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

Present:
Mr. Justice Md. Moinul Islam Chowdhury

CIVIL ORDER NO. 698 OF 2010
CIVIL REVISION NO. 1265 OF 2010

IN THE MATTER OF:

The applications under section 115(1) of the Code of Civil Procedure. (Against Order)

-And-

IN THE MATTER OF:

Md. Muzaher Mia and another
--- Plaintiff-Appellant-Petitioners.

-Versus-

Ahmed Safa and others
--- Defendant-Respondent-Opposite Parties.

No one appears
--- For the Plaintiff-Appellant-Petitioners.

Mr. Jagadish Chandra Sarker, Advocate
---For the Defendant-Respondent- O. P. No. 1.

Heard on: 07.12.2023 and 10.12.2023.
Judgment on: 10.12.2023 and 11.12.2023.

At the instance of the present plaintiff-appellant-petitioners, Md. Mujaher Mia and another, this Rule was issued upon a revisional application filed under section 115(1) of the Code of Civil Procedure calling upon the opposite party No. 1 to show cause as to why the Order dated 02.04.2009 passed by the learned Joint District Judge, Court No. 1, Chattagram in the

Miscellaneous Case No. 192 of 2000 dismissing the same for default should not be *set aside*.

The relevant facts for disposal of this Rule, *inter-alia*, are that the present petitioners as the plaintiffs filed the Other Suit No. 17 of 1980 in the court of the then learned Subordinate Judge, Court No. 2, Chattagram but this suit was heard by the then learned Subordinate Judge, Patiya, Chattagram and the same renumbered as Other Suit No. 76 of 1984 which was again transferred to the learned Assistant Judge, Court No. 2, Chattagram where the suit was further renumbered as the Other Suit No. 70 of 1988. The plaintiff-petitioners prayed for a decree under the Specific Performance of Contract directing the present defendant-opposite parties to execute a Kabala (কবলা) in respect of the suit property described in the plaint with another consequential relief. The plaint further contains that the plaintiffs and the defendant No. 1 were appointed to each other and the defendants were the owners of this suit land under a Rayoti Jote (রায়তী জোত) and possessors of the suit land. The defendant offered to sell the land and the plaintiffs agreed to purchase at a consideration money of Tk. 12,000/- (Taka Twelve Thousand) on mutual discussion. The plaint also contains that on 30.06.1979

the defendant-opposite party No. 1 received Tk. 10,000/- (Taka Ten Thousand) out of Tk. 12,000/- (taka twelve thousand) and a Bainanama (বায়নানামা) was executed by and between the plaintiffs and the defendant No. 1 and the present defendant handed over the suit land pursuant to the above-given facts and that Bainanama (বায়নানামা) was executed by and between the parties on 30.06.1979. Despite the above Bainapatra (বায়নাপত্র) the present defendant No. 1 declined to execute a registered deed of sale. The present proforma defendant Nos. 2-4 created some false documents in respect of the Baina (বায়না) land and the defendants are threatening to the plaintiffs to dispossess them.

The defendant and the proforma defendants contested the suit by filing a written statement denying all the material allegations in the plaint contending, *inter alia*, that the present suit is barred by section 42 of the Specific Relief Act. The defendants further contended that there are other disputes between the parties regarding security obtained by the defendant No. 1 and signed stamp papers upon Tk. 1.50/- in respect of repayment of loan money taken from one Ershad Ali which was never returned. The said signed stamp papers could have used in order to create a Bainapatra (বায়নাপত্র) by the plaintiffs and there is

a Criminal Case being Criminal Case No. 406 of 1980. The mother of the defendant No. 1 gifted some property to the defendant No. 1 in the years 1966, 1967 and 1978 which used to create the alleged Bainapatra (বায়নাপত্র). In the year 1983 filed an Additional written statement relating to the gifted properties to the defendant No. 1.

The learned trial court recorded the depositions by the parties in this case and after completion of the hearing, the suit was dismissed by his judgment and decree dated 30.04.1997. Being aggrieved the plaintiff-petitioners preferred Other Appeal No. 232 of 1997 in the court of the learned District Judge, Chattagram which was transferred to the court of the then learned Subordinate Judge, Court No. 1, Chattagram who after hearing the parties dismissed the appeal and thereby affirmed the judgment and decree passed by the learned trial court. However, the plaintiff-petitioners filed an application under Order 41 rule 19 read with section 151 of the Code of Civil Procedure praying for re-admission of the appeal on *setting aside* the order of dismissal which was registered as Miscellaneous Case No. 192 of 2000. On 21.04.2000 the defendant-opposite party No. 2 requested the petitioners to vacate the land as the learned courts

below concurrently passed the judgments and orders and found against the present plaintiff-petitioners. The present plaintiff-petitioners filed an application on 02.04.2009 for adjournment of the said appeal on the ground that the petitioners as the witnesses were ill but the learned trial court rejected the said application, as such, dismissed the case for default and passed the impugned judgment and decree. Being aggrieved by the said impugned judgment and decree this revisional application has been filed under section 115(1) of the Code of Civil Procedure and the Rule was issued thereupon.

This matter has been appearing in the daily cause list for a long period of time with the name of the learned Advocate for the petitioners but no one appears to support the Rule. However, the present petitioners have taken ground in the revisional application that the Miscellaneous Case under Order 41 rule 19 of the Code of Civil Procedure the responsibility of taking steps was greatly lying on the petitioners' Advocate and he having failed to discharge his professional duties resulting in dismissal of the Miscellaneous Case for default, thus, the impugned order is liable to *be set aside*.

The present Rule has been opposed by the present defendant-opposite party No. 1, namely, Ahmed Safa.

