

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Murad-A-Mowla Sohel

First Appeal No.165 of 2010

Most. Rabeya Bibi and others appellants

-Versus-

Md. Azahar Ali Akonda and respondents

Ms. Nahid Yesmin, Senior Advocate with Mr.
Iqbal Hassan, Advocate for the appellants

Mr. Md. Saidul Alam Khan, Advocate
..... for respondents 1-9

Judgment on 03.11.2025

Bhishmadev Chakrabortty, J:

Defendants 1-3 have preferred this appeal challenging the judgment and decree of the Joint District Judge, Court 1, Bogura passed on 11.02.2010 in Other Class Suit 45 of 2002 decreeing the suit praying for joint possession.

The plaint case, in brief, is that Zaminders Sumerugiri Goshai, Bhubangiri Goshai and Bishweshwar Mondal were the CS recorded tenants of the suit pond under the Government of India. Bishweshwar Mondal gave *pattan* of his share to Sumerugiri Goshai and Bhubangiri Goshai and thus they became owners in possession in 16 annas share of the suit pond. On the death of Bhubangiri his share devolved upon his brother Sumerugiri and the latter became its owner as a whole. Sumerugiri died leaving behind his two sons Satyanarayan and Ashutosh and they remained in possession of the same. The suit property is known as Rupihar Pukur in that area measuring 17.90

acres of plot 515. Afiruddin Uddin Akanda and Chikon Akanda took *pattan* of the pond from the aforesaid owners through a registered *kabuliyat* dated 10 Kartik 1350 BS corresponding 27.10.1943 AD at on yearly rent of Taka 20/-. In the *kabuliyat* Afiruddin Uddin Akanda became owner of 14 annas share while Chikon Akanda had 2 annas share. They started possessing the same on payment of rent to the Zaminders. Both of them remained in possession by implanting trees on the bank of the pond. Afiruddin died leaving behind 2 wives Shamarjan Bewa and Joytun Bewa, a daughter Jeshaton Bibi and his brother Jafir Akanda alias Jafi Akanda and sister Barani Bibi. The aforesaid heirs remained owners in possession in the pond in *ejmali*. Shamarjan died leaving behind her daughter Jeshaton Bibi. Joytun Bewa transferred her share to her adopted son defendant 4 Ahsan Ali. Jeshaton transferred her share to her 3 daughters defendants 1-3 through a registered deed and died. In this way, defendants 1-3 each got 3 annas share of the pond equivalent 2.94 acres and remained in possession in *ejmali*. Defendant 2 Saila Bibi during possession and enjoyment over her share in *ejmali* transferred 1.00 acres to plaintiff 1 through a registered *kabala* dated 18.07.1992. Defendant 2 further sold out .66 acres to plaintiff 1 through another registered *kabala* dated 25.10.1992. In this way plaintiff 1 became owner of 1.66 acres by way of purchase and remained in possession in *ejmali*. Jafi Akanda who got 4 annas share as brother of Afiruddin died leaving behind his

