

Present:

Mr. Justice Md. Salim

CIVIL REVISION NO.1044 OF 2002.

Abdul Hannan being dead his legal heirs:

Jashim Uddin and others.

..... Plaintiff-Respondent-Petitioner.

-VERSUS-

Safat Ullah @ Sifat Ullah and others.

..... Opposite parties.

Mr. Surojit Bhattacharjee with

Ms. Farhana Siraj Ronnie, Advocates.

-----For the petitioners.

Mr. Uzzal Bhowmic, Advocate

..... For the opposite parties.

**Heard on 30.10.2024, 03.11.2024,
04.11.2024, 19.11.2024, and
20.11.2024.**

Judgment on 04.12.2024.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 26.09.2001 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet in Title Appeal No.137 of 1997, allowing the appeal and reversing the Judgment and decree dated 18.8.1996 passed by the learned Assistant

Judge, Biswanath, Sylhet in Title Suit No. 86 of 1995 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.

The facts in brief for necessary disposal of the Rule is that the plaintiff-petitioners filed Title Suit No. 335 of 1974 before the Subordinate Judge (now Joint District Judge) Second Court, Sylhet, against the opposite party No.1 and proforma opposite parties 2-5 of the petition impleading them as defendants praying for specific performance of contract in respect of suit schedule 7.66 acres of land, contending interalia that the land described in the schedule annexed to the foot of the plaint belonged to defendants 1-3, who had been possessing the same land by way of inheritance from their father, Chura Charan Namasundr executed bainapatra on the 1st of Bhadra, 1376 B.S. corresponding to 18.08.1969 AD to transfer the suit land, price of the land was settled taka 6,500/- out of which the plaintiff paid of taka 5,500/- to the defendants 1-3, it was stipulated that the defendants would execute kabala within two years upon payment of remaining consideration taka

1000/-, the plaintiffs possessing the suit land, defendants 1-3 remained absent during liberation war. After the liberation of Bangladesh, the plaintiff approached the defendant on different occasions to execute Kabala, and the defendant repeatedly assured them they would register Kabala after being rehabilitated. After the harvesting season of 1380 B. S., the plaintiff knew that the defendants had tried to sell the suit land to some other party. Therefore, the plaintiffs and other influential people of the locality approached the defendants in the middle of February, 1974 to complete the transaction early. But, the defendants killed time on various pretexts, and last of all, in July 1974, they refused to execute Kabala, so the plaintiffs were compelled to file the suit.

Defendants 1-3 contested the suit by filing a joint written statement contested the suit, denying all material allegations of the plaint and contending inter-alia that during the liberation war, they entrusted the management of all their properties to plaintiffs, they left for India, signing 2/3 white papers and blank stamp in favor of plaintiffs after liberation defendants asked them to give

back the stamp papers but they replied that the Pakistani Army had taken away stamp paper. The defendants have already executed an agreement to sell the suit land to defendant 5, according to the agreement dated 16.04.1963 they have executed a registered sale deed dated 19.07.1975 with respect to 5.79 acres of land in favor of defendant no.5, who possesses the same land.

Defendant No.5, also contested the suit by filing a separate written statement; in his written statement claimed that he entered into an agreement with defendant 1-3 on 16.04.1963 for consideration and paid of Tk.6000/- and Tk.4000/- on stipulation that if they repay the said taka within 12 years defendant No. 5 would return the possession of the suit land and if they failed to repay within the said time, they would have to execute register sale deed. Accordingly, defendants 1-3 executed and registered a sale deed on 19.01.1975 on receipt of balance Tk.2000/-. Defendant 5 has been possessing the said land since 16.04.1963. The plaintiffs have no right, title, or interest in the suit land, and as such, the suit is liable to be dismissed with cost.

Subsequently, Title Suit No. 335 of 1974 was transferred before the learned Assistant Judge Sylhet and re-numbered as Title Suit No. 86 of 1995. The learned Assistant Judge, Biswanath, Sylhet, framed necessary issues to determine the dispute involved between the parties.

Eventually, the learned Assistant Judge, Biswanath, Sylhet, decreed the suit by the Judgment and decree dated 18.08.1996.

Being aggrieved, defendant No.5, as appellant, preferred Title Appeal No.137 of 1997 before the District Judge, Sylhet. Eventually, the learned Joint District Judge, Artha Rin Adalat, Sylhet, by the Judgment and decree dated 26.09.2001, allowed the appeal and reversed the Judgment and decree of the trial Court.

Being aggrieved, the plaintiff-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 status quo.

