

District: Chapainawabganj

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

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 5624 of 2022

In the matter of :

Md. Ziaur Rahman Shah and others
... Petitioners

-Versus-

Md. Salaboth Sheikh, being died his legal heirs
Ketabon Bibi and others
...Opposite parties

Mr. Mohammad Eunus, Advocate with
Mr. Zafar Sadeque and
Mr. Md. Rezaul Karim, Advocates
...For the petitioners

Mr. Syed Hasan Jubayer, Advocate with
Mr. Ashiqur Rahman, Advocate
...For the opposite parties

Heard on: 29.10.2024, 02.12.2024 and 08.12.2024

Judgment on: 07.01.2025

Rule was issued on an application under section 115 of the
Corder of Civil Procedure calling upon the opposite party No. 1 to
show cause as to why the judgment and decree dated 25.08.2022
passed by the District Judge, Chapainawabganj in Title Appeal

No. 19 of 2022, affirming those of dated 28.04.2022 passed by the Assistant Judge, Nachol, Chapainawabganj in Other Class Suit No.257 of 2018 should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The present petitioners as plaintiffs filed Other Class Suit No.257 of 2018 before the Assistant Judge, Nachol, Chapainawabganj impleading the present opposite party as defendant for a declaration that the registered deed of sale being No.3429 dated 13.09.1980 of Nachol Sub-registrar Office, Chapainawabganj relates to the 'Ka' scheduled property is illegal, fraudulent, collusive, without jurisdiction and not binding upon the plaintiffs, contending, inter alia that the 'Ka' scheduled property measuring an area of .10 decimals appertaining to latest Khatain No.226, plot No.282 of Radhanagar mouza under Upazila- Volahat, District- Chapainawabganj was originally belonged to Khosal Sheikh and while the Khosal Sheikh was in exclusive possession and enjoyment transferred $.8\frac{1}{4}$ decimals of land through registered kabala deed No. 1309 dated 03.02.1981 in

favour of the plaintiffs. Khosal Sheikh also transferred .12 decimals of land of plot Nos. 331, 282 and 283 in favour of the plaintiffs through registered kabala dated 23.12.1982. The plaintiffs upon purchasing the property mutated their name and thereby possessing the same by paying rent to the Government. On 01.09.2018, the defendant came to the scheduled property and claimed his title, threatening the plaintiffs to dispossess. On query and upon obtaining certified copy of registered kabala deed No. 3429 dated 13.09.1980 of Nachol Sub-registrar Office, the plaintiffs got definite knowledge that the defendant No. 1 managed an illegal, collusive and fraudulent deed in favour of him. Hence, they filed the suit.

On the other hand, the defendant No. 1 contested the suit by filing written statement contending, inter alia that the property under lot No. 1 of the schedule to the plaint was originally belonged to R.S. recorded tenant Khosal Sheikh; R.S. Khatian No.226 was duly prepared and published in his name. While Khosal Sheikh was in exclusive possession and enjoyment of the

property for necessity of money sold out some of that through registered kabala deed No. 3429 dated 13.09.1980 in favour of Mohammad Salaboth Sheikh, defendant No. 1. The defendant No.1 upon purchasing the property mutated his name through Mutation Case No. 727/IX-1/15-16 vide order dated 24.02.2016 and possessing the same within the knowledge of the plaintiffs and others. The plaintiffs have no cause of action to file the suit, the suit is liable to be dismissed.

During hearing the plaintiffs examined 3(three) witnesses and adduced documentary evidences as Exhibit- '1' to '8'. On the other hand, the defendant also examined 3(three) witnesses and adduced documentary evidences as Exhibit-'Ka' to 'Umah'. On conclusion of hearing learned Assistant Judge, Nachol, Chapainawabganj by his judgment and decree dated 28.04.2022 dismissed the suit on contest.

Having been aggrieved, the plaintiffs took an unsuccessful appeal being Title Appeal No. 19 of 2022 before the District

Judge, Chapainawabganj, which was dismissed by the judgment and decree dated 25.08.2022 upon affirming those of learned Assistant Judge, Nachol, Chapainawabganj.

On being aggrieved by and dissatisfied with the aforesaid judgment and decree of the District Judge, Chapainawabganj the plaintiffs preferred this civil revisional application and obtained the Rule.

Mr. Mohammad Eunus, learned Advocate for the petitioner appearing with Mr. Zafar Sadeque and Mr. Md. Rezaul Karim, learned Advocates submits that both the Courts below in the judgment and decree failed to consider that the deed in question was registered fraudulently in the Nachol Sub-registrar Office with a fictitious 0.1 decimal of land allegedly appertaining to Khatian No. 61, plot No. 128 of mouza Nachol claimed to be situated within the jurisdiction of Nachol Sub-registrar Office, although the said 0.1 decimal of land under plot No. 128 has no existence. The said property was shown to be transferred through

the disputed deed in question only to have registered the fraudulent deed-in-question in the Sub-registrar Office, Nachol, Chapainawabganj.

