

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 1676 of 2012

Jiban Chandra Karmakar another
... Petitioners

-Versus-

Bolai Krashna Karmakar and others
...Opposite-parties
Mr. Md. Shah Alam Sarker, Advocate
...For the petitioners

Mr. Goutom Kumar Roy with
Mr. Swapan Kumar Das and
Mr. Subrata Halder, Advocates
...For the opposite-party No. 1.

Judgment on 18th January, 2024.

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued at the instance of the petitioners calling upon the opposite party No. 1 to show cause as to why the impugned judgment and decree dated 12.01.2012 passed by the learned Joint District Judge, 1st Court, Narsingdi in Title Appeal No. 04 of 2007 disallowing the appeal and thereby affirming the judgment and decree dated 31.08.2006 passed by the learned Assistant Judge, Raipura, Narsingdi in Title Suit No. 23 of 2005 decreeing 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.

Shorn of unnecessary details, fact of the case lies in a very short compus. The opposite-party No. 1, as plaintiff, filed Title Suit No. 23 of 2005 in the Court of Assistant Judge, Raipura, Narsingdi against the present petitioner and others, as defendants, for a decree of recovery of possession by releasing the property from mortgage under defendants, claiming that the property measuring $11\frac{21}{40}$ sataks along with other non-suited property inherited by the petitioners and the defendants from their predecessor. While they were in ejmali possession, the plaintiff in need of money mortgaged $11\frac{21}{40}$ sataks land in favour of defendants by way of a sale deed dated 31.03.1998 and on the same day by an agreement executed by the defendants undertaking that within 4 years from the registration of the deed, if the plaintiff repaid the amount received from them they will reconvey the property in favour of the plaintiff. But the defendants on this and that plea avoiding to execute deed of reconveyance and finally refused to reconvey the property in favour of the plaintiff claiming that the property was not mortgaged but it was an out and out sale consequently, the plaintiff has constrained to file the instant

suit for recovery of possession by way of release of the suit property from mortgage as usufructuary mortgage.

The defendant No. 1 alone and the defendant Nos. 2 and 3 jointly filed written statements and contested the suit denying all the material allegations made in the plaint contending that the plaintiff and defendants are full brothers. The defendant No. 1 stated that the property in question, in fact, was mortgaged to the defendant No. 1 along with defendant Nos. 2 and 3 with a condition to reconvey the same in favour of the plaintiff and to that effect the defendant No. 1 along with defendant Nos. 2 and 3 executed an Ekrarnama on the same date in favour of the plaintiff undertaking that they will reconvey the property after 4 years. The defendant No. 1 though agreed to reconvey the property, but the defendant Nos. 2 and 3 refused to execute a deed of reconveyance in favour of the plaintiff. The defendant Nos. 2 and 3 claimed that the plaintiff and the defendants are full brothers, they jointly inherited the property left by their father. The plaintiff expressed his intention to sell the property at the prevailing price and the defendants accepted the proposal, the price of the property was settled at Tk. 3,00,000/-.

The defendants paid the said amount of consideration to the plaintiff and the plaintiff on receipt of consideration money executed and registered Deed No. 3039 dated 31.03.1998. The defendant No. 1 is eldest brother of defendant Nos. 2 and 3 they had trust upon him and they used to obey all the direction of the defendant No. 1 and on his advice the defendant Nos. 2 and 3 handed over Tk. 2,50,000/- to him but he with malafide intention got the sale deed registered on commission at the house of the plaintiff and defendants inconvenience with deed writer showing value of the same at Tk. 2,500/- but the defendants were not aware of the fact of writing such value in the deed. On the same day and at the same sitting the plaintiff and defendants jointly sold $12\frac{1}{2}$ sataks of land to one Momen and Abdul Jabbar at a consideration of Tk. 3,00,000/-, as such, there was no question of registration of the Deed No. 3039 dated 31.03.1998 showing value of the property at Tk. 2,500/-.

The disputed property is much more valuable than the property transferred by 4 brothers in favour of Momen and another, but the defendant No. 1 in connivance with deed writer has written the consideration of the sale deed as Tk. 2,500/-. The plaintiff, in

fact, sold out the property to the defendants on receipt of Tk. 3,00,000/- from the defendants, but most unfortunately at the time of registration of the deed it was registered showing the value of the property at Tk. 2,500/- which is beyond probability. Alleged Ekrarnama claimed by the plaintiff is forged and fabricated and manufactured by the plaintiff and the same was not disclosed to the defendants before filing of the suit.

The defendants alleged that their eldest brother, defendant No. 1 taking advantage of their belief on him, he in connivance with the plaintiff obtained signature on some blank stamp papers without knowledge of the defendants and created the said Ekrarnama to deprive the defendants from their purchased land. The plaintiff never mortgaged the property to the defendants and the price of the property mentioned in the deed is not the actual price of the property paid to the plaintiff which is evident from the amount shown in alleged Ekrarnama amounting to Tk. 65,000/-. Both the sale deeds and the agreement differs from each other in particular in respect of price of the property and the money received. The defendants never

executed the Ekramnama in favour of the plaintiff undertaking to reconvey the property treating the same as mortgage.

The defendant No. 1 by a Registered Deed No. 1242 dated 01.12.2002 transferred 3 sataks of land by way of exchange in favour of another person and the defendant No. 3 also by a Registered Deed No. 2528 dated 03.03.2005 exchanged 3 sataks of land with one Sanjit Kumar Saha. Apart from this the defendants after purchase the property from plaintiff got their names mutated in the khatian vide Mutation Case No. 181 of 2002-2003. After aforesaid transfer, since the defendant No. 1 refused to partition the property among them defendant Nos. 2 and 3 filed an application before the local Chairman who called a salish on 07.07.2004 and in the said salish defendant N o. 1 admitted and promised that he will make partition of the property as per their convenient. The said minutes was reduced into writing on a cartridge paper. Those facts and circumstances amply proves that the plaintiff actually sold the property to the defendants at a consideration of Tk. 3,00,000/- but for illegal gain and to deprive the defendants the plaintiff with false claim filed the instant suit.

The trial court framed 3(three) issues for determination of the dispute. In course of hearing, the plaintiff examined 3(three) witnesses as P.Ws and the defendants examined 3(three) witnesses as D.Ws. Both the parties submitted some documents in support of their respective claim which were duly marked as Exhibits. The trial court after hearing by its judgment and decree dated 31.08.2006 decreed the suit.

Being aggrieved by and dissatisfied with the impugned judgment and decree of the trial court, the defendant Nos. 2 and 3 preferred Title Appeal No. 04 of 2007 before the Court of learned District Judge, Narsingdi. Eventually, the said appeal was transferred to the Court of learned Joint District Judge, 1st Court, Narsingdi for hearing and disposal who upon hearing by the impugned judgment and decree dated 12.01.2012 dismissed the appeal affirming the judgment and decree passed by the trial court. At this juncture, the defendant-appellant-petitioners, moved this Court by filing this revisional application and obtained the present Rule and order of stay.

Mr. Md. Shah Alam Sarker, learned Advocate appearing for the petitioners submits that the transaction between the parties is in fact, an out and out sale at a consideration of Tk. 3,00,000/-. The plaintiff in suit upon receipt of full consideration executed and registered the sale deed on 31.03.1998 in favour of the defendants, but the defendant No. 1 as eldest brother of the defendant Nos. 2 and 3 was entrusted with the task of execution and registration of the deed who in connivance with deed writer got the sale deed executed and registered showing consideration of Tk. 2,500/- only which is beyond probability as on the same day and at the same sitting the plaintiff and the defendants jointly transferred $12\frac{1}{2}$ sataks of land in favour of Momen and another at a consideration of Tk. 3,00,000/-. In that view of the matter it can be easily presumed that the consideration of property transferred was shown not the actual price but it was a product of forgery on the part of the defendant No. 1 and deed writer. He submits that every usufructuary mortgage must be registered under Registration Act under Section 95(2) of the State Acquisition and Tenancy Act, but in the instant case the sale deed though registered but the agreement or Ekrarnama has not been

registered under Registration Act, as such, the said agreement is not at all enforceable in law, but the trial court as well as the appellate court failed to appreciate the provisions of law and even did not write a single word whether unregistered agreement and Ekrarnama can be enforced treating a sale deed as usufructuary mortgage.

He finally submits that mother of the plaintiff and the defendants deposed as D.W. who on oath stated that the transfer was out and out sale and the property was not placed under mortgage by the plaintiff to the defendants, both the courts below disbelieved the statement made by the mother of the plaintiff and defendants. He submits that the defendants in their written statement as well as on oath claimed that they had trust and belief upon defendant No. 1 as eldest brother who was entrusted with the work of execution and registration of the sale deed to whom the defendant Nos. 2 and 3 handedover Tk. 2,50,000/- for payment to the plaintiff as consideration of the property. The defendant No. 1 in connivance with the deed writer has shown the price of the property only Tk. 2,500/- and created an Ekrarnama showing loan of Tk. 65,000/- paid to the plaintiff. Where the agreement and the sale deed differs from

each other in that case the plaintiff is not at all entitled to get reconveyance of the property under Section 95A of the SAT Act.

Mr. Goutom Kumar Roy with Mr. Swapan Kumar Das, learned Advocates appearing for the opposite-party No. 1 submit that since the sale deed dated 31.03.1998 was executed in favour of the defendants with an agreement for reconveyance on the same day and at the same sitting, the defendants thought it wise not to show the actual value of the property in the sale deed to save unnecessary expenses on account of stamp and registration fee and other duties. But the actual amount received from the defendants has been properly shown in Ekrarnama which is amounting to Tk. 65,000/-. He further submits that the plaintiff while deposing before the court stated that for need of money he created the mortgage of the property in favour of the defendants, supporting the statement made by the plaintiff, defendant No. 1 by filing written statement and on oath clearly stated that the property in question was placed as mortgage by executing an out and out sale deed with an agreement for reconveyance on the same day and same sitting and he as one of the mortgagee willing to reconvey the property in favour of plaintiff but

the defendant Nos. 2 and 3 refused to reconvey the same claiming that they purchased the property from the plaintiff. He further submits that claiming a transaction to be usufructuary mortgage the plaintiff proved that the property transferred by an out and out sale deed with an agreement for reconveyance on the same day and same sitting. The plaintiff could able to prove the ingrediences in the instant suit and considering such fact and circumstances the trial court decreed the suit and the appellate court affirmed the same and there is no illegality at all. Referring to the case of *Abdus Salam Sheikh and others Vs. Puspa Rani Shil and others* reported in *1 MLR (AD) 436=49 DLR (AD) 71* he submits that under Section 95A of the SAT Act transaction made by executing an out and out sale with an agreement for reconveyance, the agreement for reconveyance is not required to be registered and there is no such provision in Section 95A of the SAT Act, as such, the plea of non registration of the same on the part of the petitioner has no legs to stand.

Heard the learned Advocates of both the parties, have gone through the revisional application, plaint, written statement,

evidences both oral and documentary available in lower court records and the impugned judgment and decree passed by both the courts below.

Admittedly, the suit property along with other non-suited property inherited by the petitioners and defendant Nos. 1-3 from their father. Plaintiff in need of money mortgaged the property to the defendants by executing a sale deed on 31.03.1998 as claimed by the plaintiff. At the same time the defendants executed an Ekrarnama undertaking and promising that after 4 years upon receipt of the amount paid to the plaintiff they will reconvey the property in favour of the plaintiff. On the other hand, the defendant No.1 admitted the claim of the plaintiff and defendant Nos. 2 and 3 took different stand claiming that the property was not mortgaged to them but it was sold at a consideration of Tk. 3,00,000/- and they did not execute any Ekrarnama or undertaking promising to reconvey the property in favour of the plaintiff at any time.

It is also contended that the defendant No. 1 is the eldest brother of defendant Nos. 2 and 3 who was entrusted with the job of having the sale deed executed and registered from plaintiff,

accordingly, defendant Nos. 2 and 3 handedover Tk. 2,50,000/- to the defendant No. 1 for payment of consideration of the property to the plaintiff, but he at the time of execution and registration of the deed most cunningly inconnivance with deed writer written the price of the property in the deed at Tk. 2,500/- instead of Tk. 3,00,000/-, side by side very cunningly without knowledge of the defendant Nos. 2 and 3 he successfully obtained their signatures on blank stamp papers. Subsequently, on the said stamps created an Ekrarnama showing that the defendants promised that they will reconvey the property in favour of plaintiff after expiry of 4 years.

Both the parties deposed before the trial court in favour of their respective cases. Defendant No. 1 by filing written statement as well as on oath unequivocally admitted that the property was placed as mortgage by executing a sale deed by the plaintiff in favour of the defendants in lieu of payment of Tk. 65,000/- as loan. On the date of execution of the sale deed and registration of the same on commission the defendant No. 1 along with defendant Nos. 2 and 3 executed the Ekrarnama in favour of the plaintiff (Exhibit-2) undertaking that they will reconvey the property to the plaintiff after

expiry of 4 years and the defendant No. 1 always ready to execute deed of reconveyance in favour of the plaintiff but because of denial of defendant Nos. 2 and 3 he could not execute the same.

To appreciate the claim and counter claim of the plaintiff and defendants, I have examined the Sale Deed No. 3039 and Ekrarnama both dated 31.03.1998 in original. First question may come if the property was sold by the plaintiff to the defendants at a consideration of Tk. 3,00,000/- why the value of deed has been shown at Tk. 2,500/-. Secondly, original sale deed ought to have been remained in the possession and custody of the defendants who are purchasers of the property, but in the instant case the original deed is in the hands of the plaintiff. Non-judicial stamp used in the deed comprising 7 sheets contains serial number starting from 6516-6522 and the Ekrarnama in question is serial number 6523-6525 as noted by the stamp vendor. The stamp used in sale deed is in the name of plaintiff and the stamp used in Ekrarnama is in the name of Sunil Karikar. Both the deeds and agreement written by one Md. Moslem Uddin and attesting witnesses are Shahid Uddin Chowdhury and Md. Zahir Uddin and both the deeds written with same ink and the

witnesses attested the deed by putting their signatures with same ink on the same day and at the same sitting.

The requirement of law is that in the event of creating a usufructuary mortgage there must be a deed of out and out sale along with an agreement for reconveyance executed on the same day and at the same sitting written by same writer and attested by same witnesses. All those ingredients are present in the instant case. The plaintiffs examined deed writer as P.W.2 who stated that on the same day and at the same sitting he has written both the deeds and the attesting witnesses signed in his presence. All the P.Ws corroborated each other saying that the deed in question is usufructuary mortgage and the plaintiff never sold the property to the defendants and received any consideration money.

Next question arises whether the deed of agreement is at all required to be registered under Section 95(2) of the SAT Act. In the case of *Abdus Salam Sheikh and others Vs. Puspa Rani Shil and others* reported in *1 MLR (AD) 436=49 DLR (AD) 71* their lordship held that:

“the intention of law is to rescue a raiyat from the clutches of the money lenders who taking the advantage of the poverty of the raiyat get registered kabala deeds alongside unregistered agreement for reconveyance. Sale deed attended with agreement for reconveyance whether registered or not falls within the ambit of usufructuary mortgage for a period of 7 years.”

And held that the provision of Section 95(2) regarding registration of mortgage is not mandatory.

Apart from this it was also held that any transaction transferring the property by a sale deed with an agreement for reconveyance the agreement is not required to be registered under the Registration Act. A transferee under a deed of sale with an agreement for reconveyance acquired the right of possession and enjoyment of the usufruct of land and it may be extended for a maximum period of 7 years. In the instant case admittedly the property was placed under usufructuary mortgage on 31.03.1998 and the suit was filed in the year 2005 when the defendants refused to reconvey the property in favour of the plaintiff after expiry of 7 years. The plaintiff successfully proved the existence of an agreement to reconvey the property before the trial court on oath and

from the face of the deed in question it can be easily construed that at that relevant time the prevalent price of the land in question was much more than the price shown in the deed which also indicates that the nature of the document is a usufructuary mortgage. The trial court as well as the appellate court rightly considered the transaction as usufructuary mortgage and decreed the suit.

The petitioners could not show the court any contrary provisions of law and decisions to substantiate their claim that the agreement for reconveyance must be registered or the sale deed is an out and out sale on payment of actual consideration of the property at that relevant time.

Taking into consideration the above, this Court finds no merit in the Rule as well as in the submissions of the learned Advocate for the petitioners calling for interference by this Court.

In the result, the Rule is discharged, however, without any order as to costs.

Order of *stay* granted at the time of issuance of the Rule stand vacated.

Communicate a copy of the judgment to the Court concerned
and send down the lower court records at once.

Helal-ABO