wife Sundari alias Sunduri, a son plaintiff 1, two daughters Rahiman Bibi and Jarina Bibi who remained in possession in the suit pond in *ejmali*. Sundari Bewa through a *heba-bil-ewaz* dated 03.02.1998 gifted her .49 acres to her daughter plaintiff 2 and became titleless. Rahiman Bewa through a *heba-bil-ewaz* dated 22.05.1993 gifted .50 acres out of .85 acres of her share to plaintiff 3. Plaintiff 2 Jarina Bibi through a registered *kabala* dated 10.01.2002 transferred .825 acres to plaintiff 3. Rahima transferred her remaining share to plaintiff 5 Jahurul Islam and became titleless. Barani Bibi who got 2 annas share in the suit pond measuring 1.96 acres died leaving behind 2 sons defendants 6 and 7 and a daughter defendant 8. In this way defendant 7 Haider Ali became owner of .78 acres as heirs and sold it to plaintiff 3 through a *kabala* dated 14.06.1995. Heyatullah, defendant 6 sold out his share of .78 acres to plaintiffs 5-8 on 13.07.1994. Rabeya Bibi, daughter of Jeshaton Bibi sold 2.17 acres out of her share of 2.94 acres to plaintiffs 5-7 through a *kabala* dated 03.10.1991. Rahela Bibi further sold out .77 acres to plaintiff 8 through a registered *kabala* dated 28.08.1997. Jahura Bibi sold out .10 acres and .10 acres to plaintiffs 5 and 9 through two *kabalas* both dated 30.01.1992. Jahura Bibi got .30 acres from her mother Ayla Bibi through a *kabala* dated 26.08.1992. Plaintiff 1 sold out his purchased share of 1.66 acres to plaintiff 4 through a registered *kabala* dated 15.10.1995. Plaintiff 1 further dedicated .24 acres to Pahason Eidgah field through a

registered waqf deed. The plaintiffs thus by way of inheritance and purchase became owner in possession of 9.83 acres of the suit pond and remained in possession therein in *ejmali* with other owners. The MRR *khatian* was prepared erroneously for which 2 wives and a daughter of Afiruddin filed Miscellaneous Case 154 of 1970 in the Court of the then Subordinate Judge, Bagura wherein Jafi Akanda was made as defendant 7. In that suit he filed written statement and claimed that Afiruddin Akanda had 14 annas share of the suit pond and he claimed 4 annas share as brother of Afir. The aforesaid suit was dismissed against which Miscellaneous Appeal 11 of 1972 was preferred which was allowed on 29.06.1973 and order was passed to correct the share of Afiruddin as 14 annas. In that appeal defendant 7 had filed a cross-objection wherein the learned District Judge passed remark that in such a suit title cannot be decided and he has scope to get decision of title by filing a separate suit. In the aforesaid suit Barani Bibi, a sister of Afiruddin Akanda was also made as defendant. Subsequently, the certificate officer issued notice to Monor Uddin as heirs of Afiruddin and Jafiruddin son of Sukra Akanda for arrear of rent. In response thereto, the plaintiffs paid rent and obtained receipts. Chikon Akanda and Rafiuddin Akanda died before the death of Afiruddin Akanda and Afiruddin, his brother Jafiruddin and sister Barani were alive. CS *Khatian* 3 of Saltha Muza was correctly prepared in the names of the aforesaid 2 brothers. In the recent survey

DP *khatians* have been prepared in the names of Shajahan, Haider, Hayatullah, Sundari Bewa and Rahiman Bibi (the plaintiffs). In this way the plaintiffs with others co-sharers became owner of the pond and have been in possession of the share in *ejmali* by paying rent to the concerned. The defendants disowned the plaintiffs share in the suit pond on 05.07.2002 corresponding to 21th Ashar, 1409 BS, hence the suit prying for joint possession.

Defendants 1-3 contested the suit by filing written statement denying the material statements made in the plaint. They contended that the suit is not maintainable in the present form, it is barred by limitation and principle of *res judicata*. They admitted that Sumerugiri Goshai and others were the original owners of the suit pond. They further admitted that Afiruddin Akanda and Chikon Akanda took the suit pond *pattan* from Satya Narayan and Ashutosh the heirs of Sumerugiri through a *kabuliyat* dated 27.10.1943 to the extent of 14 annas and 2 annas share respectively. Afiruddin died leaving behind 2 wives Shamarjan Bewa and Joytun Bewa and a daughter Jeshaton Bibi. Subsequently Shamarjan Bewa died and her daughter Jeshaton inherited her share. Jeshton through a *heba-bil-ewaz* dated 14.01.1989 transferred in total 10.24 acres including 4.85 acres of the suit pond to defendant 2 Saila Bibi and handed over possession thereof. Jeshaton Bibi through another *heba-bil-ewaz* dated 14.01.1989 further transferred 9.96 acres including 4.82 acres of suit pond to defendant 3

