Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1414 OF 2000.

Rajkumar Paul

..... Defendant-Petitioner.

-VERSUS-

Pachibala Paul being dead, his legal heirs:

Santosh Kumar Paul and others.

..... Plaintiff-Opposite parties.

Mr. Sarder Abul Hossain with

Mr. A.K.M. Moniruzzaman Kabir and

Mr. Suvash Chandra Tarafder, Advocate

--------For the petitioner.

Mr. Mian Md. Shamim Ahsan with
Mr. Profulla Kumar Halder, Advocate
..... For the opposite parties 1(a)-1(c).
Mr. Gobinda Chandra Pramanik, Advocate
------ For the opposite parties 2-4.

Heard on 10.11.2024, 12.11.2024, 20.11.2024, 25.11.2024, 13.01.2025 and 14.01.2025.

Judgment on 14.01.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 20.01.2000 passed by the learned Additional District Judge, 3rd Court, Khulna in Title Appeal No.174 of 1998 allowing the appeal and reversing the Judgment and decree dated 04.06.1998 passed by the learned Assistant Judge, Dumuria, Khulna in Title Suit No.54 of 1997 dismissing 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.

The facts, in brief for disposal of the Rule, are that the opposite party No.1, as plaintiff, filed Title Suit No. 54 of 1997 for cancellation of registered gift deed bearing No.2723 dated 25.04.1994 is void, obtained fraudulently and not acted upon, contending inter alia that the plaintiff became owner of 50 decimals of land by registered gift deed dated 17.12.1974 from her mother and thereafter she transferred .18 acres of land to third person. The plaintiff was the owner in possession of the remaining 0.32 acres of land. The plaintiff used to possess the land by constructing

dwelling houses and living therein. Defendant No.1 is the son-in-law of the sister of the plaintiff, who advised the plaintiff to execute and register a deed of power of attorney in his name in favor of taking proper steps to record the plaintiff's name in the ongoing settlement operation. Accordingly, the plaintiff agreed and went to the Dumuria sub-registrar's office. She put her thumb impression on the written stamps and other papers, believing that she was executing the deed of power of attorney. Defendant No.1 or anybody did not recite the deed's contents before her, that the plaintiff is in possession of the suit land. Subsequently, defendant No. 1 disclosed on 25.11.1996 that the plaintiff gifted 0.32 acres of land to the defendant by the alleged registered deed, and therefore, the plaintiff, after obtaining the certified copy on 07.12.1996, knew that defendant No. 1 by practicing fraud upon the plaintiff obtaining the deed of gift instead of power of attorney. Hence, the deed needs to be canceled.

Defendant No.1 contested the suit by filing written statements denying all the material allegations made in the

plaint, contending, inter alia, that the suit is barred by limitation and not maintainable in the present form and manner, that the plaintiff is a widow and without having any child. The plaintiff is the maternal aunt of defendant No. 1, and he maintains her by providing maintenance and taking care of her health. The plaintiff, satisfied with the services and loyalty of defendant No.1, voluntarily gifted the suit land to him and also delivered possession. Defendant No.1 constructed two houses and started to live in the suit property. The plaintiff also lived in a house with the defendant's family as a family member. The plaintiff went to the sub registrar's office and executed and registered the gift deed No. 2723 dated 25.04.1994 with full knowledge and will in the presence of witnesses. On the ill advice of local people, the plaintiff subsequently filed the instant suit, which is liable to be dismissed.

The learned Assistant Judge, Dumuria, Khulna, framed necessary issues to determine the dispute involved between the parties.

Subsequently, the learned Assistant Judge, Dumuria, Khulna, dismissed the suit by the Judgment and decree dated 04.06.1998.

Being aggrieved, the plaintiff, as appellant, preferred Title Appeal No.174 of 1998 before the District Judge, Khulna. Eventually, the learned Additional District Judge, 3rd Court, Khulna, by the Judgment and decree dated 27.01.2000, allowed the appeal and reversed the Judgment and decree of the trial Court.

Being aggrieved, the defendant-petitioner preferred this Civil Revision under section 115 (1) of the Code of Civil Procedure before this court and obtained the instant Rule and an order of stay.

