

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

First Appeal No. 62 of 2016

In the matter of:

Md. Abul Kalam Azad

... Appellant

-Versus-

Abul Hossain and another

... Respondents

Mr. Md. Abdul Kader Bhuiyan, Advocate

...For the appellant

Mr. Abdul Baten, Advocate

....For the respondent no.1

Mr. Md. Rezaul Karim, Advocate

....For the respondent no. 3

**Heard on 11.03.2024 14.03.2024
and Judgment on 19.03.2024**

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of the plaintiff in Title Suit No. 1028 of 2011, this appeal is directed against the judgment and decree dated 01.12.2015 passed by the learned Joint District Judge, 2nd court, Narayangonj in the said Suit dismissing the same.

The precise facts so have been figured in the plaint of the suit are:

By virtue of several sale deeds dated.23.04.1988, 06.08.1988 and 20.05.1990 the defendant acquired 10.50 decimals of land and while he had been enjoying title and possession over that 10.50 decimals of land, he offered to sale the same when the plaintiff expressed his interest to

purchase the property fixing its valuation at taka 50,00000/-. The plaintiff then on 24.10.2010 paid taka 45,00000/- in presence of the witnesses and it was agreed that rest amount of taka 5,00000/- will be paid in one year. Subsequently, the plaintiff time and again requested the defendant no. 1 to register the sale deed by receiving the balance amount of taka 5,00000/- but the defendant did not pay any heed to the said request and lastly he (the plaintiff) on 24.10.2011 asked the defendant to register the sale deed when he refused to do so and hence the suit.

The defendant-respondent no. 1 entered appearance in the suit and to contest the same filed a written statement denying all the material averments so made in the plaint contending inter alia that, after purchasing the suit property the defendant erected a three-storey building thereon with a foundation of four storey building and started enjoying title and possession over the building by giving rent to different tenants where his wife has been residing in the second floor of the building. Since the defendant and his wife has been residing in Germany for several years he thus devolved the responsibility upon his brother-in-law namely, Abdur Razzak to look after the building and to collect rents from the tenants who upon receiving the same would regularly send to the defendant. It has further been stated that, the plaintiff is the nephew of the defendant no. 1 and in order to look after other property including the suit property, he on 23.09.2010 executed and registered a power of attorney in favour of the plaintiff where he did never give any authority to dispose of the suit property in any manner rather since the plaintiff has been forged the deed of agreement for sale (precisely *bainapatra*) the defendant no. 1 then compelled to file a C.R Case No. 174 of 2011 and apart from that, there

have been several criminal cases pending among the plaintiff and the defendant. Subsequently, at the intervention of the respected persons of the locality including the learned lawyers of Narayangonj District bar association, a mediation has been made when on 18.10.2011 where it has been settled that both the parties would withdraw the suit and criminal cases including cancelling the *Bainapatra* on their own accord but in spite of agreeing the terms and condition set out in the compromise and putting signature by the plaintiff in it and hence the suit is liable to be dismissed.

In order to dispose of the suit, the learned judge of the trial court framed as many as four different issues and the plaintiff examined four witnesses and produced several documents which were marked as exhibit nos. 1-5 while the defendant no. 1 adduced three witnesses and also produced documents which were also marked as exhibit “ka” to “ga” series. The learned judge of the trial court after considering the materials and evidence and record vide impugned judgment and decree dismissed the suit holding that, section 22 of the Specific Reliefs Act has given discretionary power upon the court and since it has been found from the record that, the defendant executed and registered the *bainapotra* while he was not in a sound mind so *bainapotra* has not been acted upon. It is at that stage, the plaintiff as appellant came before this court and preferred this appeal.

Mr. Md. Abdul Kader Bhuiyan, the learned counsel appearing for the appellant upon taking us to the impugned judgment and decree and all other related documents appeared in the paper book at the very outset submits that, since the *bainapatra* which is the crux of the dispute has been marked as exhibit-1 so under no circumstances can the trial court

dismiss the suit since the execution and registration of the *bainapatra* has been proved by the scribe as well as the attesting witness who appeared as PW 2 and PW 4.

The learned counsel further contends that, since it has also been proved that the consideration of the suit property had been fixed at taka 50,00000/- and at the time of executing and registering the *bainapatrat* on 24.10.2010 the plaintiff paid a substantial portion of the consideration that is, taka 45,00000/- and he deliberately requested the defendant to execute and register the sale deed and since he failed to comply with the said request, so the suit has rightly been filed within the statutory period of limitation after expiry of the tenure of the *bainapatra* and there has been no reason not to decree the suit.

The learned counsel by referring to the compromise petition dated 18.10.2011 which was marked exhibit dha (৩) and dha1 (৩১) also contends that, since as per the compromise petition, the defendant had not withdrawn their suits and criminal cases so for such obvious reason, the plaintiff had not cancelled *the bainapatra* rather filed the suit for getting a decree having no illegality in it yet that very legal point has not been taken into consideration by the learned judge of the trial court while dismissing the suit.

