

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

Present:

Mr. Justice S M Kuddus Zaman

And

Ms. Justice Tamanna Rahman Khalidi

First Appeal No.188 of 2012

Mrs. Tahsina Khatun and others

... Appellants

-Versus-

Md. Ramjan Hossain and others

... Respondents

With

First Appeal No.225 of 2012

Md. Ataur Rahman and others

-Versus-

Haji Mohammad Anwar Hossain and others

With

First Appeal No.67 of 2013

Hazi Md. Anwar Hossain and others

-Versus-

Mrs. Zarina Rahman and others

Mr. Mohammad Shaiful Alam with

Mr. Nadia Ali,

Mr. M. Murad Al Hasan Chowdhury,

Mr. Joydeпта Deb Choudhury, Advocates

... For the appellants of First Appeal
No.188 of 2022 and respondent No.49 of First Appeal
No.225 of 2012 and respondent No.19 of First Appeal
No.67 of 2013.

Mr. Shaikh Atiar Rahman with

Mr. Masbaur Rahman, Advocates

... For the appellants of First Appeal No.225 of 2012.

Mr. Dr. Khondaker Quamrul Hasssan Ripon, Advocate
... For the appellants of First Appeal No.67 of 2013.

Mr. Nurul Amin, Senior Advocate with
Mr. Mainul Islam, Advocate
... For the respondent Nos.4-6 and 35 of First Appeal No.188 of 2012, respondent Nos.9-13 of First Appeal Nos.225 of 2012 and respondent Nos.2-6 of First Appeal No.67 of 2013.

Heard on 08.01.2026, 14.01.2026, 26.01.2026 and 02.02.2006.

Judgment on 09.02.2026.

S M Kuddus Zaman, J:

First Appeal No.188 of 2012, First Appeal No.225 of 2012 and First Appeal No.67 of 2013 having arisen out of identical judgment and order dated 01.03.2012 passed by the learned Joint District Judge, 6th Court (Additional), Dhaka in Title Suit No.250 of 2004 dismissing above suit under Order 14 Rule 2 of the Code of Civil Procedure above three First Appeals are heard together and being disposed of by this single judgment.

Facts in short are that the appellants as plaintiffs instituted above suit for partition of 60 decimal land as described in the schedule to the plaint seeking saham for $\frac{1}{3}$ share alleging that above property belonged

to Ramanath Das who transferred the same to Mahmudur Rahman Mallick predecessor of defendant Nos.2-4, plaintiff No.1 Golam Rahman Mallick, predecessor of plaintiff Nos.2-3 Azizur Rahman Mallick and predecessor of defendant Nos.1-7 Nurjahan Begum in separate shares by registered kabala deed dated 21.07.1954. In above kabala deed Nurjahan Begum had 8 arans share belonged to above mentioned Mahmudur Rahman Mallick, plaintiff No.1 and Azizur Rahman Mallick in equal shares and consideration money of above kabala deed was paid by above recipients according to their share. The plaintiffs and defendants as successive heirs of above four purchasers are owning and possessing above property but the same has not been partitioned by meets and bounds and the defendants refused to effect an amicable partition.

Defendant Nos.1, 1(Ka), 1(Kha)-1(Ga), 2-4 and 6-8 contested above suit by filing separate written statements and the suit was taken up for trial and three plaintiff witnesses were examined and cross examined. At this stage defendant Nos.1(Kha) - 1(Gha) jointly submitted a petition under Order 14 Rule 2 of the Code of Civil Procedure alleging that above suit was barred by res-judicata by the judgment and order of Civil Appeal No.83 of 1980 and disposal of the for disposal of the suit on consideration of issue of law. It was alleged that above Mahmudur Rahman Mallick as plaintiff filed Title Suit No.43 of 1963 in the 4th Court of Sub-Judge, Dhaka against his wife above Nurjahan Begum for

declaration that plaintiff was the real owner of the property which stands in the name of Nurjahan Begum in above kabla deed dated 21.07.1954 and she was a mere benamder of the plaintiff and above suit was decreed on contest. Above Nurjahan Begum preferred Title Appeal No.140 of 1965 to the High Court Division which was dismissed on contest and against above judgment and order of the High Court Division appellant Nurjahan Begum preferred Civil Appeal No.83 of 1980 to the Appellate Division which was allowed and judgment and decree of the Courts below were set aside and above suit was dismissed. In above appeal it was held that Nurjahan Begum was the real owner of the properties of above kabla deed. As such above suit for partition is barred by res-judicata by above judgment and order of the Appellate Division passed in Civil Appeal No.83 of 1980.

