In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Muhammad Abdul Hafiz

Civil Revision No. 769 of 2017

Khondoker Mozammel and others
Plaintiffs-Respondents-Petitioners

-Versus-

Imdadul Haque Badsha and others
Defendants-Appellants-Opposite parties

Mr. Shasti Sarker, Advocate
for the Plaintiffs-Respondents-Petitioners

Mr. Md. Hamidur Rahman, Advocate
for the Defendants-Appellants-Opposite Parties

Judgment on 26.7.2022

This Rule was issued calling upon the opposite party Nos. 1-5 to show cause as to why the impugned Judgment and Decree dated 31.10.2016 passed by the learned Joint District Judge, 2nd Court, Kushtia in Title Appeal No. 16 of 2014 allowing the appeal and thereby reversing the Judgment and Decree dated 27.1.2014 passed by the learned Assistant Judge, Kumarkhali, Kushtia in Title Suit No. 108 of 2002 decreeing the suit should not be set aside and/ or such other or further order or orders passed as to this Court may seem fit and proper.

The petitioner Nos. 1-3 as plaintiffs instituted Title Suit No. 108 of 2002 in the Court of learned Assistant Judge, Kumarkhali,

Kushtia for specific performance of contract for getting a registered sale deed.

The plaintiff's case, in short, is that the land measuring .21 acres of land in Plot No. 84 along with others in total 1.00 acres under S.A. Khatian No. 680 corresponding to R.S. Khatian No. 173, Mouza Chariakole, Police Station- Kumarkhali belongs to the defendant No. 1 and his brother Osman Biswas. Each of them had .1050 acres of land out of .21 acres from Plot No. 917. Osman Biswas sold .10$\frac{1}{2}$ acres of land from Plot No. 849 and .10$\frac{1}{2}$ acres of land from Plot No. 917 in total .21 acres of land to the plaintiffs and their brother Khandoker Musa on 20.11.1983 by registered kabala deed No. 4963. The plaintiffs have been possessing the land by erecting dwelling house and planting trees. The defendant No. 1 being possessed in respect of 11 Annas share then the defendant No. 1 claimed money for measuring .1050 acres of land. To avoid complicity in further the plaintiffs made a contract with the defendant No. 1 on 02.9.1987 to purchase the suit land at Taka 7,000/-. Taka 4,000/- was paid to the defendant No. 1 on the same day. The defendant No. 1 executed the Binanama deed willingly. Subsequently the plaintiffs paid 2500/- Taka to the defendant No. 1 in presence of the witnesses. The defendant No. 1 refused to

register the deed on 01.5.2002. Hence the plaintiffs constrained to file the suit.

The defendant No. 1 contested the suit by filing a written statement denying all the material allegations made in the plaint that the suit is not maintainable; the defendant No. 1 did not sell the disputed land or did not execute any Bainama deed in favour of the plaintiffs. The defendant No. 1 took cash money as loan due to his own necessity from the plaintiffs and he put the scheduled land as security, as the plaintiffs desire. Subsequently, the defendant No.1 repaid the money to the plaintiffs in presence of the local elite persons but the plaintiffs did not return the Bainama deed as the Bainama deed was not available at that time. The plaintiffs have filed this suit only for harassing the defendant No.1. The defendant No.1 prays for dismissal of the suit.

The learned Assistant Judge, Kumarkhali, Kushtia decreed the suit vide Judgment and Decree dated 27.1.2014. Against the Judgment and Decree the defendant No.1 as appellant preferred Title Appeal No. 16 of 2014 before the learned District Judge, Kushtia which was transferred to the learned Joint District Judge, 2nd Court, Kushtia who allowed the appeal and thus the plaintiffs-respondents as petitioners moved this application under section

115(1) of the Code of Civil Procedure before this Court and obtained this Rule.

