Present:

Mr. Justice Md. Salim

CIVIL REVISION NO. 5460 OF 2003

Kadbhanu Bibi and others
..... *Plaintiffs-Petitioners.*

-VERSUS-

Abdul Jabbar Biswas being dead, his heirs:
Md. Shahidul Alam and others

..... *Defendants-Opposite parties.*
Mr. Md. Shahabul Alam Chowdhury, Advocate
..... For the Petitioners
No one appears
..... For the Opposite Parties

Heard on: 06.05.2025, 27.07.2025,
04.11.2025 and 11.11.2025

Judgment on: 11.11.2025

By this Rule, the opposite parties were called upon to show cause as to why the Judgment and decree dated 20.08.2003 passed by the learned Additional District Judge, 2nd Court, Jhenaidah, in Title Appeal No. 81 of 2001 allowing the appeal and reversing the Judgment and decree dated 26.04.2001 passed by the learned Assistant Judge, Horinakundu, Jhenaidah in Title Suit No. 89 of 1997 decreeing the suit should not be set aside and/or pass such other or further order or orders passed as to this court may seem fit and proper.

The facts in brief for the necessary disposal of the Rule are that the predecessor of the petitioners herein, as plaintiffs, instituted Title Suit No. 89 of 1997 before the Assistant Judge, Horinakundu, Jhenaidah, for partition, contending, inter alia, that the land appertaining to C.S. Khatian Nos. 799 and 758 fully described in the schedule A and B to the plaint belonged to Kajem Mondol, Najem Mondol, each owning six anna 8 ganda, and Wares Mondol owning three anna 4 ganda, and the land appertaining to C.S Khatian No. 63 also belonged to Kajem Mondol, Najem Mondal, each owning three anna 4 ganda, Samsodi 8 anna, and Wares Mondol 1 anna 12 ganda whose name was duly recorded in the S.A Khatian. Wares Mondol died, leaving behind 1(one) son, Yousuf Ali, and a daughter, Thanda Nessa. Thanda Nessa transferred her share to the plaintiff Nos 1-4. The plaintiffs are the heirs of Yousuf Ali, and the defendants are the heirs of said Kajem Mondal and Najem Mondal. Hence, the plaintiffs requested the defendants to partition the suit land for their peaceful possession, which was refused; as such, the plaintiffs filed the suit for partition. As per the share of CS record, the plaintiffs are entitled to get 1.75 acres,

equivalent to 175 decimals of land from 'Ka' schedule land, 0.55 acres, equivalent to 55 decimals from 'Kha' schedule, and 1.56 acres, equivalent to 156 decimals of land from 'Ga' schedule.

The opposite party herein, as defendants, contested the suit by filing a joint written statement, denying all material allegations against them, and contended inter alia that Wares Mondol acquired 3.76 acres of land, out of which 1.56 acres of land was given in settlement to Nazem and Kazem Mondol in the year 1310/2011 BS. According to which only -/1/- anna 12 gondas share is supposed to be recorded in his name in CS khatian, but not to record the same in his name, wrongly recorded, showing his share as -/3/- anna 4 gonda. That, Wares Mondol would possess 84 decimals of land of Plot No. 6700 in the 'Ka' schedule and 24 decimals of land of Plot No. 7054 in the 'Kha' schedule. He had no title or possession in other plots. Kazem died, leaving behind only his son Arman and three daughters, namely Haijan, Tasiran, and Basiran. Arman died, leaving behind two sons, namely the defendant Nos. 1 and 2, and 4 daughters, namely Shahida, Zarifun, Shalki, and Fokiran; Nazem died,

leaving behind only Son Khoda Box and only daughter Forijon. The defendants are the heirs of those persons.

The learned Assistant Judge, Horinakundu, Jhenaidah, framed the necessary issues to substantiate the disputes among the parties.

Subsequently, the learned Assistant Judge, Horinakundu, Jhenaidah, decreed the suit by the Judgment and decree dated 26.04.2001 and granted Saham to the plaintiffs as claimed.