He next submits that although the trial Court in his judgment framed as well as 3(three) issues, out of which issue No. (II) was, whether the contested deed No. 3429 of 1980 is collusive and unlawful? But at the time of pronouncement of the judgment, learned Judge of the trial Court failed to decide the aforesaid issue, the main controversy between the parties and the appellate Court without applying it's judicial mind arbitrarily concurred with the judgment and decree of trial Court and thus, committed error of law in the decision occasioning failure of justice. He further submits that from the record, it transpires that no portion of the property of the deed in question is situated within the jurisdiction of the Sub-registrar of Nachol, save and except the fictitious 0.1 decimal of land, claiming to be situated within the jurisdiction of Nachol Sub-registrar as per requirement of section 28 of the Registration Act, 1908, and as such the registration is

amount to a fraud upon the law of registration, thus, the deed-in-question is an invalid and non-existent one. Despite both the Courts below failed to consider that the disputed deed-in-question having no legal implication, so far it relates to the plaintiffs right, since, the plaintiffs were not party to the deed. In support of the submission he cited the case of Syed Kawsar Ali Vs. Gahar Kazi and others reported in 37 DLR(AD) 177.

On the other hand, Mr. Syed Hasan Jubayer, learned Advocate appearing with Mr. Ashikur Rahman, learned Advocate for the opposite party No. 1 submits that both the Courts below concurrently found that the plaintiffs did not acquire any right, title over the property through their deed of the year, 1981. Thus, the plaintiffs hopelessly failed to establish their legal character or right to the property to maintain their case in the present form. He next submits that the defendant No. 1 through the deed No.3429 purchased the property in the year, 1980 and thereafter he was inducted into the physical possession of the property by his vendor, and since then he is enjoying the property upon mutating

his name in the year, 2016 and paying rent to the Government.

The defendant No.1 is in exclusive possession over .6 decimals of land appertaining to R.S. Khatian No. 226, plot No. 282 of mouza- Radhanagar under Upazila- Volahat, District- Chapainawabganj and the plaintiffs have no possession over the aforesaid property.

Thus, both the Courts below justly and legally dismissed the suit.

Heard learned Advocates of both the parties, perused the revisional application together with the annexures appended thereto and the supplementary affidavit filed on behalf of the petitioners; having gone through the lower Courts' record, cited judgment and the provision of law.

It appears that the plaintiffs filed the suit sought for a declaration that the deed mentioned in the schedule to the plaint is illegal, fraudulent, collusive, in-effective and not binding upon them.

Contention of the plaintiffs is that the disputed deed bearing 2(two) schedules, 1(one) is for .6 decimals of land appertaining to

latest Khatian No. 226, plot No. 282 of Radhanagar mouza under Upazila- Volahat, District- Chapainawabganj and the second one is for .1 decimal of land allegedly appertaining to Khatian No. 61, plot No. 128 of mouza- Nachol, District- Chapainawabganj. The specific case of the plaintiffs is that the .1 decimal of land included into the Second Schedule(lot) of the deed with a malafide and fraudulent intention to get the same registered surreptitiously through the Nachol Sub-registrar Office, although the said .1 decimal of land has no existence and is a fictitious one and it was only included into the schedule fraudulently to have the jurisdictional facility of the Sub-registrar of Nachol. The further case of the plaintiffs is that since the deed containing a piece of fictitious property, has been included upon practicing fraud on the registration law, in particular, upon the provision of section 28 of the Registration Act, 1908, thus no registration obtained means thereof is a valid one. The specific case of the plaintiffs is that the plaintiffs purchased the property of R.S. Khatian No. 226, plot No. 282 of mouza- Radhanagar under Upazila- Volahat, District-

Chapainawabganj from the original owner Khosal Sheikh through a registered deed dated 03.02.1981 and thereafter was inducted into the possession and upon mutating their name in the year, 1989 are possessing the same by paying rent to the Government and by this way, the plaintiffs acquired a valid title and possession over the suit property and although the disputed deed in question has been shown to be registered on an earlier date of the deed of plaintiffs, but since the said deed is a non-existent one, thus, the plaintiffs' title was in no manner affected by the said deed.