On consideration of submissions of the learned Advocates for the respective parties and materials on record the learned Joint District Judge allowed above petition and dismissed above suit holding that above suit for partition was barred by res-judicata by the judgment and decree passed by the Appellate Division in Civil Appeal No.83 of 1980.

Being aggrieved by and dissatisfied with above judgment and order of the trial Court above plaintiffs as appellants preferred First Appeal No.188 of 2012, defendant Nos.1(Ka)(i) - 7 preferred First Appeal No.67 of 20113 and defendant Nos.5-14 as appellants preferred First Appeal No.225 of 2012 as mentioned above.

Mr. Mohammad Shaiful Alam, learned Advocate for the appellants of First Appeal No.188 of 2012, respondent No.49 of First Appeal No.225 of 2012 and respondent No.19 of First Appeal No.67 of 2013 of submits that in above suit several issues were framed and evidence of three plaintiff witnesses were recorded thereafter the defendants submitted above petition under Order 14 Rule 2 of the Code of Civil Procedure, 1908 claiming that above suit was barred by res-judicata by the judgment and order of Civil Appeal No.83 of 1980 passed by the Appellate Division of the Supreme Court of Bangladesh. The learned Judge of the trial Court most illegally allowed above petition disregarding the facts that the defendants or their predecessors namely Azizur Rahman Mallick and Golam Rahman Mallick were not parties in above Civil Appeal No.83 of 1980 or Title Suit No.43 of 1963 and the judgment and decree of Civil Appeal No.83 of 1980 was not binding upon them. Moreover, above suit was a suit for declaration that Nurjahan Begum was the benamder of her husband Mahmudur Rahman Mallick and the issues of above suit for declaration of benamder and those of suit for partition are quite distinguishable. As such it cannot be said that the issues of both the suits were substantially identical or the issues raised in the suit for partition were conclusively determined in the previous suit. The learned Advocate lastly submits that the Appellate Division of the Supreme Court of Bangladesh held in the case of Mahbubul Haque Vs. Md. A Kader Munshi, reported in 52

DLR (AD) (2000) at Page-49 that the questions of limitation and res-judicata are mixed questions of law and facts which requires thorough investigation and adequate evidence for arriving at a correct decision after framing of specific issues by the trial Court. The learned Joint District Judge committed serious illegality in dismissing above suit under Order 14 Rule 2 of the Code of Civil Procedure on the ground of res-judicata without recording any evidence which is not tenable in law.

Mr. Dr. Khondaker Quamrul Hassan Ripon, learned Advocate for appellants of First Appeal No.67 of 2013 adopts the submissions of the learned Advocate Mr. Mohammad Shaiful Alam and further submits that in the impugned judgment the learned Joint District Judge has made some irreverent and unfounded comments as to the divorce of Nur Jahan with her first husband Mahmudur Rahman Mollick and the legality of second marriage of Nurjahan Begum with Advocate Fazlul Haque predecessor of the appellants which are liable to be quashed.

Mr. Masbaur Rahman, learned Advocate for the appellants of First Appeal No.225 of 2012 submits that in Title Appeal No.83 of 1980 the Appellant Division held that Nurjahan Begum was not the benamder of Mahmudur Rahman Mallick and Nur Jahan Begum was the real owner of 8 anna share of the the properties of registered kabla dated 21.07.1954. In above appeal there were no findings that above registered kabla deed was erroneous or Mahmudur Rahman Mallick

was not the owner and possessor for the land which stands in his name in above kabla deed.