Being aggrieved by and dissatisfied with the above Judgment and decree dated 26.04.2001, the defendants, as appellants, preferred Title Appeal No. 81 of 2001 before the District Judge, Jhenaidah. Eventually, the learned Additional District Judge, 2nd Court, Jhenaidah, by the Judgment and decree dated 20.08.2003, allowed the appeal in part and reversed the Judgment and decree dated 26.04.2001 passed by the learned Assistant Judge, Horinakundu, Jhenaidah in Title Suit No. 89 of 1997.

Being aggrieved, the plaintiffs-petitioners filed this Civil Revision under section 115(1) of the Code of Civil Procedure before this court and obtained the instant Rule.

Mr. Md. Shahabul Alam Chowdhury, the learned counsel appearing on behalf of the petitioners, submits that the Judgment and decree of the trial court are well-founded. However, the court of appeal below, without adverted to the findings of the trial court, reversed the Judgment and decree of the trial court below, which are not tenable in the eyes of the law. Moreover, the appellate court below, as the last court of facts, did not at all discuss the evidence on record as per Order XLI Rule 31 of the Code of Civil Procedure; so, the Rule is made Absolute.

On the contrary, no one appears on behalf of the defendants to oppose the Rule, although, the service of summons/notice was served upon them by way of usual process and by the special messenger, at the petitioners' cost. However, they do not feel to appear before this court.

We have anxiously considered the submissions advanced by the petitioner, perused the Judgment of the Courts below, and the oral and documentary evidence on the records.

It manifests from the record that the petitioner herein, as plaintiffs, instituted the instant suit for partition of the lands described in the schedule of the suit

and claimed the Saham of 1.75 acres equivalent to 175 decimals of land from 'Ka' schedule land, 0.55 acres equivalent to 55 decimals from 'Kha' schedule and 1.56 acres equivalent to 156 decimals of land from 'Ga' schedule.

On the contrary, the defendants contested the suit by filing a joint written statement denying the plaintiff's claim; however, they did not claim any Saham.

In order to prove the suit, the plaintiffs have examined as many as two (2) witnesses and adduced material evidence, which has been exhibited in accordance with the law. On the contrary, the defendants side examined as many as three (3) witnesses and exhibited the material evidence on record, which has also been exhibited in accordance with the law.

We have scrutinized each deposition and each witness's cross-examination. Analyzing the evidence on record, it is manifest that the learned judge of the trial court below granted Saham to the plaintiffs 1.73¾ acres equivalent to 173.75 decimals from 'Ka' schedule, 0.45 acre equivalent to 45 decimals from 'Kha' schedule, and

1.26¾ acres equivalent to 126.75 decimals from 'Ga' schedule.

However, the appellate court below modified the Judgment of the trial court below, granting saham for the plaintiffs' 1.20 decimals of land from the 'Ka', 'Kha', and 'Ga' schedules. And further to the defendants, 10.69 decimals of land from the 'Ka' and 'Kha' schedule land, and 6.27 decimals of land from the 'Ga' schedule in a total 16.96 decimal.

Notably, the defendants in their written statement stated that:

> ওয়ারেস মণ্ডল ক, খ ও গ তপশীলে তাহার ৯৪ গন্ডা অংশে ৩.৭৬ শতক জমি থেকে ১.৫৬ শতক জমি নাজেম ও কাজেম কে অনুমান ১৩১০/১১ সালের দিকে □ন্দো□স্ত দেন। সেইমতে ক ও খ তপশীলে আনার □□াদীগনের খতিয়ানে ওয়ারেশ মন্ডলের নামে /১২ গন্ডা অংশ রের্কড হওয়া উচিৎ ছিল। কিন্তু তাহা না হইয়া ৯৪ গন্ডা রেকর্ড হওয়া ভুল হইয়াছে। C.S রের্কড ভুল হইলেও ১০৮ শতক, দুই খতিয়ানে দুইটি ৬৭০০, ৭০৫৪ দাগ দখল মন্তে্য সঠিক ভা□ লিখিত আছে।

Therefore, the dispute between the parties arose in respect of the settlement. If the fact of settlement is correct, then the CS record must be recorded in the correct form, showing the share of Wares Mondol as -/1/- anna 12 gonda, because, as per the defendant's plea, the alleged settlement was made before 15/16 years of

publication of the CS record. The CS record, or any subsequent record, has not been prepared in the correct form as alleged in the written statement.

