IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Appeal No. 483 of 2014
With
Civil Rule No. 1076(F) of 2014

In the matter of:

Mrs. Ponia Akter, wife of late Abdur Rahim and another.

… Appellants

-Versus-

Md. Alamin alias Montu, son of late Ahamad Hossain of village- Dhekia, Police Station- Hossainpur, District- Kishoreganj and others.

…Respondents.

Mr. Abdul Wadud Bhuiyan, Senior Advocate with
Mr. Taufiq Anwar Chowdhury, Advocate

…For the appellants

Mr. Mustafizur Rahman Khan, Senior Advocate with
Mr. Mohammed Mutahar Hossain, Advocate

…For the respondent no. 1

Heard on 06.11.2024, 13.11.2024, 21.11.2024 and 04.12.2024.
Judgment on 04.12.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of defendant nos. 1 and 3 of Other Class Suit No. 19 of 2002, this appeal is directed against the judgment and decree dated 29.09.2014 passed by the learned Joint District Judge, 1st Court, Kishoreganj in that suit decreeing the same on contest against the defendant nos. 1-3 and *ex parte* against defendant no. 4.

The short facts leading to preferring this appeal are:

The present respondent no. 1 as plaintiff filed the aforesaid suit stating *inter alia* that the suit land measuring an area of 39 decimals appertaining to settlement khatian no. 62 comprising plot no. 303 originally belonged to the defendant nos. 1-3. The said defendants while offered to sale the same, the plaintiff agreed to purchase it and accordingly, the consideration of suit land was fixed at taka 11,70,000/- and out of that amount, the defendants received taka 3,00,000/- on 17.02.2002 and executed a *bainapatra* (agreement for sale) residing in her house in *Dhekia* in presence of one, Md. Mahtab Uddin, Abdul Malek and Abdul Matin of village *Birpaiksha* and on that very date, possession of the suit land was handed over to the plaintiff. It has been agreed between the vendors and the purchaser that the balance amount of taka 8,70,000/- will be paid within the month of June, 2002 and upon paying the balance amount, respective sale deed will be registered in favour of the plaintiff. However, soon after executing the *bainapatra*, the defendant no. 1 claimed taka 5,00,000/- and the plaintiff paid the said amount through his uncle, Ekram Hossain through the savings account maintained by the defendant no. 1 in Sonali Bank Limited, Baro Mogbazar Branch, Dhaka and that very amount was deposited through Agrani Bank Limited, Kishoreganj Branch and it was

accordingly credited to the account of the defendant no. 1 on 20.02.2002. In the aforesaid way, out of total consideration of taka 11,70,000/-, taka 8,00,000/- was paid to the defendant no. 1 and taka 3,70,000/- remained due. Subsequently, on 10.06.2002 when the plaintiff asked to register the sale deed by receiving balance amount of taka 3,70,000/- at the residence of the defendant nos. 1-3, the defendant no. 1 then assured him that within 4-5 days she went to *Hossainpur* and then register the sale deed. But as the defendant nos. 1-3 ultimately did not come to *Hossainpur* and register the sale deed, the plaintiff then on 18.06.2002 contacted the defendant no. 1 over cell phone when she again rest the plaintiff assured that, within a shortest possible time, he will register the sale deed. But as the defendant nos. 1-3 did not keep their words, the plaintiff then on 18.06.2002 issued a legal notice to the defendant nos. 1-3 requesting them to register the sale deed within the time limit of the *bainapatra*. However, as the defendant nos. 1-3 did not register the sale deed, the plaintiff then filed the suit.

On the contrary, the present appellants and respondent no. 2 who are the defendant nos. 1-3 contested the suit by filing a joint written statement denying all the material averments so made in the plaint contending *inter alia* that they did not execute any *bainapatra* alleged to have made on 17.02.2002 which is totally concocted and manufactured one rather as the plaintiff on gunpoint put their signature on a judicial stamps of taka 100/- and taka 50/- respectively and subsequently on those papers, the alleged *bainapatra* was created. It has further been stated that after receiving legal notice dated 18.06.2002, they (the defendant nos. 1-3) first came to learn about the alleged *bainapatra* and then she (the defendant no. 1) lodged a

GD entry on 29.05.2002 and subsequently lodged another GD entry on 11.07.2002 describing the threat exerted upon her and her two children by the plaintiff upon entering into her house and therefore, the suit is liable to be dismissed.

