

IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

*Present:*

*Mr. Justice S M Kuddus Zaman*

**CIVIL REVISION NO.1770 OF 2013**

**In the matter of:**

An application under Section 115(1) of the Code of Civil Procedure.

And

Md. Taizuddin Molla being dead his heirs-Mst. Nesaron Nesa and others

.... Petitioners

-Versus-

Md. Hemayet Hossen being dead his heirs- Shamima Akter and others

.... Opposite parties

Mr. Mahbubey Alam with

Mr. Md. Mahabubar Rahman, Advocate

.... For the petitioners.

Ms. Saleha Islam, Advocate

.... For the opposite party

No.1(a) - 1(c).

**Heard on 19.02.2025 and 24.02.2025.**

**Judgment on 25.02.2025.**

On an application under Section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and decree dated 20.03.2013 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Faridpur in Title Appeal No.173 of 2009 allowing the appeal and reversing the judgment and decree dated 23.06.2009 passed by the learned Assistant Judge, Nagarkanda (Bhanga), Faridpur in Title Suit

No.193 of 2005 dismissing the suit should not be set aside and or/pass such other or further order or orders as to this Court may seem fit and proper.

Facts in short are that opposite party as plaintiff instituted above suit for specific performance of contract dated 27.04.1996 executed by defendant No.1 for sale of 1.69 acres land alleging that above property belonged to defendant No.1, the father of the plaintiff, who had two wives and plaintiff was the son by his first wife. The defendant wanted to sale above property and the plaintiff agreed to purchase the same for Taka 1,95,000/- and on receipt of Tk.1,85,000/- defendant executed an unregistered binapattra on 27.04.1996 and the defendant received remaining Taka 10,000/- on 27.04.1997 but refused to execute and register a sale deed on 15.11.2005.

Defendant No.1 contested above suit alleging that he did not execute any bainapatra for sale of above 1.61 acres land to the plaintiff nor he received any advance money. He mortgaged one acre land to Md. Shahed Ali Molla and obtained loan of Taka 5,000/- and for security of above loan he deposited signed blank stamp papers to above Md. Shahed Ali Molla. After repayment of above loan Md. Shahed Ali Molla returned above stamp papers which was kekpt in the custody of the plaintiff who subsequently converted above blank stamps paper into above agreement for sale. Defendant transferred 28 decimal land to the plaintiff by registered deed of gift dated 21.09.2005 and the plaintiff

jointly with his sister transferred 31 decimal land to the plaintiff by registered deed of gift dated 08.02.1995.

At trial plaintiff examined three witnesses and defendant examined five. Documents of the plaintiff were marked Exhibit Nos.1 and 2 series and those of the defendant were marked Exhibit No."Ka" and "Kha".

On consideration of facts and circumstance of the case and evidence on record the learned Assistant Judge dismissed above suit.

Being aggrieved by above judgment and decree of the trial Court above plaintiff as appellant preferred Title Appeal No.173 of 2009 to the District Judge, Faridpur which was heard by the learned Joint District Judge, 2<sup>nd</sup> Court who allowed above appeal, set aside the judgment and decree of the trial Court and decreed the suit.

Being aggrieved by above judgment and decree of the Court of Appeal below above respondent as petitioner moved to this Court with this petition under Section 115 of the Code of Civil Procedure and obtained this Rule.

Mr. Mahbubey Alam, learned Advocate for the petitioners submits that admittedly the defendant who was the father of the plaintiff transferred 28 decimal land by a registered deed of gift to the plaintiff on 21.09.2005 and he further transferred 31 decimal land to the plaintiff jointly with his sister by registered deed of gift dated 08.02.1995. Defendant himself while giving evidence as DW1 reiterated all claims and allegations as set out in the written statement alleging

that he did not enter into any agreement to sale above 1.61 acres land to the plaintiff for Taka 1,95,000/- nor he received any advance money from the plaintiff. Above agreement was created on the basis of the blank signed signed stamp papers which he deposited to Md. Shahed Ali Molla to secure a loan of Taka 5,000/-. Above DW1 was extensively cross examined by the plaintiff but above evidence of the defendant remained free from any material contradiction.

The plaintiff claimed that he was inducted into possession of above land but the plaintiff could not examine a single witness to prove that pursuant to above deed of bainapatra possession was delivered. As far as consideration money is concerned the defendant has repeatedly stated that the plaintiff did not have financial capacity to pay Taka 1,85,000/- which has been admitted by the plaintiff. In cross examination the plaintiff as PW1 claimed that his maternal uncle gave Taka 60,000/- of above consideration money. But above maternal uncle was not examined as a witness to prove above claim. Similarly the plaintiff could not prove the payment of remaining Taka 10,000/- to the defendant by any oral or documentary evidence. On consideration of above facts and circumstances of the case and evidence on record the learned Assistant Judge rightly dismissed the suit but the learned Joint District Judge most illegally allowed the appeal and decreed the suit which is not tenable in law.

