

Criminal Misc. Case No. 66584 of 2022

Present:

Mr. Justice S M Kuddus Zaman

And

Mr. Justice A.K.M. Rabiul Hassan

Monir Ahmed

.... Petitioner

-Versus-

The State and another

.... Opposite Parties

Mr. M. Sayed Ahmed, Advocate with

Mr. Rafi Ahmed, Advocate

.... For the accused-petitioner

Mr. Md. Abdun Nur, Advocate

.... For the complainant opposite party No. 2.

Heard and Judgment on 31.07.2024

S M Kuddus Zaman, J:

This application under section 561A of the Code of Criminal Procedure, at the instance of the sole accused namely Monir Ahmed of C.R. Case No. 454 of 2022 under section 406/420/506 of the Penal Code is for quashment of above proceedings.

Facts in short are that opposite party No. 2 as complainant lodged a complaint alleging that the accused petitioner as the rightful owner and possessor of Monir Tower entered into an agreement with the complainant for sale of two apartments along with five car parking space of above Tower for a total price of Tk. 6,90,00,000.00 and on receipt of Tk. 3,58,75,000.00 he executed and registered a deed of Bainapatra on 25.07.2019.

In above Bainapatra it was stated that above two apartments along with car parking space were free from all encumbrance and the same was not sold or mortgaged to any

other person. But in fact the accused petitioner obtained a loan of Tk. 15,00,00,000.00 from Hajj Finance Ltd. on 27.07.2017 by mortgaging above property. By deliberate suppression of above material facts in above Bainapatra the accused petitioner has committed the offence of cheating punishable under section 420 of the Penal Code, 1860.

The learned Judicial Magistrate framed charge against the accused petitioner under section 420/406/506 of the Penal Code and fixed the case for recording of evidence.

Being aggrieved by and dissatisfied with the initiation of above proceedings above accused as petitioner moved to this court and obtained this rule and stay.

Mr. M. Sayed Ahmed, the learned Advocate for the petitioner submits that undisputedly the petitioner was the rightful owner and possessor of the disputed property namely Monir Tower and he had every right to keep the impugned property in mortgage as well as transfer of the same. The petitioner entered into an agreement for sale with the complainant and on receipt of advance money he executed and registered a deed of Bainapatra. The petitioner wanted to pay off the mortgage on receipt of full consideration money from the complainant and thereafter execute and register a deed for sale. Since the complainant did not pay the remaining consideration money the petitioner instituted Title Suit No. 290 of 2021 on 14.11.2021 for cancellation of above Bainapatra. After institution of above civil suit by the petitioner the complainant has filed this false case on 23.03.2022.

Moreover, in this case the complainant has claimed that the impugned Bainapatra has been vitiated by fraud but he has

filed title Suit No. 184 of 2022 on 11.04.2022 for enforcement of above Bainapatra instead of filing a suit for recovery of advance money and compensation. The initiation of the instant proceeding is misconceived which shall not settle any dispute between the parties rather cause unnecessary sufferings to the accused petitioner which amounts to abuse of the process of the court.

On the other hand Mr. Abdun Nur, the learned Advocate for the opposite party No 2 submits that undisputedly the accused petitioner mortgaged disputed property to Hajj Finance Ltd. and obtained a loan of taka 15(fifteen) crore and by misrepresentation and concealment of above material facts executed and registered the impugned deed of Bainapatra for above property to the complainant and obtained advance money. Had the accused disclosed above material facts as to above mortgage the complainant would not enter into above agreement for sale. By above deliberate misrepresentation and non-disclosure of material facts of mortgage of above property the accused has committed cheating as has been defined in section 415 of the Penal Code. The learned Judicial Magistrate has rightly framed charge in above case and fixed the case for recording of evidence which calls for no interference.

In support of above submissions the learned Advocate for the petitioner referred to the case laws reported in 40 DLR 301, 28 DLR (AD) 38, 49 DLR (AD) 132, 61 DLR (AD) 93, 73 DLR (2021) 598, 13 BLC (AD)(2008) 64, 62 DLR (AD) (2010) 233, 63 DLR (AD) (2011) 79 and 74 DLR (AD) (2022).

We have considered the submissions of the learned Advocate of the respective parties and carefully examined all materials on record.