Ayla Bibi. Jeshaton through another *heba-bil-ewaz* of same date also transferred 10.35 acres including 4.85 acres of suit pond to defendant 1 Mst. Rabeya Khatun. But when MRR khatian was prepared wrongly in the names of some titleless persons Afiruddin Akanda filed Miscellaneous Case 154 of 1970 in the Court of the then Subordinate Judge, Court 1, Baruga. During pending of the aforesaid suit Afiruddin died and his 2 wives and a daughter was impleaded in the suit as plaintiffs. In that suit Jafi Akanda was made defendant 7 where he claimed share as heir of Afiruddin but he failed to prove it. An appeal was preferred against the said judgment which was disposed of and direction was passed to correct MRR *khatian*. Against which a revision was filed in the High Court Division which was discharged for default. The plaintiffs' predecessor Jafir Akanda although contested the aforesaid suit but failed to prove his claim. The plaintiffs by suppressing the aforesaid facts instituted the instant suit praying for joint possession. Therefore, the suit would be liable to be dismissed.

On pleadings the trial Court framed the following issues-

1. Whether the suit is maintainable in the present form and manner?
2. Whether the suit is barred by limitation?
3. Whether the plaintiffs are the gradual owners of Afiruddin and a co-sharears in the suit pond?

4. Whether the plaintiffs are entitled to get decree as prayed for?

In the trial, the plaintiffs examined 3 witnesses and produced their documents exhibits-1-23. On the other hand, defendants 1-3 examined 1 witness and produced their documents exhibits-Ka-Gha(2). However, the Joint District Judge decreed the suit declaring plaintiffs' joint possession in respect of 9.775 acres in the suit pond which prompted defendants 1-3 to approach this Court with the present appeal.

Ms. Nahid Yeasmin, learned Senior Advocate for the appellants takes us through the applications both dated 23.01.2023 filed in this Court under Order 6 Rule 17 of the Code of Civil Procedure (the Code) for amendment of the written statement and under Order 41 Rule 27 of the Code for accepting additional evidence which were kept with the record and submits that the appellants are illiterate *pardanshin* village women who had no knowledge about the subject matter of the suit. They were fully dependent upon the learned Advocate of the trial Court. The learned Advocate appointed in this Court after perusing records got it discover that Afiruddin Akanda, the predecessor of the appellants had many other lands including the suit pond. The plaintiffs took shares therefrom as reversioners before institution of the instant suit but the abovesaid fact was not inadvertently included in the written statement. The learned Advocate

on perusal of the relevant documents sort out the quantum of land in the name of Afiruddin which were subsequently got, possessed and sold out by the plaintiffs. The appellants then prayed for amendment of the written statement in this Court for insertion of the lands of 3 others SA *khatians* of 3 different *mouzas*. In the application for taking additional evidence, the appellants also annexed some photostate copies of documents in support of their aforesaid claim which they wanted to brought by way of amendment of written statement. Learned Advocate refers to the aforesaid documents and the statements made in the applications and submits that the suit in the present form for mere joint possession in the *ejmali* pond is not maintainable without prayer for partition or by filing an independent suit for partition including of all the properties left by Afiruddin in the suit to resolve dispute between the parties once for all. She pointed us to the supplementary affidavit to the application for amendment of the written statement and submits that the parties predecessors had other lands of SA *Khatian* 68 measuring .63 acres, SA *Khatian* 25 measuring 1.11 acres and SA *Khatian* 8 measuring 1.13 acres. Since the plaintiffs did not bring all the properties of late Afiruddin into hotchpotch, but their predecessor and they transferred parts of which to other persons, the decree passed in this suit would deprive the defendants in the enjoyment of their shares because the plaintiffs got and enjoyed lands of other *mouzas* and *khatians* and the defendants