On the other hand Mr. Nurul Amin, learned Senior Advocate for respondent Nos.4-6 and 35 of First Appeal No.188 of 2012, respondent Nos.9-13 of First Appeal Nos.225 of 2012 and respondent Nos.2-6 of First Appeal No.67 of 2013 submits that in the judgment of Civil Appeal No.83 of 1980 the Appellate Division made specific and clear findings that Calcutta properties of Nurjahan Begum were exchanged with the Dhaka properties of Ramanath Das and consideration money of impugned registered kabla deed dated 21.07.1954 was paid by Nurjahan Begim not by her husband Mahmudur Rahman Mallick. The Appellant Division further held that Nurjahan Begum was full owner of total property of schedule A and B of the plaint of Title Suit No.43 of 1963. Above observations of the Apex Court clearly prove that the plaintiffs or their predecessors had no subsisting right, title, interest and possession in the properties of above kabla deed and they had no locus-stadi to maintain above suit for partition. On correct appreciation of above facts and circumstances of the case and materials on record the learned Joint District Judge rightly allowed above petition of the respondents under Order 14 Rule 2 of the Code of Civil Procedure and dismissed above suit which calls for no interference.

We have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is admitted that the appellants as plaintiffs filed above suit for partition alleging that disputed 60 decimal land was owned and held by Ramanath Das which was purchased by four persons namely Mahmudur Rahman Mallick, Azzizur Rahman Mallick, Golam Rahman Mallick and Nurjahan Begum, predecessors of the plaintiffs and defendants, in separate sharers by registered kabla deed dated 21.07.1954 and in above kabla deed Nurjahan Begum alone had 8 anas share and remaining 8 anas belonged to Mahmudur Rahman Mallick, Azzizur Rahman Mallick and Golam Rahman Mallick in equal shares. It is also admitted that above Mahmudur Rahman Mallick was the husband of Nurjahan Begum who as plaintiff instituted Civil Suit No.43 of 1963 for declaration that Nurjahan Begum was his benamder and he was real owner of the property which stands in her name in registered kabla deed dated 21.07.1954 and above suit which was decreed by the trial Court and affirmed in appeal by the High Court Division and above Nurjahan Begum preferred Civil Appeal No.83 of 1980 to the Appellant Division which was allowed and the judgment and decree of both the trial Court and the High Court Division were set aside and it was declared that Nurjahan Begim was the real owner of her property in above kabla deed dated 21.07.1954. It is also admitted that in Title Suit No.43 of 1963 Azzizur Rahman Mallick and Golam Rahman Mallick or their heirs were not made parties either as plaintiffs or

defendants nor any claim was made against their title and interest as was created by above registered kabla deed dated 21.07.1954.

The learned Advocate for the appellants has rightly pointed out referring to the case law of 52 DLR (AD) 2000 Page-49 that the question of res-judicata is a mixed question of law and facts which should be finally determined on consideration of evidence to be adduced by the parties at trial. In above petition under Order 14 Rule 2 of the Code of Civil Procedure, 1908 defendants claimed that above suit for partition was barred by res-judicata by the judgment of the Appellate Division of the Supreme Court of Bangladesh passed in Civil Appeal No.83 of 1980.

Order 14 Rule 2 of the Code of Civil Procedure, 1908 empowers the Civil Court to try the issues of law first postponing the settlement of issues of facts if the Court is of the opinion that the question of law alone can dispose of the case or any part thereof. Above provision is rarely utilized in most deserving cases. If a suit is barred by law the defendant can take recourse to the provisions of Order 7 Rule 11 of the Code of Civil Procedure for rejection of plaint at the initial stage of the proceeding. A petition under Order 14 Rule 2 of the Code of Civil Procedure should be submitted after framing of issues but before the trial has begun. It is admitted that trial of above suit for partition had begun and three plaintiff witnesses were examined before submission of above petition.

