

Present:-***Mr. Justice Mahmudul Hoque*****Civil Revision No. 3909 of 2016**

Bangladesh, represented by the Deputy
Commissioner, Mymensingh and another
... Petitioners

-Versus-

Swapan Kumar Sen Gupta and others

... Opposite- parties

Ms. Mahbuba Akter Jui, DAG with

Mr. Manowarul Islam, AAG and

Ms. Rohani Siddiqua, AAG

...For the petitioners

Mr. Abdul Wadud Bhuiyan, Senior Advocate with

Ms. Nadira Akhter, Advocate

...For the opposite-party Nos.1-3 & 5-6.

Judgment on 12th March, 2025.

On an application under Section 115(1) of the Code of Civil Procedure, this Rule was issued calling upon the opposite party Nos. 1-6 to show cause as to why the impugned judgment and decree dated 30.07.2006 passed by the learned Joint District Judge, 2nd Court, Mymensingh in Other Class Appeal No.07 of 2003 disallowing the appeal and thereby affirming the judgment and decree dated 30.09.2002 passed by the learned Assistant Judge, Trishal, Mymensingh in Other Class Suit No.147 of 2000 decreeing the suit should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compus. The opposite party Nos.1-6, as plaintiff, instituted Other Class Suit No. 42 of 1989 in the Court of Sub-Judge, 1st Court, Mymensingh, renumbered as Other Class Suit No.48 of 1996 on transfer to the Court of Assistant Judge, Haluaghat and again renumbered as Other Class Suit No.147 of 2000 on transfer to the Court of learned Assistant Judge, Trishal, Mymeningh, against the present defendant-petitioners, for a decree of Specific Performance of Contract, claiming that the property belonged to one Kiran Bala Sen Gupta. Defendant No. 2 started a proceeding treating the property as vested property. Kiran Bala Sen Gupta filed Other Class Suit No. 535 of 1980 against the government challenging V.P. proceeding claiming title in the property by way of settlement and adverse possession. The suit was decreed on contest on 22.01.1987. Defendant No. 2 preferred Other Class Appeal No. 50 of 1985 before the learned District Judge, Mymensingh against that decree and the appeal was dismissed on 05.12.1988. In the midst of 1988 Kiran Bala Sen Gupta proposed to sell the suit land and the present plaintiffs agreed to buy the property and the market price of the suit land was settled at 70,000/-. Kiran

Bala received Tk. 60,000/-, as earnest money on 03.01.1989 and executed a Bainapatra. Kiran Bala promised that after obtaining income tax clearance certificate within three months and receiving the rest consideration money, she would execute and register the sale deed. It is also agreed that if she failed to execute and register sale deed within three months, the plaintiffs would be entitled to get the deed executed and registered through the court. As part performance of contract, Kiran Bala Sen Gupta handed over possession of a part of the suit land. On 25.01.1989 all of a sudden Kiran Bala died and failed to execute and register the sale deed. Kiran Bala was a widow having no issue. Defendant No. 1 is her niece and for that reason she has been made party in this suit.

Defendant No. 2 filed a written statement denying the material allegations made in the plaint contending inter alia that the suit land appertaining to S.A. Plot No. 7740 and R.O.R. Plot No. 1263 belonged to Bijendra Kishore Roy Chowdhury. The suit land was involved in V.P. Case No. 8(Ka)-79-80, as such, Kiran Bala cannot enter into a sale agreement with the plaintiffs for sale of the property. Plaintiffs created a forged Bainapatra. The suit property was

requisitioned for residential accommodation of government employees vide House Requisition Case No. 41 of 60-61, but decree were obtained in Other Class Suit No. 535 of 1980 and Other Class Appeal No. 50 of 1985 using concocted facts and adducing false evidence. Plaintiffs filed this suit to grab the government property making false story. Hence, the suit is liable to be dismissed.

The trial court framed 4(four) issues for determination of the dispute. In course of hearing the plaintiffs examined 5(five) witnesses as P.Ws and the defendants side examined none. The plaintiffs submitted some documents in support of their claim which was duly marked as exhibits. The trial court after hearing decreed the suit by its judgment and decree dated 30.09.2002.

