

**8 SCOB [2016] AD 126**

**APPELLATE DIVISION**

**PRESENT**

**Mr. Justice Md. Abdul Wahhab Miah**  
**Mr. Justice Mohammad Imman Ali**  
**Mr. Justice A.H.M Shamsuddin Choudhury**

CIVIL PETITION FOR LEAVE TO APPEAL NOs.1240 and 2883 of 2013  
(From the judgment and order dated the 30<sup>th</sup> day of May, 2012 passed by the High Court  
Division in First Appeal No.228 of 2006)

**Government of Bangladesh and others** :                          Petitioners  
(in C.P.No.1240 of ‘13)

**Nasir Mohammad Khan** :                          Petitioner  
(in C.P.No.2883 of ‘13)

-Versus-

**Hamid Ali Chowdhury and others** :                          Respondents  
(in both the cases)

For the Petitioners  
(in C.P.No.1240 of 2013) : Mr. Mahbubey Alam, Attorney General  
instructed by Mr. Haridus Paul, Advocate-on-  
Record

For the Petitioner  
(in C.P.No.2883 of 2013) : Mr. Mainul Hossain, Senior Advocate  
instructed by Mr. Zainul Abedin, Advocate-  
on-Record

For Respondent No.1  
(in both the cases) : Mr. Mahmudul Islam, Senior Advocate with  
Mr. Probir Neogi, Senior Advocate instructed  
by Syed Mahbubur Rahman, Advocate-on-  
Record

For the applicant  
Ariful Islam for addition of party : Mr. Rokanuddin Mahmood, Senior Advocate

For Respondent No.1  
(in both the cases) : None represented

Date of Hearing : The 18<sup>th</sup> day of August, 2015

**We hold that the plaintiff was entitled to get exclusion of the time of the absence of defendant Nos.1 and 2, the heirs of Syed Salamat Ali from Bangladesh and the High Court Division rightly gave the said benefit and held that the suit was not barred by limitation. We further hold that time was not the essence of the contract and with the execution and registration of the general power attorney in favour of the plaintiff by Salamat Ali, the earlier contract dated 06.03.1978 was novated and the High Court Division rightly held so.**

**...(Para 26)**

**Specific performance of contract:**

As regards, the argument of the learned Attorney General that the plaintiff had no cause of action to file the suit, we are of the view that since the original lessee entered into an agreement with the plaintiff to sell the suit property and in part performance of the contract, he was put into the possession of the suit property and admittedly he is in possession thereof and he paid good amount of money being taka 15,90,000.00 in 1978 and after the death of Syed Salamat Ali, his heirs did not execute and register the sale deed, he had every right to file the suit to pray for specific performance of contract.

...(Para 27)

We find substance in the submission of Mr. Mahmudul Islam that cancellation of lease in favour of lessee, Syed Salamat Ali after filing the suit was absolutely *malafide* as in the suit, the Government and its other functionaries concerning the suit property were very much parties and in the suit, the plaintiff prayed for declaration of title to the suit property along with the other reliefs. The suit being pending by no logic, the Government could cancel the lease. We also cannot ignore the submission of Mr. Mahmudul Islam that the cancellation order was an antedated one inasmuch as the defendant Government though filed written statement in the suit on 12.05.2004, did not say the said fact in the written statement.

...(Para 28)

### Judgment

**Md. Abdul Wahhab Miah, J:**

1. These 2(two) civil petitions for leave to appeal (CPs) have been filed against judgment and decree dated 30.05.2012 passed by a Division Bench of the High Court Division in First Appeal No.228 of 2006 allowing the appeal.

2. C.P. No.1240 of 2013 has been filed by the Government of Bangladesh represented by the Secretary Ministry of Works and the other Government functionaries who were defendants in the suit.

3. C.P. No.2883 of 2013 has been filed by one Nasir Mohammad Khan, a 3<sup>rd</sup> party.

4. Facts necessary for disposal of the CPs are that respondent No.1, herein as the plaintiff filed Title Suit No.82 of 2005 in the Court of Joint District Judge, 4<sup>th</sup> Court, Dhaka, for declaration of title to the suit property along with the other declarations. Subsequently, the plaint was amended and prayer for specific performance of contract was added alternatively.

