IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)
CIVIL REVISION NO. 2915 of 2019.

Abdur Rashid Bepary being dead his legal heirs; 1(a) Jahanara Begum and others
...Petitioners.
-Versus-
Abdul Ohab Khan being dead his legal heirs 1. (Ka) Md. Shajahan Khan and others
....Opposite Parties.
Mr. Mohammad Shamsul Alam, Advocate
… For the petitioners.
Mr. A.S.M Khalequzzaman, Advocate
...For the opposite parties.

Heard on: 10.12.2024, 15.12.2024, 06.01.2025.
Judgment on: 12.01.2025.

Present:
Mr. Justice Md. Badruzzaman;

This Rule was issued calling upon opposite party Nos. 1(Ka)-1 (Cha) to show cause as to why judgment and decree dated 21.08.2019 passed by learned Senior District Judge, Munshiganj in Title Appeal No. 87 of 2015 disallowing the appeal and thereby affirming judgment and decree dated 15.04.2015 passed by learned Assistant Judge, Louhajang, Munshiganj in Title Suit No. 38 of 2014 rejecting the plaint should not be set-aside.

During issuance of Rule on 21.10.2019, the parties were directed to maintain *status quo* in respect of possession and position of the suit land for a period of 6(six) months which was, subsequently, extended time to time.

Facts, relevant for the purpose of disposal of this Rule, are that petitioner No.1 and the predecessor of petitioner Nos. 2(a)-2(c) as plaintiffs instituted Title Suit No. 38 of 2014 against the predecessor

of opposite party Nos. 1(Ka)-1(Cha) and others in the Court of learned Assistant Judge, Louhajang, Munshiganj for a decree of declaration of title to and redemption of the suit property contending *inter-alia* that the suit land measuring total 1.03 acre originally belonged to Abdul Bepari who died leaving behind two sons Muhammad Abdur Rashid and Harun-Or-Rashid (the plaintiffs) and one wife Ruposhi Bibi. In need of money the plaintiffs and their mother took loan from defendant No. 1 and mortgaged the suit land to him vide registered deed Nos. 2600, 2601 and 2602 executed on 07.08.1961 and registered on 08.08.1961 and on the same day defendant No. 1 executed a deed of reconveyance being No. 2603 in favour of the plaintiffs and their mother. Said Ruposhi Begum transferred her share to the plaintiffs by way of gift. After expiry of the stipulated period of mortgage, the plaintiffs requested defendant No. 1 on several occasions to redeem the mortgaged property upon receipt of the consideration money as per terms of the agreement but on different pretexts he was delaying the matter and thereafter, on 31.01.2014 denied to execute and register relevant deed of sale in favour of the plaintiffs and threatened them to dispossess them from the suit land and as such, the plaintiffs were constrained to institute the suit.

Defendant No.1 entered appearance in the suit and filed an application under Order VII rule 11(d) read with section 151 of the Code of Civil Procedure for rejection of the plaint contending that sale deeds were executed and registered on 07.08.1961 with a condition of reconvaynce within five years and the plaintiffs earlier filed R.P. Case No. 103 of 1973/1974 before the Assistant Commissioner (Land), Louhajang to release the suit property and

obtained an order of release in their favour which was challenged by the defendant before the High Court Division in Writ Petition No. 2847 of 1992 whereupon the order passed by the Assistant Commissioner was declared to have been passed without any lawful authority and of no legal effect and accordingly, the present suit is barred by the principle of *res judicata* under section 11 of the Code of Civil Procedure. The plaintiffs filed written objection against the application. The trial Court, upon hearing the parties, vide judgment and decree dated 15.04.2015 rejected the plaint against which the plaintiffs preferred Title Appeal No. 87 of 2015 before the learned District Judge, Munshiganj who, upon hearing the parties, vide judgment and decree dated 21.08.2019 disallowed the appeal by affirming the judgment and decree of the trial Court by judgment and decree dated 21.08.2019. Challenging the legality of the judgment and decree of the Court of appeal, plaintiff No. 1 and heirs of plaintiff No. 2 have preferred this revisional application under section 115(1) of the Code of Civil Procedure and obtained the instant Rule.

