

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain

Chief Justice

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

CIVIL APPEAL NOS.187-189 OF 2008.

(From the judgment and order dated 18.09.2007 passed by the High Court Division in Writ Petition No.5522 of 2007)

Bangladesh Railway, Dhaka

--- Appellant
(In C.A. No. 187/08)

Dhaka City Corporation

--Appellant
(In C.A. No.188/08)

Inspector General of Police
and others

--Appellant
(In C.A. No.189/08)

=Versus=

Most. Monowara Begum and others

--Respondents.
(In all the cases.)

For the Appellant:
(In C.A.No.187/08)

Mr. Mahbubey Alam, Senior Advocate, with Mr. Shaheed Alam, Senior Advocate with Sk. Reazul Haque, Advocate instructed by Mrs. Nahid Sultana, Advocate-on-Record.

For the Appellant :
(In C.A. No.188/08)

Mr. K.S. Salahuddin, Advocate, instructed by Mr. Firoz Shah, Advocate-on-Record.

For the Appellant :
(In C.A. No.189/08)

Mr. Mahbubey Alam, Senior Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record.

For the Respondents :
(In all the cases)

Mr. A.F. Hassan Arif, Senior Advocate, (with Mr. Abdul Baset Mazumder, Senior Advocate and Mr. Sharif Uddin Chaklader, Advocate) instructed by Mr. Syed Mahbubar Rahman Advocate-on-Record.

Date of hearing and judgment : 11-04-2018

J U D G M E N T

Hasan Foez Siddique, J: These three appeals are directed against the judgment and order dated 12.06.2000 passed by the High Court Division in Writ Petition No.5522 of 2007 making the Rule absolute.

The relevant facts, for the disposal of the appeals, are that the respondent No.1 Monwara Begum filed aforesaid writ petition stating that the land measuring an area of 2.8172 acres appertaining to C.S. plot No.186, C.S. khatian No. 6615 and C.S. Sheet No.22 and Tawzi No.13448 of Mouza Shahar Dhaka, at present, Ramna District Dhaka, (hereinafter referred this case land) originally belonged to Nawab Khaja Yusufjan. C.S. khatian No. 6615 was correctly prepared in his name. Nawab Khaja Yusufjan transferred the said land along with his some other properties to his only daughter Mst. Nurunnessa Khanam alias Nurun Bibi and her husband Syed Mohammad Kashmiri on 25.09.1922 by a deed of gift and delivered possession to them who accepted the gift and took over possession of the said land. Thereafter, they died one after another leaving only son Syed Jamil Hasan. S.A. Khatian was prepared in his name. Jamil Hasan entered into an agreement for sale

of the suit land with the writ petitioner on 11.04.1990 for a consideration of Tk.30,00,000/- (taka thirty lac) and upon receiving taka 29,50,000/- he executed an agreement for sale. On 15.04.1991, Syed Jamil Hasan denied to execute and register the sale deed and, thus, the writ petitioner instituted Title Suit No.161 of 1991 in the First Court of Subordinate Judge, Dhaka for Specific Performance of Contract. Said suit was transferred in the Second Court of Subordinate Judge, Dhaka and renumbered as Title Suit No.139 of 1993 and was decreed on compromise by a judgment and decree dated 06.07.1993. Accordingly, sale deed was executed and registered through Court on 21.09.1994 executing the said decree. The petitioner got delivery of possession of the case land through Court on 27.01.1996. The Government, insptie of service of summons, did not contest the said suit. On query, Additional Deputy Commissioner (L.A.), Dhaka by his Memo No.324/L.A. Section General /95 dated 06.04.1995 informed that the case land was not acquired for Bangladesh Railway. The proclamation No.342 dated 02.09.1882 published in the Calcutta Gazette on

6th September, 1882 shows that the villages/ areas were acquired by the Government for the purpose of construction of Dhaka-Mymensingh State Railway. But the case land, situated within Mouza Dhaka Shahar, was not acquired. On the basis of the said proclamation, C.S. khatian No.16868 was published in the name of Eastern Bengal State Railway. Said C.S. khatian No.16868 is covered by ward No.3, sheet No.4 while the petitioner's case land is covered by C.S. khatian No.6615 of Ward No.3, Sheet No.22. Dhaka City Corporation, the writ respondent No.3 appellant prepared a sketch map by its surveyor demarcating the case land of the petitioner. The case land of the writ petitioner is situated not within the area of Osmani Uddayan as evidenced by the said sketch map. The writ petitioner with a view to construct an international Standard Five Star Hotel and Shopping Centre in the case land in the name and style of M/S. South East Development Corporation (Pvt.) Ltd. applied to the Prime Minister and Chairman of Board of Investment for approval of the said project. After due investigation, the said project was approved in the 184th Board Meeting of the