Undisputedly accused petitioner is the rightful owner and possessor of disputed two flats and 6(six) car parking space and he executed a Bainapatra for sale of above property to the complainant at a price of taka 6,90,00,000.00 and received an advance payment of Tk. 3,58,75,000.00. Above Bainapatra deed provided for three months time for payment of full consideration money by the complainant and execution and registration of a sale deed and deliver of possession by the accused petitioner.

It trans out from above registered deed of Bainapatra that there is clear mention that above property for sale is free from all encumbrances and the same has not been mortgaged. It is not disputed that before execution and registration of above deed of Bainapatra the accused petitioner mortgaged above property to Hajj Finance Ltd. by a registered deed of mortgage on 27.07.2021 and obtained a loan of taka 15(fifteen) crore. As such there was a deliberate and willful suppression and concealment of an important material fact as to mortgage of the disputed property at the time of execution of the deed of Bainapatra.

The moot question to be determined if above non-disclosure or suppression of above material fact as to mortgage of the above property at the time of execution of the Bainapatra constitutes cheating.

It is well settled that mortgage is creation of right in a property for securing a loan. On the other hand a sale is transfer

of the right of ownership. A lawful owner has a right to mortgage his property and thereafter sale the same along with mortgage since the rights created by above two classes of transfer are not conflicting rather mutually accommodative. In 2004 by introducing Act No. XXVI of 2004 a new Section 53D has been introduced in the Transfer of Property Act, 1882 which provides that no immovable property under mortgage shall be re-mortgaged or sold without the written consent of the mortgagee and if re-mortgaged or sold without above consent the remortgage or sale shall be void.

Above Act has made it mandatory upon a mortgagor to obtain written consent of the mortgagee before execution of a deed of sale for the mortgaged property but before us is not a deed for sale rather this is a Bainapatra which does not create or transfer the right of ownership.

A deed of Bainapatra creates an obligation on the part of the executant of the Bainapatra to execute and register a deed of sale and transfer of possession. The accused petitioner had three months time for execution of a sale deed after receipt of full consideration money and during above period he could redeem above mortgage.

If the transaction was concluded or sale deed was executed and registered without redeem of above mortgage or obtaining consent of the mortgagor or disclosing above fact of mortgage of the disputed property to the complainant then it could be said that cheating has been committed.

As mentioned above before lodging of this complainant the accused petitioner instituted Title Suit No. 290 of 2021 for cancellation of above Bainapatra on the ground of non-payment

of the remaining consideration money within the stipulated time. The complainant has filed title suit No. 184 of 2022 on 21.04.2022 for Specific Performance of above Bainapatra. In this case the complainant has claimed that the impugned Bainapatra was vitiated by cheating or fraud. But in above civil suit the complainant sought for specific performance of the above contract.

As mentioned above the learned Advocate for the opposite party No. 2 has referred to the case laws reported in 74DLR(AD) 2022, 73 DLR 598, 33DLR 262, 27 DLR (AD) 175, 34 DLR 287, 35 DLR 118B, 30 DLR 58, 45 DLR 578, 27 DLR (AD) 175, 48 DLR (AD) 100, 20 BLC 550 and 14 DLR 265. We have examined all above case laws but we found that the facts and circumstances of above cases are quite distinguishable from the case in hand and those case laws are not applicable in the present case.

On consideration of above facts and circumstances of the case and materials on record, we hold that mere non-disclosure of the fact of mortgage of above property or suppression of above fact of mortgage at the time of execution of the Bainapatra does not constitute cheating.

As such above proceedings is a still born and preposterous one which shall not meet the ends of justice but cause unnecessary sufferings and plight to the petitioner which amounts to abuse of the process of the court.

In above view of above materials on record we find substance in the petition under section 561A of the Code of Criminal Procedure and the rule issued is liable to be made absolute.

In the result, the rule is made absolute.

The proceedings of C.R. Case No. 454 of 2022 under section 406/420/506 of the Penal Code now pending in the court of learned Metropolitan Magistrate Court No. 19, Dhaka is quashed.

Communicate the judgment and order to the concerned court, at once.

A.K.M. Rabiul Hassan, J:

I agree.

*Mohammad Imam Hossain
Bench officer*