

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3523 OF 2001

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Sital Das Ghose being dead his legal heirs: Rani Bala Das and others

... Petitioners

-Versus-

Sreemati Nihar Bala Ghose and others

... Opposite parties

Mr. Shahed Razmul Bari with

Mr. Mr. Bakir Hossain and

Mr. Enamul Hoque Moni, Advocates

.... For the petitioners.

Mr. Md. Nuruzzaman Khan, Advocate

.... For the opposite party Nos.1.

Heard on 23.10.2024

Judgment on 27.10.2024.

This Rule was issued calling upon the opposite No.1 to show cause as to why the impugned judgment and decree dated 14.11.2000 passed by the learned Subordinate Judge, Additional Artha Rin Adalat No.2, Dhaka in Title Appeal No.129 of 1995 affirming those dated 27.03.1995 passed by the learned Additional Assistant Judge, 5th Court, Dhaka, in Title Suit No.17 of 1994 should not be set aside and or pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite party as plaintiff instituted above suit for specific performance of contract dated 02.01.1990 allegedly

executed by defendant No.1 on receipt of an advance of Taka 95,000/- for 3 decimal land as described in the schedule to the plaint.

It was alleged that above land was owned, held and possessed by defendant No.1 as a viti land who declared to sale the same and the plaintiff agreed to purchase at a price of Taka 1,00,000/- and on receipt of Taka 95,000/- defendant No.1 executed an unregistered bainapatra on 02.01.1990. It was stipulated that a sale deed would be executed and registered within next 3 years. Plaintiff No.1 requested the defendant to execute and register a kabola deed on receipt of remaining Taka 5,000/- on several occasions but the defendant obtained time on various pretexts and on 30.11.1992 he refused to execute and register a kabala deed.

Defendant No.3 the constituted attorney of defendant No.1 contested the suit by filing a written statement alleging that defendant No.1 never entered into a contract for sale of disputed 3 decimal land to the plaintiff and above bainapatra dated 02.01.1990 was a forged document. Defendant No.1 separated the disputed joma and got his name mutated in respect of disputed 3 decimal land by Miscellaneous Case No.19528 of 991-1992 on 10.04.1992 and executed and registered a power of attorney deed in favour of this defendant on 20.09.1992 authorizing him to possess and sale of above land.

At trial plaintiff examined 3 witnesses and defendant No.3 examined 1. Documents produced and proved by the plaintiffs were

marked as Exhibit No.1 and that of the defendants were marked as Exhibit No.Ka.

On consideration of facts and circumstances of the case and evidence on record the learned Senior Assistant Judge decreed the suit.

Being aggrieved by above judgment and decree defendant No.3 as appellant preferred Civil Appeal No.129 of 1995 to the District Judge, Dhaka which was heard by the learned Sub-ordinate Judge, Additional Artha Rin Court No.2, Dhaka who dismissed the appeal and affirmed the judgment and decree of the trial Court.

Being aggrieved by the judgment and decree of the Court of appeal below above appellants as petitioners moved to this Court and obtained this Rule.

Mr. Shahed Razmul Bari, learned Advocate for the petitioners submits that admittedly disputed land was the homestead land of defendant No.1. The plaintiff claims to have paid Taka 95,000/- out of the total consideration of Taka 1,00,000/-. In her evidence PWs have stated that disputed land was vacant and defendant No.1 showed above land to the plaintiff but there is no explanation as to why possession of above land was not delivered to the plaintiff. In the impugned unregistered bainapatra there is a burning mark at the place of date. Above burning was caused to change the date which shows that above document was a forged one. While giving evidence as PW1 the plaintiff admitted that defendant No.1 had executed a registered a

power of attorney deed on 20.09.1992 to defendant No.3 authorizing him to sale above land. In her evidence plaintiff claimed to have paid Taka 95,000/- to defendant No.1 but PW2 Hafizul Alam the scribe of the bainapatra stated in his cross examination that defendant No.1 handed over above money to her husband who paid the same to defendant No.1. The husband of the plaintiff was not examined in this case. There are material contradictions in the evidence of plaintiff witnesses as to the place of talk of the sale and mode of payment of the advance money but the learned Judges of the Courts below have totally failed to appreciate above evidence of plaintiff witnesses and most illegally decreed the suit and dismissed the appeal respectively which is not tenable in law.

