

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL REVISION NO. 283 OF 1989

IN THE MATTER OF:

An application under section 115(1) of the Code of Civil Procedure. (Against Decree)

-And-

IN THE MATTER OF:

Abul Kashem Mollah (died leaving behind his legal heirs:.....) and others

--- Defendant-Respondent-Petitioners.

-Versus-

Moslem Ali Khan (O. P. Nos. 1 and 2. Moslem Ali Khan and Abdul Hamid Dhali both died leaving behind their legal heirs:.....) and others

--- Plaintiff-Appellant-Opposite Parties.

Mr. Sk. Reajul Hoque with

Mrs. Shishir Kona, Advocates

--- For the Defendant-Respondent-Petitioners.

Mr. Nakib Saiful Islam with

Mr. Pannu Khan, Advocates

---For the Plaintiff-Appellant-Opposite Parties.

Heard on: 21.05.2023, 23.05.2023, 08.06.2023, 09.07.2023, 10.07.2023 and 18.07.2023.

Judgment on: 08.08.2023.

At the instance of the present defendant-respondent-petitioners, Abul Kashem (now deceased and substituted) and others, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon

the opposite party Nos. 1 and 2 to show cause as to why the judgment and decree dated 20.10.2016 passed by the learned Joint District Judge, Court No. 1, Shariatpur in the Title Appeal No. 199 of 1987 allowing the appeal and that of the further proceedings of the Title Execution Case No. 02 of 2017 pending before the court of the learned Assistant Judge, Sadar, Shariatpur should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present opposite party Nos. 1 and 2 as the plaintiffs filed the Title Suit No. 946 of 1979 in the court of the learned Munsif, Shariatpur on 21.09.1979 against the opposite party Nos. 03-10 for Specific Performance of Contract concerning a total land measuring 5.43 acres described in the schedule of the plaint. The said suit was eventually transferred to the learned court of Munsif (now Assistant Judge), Madaripur Sadar, Madaripur and renumbered as the Title Suit No. 163 of 1985. The plaint contains that Birendra Kishore, Dharendra Kishore, Sunil Kumar, Makhan Lal, Mahendra Kumar and Sree Sree Radha Gobinda Thakur Jee represented by the said measurement of land as Shebayet Indra Bhusan and who himself entered into the above-mentioned suit property at a cost of Tk. 2,000/-. They

accordingly executed a Bainapatra on 18.04.1969 AD on receipt Tk. 1,800/- out of total Tk. 2,000/- as advanced money and delivered possession of the suit property to the plaintiffs. The said Bainapatra contains that the executents of Bainapatra would execute a registered sale deed upon collecting the income tax clearance and also permission from the Board of Revenue and the Executants who kept the remaining amount of money on the date of the registration of the deed. The plaint further contains that the plaintiffs were living in the property but allowed one of the executants, namely, Makhon Lal to live in the suit land. The executants could not have a registered sale deed and during the Liberation War, they went to India. However, the plaintiffs lastly offered the value of consideration money to them in the month of আষাঢ় ১৩৮৬ বাংলা for registering a sale deed. After the filing of the said case Birendra, Dhirendra and Sunil Kumar died and their only heir defendant No. 1, Mohandra Lal Saha. Indra Bhushan Saha and his heirs were impleaded as the defendants. The present plaintiff-opposite party Nos. 1-6 were not served the required notices to the defendant Nos. 2-6 and did not receive the notices.

However, the defendant No. 1 and the added defendant Nos. 8-10 contested the suit by filing a written statement

contending, inter alia, that the alleged Bainapatra dated 18.04.1969 AD was forged and fraudulent as none of the executants were present to execute the said Bainapatra for selling the suit property. It is further contended that none of the executants received any advanced money of Tk. 1,800/- and did not hand over the possession of the suit land. The present petitioners further contended that the alleged executants left the country without making any arrangement for the management of their land and their shares therein. Defendant No. 1, Makhon Lal never acted as Shebayet of the Deity because the last Shebayet was Indra Bhushan before he left the country to save his life. One of the executants Mohendra died leaving behind the defendant Nos. 2, 3, 5 and 6 as heirs heirs and they were living in the Kathpatti area at Daptar Road in Barishal Town and also at Kulpotti area of Shahartali under Madaripur Upazilla, Madaripur. The said defendant Nos. 2, 3, 5 and 6 engaged the petitioner No. 1 as Borgadar (বর্গাদার) for cultivation. Subsequently, they desired to sell the property measuring 1.91 acres of land which is part of the suit land and they sold the same at Tk. 15,000/- which was registered on 30.11.1979 AD.

