

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Revisional Jurisdiction)

Present:

Mr. Justice S.M. Masud Hossain Dolon

Civil Revision No. 3683 of 2019

Nirendra Kumar Paul alias Mintu being dead
his heirs 1(a) Sonjay Kumar Paul and others.

.... Defendant- petitioners.

-Versus-

Parikshit Dutta Chowdhury and others

..... Plaintiff-opposite parties.

Mr. Sukumar Biswas with

Mrs. Benozir Shokina, Advocate

..... for the petitioners.

None appears for the opposite parties.

Heard & Judgment on: 05.09.2024.

This Rule has been issued calling upon the opposite parties to show cause as to why impugned judgment and decree dated 06.10.2019 passed by the learned Additional District Judge, 1st Court, Sylhet in Title Appeal No. 315 of 2012 dismissing the appeal and thereby affirming the judgment and decree dated 21.10.2012 passed by the learned Senior Assistant Judge, Sadar Additional Court, Sylhet in Title Suit No. 245 of 2012 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.

Facts, relevant for disposal of the Rule, are that the predecessor of the Opposite party Nos. 1-4 as plaintiff instituted a suit being Title Suit No. 110 of 2009 before the learned Senior Assistant Judge, Sadar

Additional Court, Sylhet against the defendants for declaring the Registered irrevocable Power of Attorney No. 3332 dated 11.12.2000 is void and the plaintiff is not bound by Registration Deed No. 2096 dated 10.08.2003 as it is created on the basis of fraud, collusive and vexatiousness stated alleging inter alia that the suit land along with other lands were originally belonged to Upendra Kumar Gupta and accordingly the same was recorded in his name during settlement operation. Subsequently he executed a "Will" regarding this suit property in favour of his only heirs daughter Shatadal Chowdhury alias Gauri Dutta Chowdhury and he appointed his son- in-law i.e. plaintiff as executor of this 'Will'. Subsequently the plaintiff was entitled to the suit land as executor of alleged "Will" in compliance of Probate Case No. 58 of 1968. The schedule property is comprised with some Debottor (Deity's) Property and which are having sebayet (Deity's) possessor. The original plaintiff mutated the suit land in his name and he was the Government Service holder and after his retirement he felt sick, moreover the suit land was located so far from his residence that's why it was not possible for him to paying land rent according to S.A. recorded suit land in his name and thus he decided to appoint the defendant No.1 Nirendra Kumar Paul alias Mintu (since deceased) who was the husband of his religious daughter, as his Power of Attorney to take care of his property and he told the defendant No.1 to draft a Power of Attorney. The defendant No.1 drafted the Power of Attorney

as his own and left no chance for original plaintiff (since deceased) to read it and subsequently he completed its registration without disclosing its condition No. 9 i.e. the defendant No. 1 could transfer or sale the suit property.

The defendant No.1 took the advantage of love and affection of the predecessor of the present plaintiffs towards him and thus he totally exploited the personal relation between them and the old aged plaintiff (Prakiti Ranjan Dutta Chowdhury) was totally unaware of his misnomer attitude or irony of defendant No. 1, the predecessor of the present petitioners and subsequently he sold out the suit land to his wife i.e the defendant No. 2 on 10.08.2003 by executing registered deed No. 2096. The plaintiff was never intended to sale or gift or any kind of transfer of the suit land and there was no reason to execute such condition comprising power of attorney.

The defendant No. 1, the predecessor of the present defendants himself inserted much unreasonable condition No. 9 to the alleged Power of Attorney in total ignorance of the plaintiffs' father and the predecessor of the defendants done if having been motivated by the ill intention to grab the property of plaintiffs through gratitude means. The original plaintiff learnt all these heinous activities of defendants after receiving the notice of Mutation Case No. 71/2004-2005 on 12.11.2006 from Assistant Commissioner Land, Balaganj, Sylhet and they filed objection against the Mutation process and the alleged

mutation in the name of defendant No. 2 was cancelled and the defendant No. 2 filed Writ Petition No. 11511 of 2016 against this cancellation order, that the plaintiff cancelled the alleged Power of Attorney by executing the Registered deed No. 720 dated 09.04.2009 thereafter filed the instant suit.

The defendant Nos. 1 and 2 contested the suit by filing written statements denying all the material allegations made in the plaint contending inter-alia is that the suit land along with the other lands was originally belonged to Upendra Kumar Gupta and accordingly the suit land was recorded in his name during settlement operation. Subsequently he executed a 'Will' regarding this suit property in favour of his only heir Shatadal Chowdhury alias Gouri Dutta Chowdhury and he appointed his son-in-law i.e. plaintiff as executor of this Will. Subsequently the plaintiff was entitled to the suit land as executor of alleged 'Will' in compliance of Probate Case No. 58 of 1968 the plaintiff used to reside in Sylhet and it was not possible for him to take care of his property that's why he appointed the defendant No. 1, the predecessor of the present petitioners to look after his property; since then defendant No. 1 took every care of suit land which was necessary. The plaintiff was a Civil Servant and after his retirement he started practice in Sylhet Judge Court and he took decision to sale the suit property after discussing with his family members as it was tough for him to take care of this suit land while residing in Sylhet Town.

Accordingly he offered the defendant No. 1 to purchase the suit land as he was used to taking care of the suit land and he was used to reside nearby suit land and they had previous family relations with each other, the defendant went to the plaintiff's house of Taltola, Sylhet along with some renowned person like local former U.P. member, Maharaja of Sylhet Nimbarto Ashram. On that meeting plaintiff's 2nd son Parikshit Dutta Chowdhury was also presented and both party decided the sale price of suit land as Tk. 4,00,000/- only. Accordingly the defendant No.1 along with others went to plaintiff's house on 05.12.2000 and paid the amount of Tk. 4,00,000/- as sale price of suit land to the original plaintiff in presence of his son Prajit Dutta Chowdhury and Shyam Sundar Das and others. At that meeting it was decided that the plaintiff will make draft irrevocable power of attorney and the defendant will compose it. In accordant with following decision accordingly, the plaintiff registered the power of attorney on 11.12.2000 in favour of defendant No.1, and subsequently the defendant No.1 sold out the suit land to his wife, the defendant No.2 and after purchasing the suit land the defendant No.2 has been possessing through her husband, the defendant No.1. The defendant No.1 developed the land by expending huge money and constructed dwelling house and other temples over the suit land and also excavated pond situated on the suit land. The defendant did all this improvement over the suit land within the knowledge of the father of

the plaintiffs. Subsequently the defendant No.2 mutated the suit land in her name and paid the land development tax. But the plaintiff turned down being influenced by his 2nd son Parikshit Dutta Chowdhury who seduced plaintiff to cancel the Power of Attorney through the subsequent registered deed No. 720 dated 09.04.2009.

Both parties adduced evidence in support of their respective claim and the learned Senior Assistant Judge, Additional Court, Sadar, Sylhet after considering oral and documentary evidences on record decreed the suit on contest against which defendants opposite parties filed Title Appeal No. 315 of 2012 before the learned District Judge, Sylhet who transferred the same to the court of Additional District Judge, 1st Court, Sylhet for disposal who upon hearing the parties disallowed the appeal and affirmed the judgment and order passed by the learned Senior Assistant Judge, Additional Court, Sadar, Sylhet against which the defendants-appellants as petitioners filed the instant Revisional application and obtained the instant Rule.

Mr. Sukumar Biswas, the learned Advocate along with Mrs. Benozir Shokina for the petitioner submits that the D.Ws in their depositions having disclosed the real facts regarding registration of Power of Attorney and consideration money of the said Power of Attorney and also the presence of the original plaintiff Prakiti Ranjan Dutta Chawdhory was admitted by those D.Ws, before the office of the sub-registrar, both the courts below without considering those

aspects decreed the suit against the defendants which has resulted in an error in the impugned decision occasioning failure of justice. He further submits that the registered Power of Attorney dated 11.12.2000 and subsequent Deed of registered dated 10.08.2003 in favour of the defendant No. 2 having been registered and executed complied with the sections 34,35,58,59 and 60 of the Registration Act and as such the same does carry with the exclusion of oral and documentary evidence under Sections 91 and 92 of the Evidence Act and since the plaintiffs did not raise any objection about the correctness and genuineness of those registered Deeds by adducing oral evidences, those will remain intact and thereby both the courts below have committed an error in decreeing the suit which has resulted an error in the impugned decision occasioning failure of justice. In this regard he referred Abul Hossain Molla vs Khoteza Nessa reported in 46 DLR (AD) 310, Mono Mohini Devi vs Sirajuddin Ahmed Buiya reported in 21 DLR 626, Shishir Kanti Pal and others vs Nur Muhammad and others reported in 55 DLR (AD) 39 and Nur Muhammad vs Mst. Karim Bibi reported in PLD 1959 WP Lahore 932.

None appears for the opposite parties.

In view of the above submission of the learned Advocate for the petitioners, I have perused revisional application along with grounds stated therein, judgment and decree passed by the learned Trial Court and those of Appellate Court. It appears that the plaintiff was a Civil

servant and after his retirement he started practice as an Advocate in Sylhet Judge Court. The Plaintiff used to reside in Sylhet and the schedule property is located at Balaganj thana therefore it was not possible for him to take care of his property. Accordingly he executed an irrevocable Power of Attorney and the same was registered on 11.12.2000 in favour of the defendant No.1. Subsequently the defendant No.1 executed Registered Deed comply with section 34, 58, 59 and 60 of the registration Act in favour of his wife defendant No.2. The Plaintiff asserted that he did not empower the defendant No.1 to transfer or sale the schedule land and the defendant No.1 maliciously inserted clause 9 in the power of Attorney and executed the irrevocable power of Attorney by registration.

The learned Trial Court found that the defendant No.1 was unduly influenced the plaintiff by taking advantage of plaintiff's over age and the plaintiff entrusted the defendant No.1 to computerize the Power of Attorney and subsequently registered it and the same will not be getting through the power of Attorney properly. The learned Trial Court also cited famous case Wazid Khan Vs. Ewaj Ali, reported in 18 cal 545, where the Judicial committee set aside a deed of gift executed by old illiterate Mohammedam lady infavour of his confidential managing agent on the ground of compliance of under influence. The learned Trial Court did not consider the material evidence that the said irrevocable power of Attorney was registered

on 11.12.2000 and the relevant time the plaintiff was performing his profession as a learned Advocate in Judge Court, Sylhet as such the plaintiff was not an illiterate person and the case of Wazed Khan (Supra) has not be applicable in the instant case.

Both the courts concurrently considered that the plaintiff was 83 years old at the time of execution and registered the irrevocable power of Attorney as he was not mentally prudent. Whether the plaintiff was not mentally prudent person due to old age only an expert can accurately depose on such a phenomenon but the case in hand the present plaintiff-opposite parties failed to produce any expert medical witness or any witness to prove that the plaintiff was not mentally prudent as in Kazi Rafiqul Islam Vs. Kazi Zahirul Islam and others reported in 70 DLR (AD)135. Both the courts below failed to take into consideration the plaintiff filed the instant case on 22.04.2009 i.e after nine years of execution of irrevocable Power of Attorney as a prudent person.

Both the courts also failed to take into consideration the deposition of witnesses. Shree Nirendra Kumar, Defendant No.1 testified as D.W.1 that on 05.12.2000 in presence of Hazi Chunnu Mia, Mukul Chandra, Shyam Sundor Das he paid Tk.4,00,000(Four lac) to the plaintiff for sale amount of suit land. The said Haji Chunu Miah as D.W.2 and Shyam Sundor Das PW 3 spontaneously supported defendants case and testified that on 05.12.2000 the defendant No.1

paid Tk.4,00,000/-(Four lac) for sale price of the suit land to the plaintiff. The said Shyam Sundor Das DW 3 was also signed the alleged irrevocable Power of Attorney as witness. Both the courts below did not consider the plaintiff paid Tk.4,00,000/-(Four lac) for sale price of the suit land. Even if the learned Appellate Court raised the question that the plaintiff did not mention any source of payment of the said four lac taka. It transpires that son of the plaintiff namely Projit Datta Chowdhury and Shyam Sundor Das, PW3 were witnesses of the alleged Power of Attorney. PW 1 testified that said Projit Datta Chowdhury was an Advocate and he was sick and unsound but the plaintiff also failed to prove by any expert witness and no other witness testified that Projit Datta Chowdhury who was witness of the Power of Attorney was unsound at the time of execution of Power of Attorney Kazi Rafiqul Islam case (Supra).

Both the courts below also failed to consider the testimony of P.W.5, Ranjan Bhowmick and P.W.6, Jogesh Chandra Das who affirmed that the defendants are possessing the suit land by constructed building and development of the suit land and the plaintiff No. 1 also admitted by his testimony as PW 1 that the defendants are possessing the suit land. Apex Court in Bangladesh equivocally stated that since the plaintiff is not in possession, mere declaratory suit is not maintainable in the case of Amanatullah and others vs Ali Mohammad Bhuiyan and another reported in 2BLC (AD) 134.

