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

Present:
Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.642 OF 2018
In the matter of:
An application under Section 115(1) of the Code of Civil Procedure.
And
Abu Saleh Sheikh and others
.... Petitioners
-Versus-
Rahman Sheikh and others
.... Opposite parties
Mr. Md. Moniruzzaman, Advocate
.... For the petitioner.
None appears
.... For the opposite parties.

Heard and Judgment on 12.07.2023

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite No.1 to show cause as to why the impugned judgment and decree dated 07.08.2017 passed by the learned Joint District Judge, 1st Court, Gopalgonj in Title Appeal No.49 of 2015 dismissing the appeal and affirming those dated 27.11.2014 passed by the learned Assistant Judge, Kotalipara, Gopalgonj in Title Suit No.7 of 2006 dismissing the suit on contest should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper..

Facts in short are that the petitioners as plaintiffs instituted above suit for partition claiming separate saham for 17 decimals land as described in schedule- Ka-Gha to the plaint alleging that C.S. Khatian No.41 comprising an area of 47 decimals land belonged to Jan Mahmud and Abejan in equal shares and 30 decimals land comprising in C.S. Khatian No.10 belonged to Jan Mahmud and Abejan in equal shares.

After demise of above Abejan total property of above two C.S. Khatians devolved upon Jan Mahmud who died leaving two sons namely Alep and Goher who inherited above property in equal shares. Alep died leaving three sons namely Kader, Surat and Taiyab Ali and three daughters namely Jahuran Nessa, Golejan and Najiran Nessa. Plaintiffs are heirs of above mentioned Surat Ali and they inherited 3.33 decimal land by inheritance. Golejan died leaving three sons namely Lutfor, Liakot and Fateh and they inherited the land of their mother and they jointly with other two daughters of Alep namely Jahuan and Najiran transferred 5 decimal land to plaintiff No.1 by registered kabala deed dated 14.06.2004. Above mentioned Goher while owning and possessing 38 decimal land from above mentioned two C.S. Khatians died leaving 4 sons namely Azahar, Nijam Uddin, Nesar Uddin and Nur Uddin. Nur Uddin died leaving two sons namely Monirul and Jahidul and one daughter Doleya and one wife Aleya as his heirs.

Above heirs of Nur Uddin transferred $3\frac{3}{4}$ decimal land to the plaintiff No.1 by registered Kabala deed No.90 dated 06.01.2011. As such by way of inheritance and purchase by two registered kabala deeds plaintiffs acquired 17 decimals land in the disputed jama and possessing the same by constructing dwelling house. But above property has not been partitioned by meets and bound and the defendants refused to amicable partition.

The suit was contested by defendant Nos.1, 5-11 and 14-15 and 46 by filing separate written statement. It was alleged by defendant No.1 that 30 decimal land of Plot No.288 of S.A. Khatian No.3 was sold in auction for realization of arrear rents which was purchased by Saburan Nessa who mutated her name by Miscellaneous Case No.16 of 1968-69 and paid rent to the Government and sold above land to Abu Bakar by registered kabala deed dated 09.08.1977 who in his turn transferred above land to defendant No.1 by registered kabala deed dated 30.04.1980.

Defendant Nos.5-11 alleged in their joint written statement that no land of disputed khatian was ever sold in auction and auction purchaser Saburan Nessa never got possession in the same. Defendant No.1 does not have any right, title and possession on the basis of alleged purchase from Abu Bakar nor Abu Bakar got any possession

and title by purchase from Saburan Nessa. Defendant Nos. 5-7 acquired 3.5 decimals land by purchase from the successive heirs by registered kabala deed dated 07.07.1997 and they purchased 5 decimals land from Awal. The defendant Nos.5-11 acquired 20.75 decimals land from 4 schedules and claim separated saham for 20.75 decimals land.

Defendant Nos.14 and 15 are the successive heirs of Goher. They stated that 30 decimals land of S.A. Khatian No.3 was never sold in auction. Above 30 decimal land land was purchased by heirs of Alep and Goher. By way of purchase and inheritance they are owning and possessing 14.5 decimals land in above disputed khatian and they sought separate saham for above land.

At trial plaintiff examined two witnesses, defendant No.1 examined two witnesses and defendant Nos.5-11 examined two witnesses and defendant No.46 examined one witness. Documents produced and proved by of the plaintiffs were marked as Exhibit No.1 and 2 series and those of defendant No.1 were marked as Exhibit No.Ka series and documents produced and proved by defendant Nos.5-11 were marked as Exhibit-Ka and Ka-1.