The plaint further contains that the said Birendra, Dhirendra, Sunil and Indra Bhushan left the country for India, thus, the suit land was declared as enemy property and later vested by the Government as vested property and non-resident property. The present plaintiff-opposite parties made an application on 29.06.1976 to obtain a lease of the said land. There was a process by the Authority of the Government for leasing the property.

The defendant-opposite party No. 7 the Government filed a separate written statement. The above custodian of vested non-residence property has filed a separate written statement but they could not substantiate the vested property. However, the present defendant-petitioners also made an application for obtaining a lease from the Government and Custodian of enemy property in the year 1976.

The above case was heard by the learned Assistant Judge, Shariatpur Sadar, Shariatpur who obtained evidence from both by the way of depositions and documents and after the conclusion of the hearing came to a decision and dismissed the suit. Being aggrieved the present plaintiff-opposite parties preferred the Title Appeal No. 199 of 1987 in the court of the

learned District Judge, Shariatpur which was subsequently heard by the then learned Subordinate Judge, Shariatpur who after hearing the parties allowed the appeal and thereby reversed the judgment of the learned trial court. Being aggrieved the present defendant-petitioners filed this revisional application under section 115(1) of the Code of Civil Procedure challenging the legality and propriety of the impugned judgment and decree passed by the learned appellate court below and this Rule was issued thereupon.

Mr. Sk. Reajul Hoque, the learned Advocate, appearing along with the learned Advocate Mrs. Shishir Kona, submits that the learned appellate court below committed an error of law by reversing the judgment and decree of the learned trial court without considering that the suit was seriously barred by limitation as the Bainapatra which was allegedly executed on 18.04.1969 but the suit was filed on 20.09.1979 which is more than 9 years from the alleged deed of Baina under Article 113 of the Limitation Act, as such, the suit was not maintainable and the learned appellate court below avoided the material issue involved in the suit, as such, committed an error of law occasioning failure of justice by reversing the judgment and decree of the learned

trial court for Specific Performance of Contract, thus, the Rule should be made absolute.

The learned Advocate further submits that there are some serious defects of parties but the learned appellate court below committed an error of law that there was no defect as Radha Gobind Thakur Jee was impleaded as defendant 2, as such, there is no defect of party in the suit. But the appellate court below erred in law without considering Exhibits- '3(2)', '3(6)' and 'C' wherein it is clear that part of the schedule- 3 property i.e. R. S. Plot No. 350 under R. S. Khatian No. 715 was owned by Indra Bhusan as his personal property and in the year 1962-1963 at the time of S. A. Operation i.e. S. A. Plot No. 350 under S. A. Khatian No. 637. The sons of Indra Bhusan, namely, Ashim and Joti inherited the property and they were not made a party in the suit by the plaintiffs, thus, the suit is barred by a defect of parties. It is apparent from Exhibits- '3(6)' and 'C' i.e. S. A. Khatian No. 637 that the part of the schedule- 3 property was inherited by the Asim and Joti during the S. A. operation, thus, it is not at all possible to execute the alleged Bainanama by the Indro Bhusan on 18.04.1969, as such, it is clear that the alleged Bainanama is a

false and fabricated documents and the appellate court below erred in law in failure for considering the same.

The learned Advocate also submits that the learned appellate court below committed an error of law and failed to apply his judicial mind for considering Exhibit- 'I' the alleged Bainapatra without any direct and clear finding as to the genuineness of the said document which was unregistered and the possession was never handed over, rather, they left the country for India without making any arrangement of their properties even by the alleged Bainapatra in favour of the present plaintiff-opposite parties, thus, the learned appellate court below misread and failed to consider the evidence adduced and produced by the parties, as such, the Rule is, therefore, should be made absolute.

The present Rule has been opposed by the present plaintiff-opposite parties.

Mr. Nakib Saiful Islam, the learned Advocate, appearing along with the learned Advocate Mr. Pannu Khan on behalf of the present plaintiff-opposite parties, submits that the learned trial court committed an error of law by finding that the suit was barred by the defect of parties as the Sebaiyet Indro Bhushan was

not made a part, whereas, the learned appellate court below reversed the judgment and decree of the learned trial court and thereby committed no error of law as the suit was not barred by defects of parties as all concerned relevant parties were impleaded in the suit, as such, the learned trial court has committed an error of law, as such, the present Rule is liable to be discharged.

The learned Advocate also submits that the learned appellate court below properly considered the plaint filed by the plaintiffs within the limitation period but the learned trial court committed an error of law by finding that the suit was barred by limitation, thus, the Rule would not be sustainable under the provision of law, as such, the Rule is liable to be discharged.

The learned Advocate further submits that the Bainapatra dated 18.04.1969 was lawfully executed by the relevant executants of the parties, as such, no question of entering the property into the enemy property or vested property and the same was not the Government under the custodian of enemy property. As per the provision of the Disturbed Person Rehabilitation Ordinance, 1964 which required to obtain or transfer of land of the Hindu Community.

Considering the above submissions made by the learned Advocates appearing for the respective parties and also considering the revisional application filed under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree passed by the learned courts below and also perusing the huge volume of documents submitted by the respective parties in the learned courts below which have been included in the lower courts records, it appears to me that the present plaintiff-opposite parties have filed the suit praying for Specific Performance of Contract along with a prayer for possession of the suit land described in the plaint. The plaintiffs claimed that a Bainanama was executed by the executants in order to transfer the suit property total measuring 5.43 acres in favour of the present plaintiff-opposite parties which have been exhibited as Exhibit- 'I' by the plaintiffs.

I have carefully examined the validity of this Bainanama which was executed on 18.04.1969 AD (৫ই বৈশাখ ১৩৭৬ বিএস). I have carefully examined the said Bainanama as Exhibit- 'I' which is an unregistered Bainanama. Under the provision of law, an unregistered Bainanama for executing a sale deed in relation

to the transfer of any land cannot be a valid document to transfer any property. Moreover, Article 113 of the Limitation Act validity of a Bainapatra for Specific Performance of a Contract is 3 (three) years but the date would be computed from the date of refusal to execute a deed if no date is fixed performing remains part of the contract. Under Article 113 of the Limitation Act in a contract of sale when transfers the full consideration of money and got possession of the suit property by a person is entitled to section 53A of the Transfer of Property Act. Article 113 of the Limitation Act was no application to subject a claim to transfer. In such a way the contract for selling of land is necessary for transferring of registered Bainanama. In the instant case, the Bainanama claimed to have been executed by the claimed owners of the suit land in the year 1969 was neither a registered document nor the possession of the suit land handed over to the Baina receivers, even though, the Bainanama was executed by the present plaintiff-opposite parties and claimed that the executants of the Bainanama were under an obligation to obtain a sale certificate and other required documents to implement the said contract of Bainanama. Under the provision of the Disturbed Person Rehabilitation Ordinance 1964 which was operating law

at the relevant time. The vendor could not obtain such required legal documents in order to transfer the land validly in favour of the plaintiff-opposite parties. It further appears that the plaintiffs did not claim by filing any suit within 3 (three) years from the Bainanama. Rather, they waited to get the executants' documents for a long period of time. However, the plaintiffs claimed that before filing the suit on several times demanding to execution of the sale deed from the executants according to the Bainapatra which was refused for the delay and the executants of Bainapatra left for different places due to fear of living in Bangladesh in the Liberation War period and because of that period for filing the suit. I could not find any believable evidence in the lower court records as to the said refusal by the executants of the execution of the deed.

In this regard, I have carefully examined the findings of the learned courts below regarding the limitation period for filing the suit because if the limitation period to have the claim of the plaintiffs must also file that is the settled principle of law. In this regard, the learned trial court found the aforesaid matter with the following findings:

...“The alleged Bainapatra is shown to have been executed on 18.04.69 & the instant suit was filed in 1979 i.e. long after 10 years. Plff has but pleaded that the deed could not be executed because the income tax clearance certificate & permission of the Board of Revenue were required to transfer property of the Hindu Community as per the provision of the Disturbed Person Rehabilitation Ordinance 1964. But the effect of this ordinance continued till 1967 & it had no applicability at the time of the execution of Bainapatra in 1969. Moreover, in their plaint plff could not make out any specific clear date as well as the case of the last denial to execute a deed by the alleged executors. So, the case on the basis of Bainapatra dt. 18.04.69 filed in 1979 is clearly barred by limitation.”...

Regarding the limitation period the learned appellate court below failed to controvert the findings of the learned trial court, even though, it appears that the Bainanama was executed on 18.04.1969 and the suit was filed in the year 1979 which is deferred approximately 10 years beyond the limitation period for filing a suit and even the claims a date for executing to registrar the deed for refusal in order to show the provision of Article 113 of the Limitation Act.

The learned appellate court below came to a conclusion as to the impleaded persons in the title suit by finding that the suit was properly filed against all the concerned parties, in particular, the learned appellate court below considered that Sree Sree Radha Gobinda Thakur Jee has been impleaded, as such, there was no necessity of Shebayet Indro Bhushan. The learned appellate court below came to a conclusion in the following matter:

...“Moreover, the plffs instituted the suit under chapter 11 of the Specific Relief Act and U/S 9 chapter- 1 of the said Act. But the ld. trial court without discussing the form and manner under which the suit has been instituted, blindly decided that the suit is not maintainable for defect of the party. In fact, there is no defect of a party in the suit. The plffs have instituted the suit for the specific performance of a contract and also for recovery of Khas possession from a portion of the suit land. The plff paid ad-valurem court fees. I do find no defect in the suit and in the manner in which it has been filed.”...