5. In the plaint, it was averred that by a registered lease deed being No.2584 dated 26.03.1956 executed by the then Governor of East Pakistan, the suit property was given lease in favour of Syed Salamat Ali, the owner of M/S. U.K. Battery. Syed Salamat Ali after getting possession of the suit property erected a 2(two) storied building thereon and enjoyed the possession of the same peacefully without any encumbrances. Subsequently, Syed Salamat Ali executed an agreement for sale in favour of the plaintiff on 06.03.1978 on receipt of a sum of taka 12,90,000`00 (twelve lac ninety thousand) as advance out of the total consideration of taka 15,90,000`00 and with the execution of the agreement handed over possession of the suit property to the plaintiff. The plaintiff is in possession of the suit property since 1978 peacefully without any interruption. In the deed of agreement, a

condition was stipulated that the vendor, namely, Syed Salamat Ali, would execute the sale deed within 1(one) year after getting all the necessary papers including the clearance certificate from the Income Tax Department as required at that time and would receive the rest consideration thereon. Subsequently, on 7.11.1978, the vendor received the remaining balance from the plaintiff and executed a registered General Power of Attorney in his favour. During that period, the plaintiff came to know that one Nasir Mohammad Khan and his brothers instituted Title Suit No.57 of 1978 in the Court of Joint District Judge, 3<sup>rd</sup> Court, Dhaka for specific performance of contract in respect of the suit property impleading Syed Salamat Ali as defendant. The plaintiff got him added in that suit as defendant No.1(a). However, the suit was dismissed for non substitution of the heirs of late Syed Salamat Ali, the original owner of the suit property. Subsequently, the plaintiff searched for defendant Nos.1 and 2, the legal heirs of late Syed Salamat Ali and came to know that they left the country much earlier and by this way, the plaintiff became the owner and possessor of the suit property. The plaintiff approached RAJUK for approval of the plan for further construction and came to know that since he had no title deed in his possession, he would not get the approval for construction. Despite having all the legal papers in favour of the plaintiff, defendant No.3 directed him to appear before the said authority and hence the suit.

6. From the judgment of the trial Court as well as the High Court Division, it appears that 3(three) sets of defendant, namely: defendant Nos.3, 4, 5, 7-9 filed 3(three) separate sets of written statement, but it is only defendant No.3, i.e. the Government of Bangladesh represented by the Secretary Ministry of Works which contested the suit.

7. In the written statement of defendant No.3 (hereinafter referred to as the defendant), after taking legal objection that there was no cause of action for filing the suit, the suit was barred by the principle of estoppel, waiver and acquiescence and was also barred by limitation; it was contended, *inter alia* that 66:10 acres land in total was acquired by the government pursuant to L.A. Case No.5/1948-49. The acquisition was finalised by Notification No.2.86 dated 09.01.1951 which was published in the Official Gazette. A plan of the acquired land was prepared dividing the same into several plots. Following the said plan 18.66 kathas land appertaining to Plot No.4-5 (the suit land) was allotted by the Government in favour of Mr. Salamat Ali, the Proprietor of M/S. U.K. Battery Manufacturing Ltd. The physical transfer of the suit land took place on 01.05.1961. Pursuant to proviso to clause 19 of the lease deed, unless prior sanction of the defendant was obtained, no transfer of suit land would be binding upon it. After taking the possession of the suit land, the lessee abandoned the same and the plaintiff entered into the suit land as trespasser and created the so-called agreement for sale. In fact, the agreement for sale had never been executed. The document was a forged one. If the agreement for sale was signed by the lessee that was made without prior consent of the defendant and as such, the agreement was not binding upon it. The plaintiff being a trespasser to the suit land got no right, title or interest over the same. Following the record maintained by defendant No.3, no existence of the plaintiff was found. The recorded lessee of the suit land is Syed Salamat Ali, proprietor, M/S. U.K. Battery Ltd. In the event, the recorded owner is not in possession of the suit land, the same would be vested under the direct control of defendant No.3 and the plaintiff could not claim any interest whatsoever over the suit land, and therefore, the suit should be dismissed.

8. At the trial, the plaintiff examined two witnesses including himself and proved bundle of documents in support of his case which were marked as exhibits. On behalf of the defendants, one S.M. Faruque Latif, the Deputy Assistant Engineer of the Ministry of Works

was examined as DW1. On conclusion of hearing of the suit, the trial Court by its judgment and decree dated 03.01.2006 dismissed the suit.

