

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No.4269 of 1991

Nur Mohammad Bhuiyan being dead his heirs
Rumana and others

... Petitioners

-Versus-

Aysha Khatoon and others

... Opposite Parties

Mr. Md. Mobarak Hossain, Advocate

... for the petitioners

No one appears for the opposite parties

Judgment on 20.11.2011

This Rule at the instance of the plaintiff-respondents was issued calling in question the legality of judgment and decree dated 29.11.1988 passed by the Subordinate Judge (now Joint District Judge), Chandpur in Title Appeal No.195 of 1986 allowing the same and thereby reversing those dated 8.11.1986 passed by the Munsif (now Assistant Judge), First Court Chandpur in Title Suit No.51 of 1983.

The petitionersq predecessor-in-interest Shahidullah Bhuiyan instituted Title Suit No.51 of 1983 in the First Court of Munsif,

Chandpur for redemption of his mortgaged property with a declaration that order dated 9.12.1982 passed by the Circle Officer (Revenue) of Chandpur in Miscellaneous Case No.54 of 1973 rejecting the same, was illegal.

Plaintiff's case, in brief, is that he was the lawful owner of 45 decimals of land as described in the schedule of plaint. He was forced with necessity of transferring the suit land to one Haider Ali, predecessor-in-interest to defendant-opposite party Nos.1-5 by a conveyance deed executed on 18.10.1948 and registered on 29.8.1949. The said conveyance deed was followed by another deed of reconveyance registered on the same date i.e 29.8.1949. In the said deed of reconveyance, it was stipulated that on repayment of consideration money within the month of Poush of any year from 1357-1379 B.S., the plaintiff would get back the suit land. Meanwhile the said Haider Ali died leaving behind opposite party Nos.1-5 as his legal heirs and successors. Before expiry of the stipulated time, the plaintiff offered them money on several occasions and asked to restore possession of the suit land, but they refused. Opposite party Nos.1-5 realised a sum of total Taka 89,000/= (66,000/= + 23,000/=) from the usufructs of crops produced in the suit land during thirty-three years of possession thereof. At one stage the plaintiff filed an application being Miscellaneous Case No.54 of 1973 under section 95(4) of the State Acquisition and Tenancy Act before the Circle Officer, Chandpur, who under misconception of law rejected the

same by order dated 9.12.1982. In that event the plaintiff was constraint to institute the instant suit. During pendency of the suit, the plaintiff died leaving behind the present petitioners, who are substituted as plaintiffs.

Opposite Party Nos.1-5 contested the suit by filing a written statement denying the material allegations of the plaint contending, *inter alia*, that the suit was not maintainable. The Circle Officer (Revenue) had rightly passed the order rejecting the plaintiffs application. The conveyance deed executed on 18.10.1948 and registered on 29.8.1949 was out and out a sale deed and not a mortgage deed. Their predecessor-in-interest Haider Ali purchased the suit land for a consideration of Taka 1450/=. The said Haider Ali never executed and registered the deed of reconveyance as alleged in the plaint. They also took plea that the provision of section 95 A of the State Acquisition and Tenancy Act would not apply in the present case.

On the aforesaid pleadings the trial Court framed issues, namely, whether the deed in question was an usufructuary mortgage deed or a sale deed; whether the suit was barred by limitation; whether the plaintiff was entitled to get back the suit land; and whether the order dated 9.12.1982 passed by the Circle Officer (Revenue) was illegal.

In order to prove their respective cases, the substituted plaintiffs examined one witness as P.W.1 and adduced in evidence the registered deed of reconveyance dated 29.8.1949 as exhibit-1. The defendants also examined one witness as D.W.1 and adduced in evidence, the conveyance deed executed on 18.10.1948 and registered on 29.8.1949 as exhibit-A.

After conclusion of hearing, learned Munsif, First Court, Chandpur by his judgment and decree dated 8.11.1986 decreed the suit on the grounds, amongst others:

- (a) The deed of reconveyance was registered before thirty-three years of institution of the suit and having the presumption of genuineness under section 90 of the Evidence Act. The defendants failed to adduce any evidence rebutting the said presumption.
- (b) It is mentioned in the deed of reconveyance that initially the vendor was not willing to register the conveyance deed for which an appeal was preferred. Subsequently there was a compromise between the parties and ultimately the conveyance deed was registered.
- (c) Both the deeds were registered on 29.8.1949 in same registry office. Therefore, it was not possible to register a false deed in the name of Haider Patwary on the day,

when he himself was present in the registry office to register the conveyance deed.

- (d) The defendant's plea that sections 95 and 95A of the State Acquisition and Tenancy Act would not apply in the present case, is not tenable in law.

