

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 799 of 2018

Mst. Nasrin Jahan (Smrity)

.....Petitioner.

-Versus-

Md. Alim Hossen and others

.....Opposite parties.

Mr. Muhammad Salahuddin, Advocate

.....For the petitioner.

Mr. Songjukta Dobay, Advocate

.....For the opposite parties.

Heard and judgment on 29<sup>th</sup> August, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 26.11.2017 passed by the Joint District Judge, 1<sup>st</sup> Court, Gazipur in Title Appeal No. 111 of 2011 affirming those dated 03.03.2011 passed by the Assistant Judge, 4<sup>th</sup> Court, Kaliakair Gazipur in

Title Suit No. 3783 of 2008 dismissing the suit should not be set aside.

Petitioner as plaintiff filed the above suit for specific performance of contract and further declaration that the Exchange deed No. 3654 dated 22.05.2002 is illegal, inoperative, collusive and not binding upon the plaintiff.

Plaint case, in short, inter alia, is that original owner of the suit land was Abdul Ali Mondal by way of purchase vide Deed No. 1180 dated 12.02.1978. Thereafter Abdul Ali Mondal entered into a Bainapatra on 06.04.2002 with the plaintiff, which was written on 150/- taka Stamps, for transferring the suit land for a consideration of Tk. 1,90,000/- and on that very day upon receipt of Tk. 50,000/- as part consideration money, Abdul Ali Mondal inducted the plaintiff into immediate possession of the suit land and it was declared in the presence of the witnesses at the relevant time of executing Bainapatra that he will execute registered sale deed within 3 months upon receipt of balance Tk. 1,40,000/- after completing all documentations regarding the suit land. Thereafter on 15.05.2002 Abdul Ali received Tk. 80,000/- from the plaintiff in presence of the witnesses and accordingly, he endorsed and

acknowledged the same on the back page of 1<sup>st</sup> page of Bainapatra by putting his signature. Before executing registered Sale Deed Abdul Ali Mondal became sick and at that stage the plaintiff requested Abdul Ali to execute sale deed on commission upon receipt of the balance money while, the heirs of Abdul Ali, i.e. present Defendants, assured the plaintiff that after recovery from illness Abdul Ali will execute sale deed. Further, the defendants Badal Professor and Mizanur Rahman undertook to register sale deed in favour of the plaintiff and thus, the cunning defendants on the excuse of illness of Abdul Ali was killing time in executing sale deed. Lastly, Abdul Ali died on 28.04.2003 leaving behind 3 sons and a daughter to inherit him. After the death of Abdul Ali lastly the plaintiff on 14.02.2004 at about 8.00 a.m. requested the defendants to execute registered sale deed in favour of the plaintiff upon receipt of balance Tk. 60,000/- but they outright refused to do so. Selim Hossen, son of Abdul Ali purchased the stamps for Bainapatra and he witnessed the same witness No.1. The exchange deed No. 3654 dated 22.05.2002 entered upon with the defendant No.8 is illegal, inoperative, collusive and not binding upon the

plaintiff and same has been done to defraud the plaintiff from the suit land on 15.09.2004, hence the suit.

Defendant No.8 contested the suit by filing written statement denying the plaint case, alleging, inter alia, that the vide Exchange Deed No. 3654 dated 22.05.2002 original owner Abdul Ali transferred the land to the defendant No.8, who accordingly being mutated his name, remained in possession over the property since then. The suit is false and is liable to be dismissed with cost.

By the judgment and decree dated 03.03.2011, the trial court dismissed the suit on contest.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 111 of 2011 before the Court of District Judge, Gazipur, which was heard on transfer by the Joint District Judge, 1<sup>st</sup> Court, Gazipur, who by the impugned judgment and decree dated 26.11.2017 dismissed the appeal and affirmed the judgment of the trial court.

Challenging the said judgment and decree, petitioner obtained the instant rule.

Mr. Muhammad Salahuddin, the learned advocate appearing for the petitioner drawing my attention to the lower court records and the judgment passed by the court below submits that in a suit for specific performance of contract although the plaintiff has successfully able to prove his bainanama by adducing sufficient evidences including the deed writer and a witness of the deed, which was also been affirmed by the court through the Hand Writing expert but the court below totally failed to appreciate all these evidences and came to a wrong findings and dismissed the suit on wrong presumption. The impugned judgment is not sustainable in law, which is liable to be set aside. He finally prays that the case may be sent back on remand to the court below to have a proper adjudication of the matter.

Mr. Songjukta Dobay, the learned advocate appearing for the opposite party, on the other hand upon perusal of the record as well as considering the submission of the learned advocate for the petitioner although opposes the rule but finally considering that judgment was not proper in not having a consideration of the evidences at length, as such agrees to send back the suit on remand to the appellate court for proper adjudication.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for specific performance of contract together with further declaration that the Exchange Deed No. 3654 dated 22.05.2002 is illegal, inoperative, collusive and not binding upon the plaintiff, the court below concurrently dismissed the suit. Record speaks that plaintiff adduced a number of witness including a report as has been obtained from the handwriting expert on examining the signature of the deed writer as well as the witness of the deed but the court below upon misreading or non reading of the evidences adduced by the plaintiffs to prove the deed in question in order to satisfy the court to get a decree in his favour and the evidences adduced by the defendants, dismissed the suit without elaborate discussion of all these evidences of the parties most arbitrarily.

In that view of the matter, I am of the opinion that this is a fit case to send back on remand to the appellate court being the last court of fact to decide and adjudicate the matter on merits upon elaborate discussing the evidences already on record.

I find merits in this rule.

In the result, the rule is made absolute. The judgment and decree passed by the court below is hereby set aside and the suit is sent back on remand to the appellate court to decide the suit on merit upon discussing the evidences already on record and trial court is hereby directed to dispose of the suit expeditiously as early as possible. However upon prayer of the parties, the appellate court is further directed to allow both the parties to adduce further evidences if they so desire.

The order of status-quo granted earlier is hereby recalled and vacated.

Send down the L.C.R along with the judgment at once.