9. Being aggrieved by and dissatisfied with the judgment and decree of the trial Court, the plaintiff filed the above mentioned first appeal before the High Court Division and a Division of the High Court Division by the impugned judgment and decree allowed the appeal, set aside the judgment and decree of the trial Court and decreed the suit directing the trial Court to execute the sale deed in favour of the plaintiff within 30(thirty) days from the date of receipt of the judgment; hence these petitions for leave to appeal.

10. From the judgment of the trial Court, it appears that it framed 5(five) issues. The issues were:

- “1/ *ev`x Ges mi Kvi nBtZ j xR MthxZv`mq` mvj vgz Avj xi gta` bvvj kx m`u`E n`l`šli*  
সংক্রান্ত এগ্রিমেন্ট সম্পাদিত হয় কিনা?
- 2/ *ev`x bvvj kx m`u`E tZ wei æ`Lj RwbZ`Zj ARB Kwi qvtQb`Kbv?*
- 3/ *MYcZ`gšYij tqi tg`gv`tbvUk bs AvtKvt`tet 02/2002 (Z`š)/105/(3)Zvs-07/04/2002 tgj vdvBwX teAvBbx Ges nqi vbx gj-K`Kbv?*
- 4/ *AÎ gvqj v Zvgw`tZ evwi Z`Kbv?*
- 5/ *ev`x c`\_Bv Abjvqx c`ZKvi c`BtZ`Kbv?*”

11. The trial Court decided issue No.1 in favour of the plaintiff. It gave clear finding to the effect that an agreement was entered into by Syed Salamat Ali, the original lessee, with the plaintiff on 06.03.1978 and since then he has been in possession of the suit property. I consider it better to quote the relevant portion of the finding of the trial Court which is as under:

“*Dc`iv`3 Avtj vPbv I`m`v`šli Avtj vK ev`x Ges mi Kvi nBtZ gj- j xR MthxZv`mq`*  
সালামত আলীর মধ্যে নালিশী সম্পত্তি হস্তান্তর সংক্রান্তে এগ্রিমেন্ট সম্পাদিত হয় এবং উ<sup>3</sup> *GwM`g`U*  
*ev`x 6/3/1978 Zwi tL nBtZ bvvj kx m`u`E tZ`L tj AvtQb g`g`m`v`šl`tbI qv tMj |”*

12. The trial Court found issue No.2 against the plaintiff on the view that though the agreement for sale was entered into by the lessee with the plaintiff and he was in possession of the suit property, but time for acquisition of title by adverse possession was not matured, as admittedly the plaintiff went into the possession of the suit property on 06.03.1978, whereas the suit was filed on 17.04.2002 and admittedly the original owner of the suit property is the Government.

13. The trial Court found issue No.3 against the plaintiff on the view that since, as per terms of the lease agreement, no permission was obtained from the lessor Government before entering into agreement with the plaintiff. The Government being the owner of the suit property, it could very much ask the plaintiff to show papers as to how he was in possession.

14. The trial Court also decided issue No.4 against the plaintiff. The trial Court took the view that as the plaintiff did not file the suit within 3(three) years from the date of disposal of the appeal by the Appellate Division on 23.06.1996, when the order of abatement of Title Suit No.57 of 1978 passed by the High Court Division on 11.01.1995 was upheld, the suit was barred under the provision of article 113 of the Limitation Act.

15. Issue Nos.2, 3 and 4 having been found against the plaintiff, the trial Court decided issue No.5 against the plaintiff.

16. So far as the plaintiff's case that the original lessee, Syed Salamat Ali, entered into a contract with him to sell the suit property at a sum of taka 15,90,000`00 and he (Syed Salamat Ali), on receipt of taka 12,90,000`00 as advance, executed a Bainapatra on 06.03.1978 and delivered possession of the suit property to him is concerned is concurrent. Whether the original lessee, Syed Salamat Ali, entered into an agreement with the plaintiff at a consideration of taka 15,90,000`00 and on receipt of taka 12,90,000`00 as advance, executed the contract is basically a question of fact. And both the Courts below found that Syed Salamat Ali entered into an agreement with the plaintiff to sell the suit property, there is no scope to re-open the matter before this Court. The learned Attorney General could not also show by pointing out to any evidence on record that the finding of fact arrived at by the trial Court as affirmed by the High Court Division as to the fact of entering into a agreement by the original lessee with the plaintiff and handing over possession of the suit property to him pursuant to the agreement was perverse.