are entitled to get more share in the suit pond. She refers to the cases of Tayeb Ali vs. Abdul Khaleque and others, 43 DLR (AD) 87; Md. Abdul Noor @ Cunnu Mia and another vs. Makhan Mia alias Md. Laisuzzaman and others, 12 MLR (AD) 347 and Halima Khatun vs. Hamid Miah and others, 10 BLC 1 and submits that since the suit is once for declaration of joint possession to an unspecified share of a pond and there is no evidence that the previous owners had possession to the shares as claimed by the plaintiffs, the suit itself is not maintainable in the present form without prayer for partition. The trial Court has gone wrong in fact and law and decreed the suit which is required to be interfered with by this Court. The appeal, therefore, would be allowed.

Mr. Md. Saidul Alam Khan, learned Advocate for respondents 1-9, on the other hand opposes the appeal and supports the judgment and decree passed by the trial Court. He submits that this is a suit for simple declaration of joint possession in the suit pond. Although, the plaintiffs claimed joint possession with others claiming their share to the extent of 9.835 acres but the trial Court on assessment of evidence both oral and documentary decreed the suit for 9.775 acres. The claim of the plaintiffs has been well proved by documents as well as oral evidence of the parties. The suit property is a pond which is not devisable and as such the present suit for joint possession is well maintainable. If any other land or property of Afiruddin Akand

remains unadvisable, the aggrieved party may file a suit for partition at any time because the cause of action of filing a partition suit always runs. He refers to the cases of Md. Gias Uddin and others vs. Md. Nowab Ali and others, 22 BLD (HCD) 586; Shankar Chandra Das and others vs. Kalachand Das, 46 DLR 419; Joy Narain Sen Ukil Vs. Srikanta Roy and others, AIR 1922 Calcutta 8 and Enjaheruddin Mia alias Md. Enjaheruddin Mia vs. Mohammad Hossain and others, 50 DLR (AD) 85 and relied on the principle laid therein that the suit praying for simple joint possession without any consequential relief for partition is maintainable. The trial Court correctly decided the issue of maintainability of the suit. The judgment and decree passed by the trial Court is based on materials on record and as such the same may not be interfered with by this Court in this appeal. The appeal, therefore, would be dismissed.

We have considered the submissions of both the sides, gone through the materials on record and *ratio* of the cases cited by the parties. It is admitted by the parties that the disputed property is a pond measuring 17.90 acres. It is further admitted that Afiruddin Akanda and Chikon Akand took the aforesaid pond *pattan* from the superior landlords through a *kabuliyat* dated 27.10.1943. It is also admitted that Afiruddin Akanda had 14 annas share while Chikon Akanda had 2 annas in the suit pond.

The plaintiffs claimed that on the death of Afiruddin Akanda his 2 wives, a daughter, a full brother Jafir Akanda and sister Barani Bibi became heirs and they got their respective shares in the suit pond in *ejmali*. The defendants claimed that Afiruddin Akanda had only 2 wives and a daughter and at his death they inherited the suit pond. The aforesaid claim of the plaintiffs that Jafir Akanda and Barani Bibi were the brother and sister of late Afiruddin has been proved by oral evidence of 3 PWs and on admission of DW 1. Moreover, the documents lying with the record, *i.e.*, the certified copy to the plaint of Partition Suit 310 of 1949 exhibit-5 proves that Afiruddin Akanda, Jafiruddin Akanda, Chikon Akanda and Rabeya Akanda were the sons and daughter of late Sukra Akanda. Barani Bibi was also made as defendant 5 in the suit. In Miscellaneous Case 154 of 1970 filed in the Court of Subordinate Judge, Bogura exhibit-3, Jafi or Jafir Akanda was made as defendant 7. In the application for amendment of written statement as well as in the application for accepting additional evidence, the defendant-appellants in this or that way admitted the aforesaid fact of existence of Jafir Akanda and Barani Bibi as heirs of Afiruddin. The learned Advocate for the appellants did not make any submission that the above two were not the heirs of Afiruddin. The appellants further did not make any submission on point of *res judicata*, *i.e.*, whether the present suit is maintainable because of the disposal of Miscellaneous Appeal 11 of 1972. The findings and

decision of the trial Court on this point is found based on materials on record founded by well reasoning.