On consideration of facts and circumstances of the case and materials on record the learned Senior Assistant Judge dismissed the suit.

Being aggrieved by above judgment and decree of the Trial Court plaintiffs preferred Title appeal No.49 of 2015 to the District Judge, Gopalgonj which was heard by the learned Joint District Judge, First Court, Gopalgonj who dismissed the appeal and affirmed the judgment and decree of the Trial Court.

Being aggrieved by above judgment and decree the appellants as petitioners moved to this Court and obtained this Rule.

Mr. Md. Moniruzzaman, learned Advocate for the petitioners submits that undisputedly suit property comprising an area of 13 decimals land of C.S. Khatian Nos.10 and 47 decimals land of C.S. Khatian No.41 equally belonged to Jan Mahmud and Sabiran Nessa. Sabirun Nessa died leaving Jan Mahmud and Jan Mahmud died leaving two sons Alep and Goher. Alep died leaving three sons Kader, Surat and Taiyab Ali and three daughters namely Jahurunessa, Golejan and Najiran and Goher died leaving 4 sons namely Azahar, Nizam Uddin, Nesar Uddin and Nur Uddin and 1 daughter Doleya and wife Aleya. Plaintiffs are successive heirs of above mentioned Surat Ali and defendant No.1 is the son of above mentioned Kader and defendant Nos.5-11 are heirs of Taiyab Ali and defendant No.46 is the son of above mentioned Goher. Since the plaintiffs and defendants are all co-sharers and successive heirs of C.S. recorded tenants this suit for

partition was well tenable in law. But the learned Judges of both the Courts below have erroneously held that the suit was not tenable in law without declaration of title which is not tenable in law. The learned Advocate further submits that the learned Judge of Trial Court has clearly mentioned in the judgment that the plaintiff No.1 is owning and possessing $4\frac{1}{3}$ decimals land in the disputed jama. Defendant No.1 gave evidence as DW1 and clearly stated that defendant No.5-11 is in possession in the land of disputed jama by way of inheritance and purchase. As far as the plaintiff is concerned he has stated that the plaintiffs are possessing 1.5 decimals land from the homestead plot and they also possessed land from the plot of tank. Defendant No.5 while giving evidence as DW3 clearly stated in his cross examination that the plaintiffs are in possession in 17 decimal land as has been claimed by them and he has no objection if the plaintiffs get a decree for above 17 decimal land. Excepting defendant No.1 other defendant did not dispute the title and possession of the plaintiffs in 17 decimal land. The learned Advocate lastly submits that in this case the only dispute is whether 30 decimal land of S.A. Khatian was sold in auction or not and defendant No.1 has measurably failed to prove the genunity and authenticity of above auction sale of 30 decimal land of the disputed jamas. As such the learned Joint District Judge should have allowed the

appeal and decreed the suit and grant separate saham to the plaintiffs and other defendants but the learned Judge has failed to appreciate the evidence on record properly and most illegally dismissed the appeal and affirmed the flawed judgment and decree which is not tenable in law.

No one appears on behalf of the opposite parties when the Civil Revision was taken up for hearing although it appeared in the list for hearing today.

I have considered the submissions of the learned Advocate for the petitioners and pleadings, evidence on record, impugned judgment and decree and other materials on record.

It is not disputed that 77 decimal of land appertaining to C.S. Khatian Nos.10 and 41 belonged to Jan Mahmud and Sabirun Nessa. Sabirun Nessa died leaving Jan Mahmud as her sole heirs and Jan Mahmud died leaving behind two sons namely Alep and Goher.

It is also admitted that Alep died leaving three sons namely Kader, Surat and Taiyab Ali and three daughters namely Jahuran Nessa, Golejan and Najiran. It is also admitted that Goher died leaving four sons namely Azahar, Nezam Uddin, Nesar Uddin and Nur Uddin and one daughter Doleya and one wife Aleya. It is also admitted that the plaintiffs are the heirs of Surat and defendant No.1 is heir of above

mentioned Kader and defendant Nos.5-11 are heirs of Taiyab Ali and other defendants are heirs of Goher.

In this suit for partition there is no dispute as to the correctness of the C.S. Khatian and the extent of title of the C.S. recorded tenants or the genology of deceased C.S. Khatian tenants and that the plaintiffs and defendants are successive heirs of disputed C.S. Khatian tenants.