Whereas, the learned trial court came to a conclusion that the suit was not maintainable for a defect of parties and found the following terms:

...“The suit is bad for defect of the party since Indo Bhusan Sabayet of deity Radha Bigraha Jee Thakur is alleged to have executed bainapatra on behalf of deity has not been made a party. So, the suit is not maintainable.”...

The above two paragraphs are important for the legal point which the learned appellate court below committed an error and failed to apply his judicial mind to allow the appeal and thereby reversing the judgment and decree passed by the learned Assistant Judge of Sadar Court, Madaripur who dismissed the suit to above 2 grounds principally.

Now, I am inclined to take into notice of the role of the Government and the Custodian of enemy-vested property within the principle of law. I am surprised to see that the learned courts below considered the above role of the Government who could not make any substantial submission in the court, Even though, they have submitted a written statement without any point. However, both the courts below took into consideration that from the date of consideration of the Bainanama up to the filing of the present suit law regarding the property owned by the Hindu Community has changed by enacting new provisions of law on

different circumstances. In this regard, the learned appellate court below holds the role in the following terms:

...“Rather the yearly lease has been crying contending the suit land as vested property. The raiyats and tenants are entitled to hold over. But in the case of the law of enemy property, the licensee is not entitled to hold. The periodic lease is not liable to be renewed. To lease out a property lies within the discretion of the authority.

The lessee only claimed that the suit land is V.P. A lessee holding a lease under V.P. is not a necessary party in a suit for the establishment of title i.e. when the lessor the enemy property authorities are contesting the suit it is not necessary that the lessee in any way a necessary party in the suit.”...

On the other hand, the learned trial court came to a lawful conclusion that the executants of the said alleged Bainanama had left Bangladesh and come back with a free and fair life and their properties were enlisted as a vested property. In this regard, the learned trial court held that:

...“Accordingly, on 12.07.76 the officer in charge of Enemy Property (L & B) vide his order passed in lease case No. XII(E)201 of 1975-76 has ordered the subordinate authority to give a lease of the

1.26 acres of land out of the schedule to the present plff. Moslem Khan & A. Hamid Dhali on the realization of rent of Tk. 125/- per year with arrears from the year 1379 B.S. from which plffs were found to be in possession. The certified copy of lease case No. XII(E)201/75/76 has been filed by deft & made exhibit.”...

From the above conflicting decision of 2 courts regarding the enemy/ vested property and the suit was filed during the limitation period of the said provisions of law regarding the suit property measuring a total 5.43 acres of land.

I have carefully noticed that the suit was filed under the provisions of the Specific Relief Act under section 12 of the Specific Relief Act. Section 12 makes a contract enforceable once the contract may be specifically enforced. In the explanation of the said provision of law:

...“*Explanation-* Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract to transfer moveable property can be thus relieved.”...

The above explanations of the said law require that the relief under the above provisions would not be adequate if other relief is not sought for. Section 9 of the Specific Relief Act provides a relief cannot be given without any enforcement by the legal authority. In the instant case, the claim of the plaintiff-opposite parties for recovery of Khas possession proves that the plaintiffs were not functioning by virtue of the claiming Bainapatra. Most importantly a claim cannot remain to be valid beyond the limitation period by filing a case thereof.

In view of the above discussions and findings of the learned courts below, I am of the opinion that the learned appellate court below committed an error of law by allowing the appeal and thereby reversing the judgment and decree which lawfully and rightly passed by the learned Assistant Judge of Sadar Court, Madaripur who dismissed the case filed by the plaintiff-opposite parties.

Accordingly, I find merit in the Rule.

In the result, the Rule is hereby made absolute.

The judgment and decree dated 03.12.88 passed by the learned Subordinate Judge, Shariatpur in the Title Appeal No. 199 of 1987 is hereby *set aside*.

The judgment and decree dated 24.05.1987 passed by the learned Assistant Judge of Sadar Court, Madaripur in the Title Suit No. 163 of 1985 is hereby upheld.

The interim order passed by this court at the time of issuance of this Rule staying the operation of the judgment and decree dated 20.10.2016 passed by the learned Joint District Judge, Court No. 1, Shariatpur in the Title Appeal No. 199 of 1987 and that of the further proceeding of Title Execution Case No. 02 of 2017 for a period of 6 (six) months and subsequently the same was extended from time to time and lastly the same was extended till disposal of the Rule are hereby recalled and vacated.

The concerned section of this court is hereby directed to send down the lower courts records along with a copy of this judgment and order to the learned courts below immediately.