Ms. Farhana Siraj Ronnie, the learned advocate appearing on behalf of the petitioner, submits that the

court of appeal below committed an error of law resulting in an error in the decision occasioning failure of justice in holding that defendant No.5 acquired a valid title and entered into a contract long before in the year 1963 and the instrument, though not forged but a created and collusive one, based on which the plaintiffs cannot get any decree for specific performance of contract; that the appellate court as a last court of facts failed to correctly evaluate the evidence on record and without any consent reason reversed the findings of the trial court below.

Mr. Uzzal Bhowmic, the learned advocate appearing on behalf of the opposite party, submits that the time, place, and manner of the execution of the purported Bainapatra were not sufficiently proved by the plaintiffs by adducing legal and competent witnesses for granting decree in a suit for specific performance of contract being a discretionary power of the court, the appellate court below rightly dismissed the suit finding no credible evidence and witnesses. The appellate court committed no error in dismissing the suit, resulting in any error in the decision causing no failure of justice, and committed no misreading,

non-reading, or non-consideration of any material evidence on records and adverted the trial court's finding.

I have anxiously considered the submissions advanced by both parties, perusing the Judgment of the courts below and oral and documentary evidence on the records.

It appears that the learned Judge of the trial court, while decreeing the suit, says that the Bainapantra dated 18.08.1969 in favor of the plaintiff is true and to deprive the transfer by Bainapatra dated 18.08.1969, defendants 1-3 falsely created the Bainapatra dated 16.04.1963 and deed dated 13.02.1975. So, the plaintiffs are entitled to get Kabala as prayed.

It is the settled proposition of law by our Apex Court that in a suit for specific performance of a contract, the essential ingredients that the plaintiff is required to prove to succeed in a suit for specific performance of a contract, are that the Bainapatra is genuine, consideration money passed between the parties, and delivery of possession was given in pursuance thereof.

The record shows that the plaintiff side examined as many as 3PWs, and the defendant side examined as many as 6 DWs and exhibited the necessary documents to prove their respective cases. I have scrutinized each deposition, cross-examination, and the Bainapatra dated 18.08.1969, Exhibit-1 - as well as Bainapatra dated 16.04.1963 and deed dated 13.02.1975 very consciously. It manifests that exhibit-1, the alleged sale deed, was to be executed within two years from 18.08.1969. However, due to the liberation war, it could not be executed in time, and defendants 1-3 repeatedly assured the plaintiff to execute the sale deed. In July 1974, the defendants refused to execute the kabala, so the plaintiffs filed the suit on 06.08.1974, within the time as per the provision enumerated in the Limitation Act.

Notably, while reversing the trial court's finding, the learned Judge of the appellate court says that the instrument, though not forged, created, and collusive one on which the plaintiff cannot get any decree for specific performance of contract.

In fact, the bainapatra dated 18.08.1969 (Exhibit-1) was admittedly executed by the defendants 1-3. Defendants

No.1-3, in their joint written statement, stated that during the liberation war, they entrusted the management of all their properties to the plaintiffs and put their signatures on white paper and blank stamp paper in favor of the plaintiffs. Defendant No.2, in his deposition as D.W.2, also corroborated entrusting their land in favor of the plaintiffs during the liberation war. The plaintiffs proved the Bainapatra by P.Ws.2-3, who are attesting witnesses, who also proved delivery and continuance of possession of the plaintiffs concerning the suit land.

It is revealed from the recital of the document dated 16.04.1963 (Exhibit-Ka) that it is a conditional document for re-payment of money and not a deed of absolute transfer, i.e., sale under Section 54 of the Transfer of Property Act. Therefore, the alleged deed Exhibit -Ka- is barred under Section 95A of the State Acquisition and Tenancy Act as the deed is a usufructuary mortgage deed. In this context, the case of Asek Elahi -Vs.- Jalal Ahmed and others reported in 20 BLC (AD) 4 where their Lordships of the Appellate Division held that-

"From a reading of this case, it does not appear that the question as to the right of redemption of a mortgage by way of filing a suit in civil court within a period of 60 years from the date of accrual of such right was raised and decided, but this question was precisely raised and decided in 34 DLR (AD) 237 and 12 MLR (AD) 329. And we see no reason to take a view different from the views taken therein by this Division.

From the impugned Judgment, it appears that the High Court Division took notice of the conclusions arrived at by this Division in the case of Bangladesh vs Haji Abdul Gani Bisavas (supra) on the question of applicability of section 95 and 95A of the Act, 1950 correctly in deciding the point at issue in the instant case."