On the other hand, the contention of defendant No. 1 is that he has acquired valid title through the deed No. 3429 dated 13.09.1980 of Nachol Sub-registrar Office, Chapainawabganj. Upon hearing the rival contention of both the parties learned Judge of the trial Court framed as well as 3(three) issues, (I) Whether the suit is maintainable in the present form? (II) whether the contested deed No. 3429 of 1980 is collusive and unlawful? and (III) whether the plaintiffs are entitled to get the decree as prayed for? At the time of pronouncement of judgment, the trial

Court on perusal of Exhibit- 'Ka' and the Khatian No. 61 of Nachol mouza under upazila- Nachol (Exhibit- '8') categorically found that "it is seen that there are no plots being Nos. 119 and 128 in the khatian, though it was mentioned in the deed". Meaning thereby, the deed in question was registered including a fictitious and non-existent property of Nachol sub-district with a malafide intention to have the deed registered by the particular Sub-registrar of Nachol, although in fact the said sub-registrar had no jurisdiction to register the deed; despite learned Assistant Judge concluded the suit upon pronouncement of judgment without deciding issue No. (II), holding that the disputed deed of the defendant was executed and registered prior to the plaintiffs, thus, the plaintiffs through their deed No. 1309 dated 03.02.1981 did not acquire any valid title upon the suit property.

The trial Court categorically found that the property of lot 2(two) of the schedule to the deed No.3429 appertaining to Khatian No. 61 is a fictitious and non-existent one, thus, he ought to have decided that the said fictitious property was intentionally

entered (included) into the schedule of the deed by the parties for the purpose of getting registered the deed in question surreptitiously through a specific Sub-registrar Office, wherein no part of the property to the deed was actually situated, practicing fraud upon the registration law.

In the case of Syed Kawsar Ali Vs. Gahar Kazi and others reported in 37 DLR(AD)177 referring to a judgment of the Privy Council, the Apex Court held that “such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the registration law, and no registration obtained by means thereof is valid”, and thereby categorically held that the registration so obtained was invalid as no portion of the property was situated within the jurisdiction of particular Sub-registrar as required under section 28 of the Registration Act, 1908.

In the said judgment, referring to a judgment of Bombay High Court, their Lordships also held that various circumstances may arise in case of unwarranted inclusion of property in a deed. For instance, a property may not in fact exist at all and still be included to enable registration being effected in a particular place and may be a fictitious inclusion in that sense. In such a case registration is invalid.

Referring to sub-section (2) of section 28 of the Registration Act, 1908 their Lordship also held that the provision of sub-section (2) provides that notwithstanding anything contained in sub-section (1), no party thereto shall be entitled to question the validity of its registration on the ground that the property either did not exist or was fictitious etc. and in the aforesaid provision the expression 'no party' means the vendor and vendee of the deed in question.

Meaning thereby the legal bar imposed under sub-section (2) of section 28 of the Registration Act, 1908 has no implication

against the present plaintiffs under the case in hand, because the plaintiffs were not parties to the deed-in-question.

In the premise above, this Court already found that the deed-in-question was registered in a Sub-registrar Office having no jurisdiction at all to register the same and parties to the deed included a fictitious and non-existent property into the deed in question only to provide authority to the Sub-registrar of Nachol to have the deed-in-question registered surreptitiously. In view of the principle enunciated in the case of Syed Kawsar Ali Vs. Gahar Kazi and others reported in 37 DLR(AD) 177, such registration is an invalid one, and as such, through the same the defendant No. 1 did not acquire any valid right or title to create impediment in the way of acquiring title of the plaintiffs. Despite the Court of appeal below unnecessarily held that the Khosal Sheikh had no right to challenge the deed in question, the relevant portion for ready reference is reproduced herein below: “কাজেই দলিল দাতা খোসাল শেখ বিবাদিকে দলিল করিয়া দেওয়ার পর ভূয়া সম্পত্তি অযুহাতে প্রদত্ত দলিল বাতিল অযুহাতে তিনি একই সম্পত্তি অন্য কাহারো নিকট হস্তান্তর করিতে পারে না।” Meaning thereby,

Khosal Sheikh, the vendor of the deed has no legal right to challenge the validity of the registration on the ground that the deed in question was registered with a fictitious property. But the appellate Court below failed to notice the provision of clause (b) of sub-section (2) of section 28, which contemplated that the restriction of clause (a) shall not operate against the persons who were not party to the deed. Meaning thereby, the plaintiffs can raise the question of validity of the deed, which was registered fraudulently in the Nachol Sub-registrar Office with a fictitious and non-existent property.

On going through the Exhibit-‘1’, Exhibit- ‘6’ and Exhibit- ‘7-Ka’, it appears that the plaintiffs possess a legal right to seek the declaration against the deed in question, since the defendant No. 1 acquired no valid title under the invalid deed dated 13.09.1980.

In the facts and circumstances of the case in hand, I find merit in the Rule.

Accordingly, the Rule is made absolute.

The judgment and decree dated 25.08.2022 passed by the District Judge, Chapainawabganj in Title Appeal No. 19 of 2022 affirming those of dated 28.04.2022 passed by the Assistant Judge, Nachol, Chapainawabganj in Other Class Suit No. 257 of 2018 is hereby set aside and the suit of the plaintiffs stand decreed.

No order as to cost.

Send down the lower Courts' record.

Communicate the judgment and order at once.