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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

Civil Revision No. 2690 of 2008

Md. Ayub Ali
--- The plaintiff-appellant-petitioner
=Versus=
Md. Billal Hossen and others
---The defendant-respondent-opposite-parties

Mr. Shasti Sarker with
Ms. Lily Rani Shaha, Advocates
-------- For the petitioner.
Mr. Nekhil Kumar Biswas, Advocate
------ For the opposite-parties

Heard on 02.03.2017, 09.03.2017and
Judgment on 14.03.2017

At the instance of the present plaintiff-appellant-petitioner, Md. Ayub Ali, this Rule has been issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 25.03.2008 of the learned District Judge, Chuadanga in Title Appeal No.89 of 2007 affirming that dated 12.08.2007 of the learned Senior Assistant Judge, Alam Danga, Chuadanga in Title Suit No.80 of 2001 should not be set aside.

The relevant facts for disposal of the Rule, inter alia, are that the present petitioner as the plaintiff filed the Title Suit No.80 of 2001 in the Court of the learned Senior Assistant Judge, Alam Danga, Chuadanga for specific performance of contract. The plaint contains that while the

predecessors of the present opposite-party No.1 Asgor Ali had been owning and possessing the land measuring 0.079 acres mentioned in the schedule of the plaint appertaining to Mouza No.65, Uttar Laxmipur, Mouza No.68 Haradhi and Mouza No.30 Char Boalia under Police Station Alam Danga, Chuadanga had executed a contract for sale of the said land for a consideration of Tk.95,757/-. The said deed by way of a bainapatro was executed on 02.07.2000 after receiving Tk.90,000/- in front of the witnesses on condition to register a sale deed in favour of the plaintiff within 20.09.2000 after receiving the remaining of Tk.5,757/-. The possession of the suit land was handed over to him and he has been cultivating crops upon the land. Despite several requests and by personally and through Lawyer, the defendant denied to register any sale deed.

The suit has been contested by the legal heirs of the defendant No.1 as the defendant died thus substituted their names as the defendant Nos.1(ka) to 1(ja), by filing two separate written statements denying the statements made in the plaint. The defendants also contended that their predecessor Md. Asgor Ali was living in the village of Solotaka, but he returned in Keshobpur and before his death he used to possess the suit land by cultivation through his nephew, Sona and Jadu, who were the sons of the defendants' brother. The said Sona and Jadu used to perform their duties as the Borgadar of the defendants. The present plaintiff-petitioner wanted to cultivate the land for more time which the original defendant

refused; therefore, being angry the present plaintiff-petitioner prepared a false and fabricated bainapatra. After the death of the said Asgor Ali his legal heirs as the defendant Nos.1‘ka’ to 1‘ja’ have been possessing the suit land.

After considering the evidence the learned trial Court dismissed the suit. Being aggrieved the present defendant-petitioner as the appellant preferred the Title Appeal No.89 of 2007 which was disallowed by the appellate Court below. This revisional application has been filed under section 115(1) of the Code of Civil Procedure challenging the legality of the impugned judgment passed by the learned appellate Court below and the Rule was issued thereupon.

Mr. Shasti Sarker, the learned Advocate appearing with Mr. Asutosh Kumar Sana, the learned Advocate for the petitioner submits that both the Courts below committed an error of law in not considering that P.W.2 Sunnat Ali is a deed writer and he wrote the bainanama on 02.07.2000 and on his presence plaintiff paid the consideration money of Tk.90,000/- (ninety thousand) taka and after receiving the same the defendant Asgor Ali put his thumb impression on the disputed bainanama and this witness proved the plaintiff case.

The learned Advocate also submits that the present plaintiff-petitioner adduced the documentary evidence as to the contract or bainapatra dated 02.07.2000 (exhibit-3) in order to prove the case of the

plaintiff's under section 92 of the evidence Act, and such document is sufficient to prove its case, but the learned Courts below committed illegality by passing the concurrent judgment and decree, therefore, the Rule should be made absolute.

This Rule has been opposed by the present opposite-parties.