In arriving at above findings, the trial Court discussed the case of Bangladesh Vs. Haji Abdul Gani Biswas and others, 32 DLR (AD) 233, and relied on Abu Bakar Vs. Nazir Ahmed, 34 DLR (AD) 237. In the latter case under similar facts and circumstances, provisions of section 95 and 95 A of the State Acquisition and Tenancy Act were made applicable in a similar transfer that took place in 1953, wherein their Lordships of the Appellate Division observed as follows:

Section 95 has been again amended by the President's Order No.88 of 1972 with effect from 3 August 1972, but this amendment did not touch the period of usufructuary mortgage which is still seven years, nor did it affect the period of limitation for redemption suit which is 60 years. The amendment relates to two new provisions. One is that if on the expiry of the period of a mortgage, the mortgagee does not restore possession of the land to the mortgagor, then the Subdivisional Magistrate shall, on an application by the mortgagor, restore possession to the mortgagor by evicting the mortgagee. The other provision in the amendment is that notwithstanding anything contained in any other law in force, any transfer of a land by an out and out sale with a condition for

reconveyance shall be deemed to be a complete usufructuary mortgage for a period not exceeding seven years on the expiry of which the mortgagor may get back possession by an application to the Subdivisional Magistrate.+

Against the aforesaid judgment and decree, opposite party Nos.1-5 preferred Title Appeal No.195 of 1986 before the District Judge, Chandpur. The learned Subordinate Judge, Chandpur ultimately heard the appeal and allowed the same by his judgment and decree dated 29.11.1988 giving rise to the instant civil revision.

In passing the said judgment and decree, learned Subordinate Judge disbelieved the deed of reconveyance as it was executed long after execution of the conveyance deed and observed that the conveyance deed was registered under section 72 of the Registration Act, while the deed of reconveyance was registered in usual course; and that the consideration of the conveyance deed and that of the deed of reconveyance was not same. Learned Judge of the appellate Court did not, however, arrive at any specific finding that the deed of reconveyance was a forged one.

Mr. Md. Mobarak Hossain, learned Advocate appearing for the petitioners submits that in view of the provision in section 95A of the State Acquisition and Tenancy Act, the conveyance deed accompanied by the deed of reconveyance registered on the same day constitutes a usufructuary mortgage, and therefore, after expiry of seven years opposite party Nos.1-5 were legally bound to restore

the possession of the suit land. The registered deed of reconveyance clearly corresponds to the suit land and no inference can be drawn that the deed of reconveyance does not relate to the conveyance deed. The Circle Officer, Chandpur ought to have directed the mortgagee to restore possession of the mortgaged land in favour of the mortgagor.

Mr. Mobarak further submits that the registered deed of reconveyance was adduced in evidence in original without any objection and that it is an old document of more than thirty years, which has come from the proper custody, and as such it had the presumption of genuineness under section 90 of the Evidence Act. The said deed was proved and the trial Court rightly found it genuine, but the lower appellate Court without reversing the findings of trial Court allowed the appeal and thereby committed error of law. He also submits that no attention on the variation of consideration in two deeds was drawn during cross examination of P.W.1 and therefore, there is no scope to raise this point after the trial is over. Moreover, the lower appellate Court was not correct in disbelieving the deed of reconveyance on the question, which is answered in the deed itself.

I have gone through the evidence on record and judgments of the Courts below. From a close reading of the two deeds, it transpires that the parties and schedules of both the deeds are same and in the deed of reconveyance, the date of execution of conveyance deed is

categorically mentioned as 18.10.1948. In order to appreciate the points whether these two deeds are co-related and as to why the conveyance deed was registered under section 72 of the Registration Act, it would be profitable to reproduce the recital portion of the deed of reconveyance, which runs as follows:

%o Km" Kejvi fvg ~~wlr~~ cvl qvi GwM~~gš~~ cĀ wġ`s Kv~~h~~hÁv~~x~~ wRjv-wĀ cġv
Kv~~x~~ixi _v~~b~~v I mve~~x~~uR~~io~~á ~~w~~uKvg Pu` c~~p~~xi G~~j~~vKv~~x~~b cġ PwU wRjv- wĀ cġv Kv~~x~~xi 591 bs
~~w~~uR f³ Lvs Zvs i Njvg ~~w~~u gwij K k~~th~~y³ gZuj vj ~~w~~u Aax~~x~~ wds 88 bs „bi vRw` ~~w~~uRvq
gvj xKx 62-64 bs LwZqv~~b~~ Awab 69 bs LwZqv~~x~~ ~~x~~gus 8-59 kZvsk fvg ewl R gs 22 | |. Avbv
Rgvq GKwKĒv nvl j v w~~b~~hy³ _w~~k~~qv D³ nvl j vi 1&Avbv i ~~x~~wns | |. Avbvi gwij K Avcbvi w~~c~~Zv
_vKve` ~~e~~ ~~y~~vKv ~~1848~~ ~~x~~ ZrZvR" m~~u~~úEi 1&Avbv i K~~x~~g wns evi Avbv As~~x~~i I qwi k ` ~~x~~;
gwij K `Lj vi Avclb `w~~j~~j M~~w~~nZv evU~~b~~v Avcbvi D³ As~~x~~i RgvR~~ig~~ Av~~š~~x w~~b~~ae ~~w~~u~~w~~í' ewQ~~b~~c
18 Bs 14 nvZ b~~x~~i c~~w~~iwgZ bvj ~~w~~u~~t~~ 45 kZvsk Km" 12/6 Avbv Rgvi fvg A`" m~~1~~/~~u~~q
Kejvg~~x~~ Avgvi w~~b~~KU gs 1450 UvKv g~~x~~" w~~e~~u~~u~~ Kwi ~~x~~b ewj qv D³ Kejv m~~u~~úv`b Kwi qv
w` qwiQ~~x~~b | c~~x~~ Avclb H Kejv ~~w~~u~~b~~ w` ~~w~~u~~g~~ Kwi qv ~~w~~uR~~io~~«Kwi qv bv ~~w~~u~~w~~ qvq D³ Kejv ~~w~~uR~~io~~i «
Rb" K~~u~~g~~j~~vq Av~~w~~cj Kwi jvg | c~~x~~ Avgiv `~~β~~ c~~ŋ~~ 4/8/49 Bs Zwi~~x~~ Av~~x~~v~~x~~ w~~g~~gvsmvq gs
1300 UvKv g~~j~~" mve` ~~ŋ~~x GK R~~x~~š w~~c~~uU~~k~~b Kwi qv D³ Kejvi fvg ~~w~~uR~~io~~«Kwi evi Abg~~w~~Z
cvBq~~w~~Q | Kv~~x~~B Avcbvi m~~w~~nZ Avgvi GB Kejv ev P~~y~~³ i w~~n~~j ~~w~~u~~w~~D³ fvg nvZK 1357 m~~x~~i
gv~~x~~ gvN j vMv~~x~~Z 1359 m~~x~~i gv~~x~~ ~~w~~u~~w~~ g~~j~~Z g~~x~~" ~~w~~u~~w~~v~~b~~ ~~w~~u~~w~~ dmj v~~x~~ ~~2~~ ermi g~~v~~`
g~~x~~" Avclb Avgv~~x~~ D³ w~~b~~aw~~i~~ Z g~~x~~"i mg`K UvKv Avgv~~x~~ GK~~x~~v~~x~~ w~~d~~ivBqv w` ~~x~~ Av~~w~~gI
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It is, therefore, clear that the said deed corresponds to the conveyance deed and that after filing the appeal under section 72 of

the Registration Act, there was a compromise between the parties. In the said compromise consideration for reconveyance was fixed at lesser amount. It may happen that for realizing the usufructs for the gap period from execution of the conveyance deed to registration of the same i.e from 18.10.1948 to 29.8.1949, the consideration was so fixed. This variation, however, was nobody's case. This is not a material fact even. Therefore, the finding of the lower appellate Court in respect of the deed of reconveyance is not tenable.

Now the point to decide is whether a conveyance deed accompanied by a deed of reconveyance constitutes a complete usufructuary mortgage. In order to ascertain this point, it would be profitable to refer to the relevant provisions of section 95 and 95A of the State Acquisition and Tenancy Act, which after several amendments in 1972 and 1973 stand as follows:

95. (1) Notwithstanding anything contained in any other law for the time being in force a *raiyat* shall not enter into any form of usufructuary mortgage other than a complete usufructuary mortgage in respect of his holding or of a portion or share thereof, and every such complete usufructuary mortgage shall be subject to the same limitations as are imposed by section 90 on a transfer of the holding of a *raiyat* or of any share or portion thereof; and the period for which such complete usufructuary mortgage may be entered into by any *raiyat* shall not exceed, by any agreement express or implied, [seven] years.

Provided that any such usufructuary mortgage may be redeemed at any time before the expiry of the said period, on payment of an amount which shall bear the same proportion to the total

consideration money received by the mortgagor, as the unexpired period bears to the total period for which the mortgage had been entered into.

