

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,
Chief Justice

Mr. Justice Obaidul Hassan

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO. 43 OF 2014.

(From the judgment and decree dated 18.05.2009 passed by the High Court Division in First Appeal No. 271 of 1998)

Din Mohammad : Appellant.

=Versus=

Mofizur Rahman Miah and another : Respondents.

For the Appellant : Mr. Raziuddin Ahmed,
Advocate, instructed by Mr.
Md. Taufique Hossain,
Advocate-on-Record.

For the Respondents : Mr. Khair Azaz Maswood,
Senior Advocate, instructed
by Ms. Hasina Akter,
Advocate-on-Record.

Date of hearing & judgment : 16.08.2022

J U D G M E N T

Hasan Foez Siddique, C. J: This civil appeal is directed against the judgment and decree dated 18.05.2009 passed by the High Court Division in First Appeal No.271 of 1998 reversing those dated 29.06.1998 passed by the learned Joint District Judge, First Court, Feni in Title Suit No. 12 of 1997.

The facts, relating to the appeal, in a nutshell, are that the plaintiff -respondent filed

Title Suit No.12 of 1997 in the First Court of Subordinate Judge, Feni for declaration that the ex-parte decree dated 28.01.1997 in Title Suit No.5 of 1996 was fraudulent and void. Appellant Din Mohammad instituted aforesaid suit against the respondent Mafizur Rahman Mia for a decree of specific performance of contract. No process was served upon this plaintiff. Defendant obtained an ex-parte decree on 18.01.1997 by suppressing the summons. The plaintiff came to know about the ex-parte decree and kabala deed (through Court) from one Joynul Abedin on 08.06.1997. He was an accused of G.R. No.464 of 1995 and defendant petitioner No.1, who was his neighbor, assured him to take necessary tadbir for him in the said G.R. case. Thereafter, in collusion with his (defendant-petitioner) maternal cousin Nasir, who was a Mohrar in Criminal Court, he obtained his signatures on vokalatnama and a stamp paper worth of tk.50/- on the plea of swearing affidavit and also on different cartridge papers etc. giving him assurance to get release from custody on bail. Thereafter, it transpired that by manipulating respondent's signatures obtained thereon, the appellant prepared a bainapatra and a vokalatnama. A written statement was also shown to have been

submitted by the respondent in Title Suit No.05 of 1996 admitting the claim. The said bainapatra was fabricated and was not executed by the respondent nor did he submit any written statement. Under the aforesaid circumstances, the plaintiff respondent instituted the instant Title Suit for setting aside the ex-parte decree passed in Title Suit No.05 of 1996, which was allegedly obtained against him by suppression of summons and by producing fictitious bainapatra etc.

Defendant appellant No.1 contested the suit by filing written statement denying all the material allegations made in the plaint. His case was that the plaintiff respondent entered into an agreement to sell the suit land to him for a consideration of tk.2,00000/-. Out of which, he received a sum of tk.18,000/- and executed a "bainapatra" in favour of the appellant on 17.04.1996. The plaintiff respondent having refused to execute and register the deed, he instituted Title Suit No.5 of 1996 for specific performance of contract and all the processes were duly issued and served upon the plaintiff respondent who appeared in the suit by filing a vokalatnama and submitted a written statement. But ultimately, he did not contest the suit. As a result, judgment and decree was passed

in favour of the defendant appellant. The suit is liable to be dismissed.

The trial Court dismissed the suit. The plaintiff preferred First Appeal in the High court Division and the High Court Division by the impugned judgment and decree allowed appeal upon setting aside the judgment and decree of the trial Court. Thus, defendant No.1 has preferred this appeal upon getting leave.

Mr. Raziuddin Ahmed, learned Advocate appearing for the appellant, submits that the instant suit was hopelessly barred by limitation and in order to get rid of a point of limitation, the plaintiff has made some false assertion, in such view of the matter, the judgment and decree of the High Court Division is liable to be set aside. He further submits that the trial Court brought the lower Courts record of Title Suit No.5 of 1996 and examined the process server who categorically deposed that the respondent No.1 was not willing to receive the summons of the case for which the process server served the summon by way of hanging with the outer door of the respondent. He, lastly, submits that the High Court Division without appreciation of the

evidence on record, erroneously reversed the well reasoned judgment and decree of the trial Court.

Mr. Khair Azaz Maswood, learned Senior Advocate appearing for the respondent, submits that the High Court Division upon proper appreciation of the evidence on record found that the defendant No.1 obtained ex-parte decree by practising fraud upon the Court and that the notice of Title Suit No.05 of 1996 was not duly served upon the defendant No.1 (plaintiff of this suit) and that it rightly reversed the judgment and decree of the trial Court.

The plea of the plaintiff respondent was that the appellant obtained exparte decree by practising fraud so the same is a nullity but in a given case whether such decree was obtained by fraud or not, is a matter which is to be judged with reference to pleadings and evidence on record. The Courts of law are meant for imparting justice between the parties. No Court can be regarded as powerless to recall its own order if it is convinced that order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim. It appears from the materials on record that earlier the appellant instituted Title Suit No.5 of 1996

for specific performance of contract on 06.06.1996. The trial Court directed to issue process through the Process server as well as by registered post and fixed 07.07.1996 for return. It further appears from the judgment of the High Court Division that it considered the evidence both oral and documentary came to conclusion that notice upon the defendant of Title Suit No. 5 of 1996, that is, the plaintiff of present suit, was not duly served and decree had been obtained by fraudulent suppression of the summons upon the defendant No.1 of the said suit.

Since the last Court of facts upon proper appreciation of the evidence of record held that notice upon the defendant No.1 of the said suit was not duly served and plaintiff of the said suit obtained decree by practising fraud upon the Court, we are of the view, that it rightly set aside the ex- parte decree and directed the trial Court to allow the defendant of the said suit to file written statement upon restoring the Title Suit No.5 of 1996 to its original file and number.

Accordingly, we do not find any substance in the appeal.

Thus, the appeal is dismissed.

C.J.

J.

J.

The 16th August, 2022.

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