

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No. 5858 of 1991

Abdul Khaleque Miah alias Khan Abdul Khaleque since deceased substituted by his heirs Mst. Sufia Begum and others

...Petitioner

-Versus-

Sheikh Amin Uddin, since deceased substituted by his heirs Shaikh Abdur Rashid and others

...Opposite Parties

Mr. Abul Kalam Mainuddin with Mr. Munshi Abdul Hamid, Advocates

...for the petitioners

Mr. M. Shamsul Haque, Advocate

... for opposite party No.1

Judgment on 21.11.2011

This Rule, at the instance of an added defendant-appellant was issued to examine the legality of judgment and decree dated 5.12.1983 (decree signed on 8.12.1983) passed by the District Judge, Khulna in Title Appeal No.69 of 1982 dismissing the same on affirming those dated 11.5.1982 of the Subordinate Judge (now Joint District Judge), Second Court, Khulna passed in Title Suit No.319 of 1981 decreeing the suit for specific performance of contract.

Plaintiff's case, in brief, is that defendant No.1, Mokter Ali Mondal (herein opposite party No.2) entered into an agreement with the plaintiff Sheikh Amin Uddin and his wife Mst. Rabeya Khatun (herein opposite party Nos. 1 and 3 respectively) for selling ten decimals of land appertaining to S.A. Khatian No.480, Plot No. 3861 within Mouza Bania Khamar, Police Station and District Khulna as described in the schedule of plaint. On receipt of Taka 9,000/= (nine thousand) only as earnest money, he registered the agreement for sale on 8.9.1976. It was stipulated that defendant No.1 would evict his tenants from the suit land within one month and on receipt of the balance consideration money amounting to Taka 27,000/- (twenty-seven thousand) would execute and register a sale deed in favour of the plaintiff and his wife. Subsequently the plaintiff tendered the balance consideration money and requested defendant No.1 to execute and register the sale deed, but he delayed on different pretexts and lastly executed and registered a sale deed in respect of only five decimals of land in favour of his (plaintiff's) wife receiving the proportionate consideration money amounting to Taka 13,500/= (thirteen thousand five hundred) only on 26.4.1977. He, however, assured the plaintiff to execute another sale deed in respect of remaining five decimals of land within very short time after evicting his tenant therefrom. In spite of repeated demand by serving several legal notices, defendant No.1 failed to perform the remaining part of the contract, thus the cause of action for filing the present suit arose.

Defendant No.1 entered into appearance and contested the suit by filling a written statement denying the material allegations of the plaint contending, *inter alia*, that the plaintiff could not manage the total consideration money in spite of his (defendant No.1's) reminder. He also approached the plaintiff for the balance consideration money through the local people, but he expressed his inability to pay the entire amount and voluntarily relinquished his claim on half of the land under contract and agreed to purchase only five decimals therefrom. Accordingly, he (defendant No.1) had executed and registered a sale deed in respect of five decimals of land in favour of his (plaintiff's) wife on receipt of proportionate consideration money. Later on, he sold the remaining five decimals to defendant No.4, who after so purchase, was enjoying possession of the same by constructing a structure thereon. The plaintiff instituted the suit with an ill motive, because of price-hiking of the suit land.

The present petitioner purchased the suit land (remaining five decimals) during pendency of the suit and was added as defendant No.4. After so addition, he (added defendant) filed a written statement, but did not contest the suit.

On the aforesaid pleadings the trial Court framed issues, namely, whether the suit was maintainable in its present form; whether the suit was barred by limitation; whether the sale agreement

dated 8.9.1976 was a genuine document and if so whether it was legally enforceable; and what other relief, the plaintiff was entitled to.

In order to prove his case, the plaintiff himself deposed as P.W.1 and formally proved the registered sale agreement, sale deed of his wife in respect of five decimals of land, three legal notices with postal receipts and some other documents.

On the other hand, defendant No.1 Mokter Ali Mondal himself deposed as D.W.1 and exhibited an unregistered sale agreement dated 28.12.1979 and a sale deed dated 9.2.1980 in the name of added defendant No.4.

