

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 3205 of 2004

Salahuddin and others

..... Petitioners.

-Versus-

Md. Rahmatullah and others

.....Opposite parties.

Mr. Mohammad Zahirul Amin, Advocate

.....For the petitioners.

Mr. Md. Aktaruzzaman, Adv.

.....For the Opposite parties

Heard and judgment on 1st November, 2023.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite parties to show cause as to why the judgment and decree dated 13.06.2004 passed by the Joint District Judge, Dhaka in Title Appeal No.238 of 2003 reversing those dated 04.05.2003 passed by the Senior Assistant Judge, 6th Court, Dhaka in Title Suit No. 212 of 2001 dismissing the suit should not be set aside.

Opposite party Nos. 1-7 as plaintiff filed the above suit for declaration of title and for cancellation of deed mentioned in the schedule of the plaint.

Plaint case in short, inter alia, is that Enayet Ullah Miah, Oliullah and Samina Khatun were RS recorded tenant of the suit property described in the schedule of the plaint. While jointly possessing the .0353 ajuutangsha property, Enayet Ullah Miah died on 24.4.92 leaving brother and sister as his heirs, who got .0235 ajuutangsha and got .0198 ajuutangsha property respectively. Oliullah and Samina Khatun got .0588 ajuutangsha and 0294 ajuutangsha property respectively as heirs of their father and brother. Oliullah and Samina Khatun, while possessing the property on amicable family partition sold .0330 ajuutangsha property to the defendants No.1-4. Samina Khatun transferred her entire property to Koheli Begum. Plaintiffs No. 1-7 become possessor of the rest of the land of Oliullah. When defendants No.1-4 demanded the suit property of four plots, the plaintiffs collected the certified copy of deed on 20.05.2001 and saw that the defendants created forged deed by false person showing him as Enayet Ullah. Defendants did not claim the suit property earlier

and they did not possess the same. Unless the deed is cancelled, the plaintiffs will suffer irreparable loss and injury and hence the suit.

Defendant petitioner contested the suit by filing joint written statement, denying the plaint case alleging, inter alia, that the CS recorded tenant of the suit and other property was Garibullah. While he owning and possessing the suit land died leaving behind his two sons Tomijuddin and Amanullah as heirs, who subsequently become the owner and possessor of .1764 ajuutangsha land of four suit plots equally. Amanullah died leaving two sons Enayet Ullah Miah and Oliullah and one daughter Samina Khatun as his heirs and the names of Tomijuuddin, Enayet Ullah Miah, Oliullah and Samina Khatun were correctly recorded and published in the RS record. The defendants No. 1-4 purchased the suit land that is .0330 ajuutangsha by deed No. 1095 dated 12.3.84 and .0330 ajuutangsha by deed No.16188 dated 28.7.75 from the owner Oliullah alias Kalimullah and Enayet Ullah, both sons of late Amanullah. After purchase, the defendants No.1-4 mutated their names, constructed building thereon and had been peacefully

possessing and living with their families by taking connection of electricity, gas, telephone, water, sewerage etc. and paying bills, taxes, rents to the concerned agency regularly. The defendants applied to Dhaka City Corporation for separation of their holdings so as to enable them to pay taxes easily. Accordingly Dhaka City Corporation separated the holding numbers and the defendants were allotted holding Nos. 79/3/B, 79/3, 79/3/A and 79/3/C to defendant No.1 Salahuddin, defendant No.2 Alauddin, defendant No.3 Nuruddin and defendant No.4 Sahabuddin respectively. The plaintiffs had no possession over the suit land. The defendants No. 1-4 had purchased the suit land from its original owner and possessor and since then they had been living thereon by constructing pucca dwelling house. The plaintiffs had no right, title and possession over the suit land. Hence the plaintiffs would not get any relief of this suit for declaration of title and cancellation of deed. The suit is liable to be dismissed with cost.

During trial following issues were framed.

- i) Is the suit maintainable to its present form?

- ii) Is the plaintiff got any title and possession of the suit land?
- iii) Whether the deed No. 1095 dated 12.03.84 is a forged and concocted deed as being manufactured by defendant No.1-4.
- iv) Is the plaintiff entitled to get relief as prayed for?

In order to prove respective cases both the parties adduced oral and documentary evidences.

Considering the evidences and hearing the parties, trial court dismissed the suit on contest.