On the other hand Mr. Md. Nuruzzaman Khan, learned Advocate for the opposite party No.1 submits that at trial plaintiff herself gave evidence as PW1 and produced and proved the impugned unregistered bainapatra dated 02.01.1990 which was marked as Exhibit No.1. The scribe of the above document gave evidence as PW2 in support of due execution of above document. On consideration of above consistent oral evidence of competent witnesses as well as documentary evidence the learned Judges of the both the Courts below concurrently held that defendant No.1 executed above bainapatra on receipt of Taka 95,000/- and accordingly decreed the suit and dismissed the appeal respectively. Above concurrent findings of fact arrived at by the Courts below being

based on evidence on record this Court cannot in its revisional jurisdiction interfere with the same.

I have considered the submissions of the learned Advocates for the respective parties and carefully examined all materials on record.

It is admitted that defendant No.1 was the owner and possessor of disputed 3 decimal homestead land and on 20.09.1999 he executed and registered a deed of power of attorney for above land in favour of defendant No.3.

Plaintiff No.1 a woman while giving evidence as PW1 claimed to have entered into a bainapatra for purchase of above 3 decimal land with defendant No.1 on 02.01.1990 on payment of Taka 95,000/- out of total consideration of Taka 1,00,000/-. It was agreed upon that defendant No.1 would execute and register a sale deed on receipt of remaining Taka 5,000/- within a period of next 3 years.

It is not understandable as to why a long period of 3 years was given for executing a sale deed when only Taka 5,000/- was unpaid.

PW3 Jogendra has stated in his examination in chief that at the time of execution of the bainapatra defendant No.1 took them to inspect the disputed vacant. It is not understandable as to why possession of the disputed land was not delivered to the plaintiff.

In the disputed bainapatra dated 02.01.1990 above land has been described by boundary and it has been mentioned that on the west Rahim and others. In his cross examination PW3 Jogendra Chandra

Ghose stated that Rahim purchased above land from defendant No.1 about two years back. Above Rahim gave evidence on 01.11.1994.

PW1 Nihar Bala stated that on 02.01.1999 she paid Taka 95,000/- to defendant No.1 but above PW2 Hafizul Alam stated in cross examination that PW1 gave above money to her husband Modhu Babu who handed over the same to defendant No.1. PW1 Nihar Bala stated in her cross examination that the nephews of the PW1 was residing in the dwelling hut situated in the disputed plot but they were not present at the time of talk of sale or execution of the bainapatra. PW2 Hafizul admitted that he was not a licensed deed writer. He further stated that he wrote the impugned bainapatra without perusing any document nor he knew what was the terms of above sale.

It turns out from Exhibit No.1 the impugned bainapatra that there is a burning mark in the schedule of the deed. This matter was brought to the notice of PW1 Nihar and a suggestion was put to her that by above burning the plot number was changed which she denied.

PW3 Jogendra Chandra Ghose contradicted the claim of PW1 Nihar Bala and PW2 Hafizul as to the venue of the writing of the impugned bainapatra deed. PW3 Jogendra stated in his cross examination that the bainapatra was written sitting in the ghor of Bimol. But above Bimol was not a witness to the above bainapatra nor he came to the Court to give evidence as a plaintiff witness.

The husband of the plaintiff was a witness to the bainapatra and he allegedly paid the advance money to defendant No.1 and he accompanied the plaintiff to defendant No.1 when he denied to execute and register a kabala deed. As such the husband of the plaintiff was an important witness but he was not examined as a witness nor any explanation has been provided as to why he was not examined.

PW1 Nihar Bala has admitted that she knew about the execution and registration of the deed of power of attorney dated 20.09.1999 by defendant No.1 to defendant No.3 for sale of the disputed land. She has claimed that above power of attorney deed was cancelled but no evidence in support of cancellation of above registered power of attorney deed of defendant No.3 was produced by the plaintiff.

On consideration of above facts and circumstances of the case and evidence on record I hold that the learned Judges of the Courts below have failed to appreciate the materials on record properly and appreciate that the case of the plaintiff suffers from improbability and material contradictions and non examination of important witnesses and most illegally decreed the suit and dismissed the appeal respectively which is not tenable in law.

In above view of the materials on record I find substance in this application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute. The impugned judgment and decree dated 14.11.2000 passed by the learned Subordinate Judge, Additional Artha Rin Adalat No.2, Dhaka in Title Appeal No.129 of 1995 affirming those dated 27.03.1995 passed by the learned Additional Assistant Judge, 5th Court, Dhaka in Title Suit No.17 of 1994 is set aside.

Above Title Suit No.17 of 1994 is dismissed on contest against defendant No.1 without cost.

However, there is no order as to costs.

Send down the lower Courts records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER