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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 3503 OF 2019

IN THE MATTER OF:

An application under section 115(1) of the Code of Civil Procedure.
(Against Decree)

-And-

IN THE MATTER OF:

Md. Ali Akbor
--- Plaintiff-Respondent-Petitioner.

-Versus-

Moulovi Ali Ahammed being dead his legal heirs: 1-5 and another
---Defendant-Appellant-Opposite Parties.

Mr. Md. Oziullah, Senior Advocate with
Mr. Md. Saifur Rahman, Advocate
--- For the Plaintiff-Respondent-Petitioner.
Mr. Md. Shahadat Tanveer Amin, Advocate
---For the Defendant-Appellant-OP Nos. 1-6.

Heard on: 24.08.2023, 27.08.2023, 09.10.2023 and 16.10.2023.
Judgment on: 31.10.2023.

At the instance of the present plaintiff-respondent-petitioner, Md. Ali Akbor, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 21.05.2019 passed by the learned District Judge, Chandpur in the Title/Civil Appeal

No. 49 of 2001 allowing the appeal thereby reversing those dated 08.04.2001 passed by the learned Assistant Judge, Kachua, Chandpur in the Title Suit No. 79 of 1998 should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present petitioner as the plaintiff filed the Other Class Suit No. 79 of 1998 for the specific performance of a contract in the court of the learned Assistant Judge, Kachua, Chandpur praying for that a contract dated 26.06.1993 to be performed by the present defendant of his part. The plaint contains that plaintiff and defendant No. 1 (now deceased) and his legal heirs were substituted to contest the Rule. The further facts are that the plaintiff and the defendant (now deceased) were full brothers and both of them inherited the property of their father including the present suit lands. The defendant was looking after the property owned by the petitioner as a borgadar (বর্গাদার). While the defendant wished to sell the entire scheduled property the plaintiff intended to buy the land by fixing the money at Tk. 30,000-/ (Taka Thirty Thousand). For which the defendant (now deceased) received money at Tk. 4,000-/ + 3,000-/ = 7,000-/ (Taka Seven Thousand) and the defendant gave a money receipt

for Tk. 7,000-/ (Taka Seven Thousand) to the plaintiff. Thereafter, the plaintiff on 14.04.1995 and 13.04.1996 also paid Tk. 10,000-/ + 10,000-/ = 20,000/- (Taka Twenty Thousand) to the defendant No. 1 and fixed the date on ১লা জ্যৈষ্ঠ্য for registration and rest Tk. 3,000/- (Taka Three Thousand) will be given on the same day but defendant No. 1 denied the execution of registration then the plaintiff instituted the suit for legal remedy.

On the other hand, defendant No. 1 also purchased some land from his sister Nurjahan Begum by way of executing a Bainanama (বায়নানামা) and pursuant to the said Bainanam (বায়নানামা) the plaintiff registered his portion of land as well as the portion of the defendant by ignoring the right of the defendant. Regarding the said purchased property there was a dispute and the Other Class Suit No. 71 of 1997 was filed by the plaintiff and an appeal is pending now. The defendant further contended that there was no Bainanama executed on 26.06.11993 by him for selling the suit property measuring 36 decimals and the possession was never handed over to the plaintiff but the plaintiff by practicing fraud created the so-called Bainanama as there was no valid contract between the parties, as such, there was no

contract and on the basis of which there was no performance from the said Bainanama by the defendant.

Upon receipt of the said suit the learned Assistant Judge, Kachua, Chandpur heard the parties and examined the documents and oral evidence decreed the suit on 08.04.2001. Being aggrieved the present defendant (now deceased) preferred the Title/Civil Appeal No. 49 of 2001 without paying the adequate Court Fees and the learned trial court passed an order to pay the required Court Fees. In the matter of Court Fees, there was a last process of litigation up to the highest court of the Supreme Court and there was a delay in paying the required Court Fees and finally the required Court Fees were paid in the learned appellate court below who after hearing the partied and examining the materials on records allowed the appeal by his impugned judgment and decree dated 21.05.2019. Being aggrieved the present plaintiff-petitioner filed this Revisional Application under section 115(1) of the Code of Civil Procedure and this Rule was issued thereupon.