Opposite party Nos. 1(Ka)-1(Cha) filed counter-affidavit to oppose the Rule.

Mr. Mohammad Shamsul Alam, learned Advocate appearing for the petitioners submitted as follows:

(a). The transactions were mortgage by conditional sale and the period of limitation for redemption of the suit land is 60 years and that the suit is not barred by limitation.

(b). The transactions are attracted by section 95A of the State Acquisition and Tenancy Act and it does not and the principles enunciated in the cases reported in *32 DLR*

(AD) 233 and *1 BLC (AD) 90* do not defeat the plaintiffs' rights of redemption.

(c). Question of *res judicata* and limitation are mixed questions of law and facts which cannot be decided in an application under Order VII rule 11 of the Code of Civil Procedure in asmuch as the plaintiffs are not precluded in filing the present suit for redemption though they availed alternative forum under section 95 of the State Acquisition and Tenancy Act which ended in writ petition.

(d). The question, whether the plaint is liable to be rejected being barred by any law must be apparent from the statements made in the plaint itself and not from the written statement or any other material other than that has been put in the plaint.

(e). While considering the application filed under Order VII rule 11 of the Code of Civil Procedure, the court cannot take into account materials beyond the plaint to declare the case of the plaintiff frivolous and vexatious and the court is not required to take into consideration the defense set up by the defendant in his application for rejection of the plaint.

(e). Without considering the settled proposition of law the Court of appeal illegally disallowed the appeal by affirming the judgment and decree of the trial Court rejecting the plaint and as such, committed an error of law resulting in an error in the decision occasioning failure of justice.

In support of his contentions, learned Advocate has been referred to the cases of *Asek Elahi vs. Jalal Ahmed and others 20 BLC (AD) 4, Md. Nasirullah and others vs. Md. Ziauddin Khan and others 12 MLR (AD) 329, Lakshmi Bala Sen and others vs. Tarun Tapan Dutta @ Tapan Kumar Dutta and others 66 DLR (AD) 162 and Mrs. Shamsunnahar Salam and others vs. Md. Wahidur Rahman and others 4 MLR (AD) 201.*

On the other hand, in support of the impugned judgment and decree Mr. A.S.M Khalequzzaman, learned Advocate appearing for the opposite party Nos. 1(Ka)–1(Cha) made the following submissions:

(a). If the ultimate result of the suit appears that the plaintiff could not get any result, the suit should be buried at its inception so that no further time is consumed in a fruitless litigation and when the ultimate result is clear, the plaintiff cannot be allowed to proceed with the suit further.

(b). Where a plaint cannot be rejected under Order VII rule 11 of the Code of Civil Procedure, the court may invoke its inherent jurisdiction and reject the plaint taking recourse to section 151 of the Code of Civil Procedure.

(c). Since the plaintiffs do not have any legal right to institute the suit the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure.

(d). When among all the remedies available, the party avails any one of them, he is precluded from availing the

other left out remedies subsequently, because there should be end of litigations.

(e). The present transfers were out and out sale with an agreement to reconvey the suit land within five years were not alive and subsisting on the date of Presidential Order No. 88 of 1972 came into effect and as such, those were concluded by the transactions passed and closed and are not hit by section 95A of the State Acquisition and Tenancy Act.

(f). The main issue as to mortgage has been finally decided between the parties by the High Court Division in Writ Petition No. 2847 of 1992 and accordingly, the same issue raised in the present suit is barred by the principle of *res judicata*.

(g). The decision of the case reported in *20 BLC (AD) 4* is not applicable in this case because in said case the transaction was a mortgage and not an out and out sale with agreement of reconveyance.

(h). The Courts below while rejecting the plaint came to specific findings that the suit is barred by law and as such, committed no error of law resulting in an error in the decision occasioning failure of justice.

(i). The Court of appeal, upon proper appreciation of law and the materials on record rightly disallowed the appeal and affirmed the judgment and decree of the trial Court rejecting the plaint and as such, interference is not called for by this Court.