The learned Judge of the trial court in order to dispose of the suit, framed as many as 4(four) different issues. To prove the case, the plaintiff examined 4(four) witnesses and produced several documents which were marked as exhibit-'1'-'4'. On the contrary, the defendants examined 2(two) witnesses and produced a single document which was marked exhibit-'ka'.

The learned Judge of the trial court after considering the materials and evidence on record by impugned judgment and decree, decreed the suit on contest against the defendant nos. 1-3 and *ex parte* against the defendant no. 4.

It is at that stage, the defendant nos. 1 and 3 as appellants preferred this appeal. After preferring the appeal, the appellants also filed an application for stay of the operation of the impugned judgment and decree and a rule was issued and an order of stay on the operation of the impugned judgment and decree was granted which gave rise to Civil Rule No. 1076(F) of 2014.

Mr. Abdul Wadud Bhuiyan, the learned senior counsel along with Mr. Taufiq Anwar Chowdhury, the learned counsel appearing for the appellants upon taking us to the impugned judgment and decree and by reading the deposition so made by the plaintiff and the defendants witnesses vis-à-vis the documents so appeared in the paper book at the very outset submits that the learned Judge of the trial court erred in law innot

taking into consideration of the fact that the plaintiff has utterly failed to prove his case in line with the pleadings and through evidence yet the learned Judge decreed the suit.

The learned counsel by referring to the impugned judgment also contends that, the learned Judge has failed to entertain the core legal point that at the time of executing the alleged *bainabatra* both the defendant nos. 2 and 3 were minors and in spite of the clear assertion on that very point in the written statement as well as the additional written statement filed by the defendants, the learned Judge did not at all take into consideration of that very vital legal lacuna of the alleged *bainapatra* and passed the impugned judgment and decree.

The learned counsel by referring to the written statement in particular, paragraph no. 8 thereof next contends that, since there has been clear assertion in the written statement that at the time of executing the alleged *bainapatra,* the defendant nos. 2 and 3 were minor and D.W-1 in her deposition also led so, yet the learned Judge of the trial court has misappreciated the said facts and thus failed to comprehend that, no deed of agreement for sale can be enforced against any minor which is patent illegality and therefore, the impugned judgment and decree cannot be sustained.

The learned counsel by taking us to the deposition so have been made by the plaintiff witness no. 1 (shortly, P.W-1) also submits that, even the said P.W-1 in his evidence in particular, in the cross-examination clearly asserted that the defendant no. 3 was minor at the time of alleged execution of *bainapatra* even though he could not say the exact age of

defendant no. 2 and that very assertion has also been echoed by P.W-3 rather clearly who in his cross-examination stated that at the time of execution of *bainapatra,* the age of defendant no. 2 was 13 years and on the next breath he asserted that, both the defendant nos. 2 and 3 were boy (বালক) which also construe that both the defendant nos. 2 and 3 were minors at the time of execution of the *bainapatra*.

The learned counsel by taking us to the testimony of D.W-1 also contends that, though at the fag-end of his deposition, the said defendant no. 1 produced several documents by way of *firisty* (ফিরিস্তি) but inadvertently those documents were not marked as exhibits but since the documents were kept in the record, this Hon'ble court may take into judicial notice of those documents and for that, the appellants filed an application for taking the documents as additional evidence under order XLI, rule 27 of the Code of Civil Procedure. In this connection, the learned counsel submits that, from the contents of the list of the documents, in particular in the GDs which were lodged on 23.06.2002 and 11.07.2002 (appeared at page 130 of the Paper Book) where it has clearly been stated, how the plaintiff obtained the alleged signature from the defendant nos. 1-3 upon exerting threat and under coercion which proves that the alleged *bainapatra* was subsequently written on the blank stamp papers upon taking signature of the defendants earlier.

Insofar as regards to the execution of *bainapatra*, the learned counsel further contends that since it has not been proved by any documentary evidence that after execution of the alleged *bainapatra* dated 17.02.2002,

taka 5,00,000/- was paid through P.W-3 so on that score as well, the *bainapatra* cannot be enforced by any court of law.

