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HIGH COURT FORM No. (J) 3
HEADING OF JUDGMENT ON APPEAL

Sub Division : Islampur, Uttar Dinajpur

IN THE COURT OF ADDITIONAL DISTRICT JUDGE,
FTC-2ND, ISLAMPUR, UTTAR DINAJPUR

PRESENT: Sri Plaban Mukherjee (J.O Code - WB01427)
Additional District Judge,
Islampur, Uttar Dinajpur.
In-charge of
Additional District Judge, FTC 2nd Court,
Islampur, Uttar Dinajpur.

Date of Delivery of Judgment : **This day i.e. the 18th day of June, 2026.**

Dates of hearing of the appeal : **05.06.2026**

CIVIL APPEAL No. 21 OF 2024
[CNR No.WBUD05-001819-2024]

[From the Order and Decree dated 03.04.2024 and 06.05.2024
respectively passed by Ld. Civil Judge Senior Division), Islampur,
Uttar Dinajpur in Partition Suit No. 96 of 2022]

Samid Ali

..... Appellant/ Defendant No. 1

-Versus-

1. Bazari Bibi

..... Respondent/ Plaintiff

2. Bakabullya & 7 Ors.

..... Respondents/ Defendant Nos. 2 to 9

This appeal coming on this day (or having been heard on) in the presence
of -

Sri Biswajit Manda

Ld. Advocate for the Appellant

Sri Biswajit Saha

Ld. Advocate for the Respondent No. 1



J U D G M E N T

and having stood for consideration to this day, the court delivered the following judgment:-

1. The instant Appeal is directed against the impugned ex-parte Order dated 03.04.2024 and the Preliminary Decree dated 07.05.2024 passed by the Ld. Civil Judge (Senior Division), Islampur, Uttar Dinajpur in Partition Suit No. 96 of 2022 wherein learned Trial Court had decreed the suit es parte filed by the present respondent no. 1 being plaintiff.

2. The brief facts of the case before the learned Trial Court may be epitomized as follows:-

The present respondent no. 1 being plaintiff claiming herself to be the absolute owner and possessor in respect of the schedule property instituted the original suit before the learned Trial Court praying for a declaration that the plaintiff is the absolute owner of 9 decimal of land out of 18 decimal of the schedule suit property including a decree of partition in preliminary form along with other reliefs. The contention of the plaintiff in her plaint is that the suit plot mentioned in the schedule of the plaint originally belonged to Jamaluddin who was possessing the same being absolute owner and since after his death the suit property devolved upon his two sons and six daughters according to Muslim law. Since after inheriting the suit plot, the successors of Jamaluddin started possessing the same with their all right, title and interest and in course of time they had sold half portion of the suit plot, i.e. 9 decimal of land out of 18 decimal in favour of Bajari Bibi, i.e. present respondent no. 1 with specific boundary on the strength of a registered deed of sale being No. 11604 for the year 2017 dated 11.10.2017 and put her in physical possession. The present respondent no. 1 got her name mutated in the Office of the B.L. & L.R.O., Karandighi and her name stood in L.R. Khatian No. 2583. The respondent no. 1 has been possessing her acquired portion by constructing a residential house consisting of tin shed rooms,



privies and tube well. That in the mean time the present appellant by adopting an unfair mode got his name mutated in place of the name of the present respondent no. 1. After coming to know, the present respondent no. 1 filed her objection against the impugned mutation in the name of the present appellant and in consequence thereof the B.L. & L.R.O. Karandighi again recorded the name of the present respondent no. 1 in another Khatian being L.R. Khatian No. 2745 which is still continuing.

It is further alleged that thereafter the present appellant with rest respondents started interfering with the peaceful possession of the present respondent no. 1 and have tried to dispossess her forcefully. Despite several request of the present respondent no. 1, the appellant and other respondents did not pay any heed and lastly on 08.03.2022 they refused to amicably partition the suit property. Accordingly, the present respondent no. 1 being plaintiff has been compelled to institute the suit with a prayer of partition.

3. The present appellant along with eight others being defendants appeared before the learned Trial Court on 13.09.2022, but they did not submit their written statement in prescribed period and accordingly, the said suit proceeds ex-parte on the strength of order dated 03.01.2023.