Mr. Shasti Sarker, learned Advocate for the plaintiffs-respondents-petitioners, submits that the Appellate Court below has failed to consider the mandatory provision of law under Order 41 rule 31 of Code of Civil Procedure which has caused a failure of justice. The Appellate Court below has failed to consider that the plaintiffs have paid Taka 4000/- to the defendant No.1 on 02.9.1987 out of Taka 7000/-. Subsequently the plaintiffs paid Taka 2500/- in presence of witnesses and deposited Taka 500/- in the Court and prayed for getting sale deed but the Appellate Court below did not consider the same which has caused a failure of justice. He next submits that the Appellate Court below has committed an error of not holding that according to Article 113 of the Limitation Act that Specific Performance of Contract must have to be filed within 3 years from the date of execution or when the plaintiffs have noticed that performance is refused in the instant case. The defendant No. 1 has refused to register the deed on 01.5.2002 which is within the time of limitation as such the Appellate Court below has committed an error which has occasioned a failure of justice. He further submits that in a specific performance of contract for getting sale deed if the

Government has no any interest in the suit land then there is no any reason to impleaed the Government in the suit but the Appellate Court below did not consider the same which has caused a failure of justice. In support of his submissions he has referred to the case of Bangladesh Vs Abdus Subhan Talukder reported in 42 DLR(AD)-64. He next submits that a suit for specific performance of contract the possession of the suit land is very much material besides this point for consideration is whether the unregistered deed of sale dated 02.9.1987 is genuine document or not and the consideration money has been passed. In the instant case the document is genuine and consideration money has been passed. In support of his submissions he has referred to the case of A. Jabbar Rari and Others Vs Sultan Hossain Matbar and Others reported in 23 BLT(AD)92.

Mr. Md. Hamidur Rahman, learned Advocate for the defendants-appellants-opposite parties, submits that the defendant to the suit executed the so-called Bainapatra deed as security and he took the money being Taka 4,000/- (four thousand) from the plaintiffs to the suit land and the defendant by adducing oral evidences successfully proved that the security money was taken by him which was refunded to the plaintiffs and he requested the plaintiffs to give back the Bainapatra deed but the plaintiffs did to

give back the same and considering the evidence on record, the Appellate Court below correctly dismissed the appeal and hence the Rule is liable to be discharged. He further submits that the defendant Abu Musa was examined as D.W-1 and in his examination-in-chief he clearly stated that "আমি অত্র মোকদ্দমার বিবাদী। নালিশী আর, এস, সম্পত্তির মালিক আমি। এই নালিশী জমি নিয়ে বাদী পক্ষের সাথে ০২.৯.১৯৮৭ বা অন্য কোন তারিখ বেচা-বিক্রির কথা বা বায়নানামা হয়নি। আমি বাদী পক্ষের কাছ থেকে ৪ হাজার টাকা ধার নিয়েছিলাম এ কারনে বাদী আমার নিকট security চেয়েছিল। বাদী পক্ষের ইচ্ছা ও কথামত security নামা লিখে দিয়েছিলাম। আমি যে টাকা ধার নিয়েছিলাম তা ফেরৎ দিয়েছি। স্থানীয় গন্যমান্য ব্যক্তিদের সামনে তা ফেরৎ দিয়েছিলাম। কিন্তু বায়নানামা ফেরৎ দেয়নি। বায়না করে দিইনি। দিয়েছিলাম সিকিউরিটি হিসাবে। ফলে জমির দখল দেইনি। দখল আমারই আছে।" D.W.-2 stated in his examination-in-chief that "আমি আবু মুছা ও বাদীদের চিনি। বাদী ও বিবাদী এবং আমার একই গ্রামে বাড়ী। আমাদের ইউনিয়ন নন্দলালপুর। আমি নন্দলালপুর ইউপির আমাদের ওয়ার্ডের মেম্বার ছিলাম। আমি জানি বাদীরা বিবাদীদের নিকট টাকা পাবে এবং এ নিয়ে ইউপিতে মিমাংসা হয়। শালিশে টাকা-পয়সা লেনদেনের কথা শুনা যায় তবে জমির কোন কথা শুনা যায়নি। এরপরে শুনা যায় বাদীর কাছে বিবাদীর ষ্ট্যাম্প আছে এবং টাকা দিয়ে ষ্ট্যাম্প বিবাদী ফেরৎ নেবে। আমার উপস্থিতিতে ইউপি ও আনসার প্রামানিকের বাড়ীতে শালিশ হয়। শালিশে আবু মুছা বাদীদের টাকা ফেরৎ দিয়েছে কিন্তু বাদীরা মুছার স্টাম্প ফেরৎ দিচ্ছেনা। এরপর পরবর্তী শালিশ ইউপিতে আমার উপস্থিতিতে হয় এবং ঐ শালিশে বাদীকে মুছাকে ষ্ট্যাম্প ফেরৎ দেওয়ার কথা হয়। কিন্তু এখনও বাদীরা মুছাকে স্ট্যাম্প ফেরৎ দেয়নি।" D.W-3 stated in his examination-in-chief that "বাদী, বিবাদী ও নালিশী