Mr. Jagadish Chandra Sarker, the learned Advocate, appearing on behalf of the present opposite party No. 1, submits that the present plaintiff-petitioners failed to prove their case by adducing and producing documentary and oral evidence, as such, the learned appellate court below passed the impugned judgment and decree affirming the judgment and decree passed by the learned trial court who directed to the defendant-opposite party No. 1 to execute a sale deed in respect of the suit land but the present plaintiff-petitioners failed to comply with the above direction, as such, this court should not interfere upon the impugned judgment and decree and the Rule is liable to be discharged.

The learned Advocate also submits that the present plaintiff-petitioners adopted a device to delay the conclusion of the trial and the appeal by taking several steps in the trial court as well as in the appellate court below, as such, the Rule is to be heard in order to the conclusion of the appeal, as such, the learned courts below concurrently found in favour of the defendant-opposite parties.

Considering the above submissions made by the learned Advocate appearing for defendant-opposite party No. 1 and also considering the revisional application filed by the present plaintiff-petitioners under section 115(1) of the Code of Civil Procedure along with the annexures therein, in particular, the impugned judgment and decree, it appears to me that the present plaintiff-petitioners filed a title suit praying for a decree of the Specific Relief Act/Specific Performance of Contract.

On the basis of the Bainapatra (বায়নাপত্র) dated 30.06.1979 by and between the parties in order to sell and purchase by the parties. It also appears that the defendant-opposite parties were under an obligation to register a transfer deed pursuant to the above Baina (বায়না) and the learned appellate court below heard the appeal and affirmed the judgment and decree of the learned trial court on the basis of the evidence adduced and produced by the parties, as such, the Rule is hereby liable to be discharged.

I have carefully examined the annexures annexed with the revisional application in order to sell the deed of the land described in the schedule of the plaint but both the courts below came to concurrent findings as to the claim of the plaintiff-petitioners. It also appears that the plaintiffs filed the suit upon

the suit seeking relief for a decree under section 42 of the Specific Relief Act which reads as follows:

> …"**42. Discretion of Court as to declaration of status or right-** Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> **Bar to such declaration-** Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> *Explanation*- A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."…

As per the above provisions of law any punic contract in the name of Bainapatra (বায়নাপত্র) for selling and purchasing any property.

In the instant case, the present plaintiff-petitioners claimed that the Bainapatra (বায়নাপত্র) was executed validly and legally by

and between the parties in order to purchase the suit land. However, the present defendant-opposite parties denied that there was not any agreement by way of Bainapatra (বায়নাপত্র) in order to sell the suit property. The defendants denied the execution of such kind of Bainapatra (বায়নাপত্র).

It appears from the above-given facts and circumstances that the learned courts below were satisfied as to the contention made by the defendant-opposite parties and both the courts below concurrently found that the existence and validity of the said Bainapatra (বায়নাপত্র).

I have carefully examined the judgments of the learned courts below and both the courts below concurrently found that there was no valid contract that was executed by the defendant-opposite parties by adducing evidence that there was no contract by way of Bainapatra (বায়নাপত্র) and came to a conclusion concurrently in favour of the defendant-opposite parties.

I will now examine the decisions of the learned courts below which were passed on the basis of defective suit files for Specific Performance of Contract, as such, the learned trial court came to a conclusion to dismiss the suit in the following manner:

…"বাদীপ-ক্ষর বায়নানামা ও বায়নানামা সূত্রে দখল প্রমাণিত না হওয়ায় এবং পক্ষান্ত-র বিবাদীপ-ক্ষর pleadings এর বক্তব্য স্বীকৃত ম-ত প্রমাণিত হওয়ায় বাদী তাহার প্রার্থীত ম-ত বর্তমান আকার ও প্রকা-র কোন প্রতিকার পাই-ত হকদার ন-হ। বাদীপক্ষ তাহা-দর মোকদ্দমা প্রমাণে সম্পূর্ণ ব্যর্থ হইয়াছেন।"…

The learned appellate court below also passed the Order No. 106 dated 02.04.2009 and came to a lawful conclusion of the judgment and order in the following manner:

…"আ-দশ নং- ১০৬ (পরবর্তী-ত)

পূর্বোক্ত আ-দশ ম-ত প্রতিপক্ষ হাজির আ-ছ। প্রার্থীক প-ক্ষ কোন পদ-ক্ষপ নেন নাই। নথী দেখিলাম। এখন বিকাল ০৪ঃ৩০ মিনিট। প্রার্থী পক্ষ দীর্ঘ দিন থেকে অত্র মিছ দরখাস্ত বিষয়ে যথাযথ পদক্ষেপ গ্রহণ করে না। এমতাবস্থায় অত্র মিছ দরখাস্ত খারিজ যোগ্য।"…

The above concurrent findings by the learned courts below, I find that the learned courts below had to pass the judgments and orders in a technical manner as the plaintiff-petitioners were indifferent about the proceeding of the suit filed by themselves. Both the courts below passed the respective judgments by way of dismissal for default. The learned appellate court below by his Order No. 106 dated 02.02.2009 has to pass the impugned judgment because of the default on the part of the

plaintiffs, as such, I do not find any illegality of the judgments and decree passed by the learned courts below where the plaintiffs under an obligation to get relief for a decree under the provisions of the Evidence Act but in the instant plaintiffs filed the title suit and the appeal against the impugned judgments and decree without committing any error of law, as such, I am not inclined to interfere upon the impugned judgment passed by the learned appellate court below.

Accordingly, I do not find any merit in the Rule.

In the result, the Rule is hereby discharged.

The concerned section of this court is hereby directed to communicate this judgment and order to the learned courts below immediately.

There is no order as to costs.