Board of Investment, Office of the Prime Minister on 21.03.2000 and the Board of Investment issued a certificate being Registration No.2000005122-H dated 30.05.2000 under section 11 of the Board of Investment Act, 1989. For implementation of the said project at a cost of tk.564/- crore, a foreign loan equivalent to 10 Million US dollar was sanctioned by International Investment World Inc. Company, U.S.A. by a letter dated 14.03.2000. Considering the importance of the use of said project for NAM conference, the respondent No.1, by a Memo No. Sha Pro-6/RAJ-68/98/256 dated 24.05.2001 addressed to RAJUK , asked to issue clearance certificate and to approve the plan for the said project in favour of the writ petitioner. On 27.06.2001, the petitioner came to know from news item published in the "Daily Star" that the approvals of the proposal for construction of five star hotel within Osmani Uddyan has been cancelled on 26.06.2001. Against which, the writ petitioner filed writ petition No.2882 of 2001 and obtained Rule and got an order of status-quo. In connection with the said writ petition, contempt Rule was issued for

violation of the order of status-quo against the petitioner and her husband Advocate M.A. Khaleque. In that case the High Court Division directed the police to take over possession of the disputed land and to protect the same. The contempt Rule was disposed of accepting the petitioner's unconditional apology. The Rule issued in writ petition was discharged. However, police took over possession of the disputed land. In view of aforesaid circumstances, the writ petitioner has filed this writ petition for a direction upon the writ respondents to hand over possession of the disputed land.

The High Court Division, by the impugned judgment and order, made the Rule absolute. Against which, Dhaka City Corporation filed Civil Appeal No.188 of 2008, Bangladesh Railway, Dhaka filed Civil Appeal No.187 of 2008 and Inspector General of Police filed Civil Appeal No.189 of 2008 in this Division getting leave.

Mr. Mahbubey Alam, learned Senior Advocate appearing with Mr. K.S. Salauddin for the appellants in all the appeals, submits that it is apparent on the face of the record that the

decree passed in the suit for specific performance of contract as obtained by the writ petitioner was fraudulent and collusive one. He submits that Syed Jamil Hasan, judgment debtor, himself filed Title Suit No.151 of 1980 in the third Court of Subordinate Judge, Dhaka for declaration of his title and recovery of khas possession which established that the writ petitioner's alleged vendor, had no possession in the disputed land and his title in the case land, if any, is disputed so the writ petitioner is not entitled to get possession of the disputed land from this Court getting direction by way of mandamus. He submits that in the suit for specific performance of a contract, title of the disputed land had not been ascertained, the High Court Division erred in law in making the Rule absolute. He further submits that over the subject matter, several suits are pending for determination of its ownership, the High Court Division erred in law in giving direction to hand over possession of the same. He further submits that the land, in question, was acquired for Railway in 1882 and, accordingly, possession of the same was handed

over to the Railway and, at present, same is under the management by the Dhaka City Corporation, the High Court Division erred in law in making the Rule absolute. He further submits that the writ petitioner managed a collusive and fraudulent decree in respect of most valuable land situated in the heart of City price of which is taka few hundred crores, the High Court Division erred in law in making the Rule absolute.

Mr. A.F. Hassan Arif and Mr. Abdul Baset Mazumder, learned Senior Counsel appearing for the respondents, submit that the writ petitioner respondent came to an agreement with the original owner of the case land and by filing a suit for specific performance of contract got decree and upon executing the said decree he obtained sale deed registered through Court, thereby, acquired valid title in the same, the High Court Division upon proper appreciation of materials on record, rightly observed that writ petitioner is entitled to get possession of the same. He further submits that in the instant writ petition, the writ petitioner respondent sought for direction to get possession of the case land wherefrom she

was dispossessed forcibly, the High Court Division rightly directed the writ respondent appellants to hand over the possession of the case land to the writ petitioner respondent.