After conclusion of trial, learned Subordinate Judge decreed the suit by judgment and decree dated 11.5.1982 with findings that the suit was well within time; that the plaintiff had been trying althrough to complete the deal and made demands by serving several legal notices; that the story of '*shalish*' as made out by the defendant was not correct; that the sale agreement was legally enforceable and defendant No.1 was legally bound to perform the remaining part of the contract. Learned trial Judge also found that the subsequent sale agreement and sale deed in favour of the added defendant was collusive.

The added defendant preferred Title Appeal No.69 of 1982 before the District Judge, Khulna challenging the said judgment and

decree. Learned District Judge on hearing of the appeal dismissed the same and thereby affirmed the judgment of the trial Court by his judgment and decree dated 5.12.1983.

Against the said judgment and decree of the lower Appellate Court, the petitioner moved in this Court with the instant civil revision, obtained the Rule and an order staying all further proceedings of Title Execution Case No.6 of 1982, which was filed for execution of the decree and is now pending before the Subordinate Judge (Joint District Judge), Second Court, Khulna.

Mr. Abdul Kalam Mainuddin, learned Advocate appearing for the petitioner submits that in his cross-examination, the plaintiff admitted to have no money to purchase the entire land under contract and further admitted that he had already constructed a boundary wall surrounding the sold five decimals and thereby he had relinquished his claim on the remaining five decimals by his conduct. Moreover, holding of a *shalish* showing his relinquishment of claim on the remaining five decimals having been proved, learned trial Judge was wrong in decreeing the suit.

Mr. Mainuddin further submits that in a suit for specific performance of contract, it is also need to prove that the plaintiff is willing to perform his part of contract, which is absent in the present

case. More so, the petitioner being a bonafide purchaser can be allowed to retain the land.

On the other hand, Mr. M. Shamsul Haque, learned Advocate for plaintiff-opposite party No.1 submits that the sale agreement being a registered one, cannot be novated or altered by the so called *shalish* or by any conduct of the plaintiff. It can only be novated or altered by way of another registered instrument. Moreover, it is apparent from the plaint, deposition of P.W.1 and the legal notices that the plaintiff had tendered the balance consideration money and requested defendant No.1 to execute and register a proper sale deed. In view of the legal notices served under registered covers, it has been clearly proved that the plaintiff did never relinquish his claim over the remaining land. The added defendant purchased the suit land on 9.2.1980 i.e. during pendency of the suit, which is hit by the principle of *lis pendens* and therefore, he cannot claim to be a bonafide purchaser.

I have considered the submissions of learned Advocates for both the parties, examined the evidence on record and gone through the judgments. It appears from the plaint, deposition of P.W.1 and the legal notices that the plaintiff tendered the balance consideration money to defendant No.1, expressed his willingness to complete the deal and requested him to execute and register a sale deed in respect of remaining five decimals of land within the period of

limitation. In that view of the matter, it is difficult to hold that he (plaintiff) had relinquished his claim on the remaining land under contract. Admittedly defendant No.1 executed and registered the sale agreement in favour of the plaintiff. Both the Courts below found the sale agreement to be legally enforceable and arrived at concurrent findings of facts that the plaintiff had served several legal notices upon the defendant; that the story of *shalishqas* made out by the defendant was not correct; and that the subsequent deal between defendant No.1 and added defendant No.4 was collusive. Unless there is anything to show that the Courts below have arrived at the above findings in non-consideration or misreading of evidence, the revisional Court should not interfere with such concurrent findings.

Under the above, I do not find that the lower appellate Court in dismissing the appeal has committed any error of law resulting in an error in decision occasioning failure of justice. The Rule, therefore, merits no consideration.

Accordingly, the Rule is discharged. The judgment and decree dated 5.12.1983 passed by the District Judge, Khulna in Title Appeal No.69 of 1982 is hereby maintained. The order of stay passed at the time of issuance of the Rule is vacated.

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