The learned counsel by referring to the testimony of PW-1 to PW-4 also contends that, all those witnesses are the vital witnesses to prove the execution of the *bainapatra* where PW 2 as scribe proved the *bainapatra* while PW 4 being an attesting witness also proved the execution and registration of the *bainapatra* so there has been no scope not to pass decree in favour of the plaintiff-appellant.

The learned counsel by referring to the valedictory portion of the judgment passed by the learned judge of the trial court who solely put emphasis on the mental position of the defendant in executing the *bainapatra* submits that, such assertion simply cannot be any material reason in disbelieving the *bainapatra* since it has been proved that the same has rightly been executed and registered by the defendant in favour of the plaintiff so it turns out that, the learned judge has carried away with some extraneous circumstances which cannot be sustained in law.

The learned counsel by referring to the second part of section 22 of the Specific Reliefs Act also contends that, since no fraud and misrepresentation was found to have played by the plaintiff in getting the *bainapatra* so there has been no scope not to believe the execution of the *bainapatra* and since the same has rightly been furnished by the plaintiff and the defendant so there has been no scope to exercise discretion by the trial court in dismissing the suit. When we pose a question to the learned counsel for the appellant about the source of the money of the plaintiff in purchasing the suit property when the plaintiff himself in his examination-in-chief admitted that, he is a mere a school teacher of a school from where he used to draw 15,000/- per month as salary so how he could gather such staggering amount of money, the learned counsel then contends that, he received the money from his father-in-law having no scope to disbelieve the source of money asserting further that, since that very point has not been raised by the defendant nor it has been discussed by the trial court so the said issue cannot be taken into consideration by this Hon'ble court to disbelieve the transaction of the consideration to the defendant. In response to our subsequent query as to why the plaintiff

without producing the original *bainapatra* produced the certified copy of the same and there is no explanation either in the plaint or in the deposition with regard to not producing the original one, the learned counsel then submits that, since there has been no dispute among the parties with regard to the correctness of the *bainapatra* so that very point is also immaterial in adjudicating the suit. With those submissions the learned counsel finally prays for allowing the appeal by setting aside the impugned judgment and decree.

On the contrary, Mr. Abdul Baten, the learned counsel appearing for the defendant-respondent no. 1 very robustly opposes the contention so taken by the learned counsel for the appellant and contends that, since it has been found by the learned judge of the trial court that, at the time of executing and registering the alleged *bianapatra* the defendant was not in a sound mind and subsequently the parties came to a compromise on which it has been settled that, the plaintiff will cancel the alleged *bainapatra* when the defendant withdraw all the criminal cases and since the compromise petition dated 18.12.2011 was also marked as exhibit dha (၆) and dha1 (၆၁) so there has been no occasion to sustain the alleged *bainapatra*.

The learned counsel by referring to the testimony of PW 3 also contends that, that PW 3 could neither prove the *bainapatra* nor he remained present when the said *bainapatra* was executed rather what he uttered in his testimony that went contrary to the plaint and therefore the learned judge has rightly dismissed the suit.

The learned counsel by referring to the petition of C R case no. 174 of 2010 also contends that, in paragraph no. 3 of that petition it has clearly

been asserted that, authority has not been given to the plaintiff to dispose of the suit land and since the execution of the power of attorney dated 23.09.2010 has not been denied by the plaintiff so subsequent *bainapatra* dated 24.10.2010 is clear violation of the power of attorney which alternatively proves that, by exerting undue influence upon the defendant, the alleged *bainapatra* was executed and registered by the plaintiff having no scope to sustain the same.

The learned counsel also contends that, since the suit was filed on 01.12.2011 near about three months after execution of the compromise petition dated 18.10.2011 which was marked as exhibit dha (၆) and dha1 (၆၁) and that compromise was existing while filing the suit so under no circumstances can the plaintiff has assumed any authority to file the suit other than cancelling the *bainapatra* and therefore the said *bainapatra* cannot exist at all.

The learned counsel lastly by referring to the provision of section 22 of the Specific Reliefs Act also contends that, since that very provision has given discretionary power to the court and the trial court has thus rightly found that, upon taking undue advantage of residing the defendant abroad, the plaintiff has created the *bainapatra* which has never been acted upon and rightly dismissed the suit which is liable to be sustained and the appeal be dismissed.

On the contrary, Mr. Md. Rezaul Karim, the learned counsel appearing for the respondent no. 3 by supporting the case of the defendant respondent no. 1 also submits that, the respondent no. 3 obtained the suit property from his husband, the defendant no. 1 by heba deed dated 19.07.2012 and since the suit was dismissed so the defendant has rightly

transferred the suit property in her favour having no scope to sustain the alleged *bainapatra* and finally prays for dismissing the appeal.

