

12 SCOB [2019] HCD

**High Court Division**

**(Civil Revisional Jurisdiction)**

Civil Revision No.331 of 2006.

**Md. Rafiqul Islam and others.**  
.....Petitioners.

Vs.

**Md. Abdul Hadis being dead his heirs:**

**Mahbub Alam and others.**  
..... Opposite-Parties.

Mr. Tapan Kumar Chakraborty with  
Mrs. Aynunnahar Siddiqua, Advocate  
..... for the petitioners.

Mr. Subrata Saha, Advocate.  
.....for the opposite-parties.

Heard on 19.11.2015, 23.11.2015 and  
Judgment on : 24.11.2015.

**Present:**

**Mr. Justice Md. Rais Uddin.**

**Ingredients to prove the suit for specific performance of Contract;**

**In a suit for Specific Performance of Contract the essential ingredients which the plaintiffs are required to prove in order to succeed in a suit for Specific Performance of Contract, are that the Bainapatra is genuine, considerations money passed by the parties and delivery of possession was given in pursuance thereof. ... (Para 12)**

1. This Rule was issued calling upon the opposite parties to show cause as to why the judgment and decree dated 10.11.2005 passed by the learned Additional District Judge, 6<sup>th</sup> Court, Dhaka in Title Appeal No. 66 of 2003 dismissing the appeal and affirming the judgment and decree dated 26.01.2003 passed by the Joint District Judge, 1<sup>st</sup> Court, Dhaka in Title Suit No. 228 of 1999 dismissing the suit, should not be set-aside.

2. The relevant fact giving rise to this Rule, in short, is that the petitioners as plaintiffs instituted a suit for Specific Performance of Contract and for declaration that registered deed being number 12883 dated 05.09.1999 is not binding upon the plaintiffs contending, inter-alia, that business compensation money of Tk. 950/- of L.A. Case No. 153/62-63 was received before 17.04.1965 by deceitful means by the defendant No.1 and as such on 12.10.1973 he executed an agreement to pay the same within one month and having failed to pay the said money the defendant No.1 proposed to sell the suit property at consideration of Tk. 1,00,000/- in favour of the father of the plaintiffs and on 25.06.1982 after receiving Tk. 50,000/- (fifty thousand) as advance executed a bainapatra for selling the suit land and handed over the possession of the suit land to their father. After repeated request while failed to get the registered deed again on 18.11.1996 the defendant No.1 executed new bainapatra in presence of local elite persons and witnesses on consideration at Tk. 2,00,000/- (two lac) and received Tk. 1,80,000/- (one lac eight thousand) as advance in cash. In the meantime the father of the plaintiffs dies and the plaintiffs on many occasions requested the defendant No.1 to receive remaining Tk. 20,000/- (twenty thousand) and to execute and register a sale deed as per bainapatra, failing which lastly on 26.08.1999 gave legal notice through their advocate for enforcing the said contract of sale but failed. In the meantime after receiving the said legal notice on 29.08.1999 the defendant No.1 sold the suit land to the defendant No.5 by a registered sale deed No. 12883 dated 05.09.1999 and as such the plaintiff instituted this suit

for specific performance of contract along with prayer for declaration that registered sale deed No. 12843 dated 05.09.1999 is collusive, void and not binding upon them.

3. The defendant Nos. 1-5 contested the suit by filing separate written statements denying the material allegations made in the plaint contending, inter-alia, that after purchasing the suit land from one Hasina Begum vide registered sale deed No. 9159 dated 24.06.1963 he erected tin shed hut and possessing the same. In July 1980, father of the plaintiffs took monthly rent of the suit land by paying monthly rent at Tk. 700/- and had been paying rent regularly upto November, 1990 but he failed to pay total 9 month rent upto August, 1991 amounting to Tk. 6300/- as a result he executed an agreement to pay rent of Tk. 7000/- upto September 1991 in presence of local people and while on 18.10.1991 he went to demand the said due rent, the father of the plaintiffs used filthy language and assaulted him as such he filed G.D. Entry being Gulshan Police Station G.D. Entry No. 153 dated 18.10.1991 and subsequently he paid the said due rent of Tk. 7000/- by different installments. Thereafter, he did not pay any rent to him and he became a defaulter. The plaintiffs with evil intention to grab the suit land created a forged agreement dated 12.10.1973 and bainapatra dated 25.06.1982 and 18.11.1996 and served a legal notice on 26.08.1999 and after receiving the said legal notice he gave reply on 12.09.1999 denying all the allegations and demanded to hand over possession of the suit land after paying due rent. The plaintiffs did not hand over the suit land and pay the due rent and as such he filed Title Suit No. 333 of 1999 in the court of Assistant Judge, Dhaka for eviction and realization of arrear rent against the plaintiffs for which the plaintiffs suit is liable to be dismissed. The defendant No.5 also filed a written statement denying the material allegations made in the plaint and making almost identical statement of defendant No.1 written statements and further stating inter-alia that in the middle of August 1999 the defendant No.1 proposed to sell the suit property and accordingly she purchased the suit property by registered sale deed dated 05.09.1999 on consideration at Tk. 2,00,000/- (two lac). The plaintiffs knew about the said sale and as such the suit is liable to be dismissed.