17. Be that as it may, the whole thrust of the argument of the learned Attorney General was, in fact, on two points: (i) the plaintiff had no cause of action to file the suit and (ii) the suit was barred under article 113 of the Limitation Act, as pursuant to the said article, the plaintiff was obliged to file the suit within 3(three) years after the expiry of the period of 1(one) year as stipulated in the deed of agreement and at least from 23.06.1996, when the Appellate Division affirmed the order of abatement of Title Suit No.57 of 1978 of the High Court Division passed on 11.01.1995, as found by the trial Court. In this connection, the learned Attorney General has also submitted that the High Court Division was totally wrong in giving the benefit of section 13 of the Limitation Act to the plaintiff to save the period of limitation in filing the suit. In elaborating his submission on the point, he has further submitted that Syed Salamat Ali died on 17.07.1985. Therefore, the plaintiff had no cause of action to file the suit in 2002. In this connection, he referred to paragraph 13 of the plaint and submitted that the High Court Division failed to consider the statements made in the said paragraph of the plaint to decide the question of cause of action to file the suit. Mr. Attorney General has submitted that in view of the fact that the Government cancelled the lease of the lessee, Syed Salamat Ali, on 07.04.2003, the plaintiff could not continue the suit, the High Court Division erred in law in decreeing the suit.

18. Mr. Mahmudul Islam, learned Counsel, entering caveat on behalf of the plaintiff-respondent, on the other hand, supported the impugned judgment and decree and has submitted that the points canvassed before this Division were very much raised before the High Court Division and it answered the points in favour of the plaintiff. He has submitted that in the facts and circumstances of the case time was not the essence of the contract. In the instant case, Syed Salamat Ali entered into an agreement with the plaintiff on 06.03.1978, whereas Title Suit No.57 of 1978 by one Nasir was filed on 04.04.1978 for specific performance of contract against Syed Salamat Ali in respect of the same property and the plaintiff got him added there and fought upto this Division and the question of abatement of the suit came to an end on 23.06.1996 only, so, before that date there was no scope to file the suit. He has further submitted that in the mean time, Syed Salamat Ali died, the plaintiff had to look for his heirs and ultimately filed the suit giving last known address of his heirs and considering these facts, the High Court Division rightly gave the benefit of section 13 of the Limitation Act.

19. He has further submitted that if the law of limitation allows a person to wait to file a suit, the benefit of such law must be given to him. Syed Salamat Ali did not get the income tax clearance certificate as per terms of the agreement and in the agreement though limitation was for one year for execution and registration of the kabala after getting the income tax clearance certificate, in the Power of Attorney executed on 07.11.1978, i.e. within 4(four) months from the date of agreement, the earlier contract was novated and no limitation having been prescribed there, the period of one year prescribed in the agreement could not in any way be pleaded as a bar to maintain the suit. He has further submitted that Syed Salamat Ali deposed in Title Suit No.57 of 1978 and in that suit, he categorically admitted about the contract entered into with the plaintiff and also the giving of Power of Attorney to him and the receipt of the entire consideration amount of taka 15,90,000`00. As Syed Salamat Ali never denied to execute and register the sale deed and in the meantime, he died in 1985 and thereafter the plaintiff looked for the whereabouts of his heirs which has been clearly stated in paragraph 9 of the plaint and when he came to know that defendant Nos.1 and 2, the heirs of Syed Salamat Ali, left the country long before and nobody could say anything as to their whereabouts filed the suit giving their last known address in the plaint. In this connection, Mr. Mahmudul Islam referred to paragraph Nos.7, 8 and 9 of the plaint. Mr. Islam has also submitted that the defendant in the written statement did not deny that defendant Nos.1 and 2 are not the son and the daughter of Syed Salamat Ali and PW1 categorically asserted in his deposition that Syed Salamat Ali died leaving behind a son and a daughter, i.e. defendant Nos.1 and 2, but no cross-examination was made to the PW on that fact and such facts clearly attract the provisions of section 13 of the Limitation Act.