It further appears that the defendants-opposite parties, in their written statement, claimed that they obtained 1.56 acres of land from Wares Mondol by way of settlement, but the plaintiffs vehemently oppose the plea of settlement claimed by the defendants. So the burden of proof heavily lies upon the defendants-opposite parties to prove the said settlement as alleged in the written statement, because our apex court settles a principle cited in the case of Ajufannessa @ Aji Bibi and others –Vs- Safar Miah and others reported in 30 DLR (SC) 41 wherein it was held that:-

> Section 101 of the Evidence Act lays down that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exists and section 103 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is

provided by any law that the proof of that fact shall lie on the particular person.

Similar view taken in the case of Cinmoy Chowdhury and another –Vs- Sree Mridul Chowdhury and others reported in 23 BLD (AD) 83 wherein their Lordship of the Appellate Division observed that:-

In a civil litigation, the onus of proof does not remain fixed as it is in a criminal proceeding. Onus of proof in civil litigation generally lies upon the plaintiff, but sometimes it is split up between the parties, and sometimes it is shifted upon the defendants as well, as per sections 102, 103, and 104 of the Evidence Act.

In this regard, the trial court below, in its findings, observed that:-

□□াদীপক্ষ তাদের দাবীকৃত □ন্দোবস্তের সমর্থনে কোন দালিলিক কিংবা নির্ভরযোগ্য কোন মৌখিক সাক্ষ্য আদালতে উপস্থাপন করেননি। ২নং বাদী (ডি.ডব্লিউ-১) জেরার জবাবে উল্লেখ করেছেন যে, □ন্দোবস্তের সময় তার জন্মই হয়নি। □ন্দোবস্তের বিষয়টি তিনি তার পিতার কাছে শুনেছেন বলে জেরায় উল্লেখ করেন। □□াদীপক্ষের অপর দুই সাক্ষী ডি.ডব্লিউ-২ আকবর আলী ও ডি.ডব্লিউ-৩ রওশন আলী □ন্দোবস্তের বিষয়ে তাদের সাক্ষ্যে কোন কিছু উল্লেখ করেননি। □□াদীপক্ষের দাবীকৃত □ন্দোবস্ত ১৫/১৬ বছর পরে সি.এস রেকর্ড প্রকাশিত হলেও সি.এস রেকর্ড