Mr. Nekhil Kumar Biswas, the learned Advocate appearing for the opposite-parties submits that the present plaintiff-petitioner filed the suit with some forged and fabricated documents in order to get a decree for specific performance of contract, but the learned trial Court as well as the appellate Court below after considering the evidence found against the present plaintiff-petitioner concurrently, but the present petitioner obtained the Rule by misleading the Court by some false documents, as such, the Rule is liable to be discharged.

The learned Advocate also submits that there is no contract by and between the present petitioner and the predecessors of the opposite-parties and this arguments have been substantiated by the deposition of the defence witnesses as to the false suit of the contract and the present defendant-opposite-parties could successfully prove that the purported stamp upon which a document was written has no validity in the eye of law, moreover, the present opposite-parties are in absolute possession of the suit land, as such, no interference from this Court is called for.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with annexures therein, in particular, the impugned judgment passed by the learned appellate Court below, it appears to me that the present petitioner as the plaintiff filed a title suit for specific performance of contract on the basis of a fact that the predecessor of the present defendant-opposite-parties Asgor Ali wanted to sale land measuring .079 acres to the plaintiff. Accordingly, a bainapatra was prepared on 02.07.2000 by fixing a Tk.95,757/- as consideration money.

In view of the given above situation, the vital matters to be decided by this Court are that whether the bainapatra can be considered as a valid agreement by and between the parties. I did not have the opportunity to examine the said bainapatra dated 02.07.2000 as the lower court record was not called for, however, I have examined the judgment and decree passed by the learned Courts below which are sufficient to consider the factual and legal aspects of this case, I have particularly considered the deposition made by the P.Ws and D.Ws in support of their respective cases. I have noticed that the P.Ws have supported the case of the plaintiff but in cross-examination the P.Ws were confused about the suit land, whereas, the defence witness Nos.1-3 could consistently support the case of the defendants by describing the false suit as to any contract between the

parties. P.W.2 Anwar Hossain has been a borgachasi under the defendant and the D.W.3 Sanaullah has consistently made statement that the baina was a false and fabricated document. I have also considered the witness of the P.W.1 who in cross could not describe the legality of the stamps upon which the contract was purportedly executed. It appears to me that the stamp was once purchased in the name of Ansar, but latter on the name was crossed out and by replacing in the name of Asgor Ali and this change has been made by the present plaintiff-petitioner. The name of the vendor of the stamp does not contains in the said stamp, therefore, a baina is not a valid agreement and it has been created by the present plaintiff-petitioner in order to get some undue advantage and benefit which a Court of law should not allow.

Regarding the consideration money of total Tk.95757/-. In this regard the principal of consideration requires passing of consideration money from the vendor to vendee. I have carefully examined the deposition of the witnesses of the respective parties and also findings of the learned Courts below. It appears to me that the plaintiff failed to prove that any consideration was passed from the plaintiff to the defendant as the original defendant Asgor Ali denied receiving any consideration money during his life time from the present plaintiff. In this regard the plaintiff has utterly failed to substantiate the case that the consideration money had passed from the plaintiff to the defendant. Moreover, the claiming of the plaintiff

to collect Tk.90,000/- by selling tobaco tobaco for seven times for collecting Tk.90,000/- which has not believed by the Courts below. In this regard, I am of the opinion that the story made out by the plaintiff has not been substantiated because the plaintiff-petitioner could have made payment of entire Tk.95,757/- in order to get a registered deed instead of entering into a bainanama by paying maximum Tk. 90,000/- for purchased of the said land measuring 0.079 acre.

I have considered the submissions made by the learned Advocates for both the parties, that as par the provision of section 92 of the Evidence Act, documentary evidence is superior to oral evidence. I have no doubt that a documentary evidence is superior to oral document but in the instant case the document in the form of bainapatra dated 02.07.2000 cannot be considered as a valid document in order to create any right in favour of the present petitioner. Moreover, the any agreement must have a consideration money. I am of the view that the plaintiff failed to prove that the consideration money has passed from the plaintiff to the defendants, therefore, no contractual binding between the parties, as such, the question of performance does not arise.

I am now inclined to consider the judgment passed by the learned Court below. The learned trial Court dismissed the suit filed by the present petitioner on the basis of the following findings :-

> "উপ-রাক্ত সাক্ষ্য বিশ্লেষণ করলে দেখা যায় যে, বাদী বায়নাপত্র অনুসা-র টাকা-পয়সা লেনদেন, নালিশী জমির দখল ইত্যাদি বিষয়গুলো বিশ্বাস-যাগ্য ও সহমত-পাষণকারী সহ-দর মাধ্য-ম প্রমান কর-ত ব্যর্থ হ-য়-ছন, পক্ষান্ত-র বাদীও বিবাদী-দর নিকট আত্মীয় এবং বাদীর প্রতি বৈরীময় এমন সাক্ষীরা বিবাদীর অনুকূ-ল সাক্ষী প্রদান ক-র-ছন।
>
> এছাড়া মোট জমির দাম ৯৫৭৫৭/- টাকার মধ্যে মাত্র ৫৭৫৭/- টাকার জন্য সা-থ সা-থ জমি রেজিস্ট্রি না ক-র নেয়ার ঘটনাটি স্বাভাবিক নয়। বয় বাতব বেশী টাকা মোট করে সামান্য টাকা মাত্র দু মাসের জন্য বাকী রে-খ বায়না সম্পাদিত ও বাস্তবায়িত নয়। উপ-রাক্ত সাক্ষীও বাস্তব অবস্হা বি-বচনা ক-র বাদীর বায়না করার দাবী বিশ্বাস-যাগ্য না হওয়ার বিচার্য্য বিষয়ও বাদীর প্রতিকূ-ল নিষ্পত্তি করা হ-লাঃ।"

The learned appellate court below concurrently found that:

> "এমতাবস্থায়, উপ-রর সাক্ষ্য প্রমাণাদির পর্যা-লাচনা হই-ত এই সিদ্ধা-ন্ত উপনীত হওয়া যায় যে, বিজ্ঞ নিনিয়র সহকারী জজ উভয় প-ক্ষর সাক্ষ্য-প্রমাণ বিচার-বিশ্লেষণ করিয়া বাদী বায়না পত্র অনুসারে টাকা লেনদেন ও নালিশী জমির দখল ইত্যাদি বিষ-য় বিশ্বাস-যাগ্য সাক্ষ্য-প্রমাণ দ্বারা প্রমাণ করি-ত ব্যর্থ হইয়া-ছ ম-র্ম যে সিদ্ধান্ত গ্রহ-ন রা-য়র আ-লাচনায় লওয়া ১, ৩ ও ৪ নং বিচার্য বিষয়গুলি বাদী পক্ষের প্রতিকূলে নিস্পত্তি করিয়া সঠিক করিয়া-ছন। এইরূপ অবস্থায় আপীলকারী পক্ষ হই-ত সাক্ষ্য আই-নর ৬৭/৬৮ ধারা অনুসা-র বাদীর দাবীকৃত বায়না নামা যথাযথভা-ব প্রমনিত হইয়া-ছ এবং উক্ত আইনের ১০২ ধারা মতে ষ্ট্যাম্প সম্পর্কিত আপত্তি উত্থাপনের বিষয়টি প্রমানের দায়িত্ব বিবাদী পক্ষের ছিল মর্মে দাবী উত্থাপন করিলেও তাহা উপরোক্ত সাক্ষ্য প্রমাণাদির আ-লা-ক প্রতিষ্ঠিত হয় নাই।"

After examining the above concurrent findings of the Courts below and also examining the revisional application, I am satisfied that the learned appellate Court did not commit any illegality by disallowing the appeal and thereby affirming the judgment of the trial Court. I am,

therefore, not inclined to interfere upon the judgment and decree passed by the learned appellate Court below.

Accordingly, I do not find merit in this Rule.

In the result, the Rule is discharged.

The office is directed to communicate this judgment and order to the concerned Court at once.