In the writ petition, the writ petitioner respondent prayed for a direction by way of mandamus upon the writ respondents to hand over possession of the case land in her favour. There are certain principles with regard to issuance of a writ of mandamus. It may be granted only where there is a statutory duty imposed upon the officials concerned and there is a failure on their part to discharge that statutory obligation. In order to get such direction, the writ petitioner has to satisfy that she has a legal right in the case land, the writ respondents have a legal obligation to hand over possession of the same to the writ petitioner, such prayer has been made bonafide and that the writ respondents, inspite of her legal right in the case land, refused to perform their legal duty to hand over possession of the same. The object of mandamus is to compel performance of a legal duty. It is the peremptory order of the High Court Division commanding to do which the

Government or any local authority is under a legal duty to do. A writ of mandamus is controlled by equitable principles. It can be granted to a person who comes to the court with clean hands and not guilty of fraud.

In this case, it appears that the writ petitioner claimed title in the case land by virtue of a decree which she obtained in a suit for specific performance of contract. It is the claim of the writ petitioner that she, upon executing the said decree, obtained sale deed registered and took delivery of possession through Court wherefrom she has been dispossessed subsequently.

We have an opportunity to go through the relevant documents of the said decree. It was the case of the plaintiff-writ petitioner that Syed Jamil Hasan executed a "bainanama" in her favour. She is the wife of Advocate M.A. Khaleque of village Joleswaritola, 2nd floor, Bogra Town, P.S. and District Bogra at present Section -6, Block-1, Road No.4, House No.4, Mirpur, P.S. Mirpur, Dhaka. From the "bainanama", it appears that the writ petitioner Most. Monowara Begum wife of M.A. Khaleque is the recipient of the "bainanama"

and Syed Jamil Hassan, represented by his Attorney to M.A. Khaleque of the aforesaid address is the executant. That is, by virtue of the Power of Attorney alleged to have been executed by Syed Jamil Hasan in favour of writ petitioner's husband M.A. Khaleque, he (M.A. Khaleque) executed the said "bainanama" on 11.04.1990. In the "bainanama" it was, inter alia, contended, "আপনার নিকট হইতে বিভিন্ন তারিখে লওয়া এ যাবৎ সর্বমোট ২৮,৯৫,০০০/- (আটাশ লক্ষ পঁচানব্বই হাজার) টাকা গ্রহন করিয়াছি।-----
- আমি আরও স্বীকার ও অংগীকার করিতেছি যে, এই বায়নানামা দলিল মুলে তপশীল সম্পত্তি আপনার বরাবরে দখল বুঝাইয়া দিলাম। আপনি দলিল গ্রহিতা অত্র বায়নানামা মুলে আমার দলিল দাতার স্থলে স্থলাভিষিক্ত হইয়া তপশীল সম্পত্তি দখল করিতে থাকুন।"

According to the contents of the "bainanama" on the date of execution of the same the writ petitioner took over possession of the case land. It further appears that prior to execution of the said "bainanama" M.A. Khaleque, on 24.01.1990, mentioning his present address at 112, Dakkhin Basabo, District, Dhaka created a power of attorney allegedly executed by Syed Jamil Hasan in respect of his 84.7116 acres of land situated within Dhaka City Corporation, in which, the authority to sell of those lands was given. Though the said power of attorney authorised

the husband of the writ petitioner to transfer entire 84.7116 acres of land including the case land of Syed Jamil Hasan but her husband, without executing the sale deed to her on the strength of that power of attorney, allowed her to file suit for specific performance of contract on 12.05.1991 stating that the defendant Syed Jamil Hasan had denied to execute the sale deed on 05.04.1991. Thereafter, on 24.06.1993 the plaintiff-writ petitioner mentioning her present address at 14/3, Pallobi, Mirpur, Dhaka and address of Syed Jamil Hasan at No.88, Goalnagar Lane, Court House Street, Dhaka filed a compromise petition to effect compromise of the suit . It appears from the first page of the compromise petition that the plaintiffs' Lawyer was A.H. M.Ziauddin and defendant's Lawyer was A.B.M. Bayezid but from affidavits submitted in support of the said compromise petition both the plaintiff and defendant were identified by A.H.M. Ziauddin, Advocate. Non identification of Syed Jamil Hasan by his Lawyer and identification by the plaintiff's Lawyer indicates that fraud has been committed on the Court in effecting compromise. It further