জমি চিনি। নালিশী জমি মুছার অংশ গর্ত ও সেটা পড়ে আছে। নালিশী জমি নিয়ে আনসার চেয়ারম্যানের বাড়ীতে উভয়ের উপস্থিতিতে যে শালিশ হয়েছিল সে শালিশে আমি ছিলাম এবং শালিশ হয়েছিল ২০০২ সালের মাঝামাঝি। শালিশ হয়েছিল মুছা বাদীদের নিকট জমি বন্ধকের টাকা পরিশোধ করেছিল এবং শালিশে সিদ্ধান্ত হয় বাদীরা মামলা তুলে নিবে এবং মুছাকে স্ট্যাম্প ফেরৎ দিবে।" which denotes that the D.W.s corroborated the contention of the defendant to the effect that the alleged Bainanama deed was executed as security and the defendant refunded the money taken by him to the plaintiffs, but the plaintiffs did not give back the Bainapatra deed and considering the legal proposition the Appellate Court below correctly dismissed the Appeal and hence the Rule is liable to be discharged. He next submits that in a suit for specific performance of contract without impleading the Government as a party, suit cannot be succeeded and considering the provisions of law, the Appellate Court below correctly dismissed the suit. He next submits that the plaintiffs hopelessly failed to establish that their suit for specific performance of contract was filed duly within time as provided in Article 113 of the First Schedule of the Limitation Act, 1908 and considering the legal proposition, the Appellate Court below correctly dismissed the appeal. He further submits that without prejudice the submissions advanced as above it is admitted by the plaintiffs that at the time of execution of the alleged Bainapatra

deed, 02(two) out of 03 (three) proposed purchaser were minors and in that view of the matter the alleged Binapatra deed is not a valid contract in the eye of law so far as it relates to the minors and in that view of the matter the alleged Binapatra deed cannot be specifically performed as a whole and in that view of the matter the Rule is liable to be discharged.

Heard the learned Advocates for the parties and perused the record.

The plaintiffs claimed that they made a Bainanama deed with the defendant No. 1 on 02.9.1987 to purchase the suit land. On the other hand the defendant No. 1 claimed that he did not execute any Bainanama deed in favour of the plaintiffs. The defendant No. 1 took cash money from the plaintiffs as loan due to his own necessity. But Exhibit- 1 shows that it is a Bainanama deed. Evidence Act, 92 says that written terms of the contract cannot be altered or varied by oral evidence. The instant suit has been filed on 13.2.2002 within time of limitation as cause of action arose when the defendant refused to register the Kabala deed on 01.5.2002.

In the instant Case, the Government is not a necessary party.

The plaintiffs have been able to prove this case by adducing oral and documentary evidence in respect of execution of

Bainanama deed, consideration money and also delivery of possession.

Considering the facts and circumstances of the case I find substance in this Rule.

In the result, the Rule is made absolute.

The impugned Judgment and Decree dated 31.10.2016 passed by the learned Joint District Judge, 2nd Court, Kushtia in Title Appeal No. 16 of 2014 allowing the appeal and thereby reversing the Judgment and Decree dated 27.1.2014 passed by the learned Assistant Judge, Kumarkhali, Kushtia in Title Suit No. 108 of 2002 decreeing the suit is hereby set aside.

The order of Status-quo granted earlier by this Court is hereby vacated.

Let the record be sent down to the Courts below with a copy of the judgment at once.