Mr. Sarder Abul Hossain, the learned Counsel appearing on behalf of the petitioner, submits that the appellate court below allowed the appeal without reversing the material findings of the trial Court, and as such, the Judgment and decree of the appellate Court below is not a proper judgment of reversal; that the appellate court below committed an error of law resulting in an error in the

decision occasioning failure of justice in allowing the appeal without sufficient or cogent reason or any sound principle of the law.

Mr. Gobinda Chandra Pramanik, the learned Counsel appearing on behalf of the opposite parties, opposes the contention so made by the learned Counsel for the petitioner and submits that the appellate court below, having considered all the material aspects of the case reversing the findings of the trial Court and discussing the evidence rightly decreed the suit and hence the appellate court below did not commit any error of law resulting in an error in the decision occasioning failure of justice.

I have anxiously considered the submissions advanced by both parties and perused the Judgment of the courts below, as well as oral and documentary evidence on the records. It appears that the trial Court while dismissing the suit, says that-

> "বাদিনীকে আমমোক্তার নামার নামে তাকে দিয়ে নালিশী দান দলিল করিয়ে নেবার যে অভিযোগ আরজীতে করা হয়েছে তন্মর্মে ও তার কোন স্বাক্ষী নেই। সুতরাং দলিলটি তাকে যে ভুল বুঝিয়ে করিয়ে নেয়া হয়েছে এমন বিষয় প্রমানিত হয়না। ----------

নালিশী দলিল সম্পাদনে কোন প্রতারনা ছিল না। নালিশী দলিলটি রদ-রহিতের জন্য বাদীনি মামলা আনয়ন করেছেন ইং ২৫-০৪-৯৪ তারিখে নালিশী দলিলটি সম্পাদিত এবং ইং ২০-৬-৯৭ তারিখ অত্র মামলা আনয়ন করা হয়েছে। সেমতে তামাদি আইনের ১ম তপশীলের ৯১ অনুচ্ছেদ অনুযায়ী অত্র মামলাটি তামাদি বারিত বটে।”

It manifests from the record that the plaintiff side adduced 2(two) witnesses, and the defendant side adduced 5(five) witnesses, and both parties exhibited the necessary documents to prove their respective cases. Both parties admitted that the alleged deed No.2723 dated 25.04.1994 is a registered document and admitted plaintiff’s signature and thumb impression in the deed. The plaintiff also claimed that the defendant, by practicing fraud upon the plaintiff, wrote a deed of gift instead of a deed of power of attorney, but the plaintiff did not adduce any corroborative witness to prove the allegation of fraud. Therefore, since the suit deed is a registered document, it is a strong presumption that the alleged deed is a genuine instrument. This view gets support from the case of Kazi Rafiqul Islam Vs. Kazi Zahirul Islam reported in 70 DLR(AD)134 wherein their Lordship of the Appellate Division held that:-

"If the question is whether the deed is genuine or not, the simple answer is it, being a registered document, is showered with a strong presumption as to genuineness. Sections 59, 79, and 144 of the Evidence Act also lend support to section 60 of the Registration Act on this score. No doubt, this presumption is rebuttable, which connotes that presumption raised by admitted fact or registration could be rebutted by adducing counter-vailing evidence, showing that notwithstanding the fact of registration, the executant did not really affix his signature or thumb impression voluntarily, which, in the given circumstances, could be done by adducing expert evidence as to physical and/or mental incapacity of the executant".

It manifests that the appellate court, while decreeing the suit, says that-

"যেহেতু এই দান পত্রের ব্যাপারে বাদিনী কাহারো নিকট হইতে নিরপেক্ষ ও স্বাধীন পরামর্শ গ্রহণ করিতে পারে নাই এবং সে ডি. ডবিণ্ডউ-১ এর প্রতারনার শিকার হইয়াছিল সেহেতু আইনতঃ

এই দানপত্র দলিলটি রদ-রহিত যোগ্য এবং সার্বিক সাক্ষ্য-প্রমানের ভিত্তিতে মামলাটি ডিক্রী যোগ্য।" In contrary of this findings the appellate court also observed that-