Mr. Md. Oziullah, the learned Senior Advocate, appearing along with the learned filing Advocate, Mr. Md. Saifur Rahman for the plaintiff-petitioner, submits that admittedly the present

plaintiff and the defendant (now deceased) are full brothers and there was an offer to sell the suit property from the defendant in favour of the plaintiff, as such, there has been a Bainanama dated 26.06.1993 on the basis of good-faith without following the required formalities for executing a Bainanama. Upon executing the said Bainanama several Salish were held and the defendant denied to execute a sell deed, thus, the suit was filed for specific performance of contract. Upon which the learned Assistant Judge, Kachua, Chandpur decreed the suit but the learned appellate court below by misreading the evidence and depositions by the PW and DWs failed to consider the evidence and allowed the appeal by reversing the judgment of the learned trial court and thereby committed an error of law in decision occasioning failure of justice, thus, the Rule should be made absolute.

He further submits that the learned court of appeal below without considering the facts and circumstances and evidence allowed the appeal by reversing the judgment and decree passed by the learned trial court without finding of the learned trial court, therefore, committed wrong in the decision occasioning failure of justice.

The Rule has been opposed by the present defendant-opposite parties.

Mr. Md. Shahadat Tanveer Amin, the learned Advocate, appearing on behalf of the defendant-opposite parties submits that the defendant opposite party No. 1 (now deceased) never executed any Bainanama (বায়নানামা) in order to sell the inherited property in favour of the plaintiff and the plaintiff created by practicing fraud the so-called Bainanama (বায়নানামা) dated 26.06.1993 in favour of the plaintiff and the possession of the defendant's property already remain within their possession and the defendant subsequently sold some portion of land by executing a sale deed dated 19.10.1998 which exhibited as Exhibits- "Ga" and "Ga-1", as such, there was no contract and no contractual obligation to be fulfilled by the opposite parties, therefore, the present petitioner obtained the Rule by misleading the court which is liable to be discharged.

The learned Advocate further submits that the learned trial court wrongfully passed the judgment and decree in favour of the plaintiff without considering the material evidence, in particular, a money receipt which cannot be considered a Bainanama (বায়নানামা) for selling the property, as such, the learned trial court

came to a wrongful conclusion to decree the suit but the learned appellate court below after considering the evidence both documentary and by way of depositions lawfully passed the impugned judgment and decree, as such, no interference from this court is called for.

Considering the above submissions made by the learned Advocates appearing on behalf of the respective parties and also considering the revisional application filed by the present plaintiff-respondent-petitioner under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree passed by the learned appellate court below allowing the appeal and thereby reversing the judgment and decree of the learned trial court as well as perusing the essential documents available in the lower courts records, it appears to this court that both the plaintiff and the defendant inherited the land from their father which was originally owned by the grandfather of both the parties. The plaintiff also claimed that the defendant expressed an interest in selling his portion of the land without formal partitioning between the parties. However, by an amicable settlement, the defendant and the plaintiff owned and possessed their respective

land obtained by inheritance. It further appears that the defendant claimed to have expressed his intention to sell the suit land to the plaintiff and there was a Bainanama (বায়নানামা) dated 26.06.1993 which has been exhibited as Exhibit- 1 by the present plaintiff-petitioner.

I have carefully examined the said documents adduced and produced by the plaintiff to perform part of the contract by the defendant upon the said document. A Bainanama (বায়নানামা) is a unilateral contract describes the properties in detail which ultimately turns into a sale deed.

After careful examination, I found that Exhibit: 1 is simply admission as to the sale of a property by way of giving a money receipt. The validity of the said document has been disputed by the parties. The defendant denied executing any such kind of document whereas the plaintiff-petitioner filed the suit based on the said money receipt described receipt of Tk. 7,000/- (Taka Seven Thousand) in order to sell the land. As to the validity of this document, the defendant denied any execution of such document in favour of the plaintiff. Now, the question is whether Exhibit: 1 can be considered as a contract or not. In this regard, the suit was filed on the basis of section 12 of the Specific Relief

Act. Section 12 requires a contract that requires specific enforcement. In the instant case, Exhibit: 1 cannot be considered as a contract by and between the parties, as such, if there is no contract for selling any property without specifying the land or identifying the land or specification of the terms and conditions by and between the parties which could be enforced. Section 12 of the Specific Relief Act of 1877 contains the following explanation which reads as follows:

> "Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer moveable property can be thus relieved."