A similar opinion has been expressed in the case of Lakshmi Bala Sen and others -vs- Tarun Tapan Dutta @ Tapan Kumar Dutta, and others reported in 66 DLR (AD) 162 where their Lordships of the Appellate Division held that--

"From the principle laid down in the above Judgment, it appears that transactions which were subsisting on the date of promulgation of President's Order No.88 of 1972 are hit by section 95A including transactions entered into way of an out and out sale with an agreement to reconvey made whether before or after promulgation of President's Order No.88 of 1972 and that the transactions which are not alive before promulgation of President's Order No.88 of 1972 they are concluded by transactions past and closed."

The Appellate Division further held that-

"In the above case, the property was sold on 25-10-1928 with a condition to repurchase within 10 years. Their Lordships, in the light of the principles deduced in that case, held that it was an out and out sale with a condition of purchase and condition of purchase having expired, the sale became a past and closed transaction, and the plaintiff was not entitled to get any relief on the ground that the property was a mortgaged property."

In the case in hand, the plaintiff's father sold the suit property on 25-5-1962 with a condition of repurchase within 10 years, i.e. till 24-11- 1972 and President's Order No.88 of 1972 came into effect on 3-8-1972 and the condition giving right of repurchase survived when President's Order No.88 of 1972 came into effect and, as such, the sale in the present case had become a complete usufructuary mortgage within the meaning of section 95A of the State Acquisition and Tenancy Act."

In the instant case, it appears that the defendants failed to prove the genuineness of the deed dated 16.04.1963 by the D.Ws.3-4 since they are not independent witnesses rather, interested witnesses. In a suit for specific performance of contract the issues to prove under Section 53A of the Transfer of Property Act requires (I) Existence of contract, (II) Consideration and (III) Delivery of possession. Rather the defense witnesses failed to prove the defendant's possession and precise identification of the land. In his deposition, D.W.2 (defendant No.2) stated that he was 30 years old at the time of Bainanapatra, dated 16.04.1963,

but during cross, he said that he was 20 years old during the liberation war. While deposing as D.W.5 in 1996, the witness was 40 years old but deposed that he was 25-30 years old during the liberation war, which cannot be trusted. Moreover, D.W.6 did not clearly specify when defendant No.5 had been possessing the suit land, and thus, defendant witnesses failed to establish the defendant's case. It also appears that the alleged transaction dated 19.01.1975 by defendant Nos.1-3 in favor of defendant No.5 is barred by the doctrine of lis pendence as laid down in Section 52 of the Transfer of Property Act, inasmuch as the suit was filed on 06.08.1974 i.e. long before 19.01.1975 and therefore right of the parties thereto is not affected and the transfer shall be subject to the result of the present suit for specific performance of contract. This view gets support from the case of Yeakub Ali and another -vs- Md. Alii Akbor Howlader and others reported in 6 MLR (AD) 232 wherein their Lordships of the Appellate Division held:-----

"Before the trial court both parties adduced evidence in support of their respective claims. The learned

Subordinate Judge on consideration of the same decreed the suit holding that defendant No.1 actually executed 'bainapatra' exhibit-1 on receipt of full consideration money but during pendency of the suit he transferred the suit property to defendant Nos. 3 to 5 by two kabalas, which are marked exhibits A and A-1. As both the Kabalas were created during pendency of the suit, the learned Subordinate Judge found that, in this case, the doctrine of lis pendence applies.

....."

Considering the facts, circumstances, and reasons stated above, it appears that to discharge his duty, the plaintiff examined as many as three witnesses, including attesting witnesses of the Bainapatra. All these witnesses have deposed, supporting the plaintiff's case, rather defendant Nos. 1-3 admitted their thumb impression and signature on the Bainapatra. Therefore, it appears to me that the trial court rightly and justifiedly held that the Bainapantra dated 18.08.1969 in favor of the plaintiff is true and to deprive the transfer of Bainapatra dated 18.08.1969, defendants Nos.1-3 falsely created the Bainapatra dated 16.04.1963 and deed dated 13.02.1975. So, the plaintiffs are

entitled to Kabala. On the other hand, as the last court of facts, the appellate court did not correctly consider the evidence and other materials on record, giving many unnecessary findings while reversing the trial court's finding below. Therefore, I find merit in the Rule.

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

The impugned Judgment and decree dated 26.09.2001 passed by the learned Joint District Judge, Artha Rin Adalat, Sylhet, in Title Appeal No.137 of 1997, is hereby set aside. On the other hand, the Judgment and decree dated 18.8.1996 passed by the learned Assistant Judge, Biswanath, Sylhet in Title Suit No. 86 of 1995 is hereby affirmed.

The order of status-quo passed at the time of issuance of Rule stands vacated.

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

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(Md. Salim, J).