"উক্ত নগেন্দ্র পাল বাদিনীকে নালিশী দানপত্রের বিষয়ে স্বাধীন ও নিরপেক্ষ পরামর্শ প্রদান করিয়াছিল এই মর্মে আর্জি বা জবাবে কোন বিবরন নাই এবং কোন সাক্ষী এই মর্মে একটি শব্দও উচ্চারণ করে নাই।"

The appellate court also held that: "যেহেতু এই দান পত্রের ব্যাপারে বাদিনী কাহারো নিকট হইতে নিরপেক্ষ ও স্বাধীন পরামর্শ গ্রহণ করিতে পারে নাই এবং সে ডি. ডবিণ্ডউ-১ এর প্রতারনার শিকার হইয়াছিল সেহেতু আইনতঃ এই দানপত্র দলিলটি রদ-রহিত যোগ্য।"

Having scrutinized the plaintiff's plaint and oral evidence, I do not find that the plaintiff made such averment in the plaint or oral evidence. Therefore, the findings for cancellation of the deed are beyond the pleading and the materials on record, which is not at all sustainable in the eye of the law. So, the appellate court below, without considering the plaint, decreed the suit, which is barred under Order VI Rule 7 of the Code of Civil Procedure. This view gets support from the case of Shamsul Huda(Md) being dead, his heirs, Hafez Md. Ismail Vs.

Bangladesh and others reported in 10 5BLC(AD) 108 wherein their Lordships held that-

> "Neither from the averments made in the plaint do we find that the plaintiff claimed the property in suit as a vested property, nor do we find that the learned Subordinate Judge held that the property is a vested property. But in spite of such averments made in the plaint and the finding of the learned Subordinate Judge, the learned Judges of the High Court Division have made out a third case in holding that the property is a vested property. Mr. Pal rightly contended that the learned Judges of the High Court Division made out a third case in holding that the property in the suit is a vested property. For the above reasons, we are of the opinion that the learned Judges of the High Court Division wrongly held that the suit property is a vested property."

Further, it appears from the evidence on record that admittedly in possession of both parties, there are three dwelling houses among those two houses have been

possessed by the defendant-opposite party and one house by the plaintiff, but the appellate court says that as the plaintiff was in possession of home the delivery of possession has not been made as such the gift is defective in failing to consider that in the Hindu law, any property is transferred by gift by a registered deed, the delivery of possession is not mandatory as like as Mohammedan law. In this regard the trial Court says that-

> "হিন্দু আইনে দানীয় হস্ড়ান্ড়র কার্য্যকরী হওয়ার জন্য দান কৃত জমিতে দাতার দখল থাকা কোন প্রতিবন্ধকতা সৃষ্টি করে না। উক্ত আইনের ৩৫৮(২) ধারা ও সম্পত্তি হস্ড়ান্ড়র আইনের ১২৩ ধারা পাঠান্ড়ে দেখা যায় যে, কোন দানকৃত জমিতে গ্রহীতাকে দখলে না পাওয়া গেলেও হিন্দু দানটি নষ্ট হয়ে যায় না। শুধুমাত্র একটি রেজিঃকৃত দলিলের দ্বারাই দান পূর্ণতা লাভ করে। তবে এক্ষেত্রে দলিলটিতে দুই জন ইসাদী থাকা আবশ্যক যা বর্তমান নালিশী দলিলে বিদ্যমান রয়েছে। আইন অনুযায়ী নালিশী দলিলটির সম্পাদন সেমতে বৈধ। নালিশী দলিলটি জাল করা হয়নি। তা বাদীনি নিজেই স্বীকার করেন।"

In view of the above and the reason stated above, it appears that in the instant case, the appellate court, without adverting the finding of the trial court, decreed the suit by giving any reason, hit the root of the merit of the suit; thus, the Judgment and decree of the appellate court is not a proper judgment of reversal and has occasioned a failure of justice.

Resultantly, the Rule is made absolute without any order as to the cost.

The impugned Judgment and decree dated 20.01.2000 passed by the learned Additional District Judge, 3rd Court, Khulna, in Title Appeal No.174 of 1998 is hereby set aside. The Judgment and decree dated 04.06.1998 passed by the learned Assistant Judge, Dumuria, Khulna in Title Suit No.54 of 1997 is hereby affirmed.

Communicate the Judgment and send down Lower Court Records at once.

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(Md. Salim, J).

Kabir/BO