

Present:

Mr. Justice A.K.M. Asaduzzaman

Civil Revision No. 3592 of 2007

Gadu Miah and others

.....Petitioners.

-Versus-

Md. Chan Miah

.....Opposite party.

Mr. Md. Abdul Haque, Advocate

.....For the petitioners.

Mr. Md. Shah Alam Sarker, Advocate

..... For the opposite party.

Heard and judgment on 20<sup>th</sup> February, 2024.

A.K.M.Asaduzzaman,J.

This rule was issued calling upon the opposite party to show cause as to why the impugned judgment and decree dated 15.04.2007 passed by the Additional District Judge, 4<sup>th</sup> Court, Mymensingh in Other Class Appeal No. 258 of 2004 reversing those dated 10.10.2004 passed by the Senior Assistant Judge, Fulbaria, Mymensingh in Other Class Suit No. 12 of 2004 decreeing the suit should not be set aside.

Petitioner as plaintiff filed Other Class Suit No. 12 of 2004 against the opposite parties for cancellation of deed.

Plaint case in short, inter alia, is that suit property is the paternal property of the plaintiff. Osman Ali, Asor Ali and Makrom Ali are three brothers of the plaintiff and each of them has son and daughter. The defendant is the son of nephew of the plaintiff (grandson of Osman Ali and son of Rostom Ali). The brothers of the plaintiff are not alive. The plaintiff and her brothers children live in the same mess. The paternal property of the plaintiff are in ejmali. In the paternal property of the plaintiff Abul Basir, Tasimuddin, Kader, Amena Osimuddin Sekander Ali and the defendant are in ejmali possession. The plaintiff had no desire to transfer or to gift her property and she had no necessity to do so. Since the brothers and nephews has no other land except the homestead and the plaintiff considering the financial anomalous condition of the brothers and nephews of the defendant, the plaintiff did not partition her paternal property. The plaintiff resides at her husbands house, she is illiterate pardanshin lady aged about 70 years old. The defendant is a dishonest man. In the year 1410 in the month of Sravan, while the plaintiff was

seriously ill, the defendant (Chan Miah) in order to have treatment of the plaintiff, took her to Fulbaria on 03.08.2003 and gave saline and took her thumb impression and at the afternoon brought her at home, later on it was disclosed that the defendant created a deed on 13.08.2003. Son of the plaintiff obtained certified copy of the deed and came to know that the defendant in connivance with the deed writer and the witnesses of the deed fraudulently created the deed. The plaintiff did not give proposal to sale the land, she did not receive any price for the land, she never went to the Fulbaria Sub Registrar Office to execute and register the deed. The writer is the identifier of the deed, the witnesses, mentioned in the deed are resident of Baiddabari village which is at a distance of 10 mile away from the house of the plaintiff and all of them are of same seresta. The plaintiff is a pardansin lady, she is not familiar with the identifier and witness of the deed. The deed is void, it has been created fraudulently.

Opposite party contested the suit by filing written statement denying the plaint case alleging, inter alia, that plaintiff is the aunt of the defendant Asgor Ali Fakir, who was her husband, he was very poor man. Since her husband was poor she was taken away

from her paternal property and transferred her share to her brothers, plaintiff resides at her husband's house at village Baruka. She has three son and four daughters. Due to poverty plaintiff sold the suit land to the defendant at a price of Tk. 14,000/- in the month of July 2003. The defendant paid the price by taking loan of Tk. 6000/- from his father in law and the deed was done on 03.08.2003 and the defendants got possession of the land. The plaintiff went to the sub-registrar office on 03.08.2003 with her son Nurul Islam and daughter Hasena Khaton and executed and registered the deed after receiving the price. The defendant prayed for dismissal of the suit.

During trial following issues were framed.

- i) Whether the suit is maintainable to its present form?
- ii) Whether the suit is bad for defect of parties?
- iii) Whether the deed mentioning in schedule-1 on the land mentioning in schedule-2 is entitled to cancel?
- iv) What else relief or reliefs plaintiff are entitled to get?

During trial both parties adduced 4 witnesses each and exhibited some of the documents.

The learned Assistant Judge by its judgment and decree dated 10.10.2004 decreed the suit.

Challenging the said judgment and decree, defendant preferred Other Class Appeal No. 258 of 2004 before the Court of District Judge, Mymensingh, which was heard on transfer by the Additional District Judge, 4<sup>th</sup> Court, Mymensingh, who by the impugned judgment and decree dated 15.04.2007 allowed the appeal and after reversing the judgment of the trial court dismissed the suit.

Being aggrieved there against plaintiff petitioner obtained the instant Rule.

Mr. Md. Abdul Haque, the learned advocate appearing for the petitioner drawing my attention to the judgment of the court below submits that this is a suit for cancellation of deed. Plaintiffs claim that she is the pordanshin illiterate village woman. By practicing fraud without having any independent advise as well as taking active part, fraudulently obtained the sale deed from her on the suit land, which is her paternal property and she did never sold it to the defendant and as such she instituted the suit for

cancellation of the deed. Upon discussing the evidences trial court has rightly found that there was no independent advice before execution and registration of the deed in question in favour of the defendant, no transaction was ever been made as consideration money of the deed and the defendant could not prove by adducing any evidence that deed was rightly been executed and registered by the plaintiff rather it was obtained on fraud thus decreed the suit on contest. But the appellate court without at all reversing the said findings of the trial court most illegally as well as arbitrarily allowed the appeal and dismissed the suit. The impugned judgment is thus not sustainable in law, which is liable to be set aside.

Mr. Md. Shah Alam Sarker, the learned advocate appearing for the opposite party, on the other hand opposes the rule and submits that appellate court being the last court of fact has rightly reversed the judgment of the trial court and the judgment and decree of dismissing the suit by the appellate court contains no illegality. He further submits that a valid document of registered sale deed cannot be set aside or cancelled only upon believing the oral testimonies when the document itself was registered legally

and validly under section 60 of the Registration Act and has got presumptive value. In support of this contention he cited a decision in the case of Abani Mohan Vs. Assistant Custodian (SDO) Vested Property, Chandpur and ors. reported in 39 DLR(AD) 223. He finally prays that since the Rule contains no merits, it may be discharged.

Heard the learned Advocate and perused the Lower Court Record and the impugned judgment.

This is a suit for cancellation of the deed. Admittedly suit property was belonged to the plaintiff as her paternal property. Defendants are the son of her nephew. Plaintiff's contention is that promising to have a better treatment, she was taken to the hospital and by practicing fraud her signature was obtained and the defendant created a forged sale deed, on the suit land, which is owned and possessed by the plaintiff. At the time of alleged execution and registration of the sale deed the plaintiff, a pardanshin illiterate village woman had no independent advice although she had her children and can give her advice to that effect and no consideration money was at all been transacted as been alleged in the deed in question. The alleged deed was

obtained beyond the knowledge of the plaintiff. In the suit, defendant claimed that plaintiff was accompanied by her son Nurul Islam (P.W.3) and daughter Hasena (P.W.4) to the registry office and deed was executed and registered with having properly been advised by them and consideration money was properly been transacted before execution and registration of the deed and thus it was a valid deed and cannot be cancelled.

In the suit when plaintiff is claimed and found to be a pardanshin illiterate village woman challenged that the impugned deed dated 03.08.2003 was obtained from her by practicing fraud without having independent advice as well as without making the payment of any consideration money, the onus heavily lies upon the defendant to prove that she had independent advice and consideration money was paid before execution and registration of the deed in question. Although defendant claimed that at the time of execution and registration of the deed in question plaintiff son Nurul Islam and daughter Hasena Khatoon were accompanied by the plaintiffs and the deed was executed and registered at their presence but none of them have accepted in their evidence the said contention to prove their contention rather both of them denied the



same and at one stage Nurul Islam while deposing in court as P.W.3 denied the defendants contention rather it was denied in the suit that none were present at the time of execution and registration of the sale deed. The alleged deed was written and witness by deed writer Md. Azizur Rahman (D.W.2) and witness by Md. Golam Hossain (D.W.3) and Md. Abdur Rashid (D.W.4), who are also deed writer nor having any connection with the plaintiff or are independent witness to give a proper advise to the plaintiff before execution and registration of the deed. Moreover when plaintiffs had her sons and daughters, who were not been asked at the time of execution and registration of the deed in question apparently shows the mischief mind of the defendant in order to get a fraudulent deed from the plaintiff. Trial court on proper assessment of the evidence on record has thus correctly found that deed was obtained without having any independent advise and the consideration money not been transferred to the plaintiff. In this context the trial court has rightly got reliance from a case namely Mussamt Hosna Banu and others Vs. Keamat Ullah Malitha and others reported in 18 BLD (AD) 10 together with another decision reported in 6 BLT 210.

But surprising to notice that the appellate court without at all discussing the evidences as well as reversing the judgment of the trial court most arbitrarily allowed the appeal and reversed the judgment of the trial court and dismissed the suit illegally. The judgment is a clear violation of provision as laid down under Order 41 Rule 31 of the Code of Civil Procedure and accordingly it is not sustainable in law, which is liable to be set aside.

Regard being had to the above law, fact and circumstances of the case, I am of the view that the rule contains merits for consideration.

In the result, the rule is made absolute and the impugned judgment and decree passed by the appellate court is hereby set aside and the decree passed by the trial court is up held and the suit is decreed.

Send down the L.C.R along with the judgment at once.