Ms. Saleha Islam, learned Advocate for opposite party Nos.1(a) - 1(c) submits that the plaintiff produced the agreement of sale which

was marked Exhibit No.1 and while giving evidence as DW1 the defendant has admitted that the LTI in above document belonged to him. PW2 is this scribe of above document has given consistent evidence as to writing and execution of above deed by the defendant and payment of advance money Taka 1,85,000/-. It is true that the maternal uncle of the plaintiff who gave him Taka 60,000/- was not examined as a witness but PW3 Ishaq Molla has stated in cross examination that he carried Taka 60,000/- from the house of above maternal uncle and handed over above money to the plaintiff. Since the plaintiff has succeeded to prove due execution of the deed of binapattra and payment of advance money of Taka1,85,000/- the learned Judge of the Court of Appeal below rightly allowed above appeal, set aside the flawed judgment and decree of the trial court and decreed the suit which calls for no interference.

I have considered the submissions of the learned advocates for the respective parties and carefully examined all materials on record including the pleadings, judgments of the Courts below and evidence.

It is admitted that defendant No.1 was the rightful owner and possessor of 1.61 acre land and plaintiff was his elder son by his first wife.

It is also admitted that the defendant transferred 28 decimal undisputed land by a registered deed of gift to the plaintiff on 21.09.2005 and the defendant jointly with his sister further transferred

31 decimal undisputed land to the plaintiff by another registered deed of gift dated 08.02.1995.

Plaintiff claims that the defendant executed a deed of bainapatra on 27.04.1996 on receipt of tk.1,85,000/- for sale of above 1.61 acres land and received remaining 10,000/- on 27.04.1997. Plaintiff himself gave evidence on PW1 and reiterated above claims as set out in the plaint and produced above binapattra which was marked as Exhibit No.1. He also claimed that possession of above 1.61 acres land was delivered to him.

The defendant has denied above claims and further alleged that the plaintiff did not have financial capacity to pay Taka 1,85,000/- as advance money. In cross examination PW1 stated that he arranged Taka 1,85,000/- out of his service benefit, surplus income from land and by taking loan of Taka 65,000/- from his maternal uncle. No maternal uncle of the plaintiff gave evidence in this suit corroborating above claim of the plaintiff of giving loan of Taka 65,000/-.

As far as payment of remaining Taka 10,000/- is concerned PW1 claimed that the defendant received above on 27.04.1997 but the plaintiff could not adduce any other evidence oral or documentary to corroborate above claim.

As PW2 the scribe of above binapattra has given evidence as to the preparation and due execution of above deed but in cross examination he stated that he could not say anything about above binapattra from his memory and without perusing above document.

Above evidence shows that PW2 Asaduzzaman gave evidence on the basis of the contents of above document. PW3 Ishaq Mollah who is the husband of the sister of the plaintiff has stated that he was also present at the time of talk of above sale. But above evidence of PW3 Ishaq has not been endorsed by PW1 Hemayet Hossen. In cross examination PW3 stated that he did not know plaintiff's source of consideration money for above bainapatra. But he claimed that he brought Taka 60,000/- from the house of the maternal uncle of the plaintiff and handed over the same to the plaintiff. Above evidence of PW3 has not been endorsed by PW1 Hamayet Molla or by any other witness.

On the other hand defendant himself as DW1 stated that he obtained a loan of Taka 5,000/- form DW2 Shahed Ali by depositing blank singed stamp papers and after satisfying above loan he received back above stamp papers and kept in the custody of his son PW1 and the plaintiff converted above blank stamp papers to above deed of bainapatra. Above Shahed Ali gave evidence as DW2 and corroborated above evidence of PW1. In cross examination PW1 Hamayet Hossen has merely stated that he did not know if his father obtained loan from Shahed Ali by depositing blank stamp papers.

As far as delivery of possession is concerned literally no evidence was adduced by the plaintiff to prove that pursuant to above deed of bainapatra possession was handed over to the plaintiff.

On consideration of above facts and circumstance on the case and evidence on record I hold that the plaintiff has failed to prove that his

father defendant No.1 entered into an agreement for sale of 1.61 acres land for Taka 1,96,000/- and on receipt of Taka 1,85,000/- he executed a bainapatra on 27.04.1996 (Exhibit No.1) and he received remaining Taka 10,000/- on 27.04.1997 but refused to execute a sale deed on 15.11.2005 by legal evidence but the learned Judge of the Court of Appeal below utterly failed to appreciate properly above evidence on record and most illegally allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit which is not tenable in law.

In above view of the materials on record I find substance in this Civil Revisional application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result, the Rule is hereby made absolute. The impugned judgment and decree dated 20.03.2013 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Faridpur in Title Appeal No.173 of 2009 is set aside and the judgment and decree dated 23.06.2009 passed by the learned Assistant Judge, Nagarkanda (Bhanga), Faridpur in Title Suit No.193 of 2005 is restored.

However, there will be no order as to costs.

Send down the lower Court's records immediately.