4. Learned Trial Court upon considering the ex-parte evidence adduced on behalf of the present respondent no. 1, i.e. plaintiff, decreed the suit in preliminary form declaring the share of the plaintiff. In support of her case, the plaintiff, i.e. Bazari Bibi examined herself as P.W. - 1 before the learned Trial Court. Apart from that the plaintiff has further examined one Gulen Khatun, Ajijul Rahaman and Mintu Pal, Head Clerk attached to the Office of B.L. & L.R.O. Karandighi as P.W. 2, P.W. 3 and P.W. 4 respectively. The following documents have been filed by and on behalf of the plaintiff at the time of trial -



Description of documents	Exhibit mark
a. The Original R.S. Khatian being No. 474	Exbt. 1
b. Certified copy of LRROR of Khatian No. 2745 dated 11.03.2022	Exbt. 2 (series)
c. Original Registered Sale Deed being No. 11607/ 2017	Exbt. 3
d. Copy of Plot information of L.R. Plot 857	Exbt. 4
e. Certified copies of L.R. Khatian Nos. 2289, 2293, 2295, 2294, 2296 and 2291	Exbt. 5 (series)
f. Certified copy of Deed No.470 of 1962	Exbt. 6

5. After hearing suit ex-parte, learned Civil Judge (Senior Division), Islampur, Uttar Dinajpur decreed the suit in favour of the plaintiff by passing the impugned Order and Decree. Being aggrieved by and dissatisfied with the impugned ex-parte Order and Decree, the defendant no. 1 being appellants have chosen to prefer the instant Appeal. For the sake of convenience, in the instant appeal the parties, i.e. the appellant and the respondent no. 1, will be referred as per their array before the learned Trial Court. It is apt to mention here that the learned Trial Court decreed the suit by declaring the share the plaintiff in preliminary form.

6.1 : POINTS FOR CONSIDERATION :

Whether impugned ex-parte Order dated 03.04.2024 and Decree dated 06.05.2024 respectively passed by the learned Civil Judge (Senior Division), Islampur, Uttar Dinajpur requires any interference by this court?

1. Whether the appellant is entitled to get relief as prayed for?



DECISION WITH REASONS

6.2 Point Nos.1 & 2:

Both points are taken up together for the sake of convenience of discussion.

Argument placed by the Ld. Advocate for the appellants : -

7. Ld. Advocate representing the appellant/ defendant no. 1 submitted that the learned Trial Court has failed to assess properly the share of the plaintiff in absence of the defendants which is the sine qua non in a suit for partition. It is further pointed out that the learned Trial Court has only declared the share of the plaintiff on the strength of the impugned order which is absolutely bad in law and it would lead to multiplicity of proceeding. Learned Advocate for the appellant relied on the following solemn decisions in support of his contentions-

(a) AIR 2020 SC 41 ; (b) AIR 1928 CAL. 812

Argument placed by the Ld. Advocate for the respondent :-

8. Learned Advocate representing the respondent placed his brief argument before this Court by submitting that the learned Trial Court rightly passed the impugned order and decree and there is no necessity to interfere with the said judgment. It is further pointed out that the present appellant should have filed an application under Order IX Rule 13 of the C.P.C. instead of preferring the present appeal.

9. Perused the case record of the learned Trial Court with special emphasis on the plaint and the entire oral evidence of P.W. 1, P.W. 2, P.W. 3 and P.W. 4 including the documentary evidences submitted before the learned Trial Court by the plaintiff. I have also gone through the impugned Order and the Preliminary Decree dated 03.04.2024 and dated 07.05.2024 respectively passed by the learned Trial Court.



10. Upon perusal of the impugned Order it appears that the learned Trial Court had decreed the suit declaring the share of the plaintiff to the extent of 9 decimal in the plot as mentioned in the schedule of the plaint and also restrained the defendants from interfering with the peaceful joint possession of the plaintiff in respect of the schedule land till partition by metes and bounds is effected. Now we need to scrutinize each of the issues and materials on record based upon which, the learned Trial Court had arrived at the impugned judgment.