(2)ō

(3)ō

(4) Notwithstanding anything contained in any other law for the time being in force, if any mortgagee prevents the redemption of a usufructuary mortgage under the proviso to sub-section (1) or refuses to restore any land covered by a usufructuary mortgage after the expiry of the period of such mortgage, the mortgagor may apply to the Sub-Divisional Magistrate or to any officer authorized in this behalf by the Government, for such redemption or restoration and, on such application and, in the case of redemption, also on payment by the applicant of the amount due to the mortgagee under the said proviso, the Sub-Divisional Magistrate or the officer so authorized shall pass an order directing the mortgagee to restore possession of the mortgaged land to the applicant and to deliver up to the applicant all documents in his possession or power relating to the mortgaged land by such date as may be fixed in the order.

(5) If the mortgagee does not restore possession of the mortgaged land to the mortgagor by the date fixed under sub-section (4), the Sub-Divisional Magistrate [or any Officer authorised in this behalf by the Government shall, on application made by the mortgagor, put the applicant in possession of such land by evicting the mortgagee therefrom and may, for such eviction, use or cause to be used such force as may be necessary.

95 A. Notwithstanding anything contained in any other law for the time being in force, any transfer of a holding or of portion or share thereof, [either by way of an out and out sale with an agreement to reconvey,] [or] where the transferor receives from the transferee any consideration and the transferee acquires the right to possess, and to enjoy the usufruct of such holding or portion or share thereof for a specified period in lieu of such consideration, shall notwithstanding

anything contained in the document relating to the transfer, be deemed to be a complete usufructuary mortgage for a period not exceeding seven years and the provisions of section 95 shall apply to such transfer whether made before or after the date of commencement of the State Acquisition and Tenancy (Second Amendment) Order, 1972 (P. O. No. 88 of 1972).+

Section 95 A of the Act clearly provides that it would apply to such transfer, which was made before or after the date of commencement of State Acquisition and Tenancy (Second Amendment) Order, 1972 (P.O. No.88 of 1972).

In the case of Bangladesh Vs. Haji Abdul Gani Biswas and others, 32 DLR (AD) 233, P.O.Nos.88 of 1972 and 24 of 1973 were held to be constitutionally valid legislations. In the said case, their Lordships also explained the meaning and scope of the above quoted sections and concluded thus:

Our conclusions, therefore, are that the President's Order Nos.88 and 136 of 1972 and No.24 of 1973 are all valid legislations for affecting necessary amendments in the East Bengal State Acquisition and Tenancy Act and those laws cannot be attacked on the ground of ultravires. (2) any transfer of a holding of part thereof by a *raiyat* either way of out and out sale with an agreement to reconvey or where the transferor receives from the transferee any consideration and transferee acquires the right to possess and enjoy the usufruct, shall notwithstanding anything contained in the document relating to the transfer, be deemed to be a complete usufructuary mortgage for a period of maximum 7 years and the provisions of section 95 (4) and (5) shall apply to such transfers; (3)

and such transfers are not to be understood in the light of the Transfer of Property Act because those are to be understood in the light of the enactment in question; (4) those transactions which are subsisting on the date of promulgations of President's Order No. 88 of 1972 are hit by section 95A including the transaction entered into by way of an out and out sale with an agreement to recovery, made whether before or after the promulgation of President's Order No.88 of 1972 and (5) as for the transactions which are not alive before the promulgation of President's Order No.88 of 1972 they are concluded by the transaction past and closed. +

In the present case, as the transfer in question was made before commencement of P.O.No.88 of 1972, section 95 A of the Act would apply. The transfer in question also constitutes a usufructuary mortgage within the meaning of section 95 A of the Act inasmuch as the conveyance deed is accompanied by another deed of reconveyance in respect of the same suit land between the same parties registered on same day at same registry office. I do not find any conflict with the case cited.

There remains another question to be answered. What is the extent of ~~retrospective effect~~ under P.O.No.88 of 1972, which was inserted by the said section 95 A. In the present case, time stipulated in the deed of reconveyance was two years, which expired on 28.8.1951 i.e. before the date of commencement of P.O.88 of 1972. From the case of Abu Bakkar Vs. Nazir Ahmed, 34 DLR (AD) 237 it

may be held that %retrospective effect+ would cover the period of limitation of 60 years from 28.8.1951. The plaintiff-mortgagor did not extinguish or waive his right to redemption of the suit land in any manner and therefore, it cannot be treated as transaction past and closed before expiry of the period of limitation.

In view of the above, the lower appellate Court in passing the impugned judgment committed error of law resulting in an error in decision occasioning failure of justice, and as such the Rule merits consideration.

In the result, the Rule is made absolute. The impugned judgment and decree 29.11.1988 passed by the Subordinate Judge (now Joint District Judge), Chandpur in Title Appeal No.195 of 1986 are hereby set aside and those dated 8.11.1986 of the Munsif (now Assistant Judge), First Court, Chandpur in Title Suit No.51 of 1983 are restored.

Send down the lower Courtsqrecords.