Order 14 Rule 2 of the Code of Civil Procedure, 1908 employed the word “try” not “hearing” of the issue of law. There cannot be a trial without recording of evidence but the learned Joint District Judge disposed of the issue of res-judicata which is a mixed question of law and facts without recording and examining evidence. Section 11 of the Code of Civil Procedure, 1908 defines the Rule of res-judicata which prohibits a Civil Court to proceed with the trial of a subsequent suit if the issues of that suit were substantially at issue in a previous suit between the same parties or their predecessor which was finally and conclusively determined by a competent Civil Court.

The previous suit being Title Suit No.43 of 1963 was filed by sole plaintiff Mahmudur Rahman Mollick for declaration that sole defendant Nur Jahan Begum was his benamder for properties which stand her name in registered kabla deed dated 21.07.1954. Remaining two recipients of above kabla deed dated 21.07.1954 namely Azizur Rahman Mallick and Golam Rahman Mallick, predecessors of appellants were not made parties in above suit nor any remedy was sought against them or their property in above kabla deed. As such the parties between Title Suit No.43 of 1963 and above Partition Suit were not identical. The judgment of above suit for declaration of benamder being a judgment in personam the same was not binding upon the heirs of above Azzizur Rahman Mallick and Golam Rahman Mallick, the appellants.

In a suit for declaration of benamder the issues for determination are who paid the consideration money for the disputed kabla deed and subsequent conducts of the parties in dealing with above property. On the other hand in a suit for partition the sole issue for determination is the respective share of the co-sharers of the joint property. Plaintiff of such a suit admits the defendants as co-sharers. The issues of a suit for declaration of benamder and a suit for partition are not identical but totally distinguishable.

The learned Advocate for the respondents took us through the judgment of the Appellate Division passed in Civil Appeal No.83 of 1980 and pointed out that the Appellate Division on consideration of the evidence on record held that the property of above kabla deed was purchased by Nurjahan Begum alone and the consideration money of above deed was paid out of her properties at Calcutta.

In above appeal the recitals or contents of registered kabla deed dated 21.07.1954 was not disputed and the only dispute was whether defendant Nurjahan Begum was the benamder, plaintiff Mahmudur Rahman Mollick for above property or she was the real owner. In above kabla deed above Mahmudur Rahman Mallick had a separate share which was not disputed nor the same was subject matter of above suit. In above appeal the Appellate Division finally adjudged that Nurjahan Begim was the real owner of the property which stands in her name in above kabla deed and she was not the benbamder of her husband.

Above Nur Jahan Begum did not claim that she alone was the owner of the total property transferred by above kabla deed. The respondents may if so advised file an appropriate suit to establish that their predecessor Nur Jahan Begum alone was the owner of total property of above kabla deed.

The learned Joint District Judge while disposing of above petition under Order 14 Rule 2 of the Code of Civil Procedure, 1908 made some observations and comments as to the second marriage of Nur Jahan Begum with Advocate Fazlul Hoque which are irrelevant, unfounded and without any lawful basis and those observations and comments are hereby quashed.

In above view of the facts and circumstances of the case and materials on record we are of the view that the learned Joint District Judge committed serious illegality in dismissing above suit on the ground of res-judicata under on an application Order 14 Rule 2 of the Code of Civil Procedure which is not tenable in law.

In above view of the materials on record we find substance in these three First Appeals which deserve to be allowed.

In the result, First Appeal No.188 of 2012, First Appeal No.225 of 2012 and First Appeal No.67 of 2013 are allowed on contest against respondent Nos.4-7 and 35 and ex-parte against the rest.

The impugned judgment and order dated 01.03.2012 passed by the learned Joint District Judge, 6th Court (Additional), Dhaka in Title

Suit No.250 of 2004 is set aside and the learned Joint District Judge is directed to conclude the trial of above suit expeditiously within a period of 6(six) months from the date of receipt of this order.

However, there will be no order as to cost.

Send down the lower Court record immediately.

Tamanna Rahman Khalidi, J:

I agree.

MD. MASUDUR RAHMAN
BENCH OFFICER