□ন্দো□স্ত মতে প্রস্তুত হয়নি □রং ওয়ারেশ মন্ডলের প্রাপ্য সম্যক অংশের জমিই তার নামে রেকর্ড হয়েছে। সি.এস রেকর্ডের □িরুদ্ধে নাজেম, কাজেম □া তাদের ওয়ারেশগণ কখনো প্রতিকার প্রার্থনা করেননি। সি.এস রেকর্ডের □িষয়টি তারা অ□গত ছিলেন না এমন কোন দা□ী □□াদীপক্ষ করেননি। সি.এস রেকর্ডমতে ওয়ারেশ মন্ডলের জমাজমি আ□ার সঠিকভা□ে তার নামে এস.এ রেকর্ড হয়েছিল □লে □াদীপক্ষ দা□ী করেন। এই এস.এ রেকর্ডের □িরুদ্ধেও নাজেম, কাজেম □া তাদের ওয়ারেশরা কোন প্রতিকার প্রার্থনা করেছেন □লে কোন প্রমাণ নেই। □□াদীগণ তাদের দা□ীকৃত □ন্দো□স্তের জমি □া□দ কখনো কোন কর খাজনা পরিশোধ করেছেন এমন কোন প্রমাণ নেই। কোন খতিয়ানে, কোন দাগে কতটুকু জমি □ন্দো□স্ত নেয়া হয়েছিল সে □িষয়টিও □□াদীপক্ষ সুস্পষ্ট ভা□ে উল্লেখ করতে পারেন নি। এমতা□স্থায় নালিশী খতিয়ান সমূহের ১.৫৬ একর জমি ওয়ারেশ মন্ডল কর্তৃক নাজেম ও কাজেম □রা□রে □ন্দো□স্ত প্রদানের □িষয়টি আদৌ প্রমাণিত হয়নি □লে আমি মনে করি। ফলে ওয়ারেশ মডলের নামে রেকর্ডীয় অংশের জমাজমিতে ওয়ারেশ মন্ডল এ□ং পর□র্তীতে তার পুত্র ইউছুপ ও কন্যা ঠান্ডা নেছা স্বত্ব□ান ছিলেন □লে প্রতীয়মান হয়।

If we analyze evidence of the defendants witness, it appears that D.W-1, in his cross-examination, admitted that:-

ওয়ারেশ মায়ের স্বত্বে জমি পায়। ওয়ারেশ তার প্রাপ্য জমি করে খেতো। ওয়ারেশ কোন কোন তফসিলে কোন কোন জমি খেতো তা আমি □লতে পারি না ..... কোন কোন দাগ দখল করে □লতে পার□ না। □াদীরা শুধু মাঠান ধানী জমি দখল করে। □াদীরা ৪ □িঘা জমি দখল করে। ৪৬ শতকের □িঘা। মামলার জমির মধ্যে □াড়ির জমি থাকতে পারে। নালিশী জমিতে

□াদীদের □াড়ি আছে। □াড়ির দাগে কতটুকু জমি □লতে পার□ না। নালিশী জমিতে □াগান আছে। তাতে □াদীরা দখল করে। □াড়ির জমির দাগ নম্বর □লতে পার□ না। □ন্দো□স্তের জমা এ□ং কোন কোন দাগ তা □লতে পার□ না।

On the contrary, D.W-2 and D.W-3 did not support the possession of the defendants-opposite parties. In their examination-in-chief and cross-examination, they stated that the defendants-opposite parties possess only one plot. Defendants tried to prove their possession of the entire land, as alleged in the written statement, based on settlement; rather, the fact of settlement is not maintainable in the eyes of the law, because Kazem Biswas and Nazem Mondol was the maternal uncle of Wares Mondol i.e. Wares Mondol is the sister's son of Kazem and Nazem Mondol and on perusal of the exhibit-1- series it is found that the name of Kazem Biswas, Nazem Mondol and Wares Mondol has been correctly recorded showing their share as per Mohammedan law of succession.

Settlement can be given only by way of patta or any other means, upon acceptance of Kobuliyat from the tenant. As Raiyat, if Wares gave settlement as alleged, there must be a separate Khatian in the name of said

Nazim Mondol and Kazem Mondol showing them as korfa tenants, or their names are supposed to be recorded in a separate Khatian. In instant case Wares Mondol as Raiyat did not surrender his land to the Jaminder so the question of settlement cannot be arose at all but according to Section 103-B of the Bengal Tenancy Act, CS record have the presumptive value as to its correctness until it is rebutted, which is cited in **6 MLR (AD) 267** and **10 BLT (AD) 137**. In this case, the defendant-opposite party No. 1-6, though they claim that the CS record has been wrongly prepared, did not take any initiative to correct the said CS khatian by filing any appropriate suit. But the appellate court below, relying upon the remark column in CS Khatian, where in the name of Wares Mondol has been shown as possessor in plot No. 6700 and 7054, allowed the appeal. If a joint property is recorded in a khatian in the name of all the co-sharers, but in the remarks column, possession of any plot recorded in one of the co-sharers affects the record that all the co-sharers of the khatian are entitled to get the plot as per their respective share. The same is not the absolute owner of the co-sharers whose name is recorded in the remarks column; it was in the

sole possession of one co-sharer for all co-sharers. It would not raise any interference that it was in his exclusive possession or in his possession adversely to other co-sharers as sole possession. This view gets support in the case of Abdul Jalil vs Khorshed Ali, 27 DLR (AD) 143, wherein it was held that:-