In support of his submissions learned Advocate has referred to the cases of *Jobeda Khatun vs. Momtaz Begum and others 45 DLR (AD) 31, Abdul Quayum vs. International Finance Investment and Commerce Bank Ltd and others 63 DLR 359, Abdul Jalil and others vs. Islamic Bank Bangladesh Ltd and others 53 DLR (AD) 12, Syed md. Shah Jalal Nure Alam and others vs. Salimullah Chowdhury and others 10 MLR (AD) 90, Bangladesh vs. Haji Abdul Gani Biswas and others 32 DLR (AD) 233 and Abdul Khaleque Sarnamat vs. Abdul Khaleque Sarnamat and another 1 BLC (AD) 90.*

I have heard the learned Advocates, perused the revisional application, the judgments and decrees of the Courts below, the plaint, the application filed under Order VII rule 11 read with section 151 of the Code of Civil Procedure, the written objection filed against the application and other materials available on record.

In the plaint, the plaintiffs stated that they and their mother executed 3 (three) mortgage deeds being Nos. 2600, 2601 and 2602 on 07.08.1961 registered on 08.08.1961 in respect of the suit land in favour of defendant No. 1 who on the same day executed and registered separate deed of reconveyance being deed No. 2603 in favour of the plaintiffs and their mother with a condition to reconvey the suit land within 5 (five) years from 07.08.1961. The plaintiffs sought for the following reliefs:

> "(ক) নালিশী সম্পত্তি সংশ্রবে লৌহজং সাব-রেজিষ্ট্রী অফিসে রেজিষ্ট্রীকৃত ২৬০০, ২৬০১ এবং ২৬০২ নং দলিলগুলো বাদী পক্ষের উপর অকার্যকর উক্ত দলিলগুলো দ্বারা বিবাদী/বাদী পক্ষ নালিশী সম্পত্তিতে কোন স্বত্ব-স্বার্থ অর্জন করে নাই এবং দলিল গুলো বন্ধকী দলিল মর্মে ঘোষনার এক ডিক্রী দিতে;
> (খ) বাদীপক্ষকে আদালতযোগ তফসিল বর্ণিত সম্পত্তির দখল দিবার এবং বন্ধকী শর্ত মতে নালিশী সম্পত্তি বাদীপক্ষের অনুকূলে উপযুক্ত ফেরত দলিল নির্দিষ্ট সময় সীমার মধ্যে সম্পাদন ও রেজিষ্ট্রী দলিল করিয়া দিবার নিমিত্তে যথাযথ আদেশ দানে মর্জি হয়;

(গ) মোকদ্দমার খরচ বিষয়ে বাদীপক্ষের অনুকূলে বিবাদী পক্ষের প্রতিকূলে ডিক্রী দিতে মর্জি হয়;
(ঘ) সাক্ষ্য আইন, সমতা আইনে বাদীপক্ষ আর যে যে প্রতিকার পাওয়ার হকদার তৎমর্মে ডিক্রী দিতে মর্জি হয়।"

The plaintiffs claimed that the deeds were mortgage deeds with a condition of repurchase and in view of the provisions under P.O 88 of 1972 those are complete usufructuary mortgage for a period of seven years and they are entitled to a decree of redemption. The defendant claimed that the plaintiffs and their mother sold the suit land to defendant No.1, by three separate registered sale deeds, executed on 07.08.1961 and registered on 08.08.1961 for a consideration of Taka 3000/= and on the same day, an agreement was entered into between the plaintiffs and their mother with defendant No. 1 to the effect that defendant No. 1 would reconvey the suit land to the plaintiffs and their mother if they pay taka 3000/- to the defendant within the 5th (fifth) year from the date of execution and registration of the agreement. Since the plaintiffs did not pay the consideration money within time, the transactions became past and closed.

While rejecting the plaint the trial Court considered the recitals of deed Nos. 2600, 2601 and 2602 and came to the findings that the deeds were out and out sale deeds and the tenure of deed of reconveyance expired after expiry of 5 (five) years on 07.08.1966. In view of the judgment passed in Writ Petition No. 2847 of 1992 the trial court held that the suit is barred by *res judicata* and rejected the plaint in exercising jurisdiction under Order VII Rule 11 read with section 151 of the Code of Civil Procedure. The Court of appeal concurred with the findings and decision of the trial Court and dismissed the appeal.