appears that first condition amongst others in the compromise petition was, inter alia, “উক্ত আম মোক্তারনামা দলিল সত্য, সঠিক এবং বহাল আছে ও থাকিবে।” Perhaps with a motive for getting seal of the Court declaring the power of attorney genuine and valid, such condition has been incorporated in the compromise petition inasmuch as the same was extraneous matter and such condition cannot be a legal condition to effect a compromise of a suit for specific performance of contract. It was a fraudulent attempt to legalize the power of attorney in respect of entire 84.7116 acres of land inasmuch as suit land was only 2.8172 acres. In condition No.2 it has been stated that the plaintiff writ petitioner paid consideration money since 1977 and having received in total a sum of taka 29,95,000/- , the attorney executed the deed of agreement for sale. In such situation, it is not understandable what prevented the husband of the writ petitioner to execute the sale deed in favour of his wife, the writ petitioner, when she paid tk.29,95,000/- out of tk.30,00,000/- by virtue of his power of attorney which is highly doubtful. Sixth condition of the compromise petition was to the effect, “স্বাফ কবলা

দলিল সহি সম্পাদন ও রেজিস্ট্রি হওয়ার পর বাদিনী প্রয়োজন নালিশী সম্পত্তির দখল বিজ্ঞ আদালতের মাধ্যমে গ্রহন করিতে পারিবেন তাহা ১নং বিবাদী স্বীকার করিলেক ও মানিয়া লইলেক।” Where as contents of “bainanama” show that on the date of alleged execution of “bainanama” possession of the disputed land was delivered to the plaintiff- writ petitioner.

Moreover, in a suit for specific performance of contract points to be decided as to whether there is any controversy between the vendor and the vendee as to execution of the agreement for sale and whether earnest money has been paid etc. and the Court directs the vendor to execute the necessary document in favour of the vendee. A decree for specific performance of contract only declares the right of decree holder to have a deed of transfer of the property covered by the decree executed in his favour. The decree by itself does not transfer the title. It is the execution of the sale deed that transfers the property. Such transfer of title is taken place if the vendor himself has transferable perfect title in the land transferred. In that suit, neither the appellants of these appeals were impleaded nor title of the disputed land has been adjudicated and ascertained. It is to be mentioned here

that meanwhile, Syed Jamil Hasan himself filed a suit for setting aside the aforesaid compromise decree on the ground of fraud and collusion.

It appears from the materials on record that the disputed land was recorded in the name of Bangladesh Railway. It is the positive case of the Railway that the Government acquired the said land for Railway and handed over possession of the same to the Railway. Accordingly, C.S. record of right was prepared in the name of Railway. From the C.S. khatian produced by the appellant it appears that the case land was recorded in khatian No.16868 in the name of Eastern Bengal State Railway Division under Bharat Samrat. C.S. khatian has got presumptive value. According to section 103B(5) of the Bengal Tenancy Act every entry in a record of right finally published shall be evidence of the matter referred to in such entry shall be presumed to be correct until it is proved by evidence to be incorrect. The same has got a probative value. We do not find anything in the record, relying on which, it can be said that such presumption has been rebutted.

It appears from the report of an inquiry held by a Commission, Chairman of which was a District Judge, who, at the relevant time had been performing the functions of a Joint Secretary, Ministry of Law, Justice and Parliamentary Affairs, that the khatian produced by the writ petitioner is a fictitious document. There is no existence of khatian No.6615 in the concerned volume preserved in the record room. The Inquiry Committee observed, "কিন্তু মনোয়ারা বেগম তাহার দাবীকৃত মৌজা শহর ঢাকাস্থ সি,এস, ৬৬১৫ খতিয়ানের সহী মোহরা নকল দাখিল করেন নাই। কমিশন বিষয়টির উপরে সঠিক হওয়ার জন্য ঢাকার জেলা প্রশাসকের মহাফেজ খানায় গমন করে। কমিশন তথায় ৬৬১৫ খতিয়ানের কোন অস্তিত্ব খুঁজিয়া পায় নাই।" So, it is difficult to accept that the case land was not recorded in C.S. operation in the name of the Railway and that the writ petitioner's claimed land and land of Railway is not the same land.