Being aggrieved by and dissatisfied with the judgment and decree of the trial court the defendant No. 2-government preferred Other Class Appeal No.07 of 2003 before the learned District Judge, Mymensingh. Eventually, the appeal was transferred to the Court of learned Joint District Judge, 2nd Court, Mymensingh for hearing and disposal who after hearing by the impugned judgment and decree dated 30.07.2006 disallowed the appeal and thereby affirmed the

judgment and decree of the trial court. At this juncture, the defendant No.2-appellant-petitioners moved this Court by filing this application under Section 115(1) of the Code of Civil Procedure and obtained the present Rule and order of stay.

Ms. Mahbuba Akter Jui, learned Deputy Attorney General with Mr. Manowarul Islam, Assistant Attorney General appearing for the petitioners at the very outset submit that the suit property covered by S.A. Plot No.7740 and R.O.R. Plot No. 1263 stand recorded in the name of Bijendra Kishore Roy Chowdhury who left the then East Pakistan for India before 1965. Consequently, the property was declared enemy property and entered in the census list, subsequently, has become vested and non-resident property and for its management and control the government started V.P. Case No. 8(Ka)-79-80. Earlier the suit property and the building standing thereon was requisitioned for the government vide Requisition Case No. 41 of 60-61. She submits that though in earlier Other Class Suit No.535 of 1980 and Other Class Appeal No.50 of 1985 it was decided that the property owned by Kiran Bala Sen Gupta, but she did not take any step for releasing the property from the list of vested property. She

further submits that Kiran Bala Sen Gupta was not in possession of the suit property and without getting release of the property from the category of vested and non-resident property cannot claim title and transfer the property to any person like the present plaintiffs. She submits that Kiran Bala Sen Gupta did not execute alleged bairanama and received any consideration money from the plaintiffs, but in the absence of Kiran Bala Sen Gupta, the plaintiffs created the bairanama showing the same executed by Kiran Bala Sen Gupta by putting thumb impression, whereas Kiran Bala Sen Gupta was a well educated woman. She submits that the plaintiffs though examined 5 witnesses including plaintiff No.2 in support of their claim, but all the witnesses in their evidences contradicted each other and the plaintiffs could not prove execution of bairanama by Kiran Bala Sen Gupta.

She finally submits that the trial court as well as the appellate court while decreeing the suit and disallowing the appeal did not even discussed any of the evidences adduced by P.Ws and superficially found that case of the plaintiffs has been proved by the evidence and decreed the suit, as such, both the courts below committed illegality and error of law in the decision occasioning failure of justice.

Mr. Abdul Wadud Bhuiyan, Senior Advocate with Ms. Nadira Akhter, learned Advocate appearing for the opposite party Nos. 1-3 and 5-6 submits that in earlier Other Class Suit No.535 of 1980 and Other Class Appeal No. 50 of 1985 it was finally decided that Kiran Bala Sen Gupta was owner of the property. In support of such contention the plaintiffs submitted judgment and decree passed in Other Class Suit No.535 of 1980 and Other Class Appeal No. 50 of 1985 (Exhibits-1 and 2). Kiran Bala Sen Gupta was a widow without any issue, she had no heirs to inherit her from husband side, but only niece was alive named Hasi Sen Gupta. The plaintiffs used to take care of her and at the midst of 1988 she expressed her intention to sell the suit property. The plaintiffs agreed to purchase the same at a consideration of Tk. 70,000/- out of which the plaintiffs paid 60,000/- to her and upon receipt of said advance she executed a bainanama in favour of plaintiffs on 03.01.1989 in presence of deed writer and the witnesses thereto, by putting thumb impression (Exhibit-3). It was stipulated in the agreement for sale that she will execute and register sale deed within 3 months after obtaining income tax clearance

certificate, but suddenly she died on 25.01.1989 and as such, could not execute and register the sale deed in favour of the plaintiffs.

Mr. Bhuiyan by referring evidences of all the P.Ws submits that the witnesses proved execution of bainanama, payment of consideration to Kiran Bala Sen Gupta and also proved that Kiran Bala Sen Gupta after execution of bainanama died at home. The trial court upon consideration of the documents and evidences adduced by the plaintiffs held that in the absence of any contrary evidence on the part of the defendants, the plaintiffs could able to prove their case and decreed the suit. The appellate court also concurrently found that the plaintiffs could able to prove their case by adducing 5 witnesses who proved execution of bainanama by Kiran Bala Sen Gupta and payment of consideration in their presence. As such, concurrent findings of both the courts below are not liable to be interfered with in revisional jurisdiction unless there is misreading and non consideration of the evidences on record.