The plaintiff-petitioners filed copies of those deeds dated 07.08.1961 before this Court. On the face of it, those are sale deeds, the parties are same and their recitals are common except the amount of consideration of money and quantum of land. In the prefix of sale deed No. 2600 the words "জোত স্বত্ত্বের নাল জমি বিক্রয়ের সাব কবলা মূল্য মং ১৫০০/= টাকা" have been mentioned and in the recital, the following words have been stated:

> "কস্য স্থিতিবান রায়তি কর্ষ্য জোত সত্বের নাল জমি বিক্রয়ের সাফ কবলা পত্র মিদং কার্যাধ্বাঙ্গে নিম্ন তপছিল লিখিত ভূমিতে আমরা ১-২ নং দাতাদ্বয় পৈত্রিক ওয়ারিশ ও আমি ৩ নং দাত্রি স্বামীর তেজ্য-বিত্বের ওয়ারিশ। কর্ষ্য জোত স্বত্ত্বের মালিক দখলকার ও দখল শরিক বিদ্যমান থাকিয়া অন্যের বিরুদ্ধ জনিত দখল স্বত্বে যথেচ্ছা রুপে ভোগ-দখল ও তশ্রুপ করিয়া আসিতেছি এখন আমাদের নিজ নিজ প্রয়োজন ও কাজ করার পরিচালনার জন্য নগদ টাকার আবশ্যক হওয়ায় নিম্নোক্ত তপছিল লিখিত ভূমি বিক্রয় করার ঘোষনা করছি সেমতে আপনি অত্র দলিল গ্রহিতা বিশেষ রাজি বিধায় খরিদকৃত স্বত্নবান হওয়ায় উহার বিদ্যমান বাজার দর সর্ব্ব উচ্চ মূল্যে মং- ১৫০০/- পঁনের শত টাকা নির্ধারনে আপনার নিকট অত্র সাফ কবলা দলিল মূলে সাফ বিক্রয় দলিল করিলাম। আপনি অদ্য হইতে আমাদের সত্বে স্বত্ববান মালিক ও দখলকার হইলেন মালিকানা সরকার আমাদের নাম খারিজ আপনার নিজ নামজারি ক্রমে চেক দাখিলা গ্রহনে দান বিক্রয়ের সত্বাধিকারত্ব পুরুষানুক্রমে পরম সুখে যদিচ্ছাভাবে ভোগ দখল ও তশ্রুপ করিতে থাকুন ইহাতে আমাদের বা আমাদের ওয়ারিশগনের কোন প্রকার দাবী দাওয়া রইল না বা চলিবে না যদি করি তবে জেই করে তাহা সর্ব্বতোভাবে সর্বদালতে বাতিল ও অগ্রাহ্য হইবে বিক্রিত ভূমি নির্দায়ী ও নির্দোষাবস্থায় আপনার দখলে ছাড়িয়া দিয়া সম্পূর্ন রুপে নিঃস্বত্ববান হইলাম।"

Same prefix and recitals have been mentioned in deed Nos. 2601 and 2602. From the nature and recitals of those 3 (three) deeds dated 07.08.1961 it is clear that the vendors, the plaintiffs and another, sold the suit land on 07.08.1961 to the vendee, defendant No. 1, without any condition on receiving consideration of total taka 3000/- and handed over possession of the land to the vendee. Those deeds cannot be construed as deeds of mortgage but those are out and out sale deeds.

Admittedly, on the same day defendant No. 1 as vendee executed a deed of agreement of reconveyance being No. 2603. In the prefix of the agreement the words, "জোত স্বত্বের নাল জমি ফেরৎ দেওয়ার এগ্রিমেন্ট মদ্দৎ ৫ (পাঁচ) বৎসর" have been mentioned and in the recital, it has stated as follows:

> "কস্য স্থিতিবান রায়তি জোত স্বত্বের নাল জমি ফেরৎ দেওয়ার এগ্রিমেন্ট বা চুক্তিপত্র মিদং কার্য্যাজ্ঞাঙ্গে। আমি দলিলদাতা আপনারা অত্র দলিল গ্রহিতাগণ হইতে অদ্য তারিখে নিম্নোক্ত তপশীলে লিখিত ভূমি মং-৩০০০/= তিন হাজার টাকা মূল্যে খরিদ করিয়াছি। কিন্তু আপনাদের সহিত আমার এই মর্মে চুক্তি রহিল যে বর্তমান ১৩৬৮ সনের মাহে শ্রাবণ হইতে লাগামত ১৩৭৩ সনের মাহে আষাঢ় পর্যন্ত মদ্দৎ ৫ (পাঁচ) বৎসর এই বৎসর মুদ্দৎ কাল মধ্যে ৪ (চার) বৎসর জমি ভোগ করার পর বক্রী ১ (এক) বৎসরের মধ্যে যে কোন সময় আমার দেয় টাকা মং-৩০০০/- তিন হাজার টাকা এক কালীন এক মুষ্ঠে বুঝাইয়া দিতে পারিলে তখনকার ফসল উঠায়ে আপনাদের জমি আপনাদিগকে রেজিষ্টারী সাফ কোবলা দলিল মূলে ফেরৎ দিব। আপোষে ফেরৎ না দিলে উল্লেখিত মূল্যের টাকা আদালতে দাখিল করত: আমি কি আমার ওয়ারিশান হইতে জমি উদ্ধার করিয়া নিতে পারিবেন, ইহাতে আমার বা আমার ওয়ারিশগনের কোন প্রকার দাবী দাওয়া রহিবেনা বা বলিবোনা। যদি করি কি কেহ করে তাহা সর্ব্বতোভাবে সর্বাদালতে বাতিল ও অগ্রাহ্য হইবে। আরও প্রকাশ থাকে যে উপরোল্লিখিত ম্যাদান্তে সাফ কবলা দলিল বহাল ও বলবৎ থাকিবে।"

On perusal of the recitals of the deed of reconveyance dated 07.08.1961 it appears that as per agreement defendant No. 1 was obligated to execute relevant deed of reconveyance within 5 (five) years from 07.08.1961 upon receiving consideration of Taka 3000/= from the plaintiffs and their mother and the time of reconveyance expired on 6.8.1966.

If a property is sold subject to an option of repurchase within a stipulated time, the agreement to reconvey may be specifically enforced if the vendor exercises his option within the stipulated time. A sale with a condition of repurchase can be carefully distinguished from a mortgage by conditional sale. Right to

repurchase is lost if it is not exercised within the stipulated time. Where in a deed of sale, an option of repurchase is given to the vendor within a stipulated time with further stipulation that on failure to exercise the option or to fulfill the terms thereof within the stipulated time the agreement for resale would stand canceled, the option of repurchase is in the nature of a concession or privilege which is available only if the condition is strictly complied with.

As a general Rule and as per terms of the re-conveyance agreement the plaintiffs and their mother were required to tender the consideration money within 06.08.1966 to defendant No. 1 for reconveyance of the suit land to them by the defendant and failing which the plaintiffs and their mother were required to brought suit for specific performance of contract for reconveyance of the property sold within a period of three years from the date fixed for the performance under Article 113 of the 2nd Schedule of the Limitation Act.

There is no ambiguity in the language employed in the deeds and the intention of the parties can be inferred from the contents of the deeds. There is no doubt that the transactions were out and out sale with condition to repurchase within five years i.e. within 06.08.1966 and the transaction cannot be considered as mortgage by conditional sale within the meaning of section 58(c) of the Transfer of Property Act. Admittedly, the plaintiffs did not file any suit for specific performance of contract to enforce the deed of agreement at any point of time, but after insertion of section 95A in the State Acquisition and Tenancy Act by P.O. No. 88 of 1972 the plaintiffs filed R.P. Case No. 103/1973-74 before the Assistant Commissioner (Land), Louhajang, Munshiganj for redemption of the suit land and got an

order of release on 28.02.1974 which was challenged by defendant No. 1 in Writ Petition No. 2847 of 1992 before this Division whereupon Rule was issued and a Division Bench of this Division made the Rule absolute vide judgment dated 10.07.1997 with the following findings and decision:

> "It appears that aforesaid respondents transferred the case land in favour of the petitioner by registered sale deed dated 07.08.1961 and the petitioner executed an agreement in favour of them on that day/date agreeing to reconvey the land in question to them within five years on receipt of the consideration of Taka 3000/- from them.
>
> Aforesaid respondent did not get the land reconveyed within the period. But they filed R.P. Case No. 103/1973-74 before the respondent No. 1 under the provision of P.O. No. 88 and 136 of 1972 for redemption of the case land. Respondent No. 1 by impugned order dated 28.02.1974 allowed the case *ex-parte*. Thereafter, petitioner filed Writ Petition No. 1186 of 1974 which was abetted on 28.08.1990 in pursuance of the decision of the Appellate Division in the case of *Bangladesh and another vs. Salimulla reported in 35 DLR (AD) 1*. Thereafter, the petitioner moved this Court and obtained this Rule on 03.11.1992. In the case of *Anawaruddin Bepari vs. Assistant Commissioner, (Land) reported in 1 BLC (AD) 164* it has been held relying on the decision in the case of *Bangladesh vs. Haji Abdul Gani reported in 32 DLR (AD) 233* that the transaction which became passed and closed before 03.08.1972 when President's Order No. 88 of 1972 came into operation were not subsisting and as such, aforesaid 88 of 1972 have no manner of application to such transaction. In the instant case period of five years for re-conveyance expired on 07.08.1966. Thus, it is clear

> that the aforesaid transaction between the parties was not subsisting in 1972 when P.O. No. 88 came into operation. We therefore find merit in this Rule.
>
> In the result, the Rule is made absolute without any order as to costs. Impugned order dated 28.02.1974 is declared to have been passed without any lawful authority and of no legal effect."

The plaintiff-petitioner did not challenge the judgment of the High Court Division passed in Writ Petition No. 2847 of 1992 before the Hon'ble Appellate Division but filed the instant suit for redemption of the suit property for the selfsame cause of action.

Now question arises whether the suit is barred by the principle of *res judicata* or any other law.

In the case of *Bangladesh vs. Haji Abdul Gani 32 DLR (AD) 233* the Hon'ble Appellate Division held as follows:

> "Our considerations, therefore, are that the President's Order Nos. 88 and 136 of 1972 and No. 24 of 1973 are all valid legislation for effecting necessary intendments in the East Bengal State Acquisition and Tenancy Act and those laws cannot be attracted on the ground of *ultra vires*; (2) any transfer of a holding or part thereof by a raiyat either by way of out and out sale with an agreement to reconvey or where the transferor receives from the transferee any consideration and transferee acquires the right to possess and enjoy the usufruct, shall notwithstanding anything contained in the document relating to transfer, be deemed to be a complete usufructuary mortgage for a period of maximum 7 years, and the provisions of section 95(4) and (5) shall apply to such transfers; (3) and such transfers are not to be understood in the light of the Transfer of Property Act because those are to be understood in the light of the enactment in question; (4)

> those transactions which are subsisting on the date of promulgation of President's Order No. 88 of 1972 are hit by section 95A including the transaction entered into by way of out and out sale with an agreement to reconvey, made whether before or after the promulgation of President's Order No. 88 of 1972; and (5) as for the transactions which are not alive before the promulgation of President's Order No. 88 of 1972 they are concluded by the transactions passed and closed."

Relying on the above decision of the case reported in 32 DLR (AD) 233, the Hon'ble Appellate Division in the case of *Abdul Khaleque Sarnamat vs. Abdul Khaleque Sarnamat 1 BLC (AD) 90* held as follows:

> "Reading the provision of section 95A and our decision above it cannot be denied that the transactions in the present case (by way of out and out sale with an agreement to reconvey) shall be deemed to be a complete usufructuary mortgage and it must be said that the High Court Division was wrong in holding that the transaction 'cannot be treated as a mortgage transaction in the light of the above decision'. But then the question will still be that to attract the application of section 95A the transaction must be a subsisting one on the date of promulgation of President's Order No. 88 of 1972 (3-8-72) and the transactions which are not alive on that date are to be treated as transactions passed and closed. This is precisely what has been laid down in clauses (4) and (5) of paragraph 11 of the judgment quoted above. In the instant case the parties agreed by the transaction in question that the period of mortgage will be for four years beginning from 24.06.1967. So, the transaction cannot be said be alive and subsisting on the date of promulgation of President's Order No. 88 of

> 1972 i.e. on 03.08.1972. It was a transaction passed and closed."