Challenging the said judgment and decree, plaintiff preferred Title Appeal No. 238 of 2003 before the Court of District Judge, Dhaka, which was heard on transfer by the Joint District Judge, Dhaka, who by the impugned judgment and decree allowed the appeal and after reversing the judgment of trial court decreed the suit in favour of the plaintiff.

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

Mr. Mohammad Zahirul Amin, the learned Advocate appearing for the petitioner drawing my attention to the impugned judgment of the court below submits that trial court mainly dismissed the suit holding that plaintiff had miserably failed to prove the allegation that the deed in question was obtained on false personification and not been executed by the donor by adducing any proper evidence, defying the burden lies upon him under section 101 of the Evidence Act. On the other hand appellate court totally failed to appreciate the legal requirements of law and shifted the burden upon the defendant and decreed the suit most illegally. The impugned judgment is not sustainable in law, which is liable to be set aside.

Mr. Md. Aktaruzzaman, the learned advocate on the other hand, appearing for the opposite party drawing my attention to the findings of the appellate court submits that appellate court being the last court of fact has rightly assessed by himself, the signature of the deed in question, comparing the signature with a registered kabinnama contains the signature of the executant Enayetullah as been the expert of all expert and come to a finding that deed in question was a collusive deed, not been given by the executant

Enayet Ullah and accordingly he decreed the suit in favour of the plaintiff holding that the deed in question is a forged deed. Since the findings of the appellate court contains no illegality and rule contains no merit, it may be discharged.

Heard the learned Advocate and perused the Lower Court Records and the impugned judgment of the court below.

This is a suit for declaration as well as cancellation of the deed. Both plaintiffs and defendants claimed to have purchased the suit land from the admitted owner Enayet Ullah. In the suit, plaintiffs claim that Enayet Ullah, the admitted owner of the suit land did not execute and register the deed No. 1059 dated 12.03.198, which is a forged and concocted deed. Trial court while dismissing the suit has held that plaintiff failed to prove their contention that the deed was obtained on collusion but the appellate court reversed the same findings. Now in the instant rule it has to be decided, how far the said finding is justifiable.

In order to prove the respective cases both the parties adduced evidences.

Record speaks that on 28.04.2003 vide order No. 39 plaintiff filed a document of registered kabinnama dated 04.05.1971, which is the registered kabinnama of marriage between Md. Enayet Ullah, son of Md. Amanullah with one Kohima Bibi, daughter of Chunnu Mia solemnized on 4.5.1971. Said kabinnama was placed in court before judgment with having objection by the defendants but not been exhibited in court. Although this document was lying in the records and by the order of the trial court it was placed but not been considered by the trial court and the trial court accordingly formed an opinion that the deed in question dated 12.03.84 (Ext.ka) is a forged and concocted one, not been compared with the admitted signature of Enayet Ullah. On the other hand, the appellate court while noticing the presence of a document of the said executant Enayet Ullah through registered kabinnama as been placed by the plaintiff in the suit during trial, he himself exhibited the said documents as Exhibit-7 (“although it has not been marked there as Ext.7”) and compared with the signature of the deed in question dated 12.03.84 (Ext.ka) and come to a findings that the signature of the deed dated 12.03.84 is not similar with the signature put in

kabinnama by the said Enayet Ullah on 04.05.1971. In the case of Bimol Rosario –Vs. Barbara Rosario and others reported in 66 DLR 122 it has been held that:

“Expert’s opinion is not a conclusive evidence which enables the court to come to a satisfactory conclusion, though the said opinion is not binding upon the Court. The Court itself can compare any signature or LTI of any concerned person under section 73 of the Act and come to a decision in accordance with.”

In view of the above legal position, the above comparison by the court itself is not without jurisdiction and can be held that it is illegal. Appellate court observed that as per section 101 of the Evidence Act, it is the duty of the defendants to prove that the deed in question was legally been executed and it was not a fraudulent deed but defendants totally failed to prove by producing any evidence to that contest.

Now let us see, how far the finding is justified. We have noticed above that both the parties adduced evidence.

D.W.1 Md. Salauddin is a defendant of the suit, who has summaries his written statements.