If a joint property is recorded in the possession of one of the co-sharers, the effect of the record is that it was in the sole possession of that co-sharer, and it would not raise an interference that it was in his exclusive possession or in his possession adversely to other co-sharers, as sole possession is not exclusive or adverse possession.

It is in conformity with the well-settled principle of law that possession of one co-sharer is, in point of law, the possession of all co-sharers. So, mere showing in the remark column as possessor does not mean that he is the only owner of that particular plot, as it is not proved that the other land of the owner has been transferred in any way to the other co-sharers.

Further it revels from the exhibit -1 (series) that CS Khatian Nos.798 and 754 has been correctly

recorded in the name Kazem Biswas, Nazem Mondol showing their share as -/6/- anna 8 gonda and the name of Wares Mondol was recorded showing his share as -/3/- anna 4 gonda and that the CS khatian No. 63 was recorded in the name of Kazem Biswas, Nazem Mondol showing their share as -/3/- anna 4 gonda, Somsoddi Biswas showing his share as -/8/- anna and Wares Mondol showing his share as -/1/- anna 12 gonda. As per the share, Wares Mondol got 1.765 acres of land from CS Khatian No. 798, 0.56 acres of land from CS Khatian No. 754, and 1.68 acres of land from CS Khatian No. 63. Wares Mondol died, leaving only son Yousuf Ali and daughter Thanda Nessa. Thereafter, Thanda Nessa transferred her share to plaintiff Nos. 2-4 by registered saf-kabala deed being No. 6292 dated 24.01.1989, Exhibit No.2. So, the plaintiffs became the owner of 1.76 acres of land from CS Khatian No. 798 and 0.56 acres of land from CS Khatian No. 754, and to that effect and on believing the said CS Khatian trial court decreed the suit by allowing the Saham of 1.73¾ acres of land from CS khatian No. 798 which has been described in schedule 'Ka' of the plaint and .45 acres of land of CS khatian No.

754 which has been described in schedule 'Kha' of the plaint and 1.26¾ acres of land from CS khatian No. 63 which has been described in schedule 'Ga' of the plaint. Rather, the court of appeal below most erroneously modified the judgment and decree of the trial court below in giving some surprising finding by relying upon the defendant's case in respect of the settlement.

Considering the above facts and circumstances, we are of the firm view that the trial court below very judiciously considered the matter at length and decreed the suit and granted Saham to the plaintiffs as claimed. On the other hand, the appellate court below, as the last court of fact, failed to consider the entire evidence on record and came to an erroneous view, allowing the appeal to modify the Judgment of the trial court below. In fact, the Judgment of the appellate court below is not a proper judgment under Order 41, Rule 31, of the Code of Civil Procedure.

Considering the above facts and circumstances of the case, we are of the firm view that the trial court below very rightly and justifiedly decreed the suit, Thus we find merit in this Rule.

Resultantly, the Rule is made absolute without any order as to costs.

The impugned Judgment and decree dated 20.08.2003 passed by the learned Additional District Judge, 2nd Court, Jhenaidah, in Title Appeal No. 81 of 2001, allowing the appeal is set aside. The Judgment and decree dated 26.04.2001 passed by the learned Assistant Judge, Horinakundu, Jhenaidah in Title Suit No. 89 of 1997 is hereby affirmed.

Communicate the Judgment and send down the lower court records at once.

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(Md. Salim, J).

Rakib/ABO