The only point is to be decided here as per the submissions of the parties whether the present suit seeking only for joint possession in the suit pond is maintainable without seeking partition by bringing all the properties of Afiruddin Akanda and others into hotchpotch. It has been alleged by the appellants that since in the counter-affidavit to the application for amendment of plaint as well as the application for taking additional evidence the plaintiff-respondents admitted of amicable partition by the parties and enjoyment of other lands of other *khatians* and *mouzas* by the plaintiffs, therefore, the present suit, if decreed will affect of getting the respective shares of the defendants in the suit pond because the plaintiffs have already transferred more lands from other shares and consequently they would get less share of the pond. We have gone through the counter-affidavit filed by the respondents against the application for taking additional evidence. Although, there we find admission of enjoyment of other lands by way of amicable partition but on scanning the plaint, written statement and evidence of witnesses, we do not find that any case by either of the party has been made out that there was amicable settlement and the plaintiffs enjoyed more lands from other lands left by Afiruddin Akanda. Yes it is true that any of the parties to this suit could have filed a suit for partition for getting their respective *saham* in the suit

pond by bringing other lands left by Afiruddin Akanda into hotpotch, if any or could have prayed for partition in this suit in the similar manner. But it is admitted and found that the suit property described in the schedule is only a pond which Afiruddin and Chikon Akanda took *pattan* and is not devisable by metes and bounds. Therefore, the suit for simple joint possession is found maintainable as well without any prayer for partition as consequential relief or filing a separate suit for partition. In the case of Md. Gias Uddin and others vs. Md. Nowab Ali and others, 22 BLD (HCD) 586 in which this Division put reliance in the case of Shankar Chandra Das and others vs. Kalachand Das, 46 DLR 419, it is has been held-

“Since the plaintiffs are in possession of the immovable property, they are entitled to file a suit praying for declaratory relief only with a view to removing the cloud on their title created due to wrong recording of ROR, because in such a suit, declaration of title is all that the plaintiffs need. So, they are not called upon to ask for consequential relief by way of partition.”

In the case in hand, the plaintiffs averred in the plaint that the cause of action arose on 05.07.2002 while the defendants disowned title of the plaintiffs in respect of their share in the suit pond. Therefore, the plaintiffs correctly brought the suit for declaration of joint possession in the suit pond with the defendants. It is further found that the plaintiffs claimed the share of the suit pond by way of inheritance from their predecessors Jafir Akanda, the brother of Afiruddin Akanda and through purchase from other heirs of

Afiruddin. The plaintiffs proved in evidence that as heirs of Jafiruddin and by purchase through registered *kabalas* exhibits-12, 13, 14 and 18 from the heirs of Afiruddin they are entitled to the share of pond measuring 9.775 acres out of 17.90 acres. On the other hand defendant-appellants failed to make out any specific case. In the premises above, we do not find any substance in the submissions of Ms. Yesmin, learned Senior Advocate for the appellants. Therefore, the applications filed by them under Order 6 Rule 17 of the Code for amendment of written statement and under Order 41 Rule 27 of the Code for taking additional evidence are rejected. However, the option for filing any partition suit for redressing grievances of the parties is always open because the cause of action of filing a partition suit is recurrence.

In view of the discussion made hereinabove, we find no merit in this appeal. Accordingly, the appeal is dismissed. No order as to costs. The judgment and decree passed by the trial Court is hereby affirmed.

Communicate this judgment and send down the lower Court records.

Murad-A-Mowla Sohel, J.

I agree.