

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 685 of 2008

Makhlatur Rahman being dead his heirs;
1(a) Mst. Hosne Ara Begum and others
... Petitioners

-Versus-

Nurul Alam and others

...Opposite-parties

Mr. Md. Jahangir Alam, Advocate

...For the petitioner Nos. 2, 5 and 6.

Mr. Muhammad Mizanur Rahman with

Ms. Jobaida Gulshan Ara, Advocates

...For the opposite-party Nos. 1-10.

Heard on 14.05.24, 02.07.2024 and

judgment on 8th July, 2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 13.11.2007 passed by the learned Additional District Judge, 2nd Court, Chattogram in Other Appeal No. 15 of 2006 allowing the appeal and thereby reversing the judgment and decree dated 29.11.2005 passed by the Senior Assistant Judge, 3rd Court, Sadar, Chattogram in Other Suit No. 25 of 2001 dismissing the suit 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 relevant for disposal of this Rule, in short, are that the opposite-parties, as plaintiff, filed Other Suit No. 25 of 2001 in the Court of Senior Assistant Judge, 3rd Court, Sadar, Chattogram against the petitioner, as defendant No. 1 and predecessor of petitioner Nos. 2-6, as defendant No. 2 for redemption of the suit property as complete usufructuary mortgage under Section 95A of the State Acquisition and Tenancy Act, 1950 stating that the schedule land belonged to Abdus Samad and others, R. S. Khatian stands recorded in their names. Abdus Samad died leaving three sons namely, Gura Meah, Dula Meah and Abu Sukkur and two daughters Shaharbanu and Bibijan. Thereafter, said three sons transferred the property by a registered Kabala Deed No. 1729 dated 14.04.1966 at a consideration of Tk. 700/- with an agreement to convey the property to them if the loan money is refunded by the purchaser within $1\frac{1}{2}$ years. The registered sale deed and deed of agreement constituted a transaction of complete usufructuary mortgage. The defendants had been enjoying and possessing the schedule land and usufruct

therefrom for long seven years. The amount received from the purchasers had been adjusted by usufruct and after seven years the mortgage property is treated to be redeemed, but the defendants even after repeated demands did not return back the schedule land. Gura Meah died leaving plaintiff Nos. 1-4, Dula Meah died leaving plaintiffs Nos. 5-7 and Abu Sukkur died leaving plaintiff Nos. 8-10 as heirs. The defendants collusively got their names recorded in the B.S. Khatian. The defendants finally on 18.02.2001 refused to return the said land, consequently, the plaintiffs have been constrained to file the instant suit for redemption of mortgage of the suit land.

The petitioner No. 1 and predecessor of the petitioner Nos. 2-6 as defendants contested the suit by filing a joint written statement denying all the material allegations made in the plaint contending, inter alia, that the suit is not maintainable in its present form and barred by limitation. The predecessor of the plaintiffs sold the suit land to the defendants on 14.10.1966 by sale Deed No. 1729. After purchase they have been enjoying and possessing the land and their names have also been properly recorded in B.S. Khatian. The plaintiffs' predecessors on 15.02.1974 filed Miscellaneous Case No.

48/C(Mortgage) of 1973-74 under P.O. 88 and 136 of 1972 in the court of C.O. (Revenue), but the same was dismissed on 18.09.1974. Thereafter, the predecessor of plaintiff Nos. 8-10 Abu Sukkur filed another case on 29.11.1983 before the Ward Commissioner of Ward No. 33 and lost the same. The agreement for re-conveyance dated 14.04.1966 lost its validity after the expiry of $1\frac{1}{2}$ years from the date of said agreement and as such, the plaintiffs have no cause of action for filing the present suit in 2001. Section 95A of State Acquisition and Tenancy Act came into force in 1972 and as such, the agreement for re-conveyance dated 14.04.1966 was not alive on the date of promulgation of P.O. No. 88 of 1972 and hence, the said transaction has become past and closed and the plaintiffs are not entitled to any relief, as such, the suit is liable to be dismissed.

The trial court framed 5(five) issues for determination of the dispute. In course of hearing both the parties adduced evidences both oral and documentary in support of their respective cases. The trial court after hearing by its judgment and decree dated 29.11.2005 dismissed the suit.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court, the plaintiffs filed Other Appeal No. 15 of 2006 before the Court of learned District Judge, Chattogram. Eventually, the said appeal was transferred to the Court of learned Additional District Judge, 2nd Court, Chattogram for hearing and disposal who after hearing by the impugned judgment and decree dated 13.11.2007 allowed the appeal and decreed the suit. At this juncture, the petitioners, moved this Court by filing this revision and obtained the present Rule and order of stay.