From the explanation under section 12 of the specific performance of a contract, there must be a contract by and between the parties in order to sell an immovable property. In the instant case Exhibit: 1 cannot be considered as a contract, therefore, the defendant's opposite party has no obligation to perform his part of the obligation to execute any sale deed on the basis of the above-mentioned Exhibit- 1.

The learned trial court considered the said Exhibit- 1 dated 26.06.1993 as a contract despite the fact. The defendant-opposite party No. 1 deposed in the court as DW. 1 denying the execution of the said document and denying handing over any possession of the suit land in favour of the present plaintiff-petitioner.

In this regard, the learned Advocate for the petitioner referred to section 111 of the Evidence Act contains a transaction between 2 parties on the basis of good faith upon which another party has active confidence.

In this regard, the plaintiff-petitioner claimed that the Exhibit: 1 is based on good faith between the 2 brothers. In such an event, the plaintiff was under an obligation to prove in the trial court and the learned appellate court below as to the active confidence executed on the basis of a good faith must have been proved by the plaintiff-petitioner.

I have examined the depositions adduced and produced by the parties as the PWs and the DWs where the plaintiff-petitioner failed to prove that he had an active confidence on good faith could not be proved because section 111 of the Evidence Act vested the party upon the plaintiff to prove such good faith an

active confidence by adducing and producing the sufficient documents.

Moreover, the defendant denied the Exhibit- 1 and the learned trial court obtained 5 signatures from the defendant in order to prove the genuine execution of the said document claimed to have been executed on 26.06.1993.

In this regard, the learned appellate court below found that the learned trial court himself obtained these 5 signatures of the defendant without sending the matter for any expert opinion regarding the signatures of the defendant on the said papers, as such, the plaintiff-petitioner failed to comply with the burden of prove as to the validity of such contract of execution, as such, there was no contract or no Bainanama (বায়নানামা) in order to sale by the defendant to the plaintiff because the Exhibit: 1 is only money receipt in order to intention to sale the defendant's own property, therefore, the learned trial court committed an error of law by decreeing the suit on the basis of the said document. However, the learned appellate court correctly and lawfully came to a conclusion to allow the appeal thereby reversing the judgment of the learned trial court.

Now, I am going to examine the findings of the learned courts below.

The learned trial court came to a conclusion to decree the suit on the basis of the following findings:

> "বাদী কর্তৃক নালিশী বায়নাপত্র হিসাবে দাখিলা বায়নাপত্র রশিদ যাহা প্রদঃ ১ হিসাবে চিহ্নিত করা হইয়াছে যাহাতে নালিশী ভূমির পরিমাণ ও চৌহুদ্দী সুনির্দিষ্ট ভাবে চিহ্নিত করা হয় নাই। কিন্তু ১ নং বিবাদী ডি. ডব্লিউ.-১ হিসাবে তাহার জেরায় স্বতঃস্ফুর্তভাবে স্বীকার করে যে, নালিশী বায়নাপত্রে মোট জমি উল্লেখ আছে ৩৬ শতক। তাহা ছড়া সাক্ষীদের সাক্ষ্য বিশ্লেষণে দেখা যায় যে, তফসিল বর্ণিত নালিশী ভূমিতে বাদীর দখল বিদ্যমান রহিয়াছে।
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> ১ নং বিবাদী কর্তৃক দাবীকৃত বিগত ৫/২/৯৯ ইং তারিখের সালিশে বাদী কর্তৃক তাহার দাখিলা প্রদঃ ১ বায়না রশিদটি জাল বলিয়া বাদীর স্বীকার করিয়া নেওয়া সঠিক বলিয়া প্রতীয়মাণ হয় না। কারণ বিবাদীপক্ষের সাক্ষ্য বিশ্লেষণে এবং তাহাদের দাখিলা সালিশনামা বিশ্লেষণে দেখা যায় যে, উল্লেখিত সালিশনামা বাদীর অনুপস্থিতিতে লিখিত হইয়াছে।
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> সার্বিক পর্যালোচনায় ইহা প্রমাণীত হয় যে, তফসিল বর্ণিত নালিশী ভূমি বিষয়ে বাদী ও ১ নং বিবাদীর মধ্যে বায়নানামাপত্র রশিদটি সম্পাদিত হইয়াছে।"