We have considered the submission so placed by the learned counsel for the appellant and that of the respondent no. 1 and 3 at length. Together, we have also gone through the *bainapatra* which is the crux of the dispute in adjudicating the instant suit. It is admitted possession that, the *bainapatra* was marked as exhibit no. 1 without objection by the defendant at the time of taking it into evidence but fact remains, the certified copy of the said *bainapatra* was produced before the trial court but fact remains, when the said *bainapatra* was taking into evidence, the learned judge has not made any query why the original one was not produced even though it was a secondary evidence and in absence of the original document, a certified copy of the same can never be taken into consideration as of evidence and if it does, there must have an explanation as to why such secondary evidence is being produced but nothing sort of this is there either in the plaint or in the evidence of PW-1 at whose instance the alleged *bainapatra* was produced. Furthermore, though none of the parties to the suit has produced the power of attorney dated 23.09.2010 but from the petition of C R case no. 174 of 2011 and the power of attorney so supplied by the learned counsel for the respondent no. 3, we find that, in the power of attorney there has been clear recital that, the plaintiff will look after the suit property and collect the rent from the tenants of the demised building on behalf of the defendant where the plaintiff has not been authorized to take any step in transferring the suit property and since that contents of the power of attorney is admitted by both the parties then subsequent execution of the *bainapatra* clearly

proves to be an invalid document which also cast serious doubt about the transfer of the suit property in favour of the plaintiff. Regardless, since it has been found from the investigation report so submitted in C R case no. 174 of 2011 that out of anger and frustration the defendant executed and registered the *bainapatra* but when the defendant sensed about the outcome of the *bainapatra* then he filed CR case no. 174 of 2011 where he challenged the propriety of the *bainapatra* claiming it to be forged and in the investigation report the clear picture has been surfaced that at that point of time its execution, the defendant was not in a sound mind. Since section 22 of the Specific Reliefs Act has authorized the court to exercise its direction so considering that attending circumstances prevailed at the time of execution the trial court has perfectly exercised its direction. The another aspect of the case is the source of passing alleged consideration of taka 45,00000/- to the defendant as it has been found from the testimony of the PW 1 that he is mere a school teacher having drawn an amount of taka 15,000/- as salary per month so by that meagre income it is quite impossible for anyone to save any money to purchase a property at taka 50,00000/- after maintaining a family and the value of the property could never be taka 50,00000/- only where a three-story building is there. Furthermore, in support of passing of the consideration, PW,1,2,3 and 4 appeared for the plaintiff where PW 4 both in his chief as well as cross examination clearly stated that, the *bainapatra* was executed and registered in the house of the plaintiff but fact remains, the alleged execution and registration was made at Fatulla sub-registry office which cast a serious doubt about passing of the consideration as well as execution of the *bainapatra*. Furthermore, PW 3 who appears to be

hearsay witness and who is a clerk (মহরার) by profession made a different story saying that he was not present when the *bainapatra* was executed vis-a-vis the consideration was passed and he did not know who was the attesting witness remained present at the time of execution of the alleged *bainapatra* stating further that, the date of stamp paper on which the *bainapatra* was written was obtained on 24.10.2014 but fact remains, that very *bainapatra* was registered on 24.10.2010 and has got no knowledge about the signature on the *bainapatra*. On the other hand PW 2 who claimed to be scribe of the *bainapatra* has clearly stated that at the time of executing the *bainapatra* taka 45,00000/- was transacted but in whose presence that very staggering amount of taka 45,00000/- was handed over to the defendant has not been disclosed. When PW-4 could not say who was another attesting witness even though there have been two attesting witness in the alleged *bainapatra*, so he was supposed to know another attesting witness who in the same sitting put their signature and therefore the evidence so given by the PW 2 and PW 4 cannot be believed and taken those as true.

On top of that, since before filing of the suit dated 01.12.2011 the parties to the suit entered into a compromise on 18.10.2011 and the plaintiff agreed to cancel the *bainapatra*, and to withdraw all the suits and the criminal cases pending against them and since the said compromise petition was marked at the instance of the defendant as exhibit dha (ঢ) and dha1 (ঢ১) even without any objection from the plaintiff and since the compromise petition is proved so there has been no scope on the part of the plaintiff not to cancel the alleged *bainapatra* who agreed its contents by putting his own signature in those two vital documents.

Then again, the plaintiff could produce his father-in-law to prove the source of money he paid to the defendant no. 1 and as he failed to do so then it also proves that in fact no amount was paid at the time of execution of *bainapatra*.

Given all the facts, circumstances, discussion and observation we are of the view that, the learned judge of the trial court has not committed any error of law in dismissing the suit and has correctly exercised his discretion in dismissing the suit which is based on materials and evidence on record and is liable to be sustained.

Accordingly, the appeal is dismissed however without any order as to costs.

The plaintiff-appellant is at liberty to withdraw taka 5,00000/- from the trial court in accordance with law.

Let a copy of this judgment and order along with the lower court records be communicated to the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.