4. At the trial, the plaintiffs examined 4(four) witnesses and the defendants examined 5(five) witnesses in support of their respective cases.

5. The learned Judge of the trial court on conclusion of trial after hearing the parties, considering the evidence and materials on record dismissed the suit by his judgment and decree dated 26.01.2003. Against the said judgment and decree the plaintiffs preferred appeal before the learned District Judge, Dhaka. On transfer it was heard and disposed of by the learned Additional District Judge, 6<sup>th</sup> Court, Dhaka who after hearing the parties, considering the materials on record dismissed the appeal and affirmed the judgment and decree of the trial court by his judgment and decree dated 10.11.2005.

6. Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiffs as petitioners moved this court and obtained the instant Rule.

7. Mr. Tapan Kumar Chakraborty, the learned advocate appearing for the petitioners has placed the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below and submits that the appellate court failed to consider that expert opinion in respect of comparison of hand writing of the alleged vendor of Bainapatra was necessary but rejected and thus committed illegality. He submits that the appellate court failed to consider the observation of his own passed in order dated 03.09.2005. He submits that the relatives are not ground to reject and disbelieve the evidence of the witnesses. He further submits that the trial court misread the Bainapatra exhibits 1 and 5 in respect date of Bainapatra. He lastly

submits that both the courts below failed to consider the source of possession which is the basis of agreement. In support of his contention he has referred the decision reported in: (1) 13 BLT(AD) 177, (2) 60 DLR(AD) 55, (3) 13 MLR(AD)171, (4) 26 DLR(AD) 70, (5) 20 BLC(AD) 25.

8. Mr. Subrata Saha, the learned advocate appearing for the opposite-parties opposed the rule and submits that the plaintiffs failed to prove Bainapatra by adducing evidence and as such trial court rightly dismissed the suit and the appellate court affirmed the judgment and decree of the trial court. He submits that Bainapatra dated 25.06.1982 has no schedule and no name of witnesses mentioned in the aforesaid Bainapatra and P.W.1 in cross-examination admitted that- “বিগত ২৫-০৬-১৯৮২ ইং তারিখেই বায়নাপত্র .৭৫ পয়সা স্টাম্পের উপর গুলখা হহ. বায়নাপত্রে কেহ সাক্ষী নাই। বায়নাপত্রে তফশিল নাই। ১৮-০৬-১৯৯৬ ইং তারিখ অপর একটি বায়নাপত্রের কথা বলিয়াছেন উহাতে সাক্ষী নাই।” He submits that none of the P.Ws. stated that they were present at the time of execution of Bainapatra dated 25.06.1982 and as such Bainapatra dated 25.06.1982 has not been proved by the plaintiffs. He submits that the plaintiffs purchased the stamp on 26.12.1975 by which Bainapatra was executed after 06(six) years on 25.06.1982 which proved that the Bainapatra is forged and concocted one. He submits that none of the P.Ws. stated that Tk. 50,000/- was paid to defendant No.1 as earnest money in his presence and as such the Bainapatra dated 25.06.1982 has not been proved. He further submits that in respect of Bainapatra dated 18.11.1996 which was marked as exhibit-1 and submits that P.W.1 stated that he is not a witness in Bainapatra dated 18.11.1996 and he was not present at the time of execution of the Bainapatra which proved that he knows nothing about Bainapatra dated 18.11.1996. He submits that P.W.2 is the attesting witness No.3 of Bainapatra dated 18.11.1996 but in cross-examination he admitted that-“বায়নাপত্র তফশিলে খতিয়ানে একটু ঘষামাজা দেখা যায়। বায়নাপত্রে ১ নং বিবাদীর সহি ভিন্ন দেখা যায়।” This admission proved that Bainapatra is forged one. Mr. Subrata Saha further adds that P.W.3 is attesting witness No.2 of Bainapatra who in his cross-examination stated that he is uncle of plaintiffs and also admitted that-“বায়নাপত্রে কিছু কাটাকাটি আছে।” He submits that P.W.4 is an attesting witness of Bainapatra dated 18.11.1996 and who is brother in law of the plaintiffs and he knew nothing about Bainapatra and thus P.W.1-4 failed to prove the execution of Bainapatra dated 18.11.1996. He submits that the plaintiff purchased the stamp on 17.11.1995 and Bainapatra was executed on 18.11.1996 after 01(one) year of purchase which proved that Bainapatra is ante dated and forged one. He further submits that evidence beyond pleadings is not sustainable as per provisions under order VI rule 7 of the Code of Civil Procedure. He lastly submits that the plaintiffs failed to file any scrap of paper to prove that defendant No.1 withdrew compensation money of Ismail and P.W.2, 4 stated that they have no any paper to show that defendant No.1 withdrew compensation money of Ismail. In support of his contention he has referred the decisions reported in: (1) 50 DLR(AD) 88, (2) 16 DLR(AD) 157, (3) 44 DLR 69, (4) 38 DLR 39, (5) 58 DLR 329, (6) 15 MLR(AD) 500, (7) 4 MLR(AD) 127, (8) 62 DLR(AD) 242, and (9) 16 BLD (AD) 280.