He finally submits that witnesses told that Kiran Bala Sen Gupta was a literate woman, she could write and read well but because of her illness she could not sign rather executed the

bainanama by putting thumb impression. No contrary evidence came out from counterpart, as such, there is no earthly reason to disbelieve the evidences adduced by the plaintiffs and to find any defect in the bainanama. Therefore, both the courts below committed no illegality and error of law in the decision, in decreeing the suit and disallowing the appeal and as such, the Rule is liable to be discharged.

Heard the learned Deputy Attorney General and the learned Advocate for opposite parties, have gone through the revisional application, plaint in suit, written statement, evidences of all the P.Ws, bainanama dated 03.01.1989, judgment and decree passed in Other Class Suit No.535 of 1980 and Other Class Appeal No. 50 of 1985 and the impugned judgment and decree of both the courts below.

Admittedly, the property in question belonged to one Bijendra Roy Kishore Chowdhury as recorded in C.S. Khatian No. 866 and R.O.R. Khatian No. 1263 measuring 1950 ajutangsha. The property earlier declared vested and non-resident property by the government on the ground that Bijendra Roy Kishore Chowdhury left the then East Pakistan during Indo-Pak War 1965 for India. Consequently, the property in question declared enemy property. After independence of

Bangladesh all the enemy property renamed as evacuee property and then vested and non-resident property. The government started V.P. Case No. 8(Kha) of (79-80) for its management and control. Before that, the government claimed that the property was requisitioned by the government vide Requisition Case No.41 of (60-61) and being used for the purpose of residence of government employees, since then the landed property along with house standing thereon under the possession of the government till today. The plaintiffs claimed that Kiran Bala Sen Gupta claiming herself as owner of the property filed Other Class Suit No. 535 of 1980 in the Court of Munsif, 2nd Court, Trishal, Mymensingh against the present petitioner-government and another, as defendants.

The government contested the suit by filing written statement on the same averments made in the present suit. The trial court after hearing by judgment and decree dated 22.01.1985 decreed the suit. In the plaint in Other Class Suit No.535 of 1980 at para 3 she claimed that her father-in-law Umanath Sen Gupta was an employee under Gouripur Jamidary Estate of Sreejukto Bijendra Kishore Roy Chowdhury and subsequently, her husband Hemanta Nath Sen Gupta

was appointed in his place after her retirement and at para 6 she stated that she had education, can write and read. In the judgment of Other Class Suit No.535 of 1980 the trial court observed that plaintiff Kiran Bala Sen Gupta entered into an agreement for sale with a person who filed Other Class Suit No. 377 of 1980 in the court of 1st Sub-ordinate Judge, Mymensingh against Kiran Bala Sen Gupta and also she executed and registered a Power of Attorney for the property appointing one Paritosh Sen. However, the court decreed the suit finding title of the plaintiff in suit by adverse possession. The government preferred Other Class Appeal No.50 of 1985 which was also dismissed on contest, meaning thereby, the property belonged to Kiran Bala Sen Gupta and it was not vested and non-resident property. After obtaining decree from court Kiran Bala Sen Gupta took no step for correction of the khatian in her name and to get back the possession of the property by evicting the possessors. The plaintiff of the instant suit as well as the defendant-government did not file any papers regarding filing of Other Class Suit No.377 of 1980 against Kiran Bala Sen Gupta in the court of 1st Subordinate Judge (now Joint District Judge), Mymensingh and could not apprise the court about

faith of that case. When Kiran Bala Sen Gupta executed a bainanama in favour of a person for selling the property at a consideration of Tk. 33,000/- who filed a suit for Specific Performance of Contract, without disposal of the said suit, how she could enter into an agreement for sale with the plaintiffs. The plaintiffs in their plaint at the end of paragraph 3 has stated that:

“কিরন বালা সেন গুপ্তা এজাহারী বিক্রয় চুক্তির প্রবৃত্তি মূলে ঐ চুক্তির- Part performance হিসাবে নালিশী সম্পত্তির একাংশে বাদীগনকে দখল প্রদান করিয়াছি-লন, কিন্তু দুঃ-খর বিষয় বিগত ২৫/০১/১৯৮৯ইং তারিখে কথিত কিরন বালা সেন গুপ্তা নিজ সাকিনে আকস্মাৎ সকাল বেলায় মৃত্যু বরণ ক-রন।”

At the end of paragraph 4 cause of action for filing of the suit has been stated as;

“বিগত ০৩/০১/১৯৮৯ইং তারিখে নালিশী সম্পত্তির মালিক কিরন বালা সেন গুপ্তা এজাহারী বায়নাপত্র দলিল বাদীগন অনুকু-ল সম্পাদন করায় এবং তিনি বিগত ২৫/০১/১৯৮৯ইং তারি-খ এতেদেদশে কোন ওয়ারিশ বিহী-ন মৃত্যুবরণ করায় ঐ তারিখ অন্তে অত্র মোকদ্দমার কারন উদ্ভব হইয়া-ছ।”

which has been inserted by hand writing, subsequently, they got their plaint amended on 17.07.1977 incorporating a fact that the defendant No.2 took over possession of the portion of the suit land from them and kept the house under lock and key, sometimes they

used the house for temporary residence without mentioning any date of dispossession and also incorporated a prayer for recovery of possession. The petitioner-government though filed written statement, but examined no witnesses in support of their claim. Resultantly, they failed to substantiate their claim though filed written statement. Both the courts below in their judgments did not discuss any evidence adduced by the plaintiffs. To appreciate the case of the plaintiffs, evidences adduced by them may be looked into. Defendant No.2, Tapan Kumar Sen Gupta deposed as P.W.1 who deposed for him and on behalf of other plaintiffs. He stated that:

“বাদীরাই তা-ক (কিরন বালা সেন গুপ্তাকে) দেখাশুনা করত । কিরন বালা বৃদ্ধা ও বিধবা ছি-লন, তার কোন সন্তান ছিল না। তিনি ১৯৮৮ সনের শেষ দিকে নালিশী জমি বিক্রির প্রস্তাব করেন। আমরা ৭০,০০০/- টাকার ম-ধ্য ৬০,০০০/- টাকা বায়না দেই ইং-রজী ০৩/০১/১৯৮৯ তারিখ । বায়না পত্রের লেখক বায়নাপত্রটি কিরন বালা-ক পড়িয়া শোনান। তিনি নিজেও বায়নাপত্রটি পড়েন। তিনি উক্ত বায়নাপত্র টিপ দিয়ে সম্পাদন করেন। তিনি বয়স্ক হওয়ায় হাত কাঁপ-তা ব-ল স্বাক্ষর কর-ত পা-রন নাই।”

But in the plaint no such statement is found. He further stated that:

“কিরন বালার এক ভাই ছিল তাহার নাম জানি না। কিরন বালা লেখাপড়া জান-তা, নাম দস্তখত কর-তা । কিরন বালা মৃত্যু সম্পর্কিত কোন সার্টিফি-কট আদাল-ত দাখিল করি নাই। তার অন্ত্যেষ্টিক্রিয়ার সময় আমি উপস্থিত ছিলাম না। কথিত ভাতিজি হাসি সেন গুপ্তাকে

নালিশী জমির সাফ কবলা ক-র দি-ত বলি নাই, তা-ক এ বিষ-য় চিঠি দেই নাই। নালিশী জমির ঘ-র তালা মারা বিষ-য় আমি ডি,সি, কে কিছু জানাই নাই। বায়না পত্রের স্ট্যাম্প দলিল লেখক কি-নছি-লা কার না-ম কি-নছিল তা আমি জানি না।”

Subsequently, on recall he stated that death certificate of Kiran Bala Sen Gupta has been filed, but no such certificate is found in the record as exhibit. P.W.2 named Md. Shamsuddin Talukder who deposed as deed writer, told that he has written the bainanama at the home of Kiran Bala, price for the property was settled at Tk.70,000/- out of which Tk.60,000/- was paid in his presence and Kiran Bala executed the bainanama by putting her thumb impression and he identified the same as Exhibit-3/(ka) and his signature Exhibit-3/(kha) and he told that:

“বায়না পত্রটি সঠিক, জাল নয়।”

In cross he stated that:

“দলিল লেখার সময় বাদী-দর একজন ছিল না। মোট ৬ জন লোক ছিল তখন। আমি টাকা হা-ত নি-য় কিরন বালার হা-ত দি-য়ছি। সে তা গুনেছে কিনা তা ম-ন নাই। তখন অ-নক লোক ছিল। সবাই লেখাপড়া জান-তা। আমি শু-নছি যে, কিরন বালা মারা গে-ছ। ক-ব মারা গেল জানি না। আমি জমির দখল গ্রহীতা-দর দেবার কথা শু-নছি।।”

P.W.3, Protap Chandra Paul who is an attesting witness to the bainapatra. He stated that:

“আমি ১৪নং বি-শুশুরী দেবী রোড দোকান করি। নালিশী জমি হ-ত উহা ৫০/৬০ গজ দূ-র। আমি নালিশী জমি Vested property হওয়া বিষ-য় কিছু জানি না। ৬০ হাজার টাকা লেন-দন হয় আমার সামনে, বায়নাপত্র হয়। সামছুদ্দিন তালুকদার বায়নাপত্র আমার সাম-নই লে-খ। কিরনবালা প্যারালাইসিস অসু-খ তার হাত কাঁপ-তা, এজন্য টিপ দিয়ে বায়নাপত্র সম্পাদন করেছে। আমি বায়নাপত্রে সাক্ষী হিসা-ব দস্তখত করি। এই সেই দস্তখত (প্রদর্শনী-৩/গ)। বায়নাপত্রটি হয় ০৩/০১/১৯৮৯ইং তারিখ। তর্কিত দলিলটি সঠিক।”

In cross he stated that:

“কিরনবালা প্যারালাইসিস হ-য় সে প্রায় দুইমাস শয্যাশায়ী ছিল। হাসি সেন গুপ্তার নাম শু-নছি, কখ-না দেখি নাই। কিরন বালা অসুস্থ থাকাবস্থায় আমি দোকান থেকে জিনিস পত্র নিয়ে দিতাম। রঞ্জিত দেবনাথ সব সময় কিরনবালার সা-থ থাক-তা। রঞ্জিত বাবুর ছাত্রাবস্থায় নালিশী জমি কিরনবালা বিক্রি করেছে। রঞ্জিত বাবু টাকা কিরনবালার হা-ত দি-য়-ছ, টাকার বাড়িল ছিল কিন্তু টাকা গোনা হয় নাই। কিরনবালা কাপড়ে গুজে টাকা ঘরে নিয়ে গেছে। উক্ত টাকা নেবার ৪/৫ মাস প-র কিরন বালা মারা গে-ছ।”

P.W. 4, Md. Abdul Kader in-chief stated that:

“উক্ত বায়নাপত্রের সময় আমি ছিলাম। বায়না পত্রের টাকা আমার সাম-ন লেন-দন হয়। ১নং বাদী (স্বপন কুমার সেন গুপ্ত) কিরন বালার হা-ত ৬০ হাজার টাকা দি-য়ছিল। বায়নার পর নালিশী জমির দখল বাদীপ-ক্ষর বরাব-র বুঝাইয়া দেয়া হয়। ১নং বাদী কিরনবালা সেন গুপ্তের শ্রাদ্ধ ক-র-ছ। আমি শ্রাদ্ধ অনুষ্ঠা-ন ছিলাম।”

In cross he stated that:

“আমি হাসি সেন গুপ্তকে দেখি নাই। হাসি সেন গুপ্ত (১নং বিবাদী) সে ভার-ত থা-ক ব-ল শু-নছি। শু-নছি সে জীবিত আ-ছ। নালিশী জমির আ-শ পা-শ আমার জমি নাই। কিরনবালা লেখাপড়া জান-তা। আমি