In regard to the consequence of a deed executed by a minor, the learned counsel has also placed his reliance in a slew of decisions and submits that, it has been proved that the alleged *bainapatra* was executed by the minors so it can never be enforced so no decree for specific performance of contract can be passed.

In reference to the provision provided in section 22 of the Specific Relief Act, the learned counsel further contends that literally a discretionary power has been bestowed upon the court to pass decree in a suit filed for specific performance of contract so if the court finds any unfairness adopted in obtaining a *bainapatra*, the court can interfere in it by applying that discretionary power and in the instant case, since from the circumstances vis-à-vis the materials on record clearly suggests that the alleged *bainapatra* was subsequently created upon obtaining signature of the defendants through coercion, so the trial court ought to have exercised its discretionary power by not passing any decree for Specific Performance of Contract.

In reply to the submission so placed by the learned senior counsel for the respondent no. 1, the learned counsel for the appellants contends that, not from the deposition of D.W-1 himself even P.W-1 and P.W-3 also in their respective testimony have repeatedly asserted that at the time of executing the *bainapatra*, the defendant nos. 2 and 3 were minors which has willfully been sidetracked by the trial court and therefore, this Hon’ble

court can exercise that discretion under the provision of section 107 of the Code of Civil Procedure by discarding the alleged *bainapatra*.

In adverting to the assertion made by the learned counsel for the respondent no. 1 that at the time of the death of the husband of the defendant no. 1, the defendant nos. 2 and 3 were minors not at the time of executing *bainapatra* as deposed by P.W-3, the learned senior counsel for the appellants then contends that, there has been no ambiguity in the deposition of P.W-3 in regard to eligibility of executing the alleged *bainapatra* as P.W-3 in his cross-examination rather in clear term asserted that "দাতা হিসাবে পনিয়া আখতার, মার্জিয়া, ফরহাদ বায়নাপত্রে স্বাক্ষর করেন। মার্জিয়া বড় তার বয়স তখন ১৩ বছর হবে। তারা দুইজনই বালক হবে". However, in support of the submission, the learned senior counsel cited a string of decisions reported in *AIR 1961 Patna 21 (V 48 C 6); AIR 1928 Lahore 609; AIR 1941 Nagpur 105; AIR 1928 Privy Council 152; 68 DLR (AD) 337; 72 DLR (AD) 222 and 25 BLC (AD) 150*. With the submissions and relying on the decisions, the learned counsel finally prays for allowing the appeal by setting aside the impugned judgment and decree.

On the flipside, Mr. Mustafizur Rahman Khan, the learned senior counsel along with Mr. Mohammed Mutahar Hossain, the learned counsel appearing for the respondent no. 1 very robustly opposes the contention taken by the learned senior counsel for the appellants and submits that since in the written statement filed by the defendants there has been no assertion with regard to the issue of minority of the defendant nos. 2 and 3 as has been canvassed for the appellants so under the provision of order VII,

rule 2 and 3 of the Code of Civil Procedure, the plaintiff has got no obligation to deny such case of the defendants.

The learned counsel by taking us to the deposition of P.W-3 then contends that though the defendants tried to rely upon the evidence of P.W-3 especially with regard to the age of the defendant no. 2, Marzia Akter aged 13 years asserting that both the defendant nos. 2 and 3 were minors but the said assertion was made by that P.W-3 reckoning their age from the date of death of their father, late Abdur Rahim not from the date of execution of the *bainapatra* so the assertion made by the defendants about the age of the defendant nos. 2-3 cannot be sustained.

The learned counsel by referring to the deposition of P.W-3 through whom subsequent amount of taka 5,00,000/- was paid in the account of the defendant no. 1 through Demand Draft (DD) also contends that, what has been asserted in the plaint with regard to the subsequent payment has been corroborated by that P.W-3 without any deviation by cross-examination from the defendant's side resulting in, it has been proved that a total amount of taka 8,00,000/- has been paid to the defendants.

The learned counsel next contends that, though it is the case of the defendants that, they received payment of taka 5,00,000/- from selling another land but that fact cannot be proved by any evidence by the defendants which alternatively proves that the payment of taka 5,00,000/- was made by the plaintiff for the suit land on the next day of execution of *bainapatra*.

Insofar as regards to the allegation of obtaining signature of the defendants on the stamp papers under coercion, the learned counsel then

contends that, that very assertion has to be proved by sufficient evidence but it remains disproved when the defendants are equally bound to prove their own case as well so no threat had ever been exerted by the plaintiff in obtaining the *bainapatra* from the defendants.