On the other hand, the learned appellate court below came to a conclusion to allow the appeal by reversing the judgment of the learned trial court on the basis of the following findings:

"পি. ডব্লিউ. -২ অনুরূপ বক্তব্য প্রদান করেন। অর্থাৎ বাদীর দাখিলী কথিত চুক্তিপত্রটি বিধি সম্মতভাবে প্রস্তুত করা হয় নাই এবং উহা দৃষ্টে জমির পরিমাণ, দাগ, খতিয়ান, চৌহুদ্দী ও টাকা লেনদেনের পরিমাণ এবং কবে এই জমি কত দিনের মধ্যে রেজিস্ট্রি করিয়া দিতে হইবে সেই সমস্ত শর্তাবলী কোন কিছুই উল্লেখ নাই। ফলে উহা একটি বৈধ চুক্তিপত্র বলিয়া আদৌ গণ্য হয় না। সাক্ষীগণ উক্ত জমিজমা বিক্রয়ের কথাবার্তা, টাকা লেন-দেন ইত্যাদি বিষয়ে পরস্পর বিরোধী বক্তব্য প্রদান করেন এবং চুক্তিপত্র মূলে নালিশী ভূমির দখল প্রদানের বিষয়টি কোন সুস্পষ্ট সাক্ষ্য দ্বারা বাদী প্রমাণ করিতে সক্ষম হন নাই। বাদীর মামলা বাদীকেই প্রমাণ করিতে হইবে। বিবাদীপক্ষের দুর্বলতা এই ক্ষেত্রে বাদী কোন সুবিধা প্রাপ্ত হইতে পারেন না। ডি. ডব্লিউ.- ১ মোঃ আলী আহম্মদ তাহার বর্ণনার সমর্থনে সুনির্দিষ্টভাবে জবানবন্দী প্রদান করেন। তাহাকে জেরা করিয়া তাহার জবানবন্দীর বক্তব্য বাদীপক্ষ আদৌ খন্ডন করিতে সক্ষম হন নাই। ডি. ডব্লিউ. ২ লনি মিয়া সুস্পষ্টভাবে বলেন যে, বাদী-বিবাদীর মধ্যে নালিশী জমি বেচা বিক্রি সম্পর্কে কোন বায়নাপত্র হয় নাই।"

On the basis of the above discussions and the findings of the learned courts below I am of the opinion that the learned trial court committed an error of law by considering the Exhibit: 1 as a Bainanama (বায়নানামা) which requires a performance by the defendant and the plaintiff. The learned trial court also committed an error of law by recognizing the said document as a Bainanama (বায়নানামা) of a money receipt. Whereas, the learned appellate court below came to a lawful conclusion that the said Exhibit: 1 cannot be considered as a Bainanama (বায়নানামা), as

such, he reverses the judgment and decree of the learned trial court lawfully.

In view of the above conflicting findings, I am of the opinion that the learned trial court committed an error of law by decreeing the suit but the learned appellate court below came to a lawful conclusion to allow the appeal by reversing the judgment of the learned trial court.

In view of the above, I consider that this is not a proper case for interference upon the impugned judgment by this court.

Accordingly, I do not find merit in the Rule.

In the result, the Rule is hereby discharged.

The impugned judgment and decree dated 21.05.2019 passed by the learned District Judge, Chandpur in the Title/Civil Appeal No. 49 of 2001 by reversing those dated 08.04.2001 passed by the learned Assistant Judge, Kachua, Chandpur in the Title Suit No. 79 of 1998 is hereby upheld.

The concerned section of this court is hereby directed to send down the lower courts records along with this judgment and order to the learned courts below immediately.