Mr. Md. Jahangir Alam, learned Advocate appearing for the petitioners at the very outset read out Section 95A of the State Acquisition and Tenancy Act and referring the case of *Abdul Khaleque Sarnamat Vs. Abdul Khaleque Sarnamat and another* reported in *1 BLC (AD) 90*, submits that admittedly, the predecessors of the petitioners purchased the property from the predecessors of opposite-parties by a registered sale deed dated 14.04.1966 and on the same day executed an agreement to reconvey, promising that if the vendors or their successors repaid the amount within $1\frac{1}{2}$ years, the purchasers will reconvey the property in favour of

the vendors. Similarly, in the case reported in *I BLC* the agreement dated 24.06.1967 provided a period for 4 years. Ultimately, Appellate Division held that on the date of promulgation of P.O. No. 88 of 1972 on 03.08.1972, the transactions were not alive, as such, the same to be treated as transaction past and closed. He argued that the trial court rightly dismissed the suit on that ground, but the appellate court upon misconception of law found that the plaintiffs in suit are entitled to get back the case property within 60 years from the date of accrual of cause of action, as such, has committed an error in the decision occasioning failure of justice.

Mr. Muhammad Mijanur Rahman with Ms. Jobaida Gulshan Ara, learned Advocates appearing for the opposite-parties submit that as per Section 95A of the State Acquisition and Tenancy Act the transaction between the parties is an out and out sale with an agreement to reconvey and this sort of transaction are treated to be complete usufructuary mortgage and the limitation for such mortgage upto 7 years which was alive on the date of promulgation of P.O. No. 88 of 1972, as such, the suit of the plaintiffs is not barred by limitation and the appellate court rightly decreed the suit

following the decisions in the cases of *Asek Elahi Vs. Jalal Ahmed and others* reported in *20 BLC (AD) 4*, *Bangladesh Vs. Haji Abdul Gani* reported in *32 DLR (AD) 233*, *Abu Bakkar Vs. Nazir Ahmed* reported in *34 DLR (AD) 237* and *Nasirullah (Md.) and others Vs. Md. Ziauddin Khan and others* reported in *14 MLR (AD) 21*.

Heard the learned Advocates of both the parties, have gone through the revisional application, plaint in suit, written statement, evidences both oral and documentary and the impugned judgment and decree passed by both the courts below.

Admittedly, suit property originally belonged to one Abdus Samad who died leaving 3 sons Gura Meah, Dula Meah and Abu Sukkur and two daughters Shaharbanu and Bibijan. Among the heirs by amicable arrangement 3 sons of Abdus Samad got the property in their share. While they were in possession and enjoyment, by a Registered Deed No. 1729 dated 14.04.1966 sold out the property to defendant Nos. 1 and 2 at a consideration of Tk. 700/- and delivered possession. On the same day the defendant Nos. 1 and 2 as purchasers executed a registered agreement in favour of aforesaid vendors promising that, if the vendors repay the amount received

from the purchasers within $1\frac{1}{2}$ years the purchasers shall reconvey the property to the vendors. The vendors or the present petitioners did not come forward within the time fixed demanding reconveyance of the property repaying consideration money to the purchasers. After P.O. No. 88 of 1972 came into force on and from 03.08.1972, the vendors filed Miscellaneous Case No. $\frac{48}{C}$ of 1973-74 in the court of C.O. (Revenue), Sadar, Chattogram praying for restoration of possession of the property against the purchasers. C.O. (Rev.), Sadar, Chattogram by its order dated 18.09.1974 filed the case refusing restoration of possession on the ground that Section 95A only applicable in respect of agriculture land, but the land in question is non-agriculture land, as such, does not come under the purview of Section 95A read with P.O. Nos. 88/136 of 1972.

Thereafter, the predecessors of the petitioners remained silent and did not move before any higher authority. After about 9 years one of the vendors, named Abu Sukkur filed Case No. MH/248/83 before the Commissioner, Ward No. 35, Middle Haliashahar,

Chattogram on 29.11.1983 for redemption of the property which was also refused.