The learned counsel next submits that though it is the universal proposition that the plaintiff has to prove his/her own case but if the defendant relies on any certain facts and describes in the written statement it is also incumbent upon the defendant to prove his/her such defence case as well but in the instant case, since the defendants have failed to prove their case, so the plaintiff is entitled to a decree of specific performance of contract which has rightly been passed by the learned Judge of the trial court considering the evidence and materials on record which is liable to be sustained.

When we pose a question to the learned counsel for the respondent no. 1 that why no endorsement was made in the original *bainapatra* as regard to the payment of taka 5,00,000/- or to execute any supplementary document for that amount, the learned counsel then submits that, since the subsequent payment has also been proved by corroborative evidence so there has been no reason to make any endorsement of such payment in the *bainapatra* or to make any documents to that effect and hence, there has been no illegality in the impugned judgment and decree.

However, in support of the submission, the learned counsel for the respondent no. 1 has placed his reliance in the decision reported in 6 BLC (HCD) 323 settling the discretionary power of the court under the provision of section 22 of the Specific Relief Act and read out paragraph 32 thereof.

On the similar point, the learned counsel has also relied upon a decision reported in an online legal portal "*Manupatra*" which has also reported in 6 BLC (AD) 99 and read out paragraph no. 5 thereof. With regard to the legality of any document executed by any minor, the learned counsel then placed his reliance in the decision reported in AIR 2001A 334 and read out paragraph no. 37 thereof. With the above submissions and relying on the decisions, the learned counsel finally prays for dismissing the appeal.

Be that as it may, we have considered the submission so advanced by the learned senior counsel for the appellants and that of the learned senior counsel for the respondent no. 1 at length. We have also gone through the impugned judgment and decree and all the documents appeared in the paper book including the decisions cited at the bar.

At the very outset, we would like to examine the plaint to find whether the plaintiff has been able to prove his case by supporting documents as well as adducing evidence. On going through the plaint, we find that, in paragraph no. 2 thereof, it has been asserted that on 17.02.2002, the alleged *bainapatra* was executed in the house of the defendants at *Dhekia Sakin* in presence of Mahtab Uddin, Abdul Malek and Abdul Matin. Now in order to prove the execution of the *bainapatra,* the venue of executing the *bainapatra* is very vital. Now let us examine what has been stated by P.W-4 that is, Abdul Malek who happened to be the attesting witness and claimed to be present at the time of such execution. In his cross-examination that P.W-4 in clear term asserted that, the *bainapatra* was registered in the Sub-Registry Office when he himself, Matin and P. W-3 were present. Apart from P.W-4, P.W-1 in his testimony asserted that,

before executing the *bainapatra* there had been discussion with regard to executing *bainapatra* on 10.02.2002 but nothing of this sort (previous discussion) has been there in the entire plaint, so the assertion with regard to previous discussion is nothing but an exaggeration that aims to give emphasis on the execution of alleged *bainapatra*.

Furthermore, P.W-3 in his deposition asserted that, the defendant no. 1 claimed taka 5,00,000/- in the Sub-Registry Office but in the plaint, the plaintiff asserted that after executing the *bainapatra* and after returning to the house, the defendant no. 1 asked the plaintiff to pay her taka 5,00,000/- more. So in regard to subsequent payment of taka 5,00,000/- there remains clear contradiction in the testimony of P.W-3 and to what has been asserted in the plaint.

Regarding the assertion of minority of the defendant nos. 2 and 3, it is the submission of the learned counsel for the respondent no. 1 that, since the defendant no. 1 in her deposition asserted that, not only in the year 2002, the defendant nos. 2 and 3 were also minors while selling other lands. In that regard, the learned senior counsel for the appellants submits that since the point of minority has not been challenged by any party to the transaction alleged to have made in transferring other land, so it cannot be taken into consideration in disposing of the case in hand when it has been asserted by the defendants in their written statement as well as through the testimony of D.W-1 that, the defendant nos. 2 and 3 were minors, so the onus lies upon the plaintiff to discard the said assertion, which he has utterly failed.

