Hoque instead of Sayera Khatun. Though the plaintiffs claimed that they and two others purchased the suit land in 1974 from Sayera Khatun by three sale deeds but after that they did not challenge Diyara Khatian No. 404 in any forum. The Assistant Commissioner (Land) vide order dated 12.09.2012 (exhibit Cha) cancelled those mutations and retained the suit land in Khatian No. 404. Accordingly, after cancellation of the mutations of the plaintiffs it is clear that the plaintiffs have no mutation in their names. The plaintiffs further contended that during recent survey D.P Khatian Nos. 677, 1232, 2103 and 1415 have been prepared and published in their names but they did not produce those Khatians during trial. On the contrary, the defendants produced certified copies of orders passed in Appeal Nos. 22787 of 2012 and 22791 of 2012 filed under rule 31 of the State Acquisition and Tenancy Rules filed by the defendants challenging the D.P Khatians of the plaintiffs and those were marked as exhibit-Gha and Gha 2. The defendants also filed certified copy of survey report dated 24.9.2013 submitted by the Surveyor appointed in Appeal Nos. 22787 of 2012 and 22791 of 2012 which was marked as exhibit Gha-1 from which it appears that after filing of the appeal cases a field survey was held by a Surveyor appointed by the Settlement Officer who, upon investigation, submitted report stating that the defendants have possession in respect of .63 acre land of hal Plot No.

5140 of the D.P Khatian No. 1415 and .96 acre land of Plot No. 5144 of D.P Khatian No. 1481 and considering the report of the surveyor the Settlement Officer directed to record said land in favour of the defendants. Accordingly, it cannot be said that during recent survey the record-of-rights in respect of the total suit land was prepared and finally published in the name of the plaintiffs. On perusal of the impugned judgment, it appears that the trial Court emphasized upon the rent receipts and recent record-of-rights (thought the D.P Khatians were not produced during trial) as documents of possession of the plaintiffs in the suit land and came to erroneous finding that since mutation and record-of-rights are documents of possession the plaintiffs could prove their possession in the suit land. It appears that the trial Court did not consider that the mutations of the plaintiffs have been cancelled and the Revenue Officer found possession of the defendants in some portion of the suit land.

Not only that the defendants produced certified copies of the complaint of Petition Case No. 917 of 2012 and an order dated 25.6.2014 passed therein by Additional District Magistrate, Noakhali which were marked as exhibit-Uma and Uma(1) from which it appears that defendant No. 2 Abdul Haque filed Petition Case No. 917 of 2012 against the plaintiffs before the Additional District Magistrate, Noakhali on 5.12.2012 praying for drawing up proceeding under section 145 of the Cr.P.C against them and as per direction of the Magistrate an investigation was held by a Sub-Inspector of Police who, after field investigation submitted report stating that the defendants of this suit have been possessing the suit land and upon considering said report, the Additional District Magistrate vide order dated 25.6.2014 restrained the opposite parties (the plaintiffs of the present suit) from

dispossessing the defendants of this suit from the suit land unless a contrary order comes from a competent Court. The plaintiffs did not challenge said order before any higher forum. The defendants also produced certified copy of an order dated 30.05.2012 passed by No. 1 Char Jabbar Union Parishad Village Court in Petition Case No. 89 of 2012 which was marked as exhibit-Cha from which it appears that the present defendants filed said case against the plaintiffs on the allegation of cutting and taking away soybean crops from the suit property by them and the Village Court upon taking evidence observed that the defendants have been owning and possessing the suit land but the plaintiffs of the present suit illegally cut and take away Soybean crops causing financial loss to the defendants amounting to Tk. 14,000/- and directed the present plaintiffs to pay Tk. 14,000/- to the defendants as compensation. The plaintiffs did not challenge the order of the Village Court in the higher forum.

From the chronological facts as discussed above and the oral evidence adduced by the parties, it appears the P.W.s by their oral testimonies stated that the plaintiffs have been possessing the suit properly and on the other hand, the D.W.s by their oral testimonies stated that the defendants have been possessing the suit properly but the oral evidence of the plaintiffs cannot be believed and relied on because of the fact that in Miscellaneous Case No. 149 of 2012-2013 filed for cancellation of the mutation of the plaintiffs, Appeal Nos. 22787 and 22791 of 2012 filed under rule 31 of the SAT Rules, Complaint Case No. 917 of 2012 filed under section 145 of the Cr.P.C and Case No. 89 of 2012 filed before the Village Court, the possession of the defendants in the suit land has been established and the plaintiffs did not challenge the final orders passed therein and

accordingly, we are of the view that the plaintiffs could not prove their possession in the suit land.

Considering the facts and circumstances of the case and the evidence adduced by the parties, we are of the view that the plaintiffs could not prove their title to and possession in the suit land. Accordingly, they are not entitled to any decree as prayed for. On perusal of the impugned judgment, it appears that the trial Court upon misreading and non-consideration of the evidence of the parties and misconception of law came to its findings and decision and illegally decreed the suit which calls for interference by this Court.

In view of the above, we find merit in this appeal.

In the result, the appeal is allowed, however without any order as to costs. The impugned judgment and decree dated 22.01.2020 (decree signed on 27.01.2020) passed by learned Joint District Judge, 1st Court, Noakhali are set aside. Consequently, Title Suit No. 465 of 2012 be dismissed.

Send down the L.C.R along with a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Justice Aynun Nahar Siddiqua)