9. In order to appreciate the submission made by the learned advocates of the parties, I have gone through the revisional application, pleadings, evidence, exhibits, judgment and decree of the courts below very carefully.

10. Now the question calls for consideration whether the learned Judge of the court of appeal below has committed any error of law resulting in an error in the decision occasioning failure of justice in passing the impugned judgment and decree.

11. On perusal of the record it appears that the plaintiffs brought a suit for Specific Performance of Contract and for declaration that sell deed dated 05.09.1999 is not binding

upon the plaintiffs. To prove the case the plaintiffs adduced the evidence both oral and documentary. The learned Judge of the trial court considering the evidence and materials on record dismissed the suit holding that the plaintiffs failed to prove their case with observation that-“উভয়পক্ষের স্বাক্ষীগণের জেরা জবানবন্দি পর্যালোচনা করিলে দেখা যায় যে, বাদীগণের পূর্ববর্তী মৃত ইসমাইল মিয়া নালিশী বাড়ীতে ভাড়াটিয়া ছিলেন। বাদীপক্ষের বায়নাপত্র পর্যালোচনা করিয়া দেখা যায়, উহাতে ঘষামাজা আছে। তদুপরি অংগীকার নামা এবং বায়নাপত্রে ১ নং বিবাদীর স্বাক্ষরের মধ্যে ভিন্নতা দেখা যায়।” The learned Judge of the appellate court considering the evidence, assessing and reassessing the evidence independently dismissed the appeal and affirmed the judgment of the trial court with the finding that the plaintiffs failed to prove the Bainapatra which were basis of the plaintiffs by any evidence oral and documentary as to Bainapatra dated 25.06.1982 exhibit-5(ka) and Bainapatra dated 18.11.1996 exhibit-1.

12. In a suit for Specific Performance of Contract the essential ingredients which the plaintiffs are required to prove in order to succeed in a suit for Specific Performance of Contract, are that the Bainapatra is genuine, considerations money passed by the parties and delivery of possession was given in pursuance thereof. But in the instant case the plaintiffs measurably failed to prove the Bainapatra considerations of money and also as to possession and as such the learned Judge of the trial court rightly dismissed the suit and the appellate court on assessing the evidence on record rightly dismissed the appeal and affirmed the judgment and decree of the trial court.

13. On analysis of the judgment of the appellate court it appears to me that the findings arrived by the court of appeal below having been rested upon considerations and discussions of evidence and materials on record and also on a correct and proper analysis of the legal aspect involved in the case. Moreover, the impugned judgment and decree of the appellate court below in its entirety are well founded in the facts and circumstances of the case. Therefore, grounds urged and the contentions advanced by the learned advocate for the petitioners are not correct exposition of law. However, I have gone through the decisions reported in (1) 13 BLT(AD) 177, (2) 60 DLR(AD) 55, (3) 13 MLR(AD)171, (4) 26 DLR(AD) 70, (5) 20 BLC(AD) 25, as referred by the learned advocate for the petitioners. I am respectful agreement with principles enunciated therein. But the facts leading to those cases are quite distinguishable to that of the instant case and therefore, to that effect I am also unable to accept his submissions. On the contrary the legal pleas taken by the learned advocate for opposite parties prevail and the decisions cited by him reported in (1) 50 DLR(AD) 88, (2) 16 DLR(AD) 157, (3) 44 DLR 69, (4) 38 DLR 39, (5) 58 DLR 329, (6) 15 MLR(AD) 500, (7) 4 MLR(AD) 127, (8) 62 DLR(AD) 242, and (9) 16 BLD (AD) 280, appear to have a good deal of force.

14. In view of discussions, decisions and reasons stated above, I am of the view that the impugned judgment and decree of the court of appeal below suffers from no legal infirmity which calls for no interference by this court in revision. Thus, I find no merit in the Rule.

15. In the result, the Rule is discharged. However, there will be no order as to costs.

16. Let the Lower Court Records along with a copy of the judgment be sent to the court concerned at once.