However, we find ample substance to the submission made by the learned senior counsel for the appellants because not only the defendants rather the testimony of P.W-1 and P.W-3 who stood as attesting witness and remained present at the time of execution the alleged *bainapatra* also asserted that, at the time of execution of *bainapatra* both the defendant nos. 2 and 3 were minors. At that, the learned counsel for the respondent no. 1 has referred the provision of order VIII, rule 2 and 3 of the Code of Civil Procedure but on going through the provision of rule 2 and 3 of order VII we find no application of those very provision here.

Then again, it is the specific case of the defendants-appellants that though the defendant nos. 1-3 put their signature on stamp papers but the said signature was taken through coercion and threat for which after coming to know about the said fact, through receiving legal notice issued by the plaintiff dated 18.06.2002, she (the defendant no. 1) lodged GD entries on 23.06.2002 and 11.07.2002 respectively narrating similar facts as regards to obtaining the signature on the stamp papers under coercion even though those two vital GDs were produced before the trial court but inadvertently it has not been marked as exhibits. But invariably those documents should have been taken into judicial notice by the trial court since he has not refused to entertain the documents and for that obvious reason, the defendants-appellants filed an application for taking those documents as additional evidence under order XLI, rule 27 of the Code of Civil Procedure. However, we take those two GDs to our judicial notice and find substance to what has been asserted therein the GD entries with

regard to exerting threat for obtaining signature in the alleged *bainapatra* from the defendants.

Now let us examine the case of the plaintiff with regard to the subsequent payment of taka 5,00,000/- claim to have paid on 18.02.2002 when P.W-3 was assigned to transmit the said amount in the account of the defendant no. 1. But what we find from the deposition of P.W-3 to that respect, is rather contradictory because in his deposition, he stated that on 18.02.2002 taka 5,00,000/- was given by the plaintiff in favour of the defendants by saying that "১৮.০২.২০০২ তারিখে আবার ৫ লক্ষ টাকা বাদী ১ নং বিবাদীকে দেয়। দখল বুঝে দেয় ১৭ তারিখেই।". On the next breath, he also stated that the payment has been made by him on 18.02.2002 through DD. In such a state of affairs, we pose a question to the learned counsel for the respondent no. 1 why any document with regard to such payment has not been produced before the court in absence of any endorsement in the *bainapatra*, the learned counsel then contends that since P.W-3 was assigned to pay the said amount and he asserted so in line with the statement made in the plaint so there has been no necessity to produce any documentary evidence. But we are not at one with such submission because if a DD was issued favouring the defendant no. 1 there would have been a certain document. Also, it is the definite case of the defendants that, they did never execute any *bainapatra* rather under coercion signature was taken by the plaintiff on certain stamp papers and subsequently alleged *bainapatra* was furnished thereon which sounds true given the evidence and materials on record. Then again, since the payment as alleged by the plaintiff has not been

proved by any convincing evidence so the *bainapatra* cannot stand let alone enforce through court.

Further, as discussed above, we find that there has been no proof of making payment of taka 5,00,000/- to the defendants so no decree can be passed for specific performance of contract basing on the alleged *bainapatra*.

On top of that, the alleged *bainapatra* was supposed to be retained with the plaintiff and produce to the court from his custody but funnily enough, that *bainapatra* was produced by P.W-2 who is merely a scribe, a deed writer who can never be regarded as proper custodian of that vital document which also cast serious doubt of the plaintiff's case. However, all those pertinent point has not been taken into consideration by the trial court.

Regard being had to the above facts and circumstances and the evidence and materials on record and the observation made hereinabove, we find ample substance to the submission so advanced by the learned senior counsel for the appellants and thus we are inclined to allow the appeal.

Accordingly, the appeal is allowed however without any order as to costs.

The judgment and decree dated 29.09.2014 passed by the learned Joint District Judge, 1st Court, Kishoreganj in Other Class Suit No. 19 of 2002 stands set aside. Consequently, the suit is dismissed.

Since the appeal is allowed and ultimately suit is dismissed so there has been no necessity to sustain the rule.

Resultantly, the Civil Rule No. 1076(F) of 2014 is discharged however without any order as to costs.

Let a copy of this judgment along with the lower court records be transmitted to the learned Joint District Judge, 1st Court, Kishoreganj forthwith.

Md. Bashir Ullah, J.

I agree.

Abdul Kuddus/**B.O**.