D.W.2 Alamgir Alam Mamun stated in his deposition that:

"বাদী বিবাদী ও নাঃ জমি চিনি। নাঃ জমি থেকে বাড়ী ১০ গজ দূরে। ১-৪নং বিবাদী নাঃ জমিতে বাড়ী ঘর করে বসবাস করে। নাঃ জমিতে বাদীদের কোন ভোগ দখল নাই।"

In his cross-examination he further said that:

"নাঃ জমি ওয়ালিউল্লা ও এনায়েত উল্লা মালিক। বিবাদীরা ওয়ালিউল্লার জায়গা কিনেছে একথা সত্য নয়। দুজনের জমি ক্রয় করেছে। সত্য নয় যে, মিথ্যা সাক্ষ্য দিলাম।"

D.W.3 Lat Mia stated in his deposition that:

"বাদী বিবাদী ও নাঃ জমি চিনি। নাঃ জমি বিবাদীরা দখল করে। নাঃ জমি বাদীরা কখনও ভোগ দখল করে নাই।"

In his cross-examination he further stated that:

"নাঃ সম্পত্তি কতটুকু বা দাগ খতিয়ান জানা নাই। নাঃ জমির মূল মালিক ছিল এনায়েত উল্লা ও ওয়ালী উল্লা। সত্য নয় যে, ওয়ালী উল্লা শুধু বিক্রী করে। বিক্রীর কথা শুনেছি। সত্য নয় যে, মিথ্যা সাক্ষ্য দিলাম।"

P.W.4 Sahera Khatunn stated in her deposition that:

"আমি নাঃ জমি চিনি। এনায়েত উল্লাহ বড় মামা। বাদীরা ছোট মামার ছেলে। সম্পত্তি বিক্রি করেছে ৮৪ সালে। ২ কাঠা জমি ৭৫ সালে ওলিউল্লা জমি বিক্রি করে। ১-৪নং বিবাদীরা জমি ভোগ দখল করিতেছে। বিক্রির সময় আমি উপস্থিত ছিলাম। টাকা পয়সা উঠাইয়া আমি আমার মামাকে দিয়েছি।"

In her cross-examination, she has further stated that:

"এনায়েত উল্লাহ আমার বড় মামা। বিবাদীরা মামাতো ভাই হয়। এনায়েত উল্লা ৮৪ সালে বিক্রি করে যায়গা গেভারিয়া ধুপ খোলা মাঠে রেজিষ্ট্রি হয়। রেজিষ্ট্রির সময় শাহা ও মামা ছিল। (P.W.2 but he did not say so.) শাহা আমার মহল্লাবাসী। শাহা ৪নং বিবাদী নয়। নাঃ জমির দাগ খতিয়ান কত বলতে পারবো না। এনায়েত উল্লা চিকিৎসার জন্য জমি বিক্রি করে। দলিলে কি লেখা আছে জানা নাই। কত দাগে তাহা হয় জানা নাই। নাঃ জমিতে বাদীরা দখলে নেয়। দলিলের লেখক কে জানা নাই। সত্য নয় যে, এনায়েত উল্লা আগে জমি বিক্রি করে নাই। সত্য নয় যে, বিবাদীদের

জমি ষড়যন্ত্র করে অত্র দলিল রেজিস্ট্রি করেছে। ১-৪ নং বিবাদী আমার পুত্র। সত্য নয় যে, মিথ্যা সাক্ষ্য দিলাম।"

Now upon perusal of the deed in question dated 12.03.84 (Ext.ka) it will appear that the deed was attested by one Shahabuddin, he was not made any witness in the instant case. D.W.4 Sahera Khatun, who tried to say that the transaction was made in her presence, she was neither a witness of the deed in question nor there is any recital of her presence in the said deed. The said deed was written by one Shaheb Ali, in presence of 1. Shahabuddin, 2. Md. Abdul Mia and 3. Md. Easin. None of the above person, either deed writer or attestating witness, has come forward to prove the said documents. When the said documents was not been formally been proved in court by any witness as it was challenged before the court, the findings and observation as been held by the appellate court cannot be said that it was not made in accordance with law.

Having given my anxious thought to the above law, fact and circumstances of the case, I am of the opinion that the appellate court committed no illegality in reversing the judgment of the trial court and decreed the suit in favour of the plaintiffs.

I thus find no merits in this rule.

In the result, the rule is discharged and the judgment and decree passed by the court below is hereby affirmed.

The order of stay granted earlier is hereby recalled and vacated.

Send down the Lower Court Records along with the judgment at once.