উক্ত বায়নাপত্রে সাক্ষী নই। কিরনবালা নিজে টাকা গুনে নিয়েছে। কিরন বালা বার্ষিক্যজনিত -রা-গ মারা গে-ছ। তার মারা যাবার সময় তার স্বামী বা কোন ওয়ারিশ জীবিত ছিল না। ৬০ হাজার টাকা দি-য় কিরনবালা কি ক-র-ছ তা আমি জানি না। আমি কমিশনার প-দ নির্বাচন ক-রছিলাম। নালিশী জমির প্রতি শতাংশ এর মূল্য ১ থে-ক $1\frac{1}{2}$ লাখ টাকা হ-ব।”

P.W.5 Gouranga Chandra Saha in-chief stated that:

“আলাপ আলোচনা ও বায়নাপত্র হবার সময় আমি উপস্থিত ছিলাম। স্বপন সেন গুপ্ত বায়নার টাকা কিরন সেন গুপ্তকে দিয়েছিল। কিরন বালা সেন গুপ্ত মারা গেছে। বাদীরা কিরনবালার দাহ ও শ্রাদ্ধ ক-র-ছ। আমি শ্রা-দ্ধর অনুষ্ঠা-ন ছিলাম।”

In cross he said that:

“নালিশী জমি-ত কেনার পর বাদী-দর বাড়ীঘর নাই। নালিশী জমি নি-য় আর কোন মামলা আ-ছ কিনা জানি না। কিরনবালা নি-জ টাকার বাড়িল ৬ টি গুনে নিয়েছে। সে টাকা দিয়ে কি করেছে জানি না। সে বার্ষিক্যজনিত কার-ণ মারা গে-ছ। মারা যাবার দিন তার বাসায় আমি ছিলাম না, প-র শূশা-ন গি-য়ছিলাম।”

From perusal of evidences of P.Ws, it appears that admittedly Kiran Bala Sen Gupta was an educated woman. P.W.1 stated that because of her old age she could not sign, but put thumb impression. He did not even utter a single word who has paid Tk.60,000/- as baina to Kiran Bala Sen Gupta. He only said we paid Tk. 60,000/- on 03.01.1989. He said that he was not present in the cremation

ceremony of Kiran Bala Sen Gupta and could not file or submit any paper to show that Kiran Bala had been suffering from any illness or she died on 25.01.1989 by submitting any death certificate showing cause of her death. P.W.2, deed writer, Shamsuddin Talukder clearly stated that he has given advance money to Kiran Bala Sen Gupta. P.W.3, Protap Chandra Paul alleged attesting witness stated that Kiran Bala had been suffering from paralysis for and she was bedridden for 2(two) months and stated that Ranjit Babu (plaintiff No.6) paid the advance amount to Kiran Bala. Kiran Bala by covering the said money took the same in her house and she died after 4/5 months of execution of bainanama. P.W.4, Md. Abdul Kader stated that the money paid in his presence. Swapan Kumar Sen Gupta (plaintiff No.1) paid Tk. 60,000/- to Kiran Bala. He could not say when Kiran Bala died. He claimed himself as B. A. passed but he is not an attesting witness to the bainanama. P.W.5, Gouranga Chandra Saha stated that:

“স্বপন সেন গুপ্ত বায়নার টাকা কিরন বালা সেন গুপ্তাকে দিয়েছিল।”

In cross said that:

“Kiran Bala Sen Gupta was educated woman. I was present at the time of execution of bainanama. I don't know how many house standing on the suit land and who is in possession of the same now. Kiran Bala received the money in 6 bundles by counting the same. She died of old age.”

All the evidences led by P.Ws established that they contradict each other in respect of payment of money and receipt of the same by Kiran Bala. Majority witnesses stated that Kiran Bala died of old age. But one of the P.Ws stated that she had been suffering from paralysis and was bedridden for 2(two) months. Thereafter, he told that Ranjit made payment of Tk.60,000/- to Kiran Bala and Kiran Bala after receipt of money covering the same with cloth took in her house. Had it been so, Kiran Bala was not suffering from paralysis and bedridden. He is an attesting witness to the bainanama, he used to reside 50/60 yards away from suit land and he used to visit house of Kiran Bala Sen Gupta regularly, as he used to supply all the necessary goods for Kiran Bala Sen Gupta. He told that Kiran Bala died after 4/5 months of execution of bainanama, but in the plaint and P.Ws. 1, 2 and 4 stated that she died after 20/22 days from the date of execution of the bainanama. All those evidences contradict each other. The plaint

shows that defendant No.1, Hasi Sen Gupta resides in Jalpaiguri, West Bengal, India. No notice or summon served upon her through court as appearing from the order sheets. Order No.12 dated 14.03.1990, Order No.5 dated 10.06.1990 show that the plaintiffs filed an application praying for service of summon upon defendant No.1 by beating drum.