It was found by both the Courts below that in this suit for partition all co-sharers were impleaded as defendants and all joint properties were brought into hotchpotch and the suit was not defective in any other way. But both the learned Judges of the Courts below concurrently held that the suit was not tenable without seeking a decree for declaration of title.

In this case the sole dispute appears to be alleged auction sale of 26 decimals land of S.A. Khatian No.3. Defendant No.1 claims title in above 26 decimal land by successive purchase from the alleged auction purchaser. Defendant No.1 is a co-sharer of the plaintiffs and other defendant since he is the heir of above mentioned Kader and grandson of C.S. recorded tenant Alep.

It is well settled that in a suit for partition all dispute as to the title or possession or quantity of share between the co-sharers can be determined in a properly framed suit for partition.

The learned Judges of the Courts below have actually given a decision on the main question of this suit whether above mentioned auction sale was lawful and effective and both the Courts below found that above auction sale was lawful and effective. As such the concurrent findings of the learned Judges of the Courts below that their suit for simple partition amongst the co-sharer was not tenable in law without a further declaration of title is misconceived and not tenable in law.

The only dispute between the parties of the suit is as mentioned above auction sale of 26 decimal land of S.A. Khatian No.3 as has been alleged by defendant No.1. In his written statement the defendant did not mention the date of alleged auction sale of above land nor he has stated where or in which Court above auction was held. No case number of above auction sale was mentioned in the written statement. Rent is fixed and realized on the basis of jama or khatian not on the basis of a plot and accordingly, due to nonpayment of rent the land of the whole jama is put into auction for sale. But in this case it has been alleged that 26 decimal land of Plot No.288 was only sold in auction which appears to be highly unusual and improbable.

Defendant No.1 gave evidence in this case as DW1 but he could not produce any single document to substantiate his claim of sale of 26 decimal land in auction. Above witnesses has produced and proved a

certified copy of S.A. Khatian No.3 which shows that disputed Plot No.288 was incorporated in S.A. Khatian No.3 which stands in the name of Dinesh Chandra Chakrabarty. But in the column of possession of land of Plot No.288 the names of Surat Ali and Taiyab Ali and defendant No.1 son of Kader and Nezam Uddin and Nesar Uddin have been recorded. DW1 Abdur Rahman has admitted in his cross examination that defendant Nos.5-11 are owning and possessing land in the disputed jama on the basis of inheritance and purchased and they are entitled to get saham for that. He has further admitted the plaintiffs possession in the land of the disputed jama. Above witness stated that the plaintiffs do not have possession in the house plot but they have possession in other plots and they possessed 1.5 decimals land from house plot and they also possessed land from the plot of the tank. Defendant No.5 while giving evidence for defendant Nos.5-11 as DW3 stated in cross examination that plaintiffs are owning and possessing 17 decimals land and they are possessing 20.75 decimals and they want separate saham for above land. Defendant No.14 while giving evidence on behalf of defendant Nos.14-15 as DW5 admitted in cross examination that plaintiffs are in possession in 17 decimal land and they are entitled to get decree for above land.

On consideration of above facts and circumstances of the case and evidence on record I hold that the defendant No.1 has failed to prove by legal evidence that 26 decimals land of S.A. Plot No.288 was sold in auction and the same was purchased by one Saburunessa and he acquired above land by way of successive purchase.

In this suit defendant No.5-11 and 46 have sought separate saham but from the statements made in the plaint and written statements of above defendants as well as from their documents it is difficult to ascertain the quantity of their share. Moreover, the learned Judges of the Courts below did not pass any decision as to the claim of separate saham by above defendants since the suit was dismissed on the ground of maintainability.

In view of above facts and circumstances I hold that the ends of justice will be met if the impugned judgment and decree is set aside and the suit is remanded back to the Trial Court for retrial after giving both sides an opportunity to amend pleadings and adduce further evidence.

In above view of the materials on record, I find substance in this Civil Revision and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is made absolute.

The impugned judgment and decree dated 07.08.2017 passed by the learned Joint District Judge, 1st Court, Gopalgonj in Title Appeal No.49 of 2015 dismissing the appeal and affirming the judgment and decree dated 27.11.2014 passed by the learned Assistant Judge, Kotalipara, Gopalgonj in Title Suit No.7 of 2006 is set aside and the suit is remanded back to the Trial Court for retrial after giving both sides an opportunity to avail pleadings and adduce further evidence.

However, there is no order as to costs.

Send down the lower Court's records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER