

In the Supreme Court of Bangladesh  
High Court Division  
(Civil Revisional Jurisdiction)

Present:

**Mr. Justice Muhammad Abdul Hafiz**

**Civil Revision No. 3014 of 2016**

Khaleda Begum and others  
Plaintiffs-Respondents-Petitioners

Versus

Ziaur Rahman  
Defendant-Appellant-Opposite Party  
No. 1

The Government of Bangladesh  
Proforma-Defendant-Respondent-  
Opposite Party

None appears  
for the Plaintiffs-Respondents-Petitioners

Mr. Chowdhury Mokimuddin Khan  
Jahan Ali, Advocate  
for the Defendant-Appellant-Opposite  
Party No. 1

**Judgment on: 02.8.2022**

This Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned Judgment and Decree dated 02.8.2016 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Cox's Bazar in Other Class Appeal No. 33 of 2003 allowing the appeal and thereby reversing the Judgment and Decree dated 31.3.2003 passed by the learned Assistant Judge, Teknaf, Cox's Bazar in Other Class Suit No. 40 of 2001 decreeing the suit should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioners as plaintiffs instituted Other Class Suit No. 40 of 2001(Teknaf) in the Court of learned Assistant Judge, Teknaf, Cox's Bazar against the defendant-opposite party No. 1 for specific performance of contract.

The plaintiffs Case, in short, is that the suit land owned and possessed by the defendant No.1 and when the defendant No. 1 declared to sell the suit land, the plaintiffs agreed to purchase the same. The consideration money was fixed at Taka 40000/-. The plaintiffs by giving Taka 35000/- executed a Bainanama on 27.3.1996 on a condition that after giving rest amount of Taka 5000/- defendant-opposite party No.1 registered a Kabala deed in favour of the plaintiffs. After executing Bainanama the defendant-opposite party No. 1 inducted the possession of the suit land to the plaintiffs-petitioners. Defendant No. 1 got married on 04.01.98 by a registered Kabinnama. In the said Kabinanama the opposite party No.1 and his wife's age were mentioned 25 and 20 years respectively. So in the year 1996 the defendant-opposite party No. 1 was major. The plaintiffs-petitioners requested the defendant-opposite party No. 1 to register the kabala deed by taking rest amount several times but the defendant- opposite party No. 1 by giving different excuse lingering the time. On 20-06-2001 when the plaintiffs-petitioners again asked to execute the Kabala deed

then the defendants-opposite party No.1 refused to execute the same. Hence the suit.

The defendant-opposite party No. 1 contested the suit by filing written statement denying all the material allegations of the plaint contending, inter-alia, that the suit is not maintainable in its present form and nature. The defendant's Case, in short, is that the suit land is owned and possessed by Haider Ali and R.S. record was duly published in his name. Thereafter said Haider Ali died leaving behind seven sons namely Sultan Ahmed, Bacha Miya and others. Bacha Miya died leaving behind one minor son i.e. defendant-opposite party No. 1 and five minor daughters and accordingly they possessed the suit land. Among the seven brothers of the said Bacha Miya, plaintiff No. 1 was clever than others gave him the responsibility to take care of their land along with suit land. As the suit land was fishing land so for the purpose of lease the plaintiff No. 1 took thumb impressions of the defendant-opposite party No. 1 in the blank stamp papers. Plaintiff No. 1 took thumb impression of the defendant-opposite party No. 1 on the top of 25 Taka stamp papers while the defendant-opposite party No. 1 was minor, thereafter when the defendant-opposite party No. 1 wanted to fish separately the suit land then the dispute arises between them. The defendant-opposite party No. 1 did not put his thumb impression in the alleged Bainanama and the

plaintiffs filed the instant false suit against the defendant to grab the suit land in question as a result the suit of the plaintiffs would be dismissed with cost.

The learned Assistant Judge, Teknaf, Cox'sbazar decreed the suit by his Judgment and Decree dated 31.3.2003. Thereafter the defendant No. 1 as appellant preferred Other Class Appeal No. 33 of 2003 before the learned District Judge, Cox'sbazar which was heard by the learned Joint District Judge, 2<sup>nd</sup> Court, Cox'sbazar who allowed the appeal by his Judgment and Decree dated 02.8.2016 and hence the plaintiffs as petitioners moved this Court with the application under Section 115(1) of the Code of Civil Procedure and obtained this Rule.

None appears on behalf of the plaintiffs-respondents-petitioners to press the Rule.

Mr. Chowdhury Mokimuddin Khan Jahan Ali, learned Advocate for the defendant-appellant-opposite party No. 1, submits that the defendant-opposite party No.1 was minor at the time of execution of the Bainanama dated 27.03.1996 and his age was 13 years. Supporting the said statement as minor, defendant-opposite party No. 1 submitted a Birth Certificate issued by Upazila Parishankan Office, Teknaf dated 20.02.2003 which marked as Exhibit-Ka and the Birth Certificate Exhibit- Ka was proved by D.W.-5. He further submits that the plaintiffs stated in

the plaint that defendant-opposite party No.1 executed the Bainanama as major and to prove the same plaintiffs-petitioners submitted Kabinnama of the defendant opposite party No. 1 which was issued on 04.01.1998 and voter list issued on 26.10.2000 and those were marked as Exhibit-2 and 3. In the Kabinnama Exhibit No. 2 age of the defendant-opposite party No.1 was mentioned 25 years and the date of birth of the defendant-opposite party No. 1 was mentioned on 04.01.1973 in the voter list Exhibit 3 and age was mentioned 26 years. According to the voter list date of birth is on 20.06.1973 and according to Kabinnama and birth certificate of the defendant opposite party No.1 is different. Therefore, from the above mentioned contradictions plaintiffs petitioners miserably failed to prove that at the time of execution of the Bainanama defendant-opposite party No. 1 was major. He further submits that, as per section 11 of the Contract Act 1872 the defendant-opposite party No. 1 as minor was not competent to execute the Bainanama. In the suit for specific performance of contract, first of all the plaintiffs-petitioners must prove that the contract i.e the Bainanama deed upon which suit stands, must be valid. If we go through the Bainanama deed dated 27.03.1996 Exhibit-1 in the said Bainanama defendant-opposite party No. 1 gave his thumb impression which was ব-কলাম by Sheikh Ahmed, plaintiffs also submitted Kabinnama of defendant opposite party No.1 issued on

04.01.1998 Exhibit No. 2 where the defendant opposite party No.1 put his signature. The Bainanama Exhibit-1 execution date was on 27.03.1996 and the Kabinnama Exhibit- 2 issuing date 04.01.1998. It appears that during the year of 1997 and 1998 the defendant opposite party No. 1 was able to put his signature. So a doubt arises as to why in the said Bainanama dated 27.03.1996 Exhibit- 1 the defendant- opposite party No. 1 put his thumb impression while he was able to sign. To clear the said doubt plaintiff would examine the person namely Sheikh Ahmed who ব-কলাম the thumb impression of the defendant-opposite party No.1 but the plaintiff did not examine him as a witness to prove thumb impression of the defendant-opposite party No.1. Therefore, the plaintiff miserably failed to prove the thumb impression of the defendant-opposite party No.1 in the said Bainanama. The Appellate Court below properly adjudicating the said matter and allowed the appeal by giving his finding in the judgment. Furthermore, the stamp of the Bainanama deed was bought by Zafrul Islam but the plaintiff did not examine him as a witness to prove the Bainanama. The Appellate Court below properly adjudicating the said matter and allowed the appeal. He lastly submits that the plaintiffs-petitioners has failed to prove his case. The plaintiffs created an imaginary story to grab the suit land.

Heard the learned Advocate for the defendant-appellant-opposite party No. 1 and perused the record.

The petitioners as plaintiffs instituted the instant suit for specific performance of contract. The plaintiffs claimed that the defendant opposite party No. 1 declared to sell the suit land and the plaintiffs agreed to purchase the same. The consideration money was fixed and accordingly a Bainanama was executed. But the defendant-opposite party No. 1 stated that the plaintiff No. 1 is his uncle and the plaintiff No. 1 to take care of the suit land as the defendant's father died leaving him and others as minors. As the suit land was fishing land so for the purpose of lease the plaintiff No. 1 took thumb impression of the defendant-opposite party No. 1 in the blank stamp papers. The plaintiff No. 1 took thumb impression of the defendant-opposite party No. 1 on the top of 25 Taka stamp papers while the defendant-opposite party No. 1 was minor. The defendant-opposite party No. 1 claimed that he did not put his thumb impression in the alleged Bainanama.

Now questions are here;

- (a) Whether the defendant-opposite party No. 1 was minor at the time of execution of the Bainanama dated 27.3.1996.
- (b) Whether the defendant-opposite party No. 1 executed the Bainanama dated 27.7.1996.

The defendant opposite party No. 1 claimed that at the time of execution of Bainanama dated 27.3.1997 the defendant-opposite party No. 1 was minor and his age was 13 years; supporting this defendant-opposite party No. 1 submitted a Birth Certificate issued by Upazilla Parishankan Officer, Teknaf dated 20.2.2003 which was marked as Exhibit-Ka. To prove the same the defendant-opposite party No. 1 examine D.W. 5 who was the Junior Parisankan Officer, Teknaf. In his corss examination the plaintiff-petitioner did not get anything against the said Birth Certificate.

On the other hand plaintiffs-petitioners in the plaint stated that the defendant-opposite party No. 1 executed the Bainanama and at the time of execution the said Bainanama, the defendant-opposite party No. 1 was major. To prove the same, the plaintiffs-petitioners submitted Kabinnama and voter list issued on 04.1.1998 and 26.10.2000 respectively which were marked as Exhibit 2 and 3. According to Kabinnama date of birth is 04.1.1973 and according to voter list date of birth is 20.6.1973. The witnesses of the plaintiffs have failed to resolve the contradictory date of birth.

Therefore, the Appellate Court below properly adjudicating the said matter and allowed the appeal by giving his finding that,

“বাস্তব অবস্থা বিবেচনা এদেশের প্রেক্ষাপটে কবিননামা ও পূর্ববর্তী ভোটার লিস্টে অনুমান ভিত্তিক বয়স লেখা হতো। যে কারণে প্রদর্শনী ২ ও ৩ এর মধ্যে গরমিল পরিলক্ষিত হয়।”



In the aforesaid Bainanama defendant-opposite party No. 1 gave his thumb impression which was ব- কলাম by Sheikh Ahmed; plaintiff also submitted Kabinnama of defendant-opposite party No. 1 where the opposite party No. 1 put his signature. The Bainanama execution date was 27.3.1996 and the Kabinnama issued on 04.1.1998. It appears that during the year of 1998 the defendant-opposite party No. 1 was able to do put his signature. So a doubt arises as to why the said Bainanama dated 27.3.1996 defendant-opposite party No. 1 put his thumb impression where he was able to sign. To clear the said doubt plaintiff would examine the person namely Sheikh Ahmed who ব-কলাম the thumb impression of the defendant-opposite party No. 1 but the plaintiff did not examine him as a witness to prove thumb impression of the defendant-opposite party No. 1 and therefore, the plaintiffs-petitioners failed to prove thumb impression of the defendant-opposite party No. 1 in the said Bainanama.

Considering the facts and circumstances of the case, I find no substance in the Rule.

**In the result, the Rule is discharged without any order as to costs.**

The impugned Judgment and Decree dated 02.8.2016 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Cox's Bazar in Other Class Appeal No. 33 of 2003 allowing the appeal and

thereby reversing the Judgment and Decree dated 31.3.2003 passed by the learned Assistant Judge, Teknaf, Cox's Bazar in Other Class Suit No. 40 of 2001 is hereby upheld.

The order of stay granted earlier by this Court is hereby vacated.

Send down the lower Courts record with a copy of this Judgment to the Courts below at once.