Those two decisions reported in 32 DLR (AD) 233 and 1 BLC (AD) 90 were referred to in the case of *Asek Elahi vs. Jalal Ahmed and others 20 BLC (AD) 4* before the hon'ble Appellate Division and their Lordships, after consulting those decisions and other decisions of the Apex Court, in a majority view (6:1) endorsed the views taken therein and held as follows:

> "From a reading of this case it does not appear that the question as to the right of redemption of a mortgage by way of filing a suit in civil court within a period of 60 (sixty) years from the date of accrual of such right was raised and decided, but this question was precisely raised and decided in *34 DLR (AD) 237* and *12 MLR (AD) 239*. And we see no reason to take a view different from the views taken therein by this Division.
>
> From the impugned judgment, it appears that the High Court Division took notice of the conclusions arrived at by this Division in the case of Bangladesh vs. *Haji Abdul Gani Biswas (supra)* on the question of applicability of section 95 and 95A of the Act, 1950 correctly in deciding the point at issue in the instant case. Therefore, we find no merit in the submission that the High Court Division passed the impugned judgment and decree 'contrary to the decision reported in *1 BLC (AD) 90, 164'* and also 'on misreading of the decision reported in *32 DLR (AD) 233, 34 DLR (AD) 237'*.
>
> Since we have found that the deed in question (22.04.1936) is a deed of mortgage and not an out and out sale deed and the suit for redemption maintainable, the other ancillary point argued by Mr. Bhuiyan and the citations referred to by him in that respect do not deserve any consideration."

The facts and circumstances of this case clearly reveals that the transactions were not mortgages but out and out sales with an agreement to reconvey within five years from 07.08.1961 which

were not alive and subsisting on the date of promulgation of President's Order 88 of 1972, i.e. on 03.08.1972 and accordingly, the *ratio* settled in 1 BLC (AD) 90 is applicable in this case and the case reported in *24 BLC (AD) 4* cannot help the plaintiff-petitioners. Accordingly, the plaintiffs have no legal right and *locus-standi* to institute the present suit for declaration of title to and redemption of the suit land.

In *Syed Md. Shah Jalal Nure Alam and others vs. Salimullah Chowdhury and others 10 MLR (AD) 90* respondent Nos. 1 and 2 of that case instituted Title Suit No. 139 of 1979 for declaration of title to 52.55 acre suit land and the summons were duly served upon the defendants and the suit was decreed *ex-parte* wherein the plaintiff's title and interest in the suit land were declared. Thereafter, defendant No. 3 of that suit and his transferee Sayed Jane Alam filed an application under Order IX rule 13 of Code of Civil Procedure, which was registered as Miscellaneous Case No. 99 of 1980 for setting-aside the *ex-parte* decree. The learned Assistant Judge rejected the miscellaneous case by order dated 02.05.1981 as being barred by limitation. The petitioners of Miscellaneous Case No. 99 of 1980 or any of their successors in interest did not move the higher court against the order of rejection of the miscellaneous case. Subsequent purchasers through defendant No. 3 filed Title Suit No. 1 of 1982 against the plaintiff-respondent for declaration of their title in respect of 27.02 acre land out of 52.55 acre land. The Hon'ble Appellate Division rejected the plaint of the suit as being barred by the principle of *res judicata* holding as follows:

> "It is true that all the remedies were available to the defendant of the suit but once one of the remedies is availed of, the defendants are precluded from availing of

other remedies because there should be an end of litigation."