11.1. At first this Court deems it prudent to discuss the claim of the respondent no. 1 to the effect that the appellant should have filed an application under order IX rule 13 of the CPC instead of preferring the instant appeal. In order to counter the submission of the respondent no. 1 it would be apposite to refer the provision of order IX rule 13 of the C.P.C. which reads as follows –

“13. Setting aside decree ex parte against defendant.– In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of



the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.– Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any of the ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.”

11.2. The provision as engrafted in Order IX rule 13 of the C.P.C. ex facie shows that the benefit of this provision may be availed by the defendant if he satisfies the Court that either –

- (a) summons was not duly served upon him, or
- (b) he was prevented by any sufficient cause from appearing when the suit was called on hearing.

Upon careful scrutiny of the case record of the learned Trial Court it appears that the present appellant being defendant no. 1 including other eight defendants had made their appearance before the learned Trial Court on 13.09.2022 after receiving their summons, but thereafter they did not take any initiative to contest the said suit any more by filing their written statement and accordingly, the suit proceeds ex-parte on the strength of the order dated 03.01.2023. Thus, none of the conditions as enumerated in order IX rule 13 of the C.P.C. are applicable in the facts and circumstances of the instant lis. At this juncture it would be apt to rely on the solemn decision of the Hon'ble Supreme Court of India in **N. Mohan vs. R. Madhu** reported in **AIR 2020 S.C. 41** wherein the Hon'ble Apex Court has been pleased to opine as follows –

“9. When an ex-parte decree is passed, the defendant has two remedies – (a) Either to file an application under Order IX Rule 13 CPC to set aside the ex-parte decree by satisfying the court that the



summons was not served or if served, the defendant was prevented by “sufficient cause” from appearing in the court when the suit was for hearing; (b) to file a regular appeal from the original decree to the first appellate court in terms of section 96(2) CPC and challenge the ex-parte decree on merits.

10. Right to file an appeal under Section 96(2) CPC is a statutory remedy. The right to appeal is not a mere matter of procedure; but is a substantive right. Right to appeal under Section 96(2) CPC challenging the original decree passed ex-parte, being a statutory right, the defendant cannot be deprived of the statutory right merely on the ground that the application filed under Order IX Rule 13 CPC was earlier dismissed.”

11.3. Accordingly, in view of the above discussion it can safely be concluded that the argument as placed by the learned Advocate for the present respondent no. 1 has no leg to stand and the present appellant has committed no error in preferring the instant appeal challenging the impugned ex-parte Order as passed by the learned Trial Court. Hence, the present appeal is very much maintainable.

12.1. Another point of argument as forwarded by the learned Advocate representing the present appellant is that the impugned decree of the learned Trial Court is incomplete since it only declares the share of the plaintiff and it did not ascertain the share of the defendants which would lead to multiplicity of proceedings. In order to properly appreciate this submission it would be relevant to quote the operative portion of the impugned order which runs as follows—

“ Henec, it is,

ORDERED

***That the suit is decreed ex-parte in favour of the plaintiff. Plaintiff to get a declaration that she has acquired valid right title interest and**



possession over the said land as per the schedule of the plaint to the extent of 9 decimals;

*** Plaintiff to get preliminary decree of partition,**

The share of the defendants in the suit property could not be ascertained as none of them appeared to contest the suit,

*** Defendants are further restrained from interfering with the peaceful joint possession of the plaintiff in respect of the schedule land till partition by metes and bounds is effected**

*** The parties to the suit are directed to make partition of the suit property by metes and bounds within 90 days from the drawing up of the preliminary decree failing which either of the parties may approach this Court for getting the suit property partitioned by appointment of a Survey knowing Commissioner in accordance with the law.**

*** There is no order as to cost.”**

(Emphasis supplied)