Another aspect, which has not been taken into consideration by the High Court Division is that in Writ Petition No.2882 of 2001 High Court Division earlier observed,

"It is relevant to point out here that the vendor of the said land namely Syed Jamil Hasan, from whom the petitioner allegedly purchased the same and obtained possession, has himself filed Title Suit

No.151 of 1980 in the 3rd Court of the learned Subordinate Judge, Dhaka for declaration of title and recovery of khas possession. If the vendor of the case land has himself filed suit to obtain title and possession of the property from the Bangladesh Railway, then it cannot be believed that during the pendency of that suit the petitioner has got possession of the said land from the vendor. It has also been alleged by the petitioner that she has obtained title in the said land through a sole decree in a suit for specific performance of contract and thereafter obtained possession of the said land through the process of Court although in a suit for specific performance of contract delivery of possession is not intended by the process of Court."

Against the aforesaid observation, the writ petitioner Monwara Begom filed Civil Petition for Leave to Appeal No.1472 of 2006 and this Division while disposing of the leave petition has observed,

"It is relevant to point out here that vendor of the land, namely, Syed Jamil Hasan, from whom possession, has himself filed Title Suit No.151 of 1980 in the 3rd Court the learned Subordinate Judge, Dhaka for declaration of title and recovery of khas possession. If the vendor of the case

land has himself filed suit to obtain title and possession of the property from the Bangladesh Railway, then it cannot be believed that during the pendency of that suit the petitioner has got possession of the said land from the vendor."

In view of the observations quoted above it is difficult to hold that the writ petitioner or her alleged vendor was in possession of the case land till her alleged dispossession.

The above quoted findings and observations are binding upon the writ petitioner.

Several cases are pending for ascertaining the title of the case land in different Courts. Earlier Motwalli of Shahjadi Waqf Estate filed Title suit No. 363 of 1985 against Railway and others and in that suit Munsif, 4th Court Dhaka found the title and possession of the Railway. In Title Appeal No.158 of 1987 and 159 of 1987, Additional District Judge, 3rd Court, Dhaka observed that the disputed land is the acquired land of the Government and Railway has been possessing the same. The plaintiff of the said suit fought up to the Appellate Division and lost. Syed Jamil Hasan, the alleged vendor of the writ petitioner, himself

filed Title Suit No.151 of 1980 for declaration of title and recovery of possession in the then 3rd Court of Subordinate Judge, Dhaka against Railway and others admitting the possession of the Railway. The said suit is still pending in the Second Court of Joint District Judge, Dhaka where the same was renumbered as Title Suit No.837 of 2015. That is, at the time of alleged execution of "bainanama" Syed Jamil Hasan's title was doubtful and he had no possession of the case land. A title which has not been perfected and which cannot rationally be said to be free from doubt is no title at all.

Since the appellants, in possession, of the disputed lands, have raised a serious question as to the validity of the writ petitioner's title and her claimed possession and thereafter, dispossession and that there is no conclusive evidence of the writ petitioner's title in the same, the High Court Division in an application under Article 102 of the Constitution cannot put the writ petitioner in possession by dispossessing the appellants from the case land. In the case of Mohan Panday V. Usha Rani Rajaria reported in 1992

(IV) SCC 61 it has been laid down that no mandamus can be based on a Civil Court decree, which would be in the nature of executing or giving effect to a civil decree. This writ petition was full of disputed facts and the prayer made in it cannot be granted in a proceeding under Article 102 of the Constitution as factual disputes cannot be decided in this proceeding. The writ of mandamus cannot be demanded ex-debito justitiae but it issues only in the discretion of the court. It is a high prerogative writ and is to amplify justice not to give effect of a decree which is apparently fraudulent and collusive in nature. It is a malafide attempt on behalf of writ petitioner Monowara Begum, wife of an Advocate to grab the property of the Republic. She came in this Court with unclean hands.

The High Court Division did not at all enter into or consider the aforesaid disputed question of facts, and law related thereto and, thereby, erroneously directed the appellants to handover the possession of the case land.

Accordingly, we find substance in the appeals.

Thus, all the appeals are allowed. The judgment and order passed by the High Court Division is hereby set aside.

C.J.

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The 11th April, 2018
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