In the instant case, there is no dispute that the present petitioners filed R.P. case before the Assistant Commissioner (Land) for releasing the property from mortgage and got an order in their favour and at the instance of defendant No. 1 the High Court Division in Writ Petition No. 2847 of 1982 nullified the order of the Assistant Commissioner (Land) by judgment dated 10.7.1997 declaring the transaction passed and closed. The petitioners did not move the hon'ble Appellate Division against the judgment of the High Court Division. The subject matter of the earlier proceeding and the present suit are same, the parties are same and the issue is substantially same because in this suit they prayed for redemption of the suit property with an additional prayer of declaration of title to the suit land. Since in the earlier proceeding, the High Court Division clearly decided that the transactions became passed and closed in view of the decisions reported in 32 DLR (AD) 233 and 1 BLC (AD) 164, the present suit for the self-same cause of action, same subject matter and between the same parties is barred by the principle of *res judicata* and the plaint is liable to be rejected in view of the decision reported in 10 MLR (AD) 90.

Now question arises whether a plaint can be rejected by resorting to the provisions of Order VII rule 11 or in exercising jurisdiction under section 151 of the Code of Civil Procedure.

This question is not a *res integra.* Our Apex Court in various decisions settled this issue. In the case of *Abdul Jalil and others. vs. Islamic Bank Bangladesh Ltd and others 53 DLR (AD) 12* the Appellate Division held that, "*it is well settled that a plaint may be rejected on a*

plain reading of the same…….where a plaint cannot be rejected under Order VII rule 11 of the Code of Civil Procedure the Court may invoke its inherent jurisdiction and reject the plaint taking recourse to section 151 of the Code of Civil Procedure……As the ultimate result of the suit is as clear as daylight such a suit should be properly buried at its inception so that no further time is consumed in a fruitless litigation." In *Mrs. Rawshan Jamil vs. Adiluzzaman and others 11 ADC 117*, the Hon'ble Appellate Division held that, *"if the plaintiffs do not have any legal character/interest in the suit property, in such a situation, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure and that if the suit is prohibited under the law in the sense that it is barred under legal provisions, the plaint may be rejected by invoking section 151 of the Code of Civil Procedure*". In *Rasheda Begum vs. M.M Nurussafa and others 24 BLD (AD) 223,* the Hon'ble Appellate Division held that, *"rejection of plaint is not confined to the provision of Order VII rule 11 of the Code of Civil Procedure. In an appropriate case while the proceeding itself is an abuse of the process of the Court, the Court having recourse of section 151 will be competent to reject the plaint".*

The principles of law deduced by our Apex Court is very clear that the trial Court would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage and if the ultimate result of the suit is as clear as daylight such a suit should be properly buried at its inception so that no further time is consumed in a fruitless litigation. If the plaintiff does not have any legal character/interest in the suit property, in such a situation, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure.

A suit may be specifically barred by law and in such an event, the matter would come under the express terms of clause (d) of rule 11 of Order VII of the Code of Civil Procedure, but even in a case where a suit is not permitted by necessary implication of law in the sense that a positive prohibition can be spelt out of legal provision, the court has an inherent jurisdiction to reject the plaint and this really amount to saying that Order VII rule 11 of the Code is not exhaustive and a plaint can be rejected by resorting to section 151 of the Code of Civil Procedure.

From the impugned judgment it appears that the Court of appeal by invoking jurisdiction under Order VII rule 11(d) of the Code of Civil Procedure and section 151 of the Code of Civil Procedure came to the clear finding that the suit is barred by the principle of *res judicata* and the plaintiffs are not entitled to any relief in the present suit affirmed the order of the trial Court who rejected the plaint. Considering the facts and circumstances of the case, it is apparent that the plaintiffs have no chance to get a decree as prayed for in the plaint. Accordingly, in view of the settled principle of law, as discussed above, the plaint of the present suit is liable to be rejected on two counts i.e. by resorting to Order VII rule 11 of the Code of Civil Procedure as the suit is barred by the principle of *res judicata* and by exercising inherent power of the Court under section 151 of the Code of Civil Procedure as the plaintiffs do not have any legal right of redemption of the suit land as per law settled by our Apex Court. I am of the view that the Court of appeal came to correct findings and decision and rightly upheld the findings and decision of the trial Court rejecting the plaint and in doing so committed no error

of law resulting in an error in the decision occasioning failure of justice.

Accordingly, I find no merit in this Rule.

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

The order of *status-quo* granted earlier is hereby vacated.

Send down the LCR along with a copy of this judgment to the Courts below at once.

(Justice Md. Badruzzaman)

Faruq Hossain, A.B.O