The trial court by its order dated 28.08.1990 allowed the prayer and treated service of summon upon defendant No.1 by beating drum in the locality, whereas she was not resident of this Country at the time of filing of the suit as appearing from address given in the plaint. Moreover, how defendant No.1 is related to Kiran Bala Sen Gupta, through whom, has not been clearly stated in the plaint as well as in the evidences. The plaint disclosed that one of his distant relation defendant No.1 living in India. Cause of action for filing of the suit stated that Kiran Bala Sen Gupta died on 25.01.1989 without any issue and her death has given rise cause of action to file the present suit.

In a suit for Specific Performance of Contract cause of action arises on and from the date of refusal to execute and register the sale deed on demand by the plaintiffs, but the plaintiff No.2 while

deposing before the court stated that they did not demand execution and registration of the sale deed from defendant No.1 and did not raise any objection for dispossession by the local administration by filing any application before Deputy Commissioner, Mymenisngh and they did not offer balance amount to the defendant No.1. All these facts and circumstances of the case established that the cause of action for filing of the suit against the defendant No.1 has no basis at all. It is not understandable how defendant No.1 is at all liable to be made party in the suit where she was not asked to execute sale deed on the basis of bainanama executed by Kiran Bala Sen Gupta and no demand whatsoever made by the plaintiffs demanding execution and registration of Kabala from her. In the absence of offer of balance consideration of money, demand of execution and registration of kabala either the defendant No.1 or defendant No.2, I find no cause of action for filing of the suit.

Apart from this, as admitted by the plaintiffs and other witnesses, Kiran Bala Sen Gupta was a literate woman, she filed earlier Other Class Suit No. 535 of 1980 by signing her name in the

plaint, as appearing from the plaint in Other Class Suit No. 535 of 1980 called for by this court.

From perusal of plaint in that suit, it appears that she was well educated lady. In the absence of any statement in the plaint and statement of the P.W.1, I find that she was not suffering from any illness and her date of death has not been proved by any document before the trial court. In the absence of any evidence of her death either of old age or of illness it cannot be construed that Kiran Bala died in this Country.

Moreover, from perusal of alleged bairanama, it appears that Kiran Bala's thumb impression put on the stamp as well as on the cartridge paper are illegible. In the absence of any evidence of her illness or suffering from any diseases and not capable of putting her signature it cannot be construed that the thumb impression was put by Kiran Bala Sen Gupta. Because of all this situations the plaintiffs by evidence could not prove that Kiran Bala Sen Gupta entered into agreement for sale of the suit property with the plaintiffs and she executed a bairanama and died after 22 days without execution and registration of the deed in favour of the plaintiffs.

The trial court as well as the appellate court did not discuss the evidences both oral and documentary in its true perspective and failed to find serious contradictions between the evidences of P.Ws and also failed to find that there had no earthly reason to put thumb impression by Kiran Bala Sen Gupta who was an educated woman.

Since the case has not been proved beyond doubt a relief for Specific Performance of Contract which is an equitable relief and depends on the discretion of the Court cannot be given for mere asking of it. It is settled principle of law that to get a decree the plaintiffs are to prove their case independent of the case of the defendants. But in the instant case, the plaintiffs failed to prove their case to get a decree for Specific Performance of Contract.

In view of the above, this Court finds merit in the Rule as well as in the submissions made by the Deputy Attorney General for the petitioners.

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

The judgment and decree passed by the trial court as well as the appellate court are hereby set aside; consequently, the suit is dismissed. In the absence of any claimant of the property Deputy Commissioner, Mymensingh representing the Government shall take management and control of the property.

The order of stay granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned and send down the lower court records along with called for records of Other Class Suit No. 535 of 1980 and Other Class Appeal No.50 of 1985 at once.