It appears that it was admitted by the plaintiff in his plaint (the plaintiff was died on 09.01.2011 and his heirs Prokhit Datta Chowdhury and others were substituted) that he signed the irrevocable power of Attorney but claimed that the defendant No.1 inserted clause to transfer the suit land. It is also transpired when the irrevocable power of Attorney was executed and registered the plaintiff was an Advocate and the defendant No.1 was simply an ordinary man. The plaintiffs who asserted that the document was obtained by fraud, the onus is fully on them to establish that said assertion by adducing evidence Section 101 of the Evident Act. The burden would shift to the defendants, if, the plaintiffs could discharge their initial burden of proving what they claimed, the standard of proving, however, being balance of probability which is the civil standard as in Kazi Rafiqul Islam Case (Supra). In this regard the burden lies to the plaintiff to prove under influence and non receipt of consideration he executed irrevocable power of attorney as in Haji Ghulam Mustafa Vs. Allah Bux PLD 1963 kar.960.

The irrevocable power of Attorney having been executed and registered there is no scope to say that the said irrevocable Power of Attorney was forged unless any positive evidence is adduced, section 114(e) of the Evidence Act, in Aminul Hoque Vs. Noor Jahan Begum reported in 13 BLC 472. The evidence of the scribe of the deed in question would have been the best evidence to establish the

genuineness of the document as in *Ali Akbar (Md.) vs Shajirannessa Bewa and ors* reported in 11BLC(AD) 140. Both the Courts below did not consider the testimony of DW 4, Anjan Kumar who was scribe and testified that before registration of power of Attorney he had read the power of Attorney to the plaintiff and plaintiff admitted that the statements are true and written as he said and thereafter sign the power of Attorney.

All things done before the registration officer will be presumed to be duly done. *Abani Mohan Saha Vs. Assistant Custodian* 39 DLR (AD) 223 provided that-

“The Registration is a solemn act, to be performed in the presence of the competent official appointed to act as registrar, whose duty is to attend the parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order”

Therefore the irrevocable Power of Attorney itself has to be proved. The terms of Power of Attorney cannot be proved by any other mode of proof, *Amanat Ullah Howlader vs Abu Hanif Howlader (Civil)*, 21 BLC 307 and no evidence is admissible to vary the contents of the documents by any oral evidence, *Joynal Abedin Molla Vs. Aliar*

Rahman and others reported in 1983 BLD (AD) 105. Moreover any evidence to vary the terms of deed is barred under the provisions of section 91 of the Evidence Act, Moyez Uddin Ahmed vs Dr. Mamunur Rashid (Civil) 23 BLC 24. It is the settled principle of law the nothing short of a decree of a competent civil court can undo a registered instrument and if this type of cancellation of a registered instrument is allowed to continue there would be no sanctity of any registered instrument in the case Rahmat Goni vs Meherun Nessa and Ors 12 MLR (AD) 166.

Both the courts below raised the question that after receiving the full amount why the plaintiff executed and registered irrevocable Power of Attorney and why the defendant received Power of Attorney but not the sale deed and the defendant No.1 did not produce any evidence why the plaintiff executed power of Attorney but not the sale deed. The learned Appellate Court also reviewed "Exhibit ka" and found that Prajeet Data Chowdhury son of the plaintiff had been signed only on 2nd page of the power of Attorney and no terms and conditions were written in the said page and no explanation was given why the witnesses signed in said page and it is customary practice that witnesses signed the last page of the deed. The plaintiff was the creator of the Power of Attorney and it is well settled principal that no one can get benefit on his own fault as in the case of Secretary,

Ministry of Industries, Nationalized Industries Division vs Saleh Ahmed and another reported in 46 DLR(AD) 148.

Moreover, the witness of the P.Ws and D.Ws and material exhibit marked were not also properly scrutinized by the courts below. Both the two courts below did not consider these material aspects as I have stated above and as such their judgment and orders are based on non consideration of material evidence on record and law.

In view of the above facts and circumstances of the case as the plaintiff opposite party has totally failed to prove his own case, I am of the view that both the two courts below has committed an error of law resulting in an error in the decision occasioning failure of justice.

In view of the discussion made above, I find merit in this Rule.

Accordingly, the Rule is made absolute without any order as to cost. The impugned judgment and decree dated 06.10.2019 passed by the learned Additional District Judge, 1st Court, Sylhet in Title Appeal No. 315 of 2012 and the judgment and decree dated 21.10.2012 passed by the learned Senior Assistant Judge, Sadar Additional Court, Sylhet in Title Suit No. 245 of 2012 be set-aside.

Send down the L.C.R along with a copy of this judgment to the concerned court for information and necessary action.