12.2. The impugned order itself reveals that the learned Court could not ascertain the share of the defendants as none of them appeared to contest the suit. The plaint lying in the case record of the learned Trial Court reveals that nine persons were impleaded as defendants who entered their appearance before the learned Trial Court, but they did not continue to contest the said suit. The present appeal was preferred by the defendant no. 1 being the sole appellant and he made other eight defendants as respondent 2nd parties/ defendant nos. 2 to 9 in the memo of appeal. The schedule of the plaint reflects that the total area of the schedule plot is 18 decimal and the learned Trial Court declared only the share of the plaintiff being 9 decimals without commenting upon the share of each of the defendants as the said suit proceeds ex-parte against them. It is no



more res-integra that in a partition suit all the parties therein are decree holders since every party is going to get something as per their legal entitlement. A preliminary decree in a partition suit is meant to declare the shares of all parties involved therein. It is essential for the Court to specify the shares of both the plaintiff and the defendant to ensure clarity and fairness in the division of property. A decree that declares only the plaintiff's share, without addressing the defendant's share, may lead to ambiguity and multiplicity of proceeding.

12.3. Besides, it is apposite to refer the provision of Order XX Rule 18 of the C.P.C. which reads as follows–

“18. Decree in suit for partition of property or separate possession of a share therein.– Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,–

(1) if and in so far as the decree relates to an estate assessed to the payment of the revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such a partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the right of the several parties interested in the property and giving such further directions as may be required.”

Thus Sub Rule (2) of Rule 18 of Order XX of the C.P.C. makes it apparent that in a case of partition of immovable property, the Court may pass a preliminary decree declaring the right of the several parties



interested in the property. Accordingly, the learned Trial Court should have considered the interest of the defendants before it for proper adjudication of the lis conclusively.

13. Thus, considering the cumulative effect of the discussion made above, this Court is of the considered view that the impugned Order and the preliminary decree of the learned Trial Court need to be set aside with a view to arm the appellant with an opportunity to contest the partition suit for determination of the real question in controversy. In addition to the above, this Court is of the considered view that this is a fit case for remanding back the lis to the learned Trial Court under Order XLI Rule 23-A of the C.P.C. coupled with a direction to provide the present appellant and the defendant nos. 2 to 9 to contest the said suit by filing their written statement and thereafter to proceed in accordance with law.

Accordingly, the ex parte Order dated 03.04.2024 and Decree dated 06.05.2024 respectively passed by the Ld. Civil Judge (Sr. Division) at Islampur, in connection with Partition Suit No. 96 of 2022 is liable to be set aside.

14. Resultantly, the instant appeal is allowed.

15. The memorandum of appeal is properly stamped.

16. Hence, it is,

ORDERED

that the instant Civil Appeal be and the same is allowed on contest but without any order as to cost.

The Order dated 03.04.2024 and the Preliminary Decree dated 06.05.2024 passed by learned Civil Judge (Senior Division), Islampur in Partition Suit No. 96 of 2022 is hereby set aside.



The case is remanded to the Court of the learned Civil Judge (Senior Division), Islampur in view of the provision under Order XLI Rule 23-A of the C.P.C., with a direction to restore the suit to its original file and number and to afford the defendants an opportunity to file their written statement within the prescribed period.

Upon receipt of the written statement, the learned Trial Court shall proceed with the suit in accordance with law and shall adjudicate the issues involved on their merits after granting reasonable opportunity of hearing to all concerned parties for taking the lis to its logical conclusion.

The parties to the instant appeal are directed to appear before the learned Trial Court on 7th July, 2026 in view of Order XLI Rule 26-A of the C.P.C.

Thus the instant Title Appeal is disposed of.

All pending interlocutory applications, if any, stands disposed off accordingly.

Note in the relevant register.

Update in the CIS.

Let a Copy of this Judgment along with the case record of the learned Trial Court be sent to the learned Civil Judge (Sr. Division), Islampur for information and necessary action.

Dictated & Corrected by me.

(PLABAN MUKHERJEE)

Additional District Judge
Islampur, Uttar Dinajpur

In-charge of
AddL. District Judge, FTC 2nd Court,
Islampur, Uttar Dinajpur.

(PLABAN MUKHERJEE)

Additional District Judge
Islampur, Uttar Dinajpur

In-charge of
AddL. District Judge, FTC 2nd Court,
Islampur, Uttar Dinajpur.
Date : 18/06/2026.