Sections 95 and 95A are special laws promulgated for restoration of mortgaged property in a summary manner without the intervention of the court and payment of court fees. It being a special privilege given to the mortgagor, the latter would choose the forum for remedy. If the mortgagor chooses to abandon this forum section 95 does not bar them from availing the forum under the old law. The question as regards past and closed transactions is to be seen in relation to the choice of forum. If the mortgagor chooses the special forum provided by sub-section (4) and (5) of section 95 of the Act, 1950, then the opinions expressed in the decision reported in *1 BLC* that the transaction which is not alive on the date of promulgation of P. O. No. 88 of 1972 has become past and closed. In the instant case after a long time the present petitioners, as heirs of original vendors, filed this suit on 01.03.2001 for redemption of the case property after exhausting special forum provided in section 95(4) and (5) of the Act. Therefore, the plaintiffs have no scope to come before the civil

court for the same relief as their predecessor had chosen the forum under section 95 of the Act.

The trial court after consideration of evidences both oral and documentary as well as respective laws in this regard held that, the transactions between the parties was not alive on the date of promulgation of P.O. No. 88 of 1972 and relying on the decision reported in *1 BLC (AD) 90* dismissed the suit. On appeal the appellate court held that the transaction between the parties was a complete usufructuary mortgage and the mortgagors are entitled to get back the property under the terms and conditions of the agreement and that the suit is maintainable as it was filed within 60 years from the date of accrual of cause of action, as such, the suit is not barred by limitation, relying on the decision reported in *34 DLR (AD) 237 (Abu Bakkar Vs. Nazir Ahmed)*, fact of that case is totally different from the instant case.

Now, the question before this Court whether the deed in question is a deed of mortgage within the meaning of section 58 of the Transfer of Property Act or an out and out sale with an agreement to reconvey and the suit for redemption is maintainable.

In *Asek Elahi Vs. Jalal Ahmed and others* case reported in **20 BLC (AD) 4**, *Bangladesh Vs. Haji Abdul Gani* reported in **32 DLR (AD) 233** their lordships of the Appellate Division differentiate the mortgage under Transfer of Property Act and usufructuary mortgage under State Acquisition and Tenancy Act and held that the transactions like the present one is a mortgage within the meaning of section 95A and which were subsisting on the date of promulgation of P.O. No. 88 of 1972 are hit by Section 95A including the transaction entered into by way of an out and out sale with an agreement to reconvey, made whether before or after the promulgation of P.O. No. 88 of 1972 and the transactions which are not alive on the date of promulgation of P.O. No. 88 of 1972 they are concluded by the transactions past and closed, relying on the decision reported in **32 DLR (AD) 233**. In the case reported in **1 BLC (AD) 90**, in a similar fact, their lordships held that “the intention of the law is to limit the period of mortgage to 7 years which prior to the amendment in 1969 was fifteen years. This does not mean that the parties cannot or could not make a transaction for less than 7 years and that in such a case also Section 95A

contemplates mortgage for 7 years”. Admittedly, the agreement in the present case was for $1\frac{1}{2}$ years and the period having already expired long before 03.08.1972, Section 95A will have no application to the transaction which was past and closed.

On behalf of the opposite-parties, it is argued that although time for reconveyance ended on 13.10.1967 the period would be extended as per language used in Section 95A of the State Acquisition and Tenancy Act upto 7 years, but the legislature itself does not mean so. In the cases of *Mahadeb Chandra Mondal Vs. Dulal Chandra Mondal* reported in 57 *DLR (AD) 126*, *Yeor Mia (Md) Vs. Haji Shah Dhanai Ali* reported in 58 *DLR (AD) 79* and 1 *BLC* it is clearly observed that Section 95A of the State Acquisition and Tenancy Act may be attracted if the transactions are alive on the date of promulgation of P.O. No. 88 of 1972. But in the present case, the period provided in the agreement to reconvey already expired in the year 1967 long before P.O. No. 88 of 1972 came into force. The appellate court failed to appreciate the provisions in Section 95A of the State Acquisition and Tenancy Act and came to a wrong finding that the plaintiffs are entitled to get back the property within 60 years

from the date of cause of action. Since the transactions was construed to be a mortgage for $1\frac{1}{2}$ years only and not 7 years as mentioned in Section 95A, the vendors have no case, as the transactions are governed by the principle of transaction past and closed as laid down in *32, 57,58 DLR* and *1 BLC*. Therefore, I find that the appellate court committed error of law in the decision occasioning failure of justice.

Taking into consideration the above, I find merit in the Rule as well as in the submissions of the learned Advocate for the petitioners.

In the result, the Rule is made absolute, however, without any order as to costs.

The judgment and decree of the appellate court is hereby set aside and the judgment and decree of the trial court is hereby restored.

Order of *stay* granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned
and send down the lower court records at once.

Helal-ABO