20. About the cancellation of the lease agreement Mr. Islam has submitted that it was a *mala fide* action on the part the Government and, in fact, the letter of cancellation of the lease was antedated as in the written statement filed by the Government on 12.05.2004, no such fact was stated. Further the suit having filed on 17.04.2002 with the prayer for declaration of title along with other prayers, the Government could not cancel the lease.

21. Mr. Mainul Hossein, learned Counsel, appearing for the petitioner in C.P. No.2883 of 2013 has submitted that before the High Court Division, the petitioner filed an application for adding him as respondent, but the High Court Division did not dispose of the said application. He has submitted that the petitioner having obtained a decree in Title Suit No.57 of 1978 for specific performance of contract, acquired a right to contest the claim of the plaintiff. Therefore, leave may be granted in his petition to contest the decree passed by the High Court Division.

22. Mr. Mahmudul Islam for the respondent seriously opposed the submission of Mr. Moinul Islam. He has submitted that the decree passed in Title Suit No.57 of 1978 was a nullity inasmuch as the same was obtained in the said suit against a dead person.

23. An application has been also filed by one Ariful Islam, son of late Nazrul Islam to add him as a respondent in C.P. No.1240 of 2013. Mr. Rokonuddin Mahmud submits that since admittedly the applicant is in possession of the suit property, he may be added as a respondent.

24. Mr. Mahmudul Islam opposing the prayer has submitted that the applicant being a tenant under the plaintiff had/has no *locus standi* to contest the claim of the plaintiff and therefore, his prayer for addition of party does not deserve any consideration. An application has been also filed on behalf of the plaintiff-respondent with the prayer to reject the prayer

for addition of party of Ariful Islam. Mr. Islam has referred paragraph Nos.3 and 5 of the said application which are as under:

- “3. That Gharowa Hotel and Restaurant Ltd took monthly lease of a portion of the ground floor of the suit property from the applicant under agreements of lease the latest of which is one dated 6<sup>th</sup> day of June, 2011 photocopy of which is hereto annexed and marked as Annexure-A. Opposite Party no.1 Ariful Islam executed the agreement of monthly lease as Managing Director of Gharowa Hotel and Restaurant Ltd. The lease period has expired on 31.5.2012.
5. That a plain reading of the said application for addition of party shows that late Nazrul Islam father of opposite party no.1 entered into the suit property as monthly tenant under the respondent-applicant and ran a restaurant in the name of Gharowa Hotel and Restaurant which later on was converted into a private limited company. Gharowa Hotel and Restaurant Ltd. (Gharowa), which occupies approximately 1478 square feet of the ground floor of suit premises. In the last monthly tenancy agreement with Gharowa Annexure-A (the fact of which was cleverly suppressed by opposite party no.1 in his application for addition of party), Gharowa had committed to vacate the premises by 31<sup>st</sup> May, 2012 and it was further stated that Gharowa would not seek any further extension of their tenancy agreement under any circumstances.”

25. In view of the submissions of the learned Attorney General, Mr. Mahmudul Islam and Mr. Mainul Hossein, the main points to be decided in this petition are whether the plaintiff had cause of action to file the suit and whether his suit was barred by limitation in view of article 113 of the Limitation Act which provides limitation for filing a suit of the instant nature within 3(three) years from the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that the performance is refused.

26. The submissions made by Mr. Attorney General as noted hereinbefore were very much made before the High Court Division and the High Court Division in an elaborate manner met all the points raised by the learned Attorney General. From the impugned judgment, it appears that the High Court Division relying upon the principle of law enunciated in the case of Bangladesh, represented by the Deputy Commissioner, Pabna and others-Vs-Abdus Sobhan Talukder (Md.) and another 42 DLR (AD) 63, on section 13 of the Limitation Act held that the suit was not barred by limitation. We have gone through the decision and with respect we agree with the view taken therein in respect of the application of section 13 of the Limitation Act. We are not reiterating the principle here as the High Court Division exhaustively quoted in its judgment from that decision. In the facts and circumstances of the case, particularly, the statements made in paragraph Nos.7, 8 and 9 of the plaint as referred by Mr. Mahmudul Islam, the principle of law enunciated in the case of Bangladesh, represented by the Deputy Commissioner, Pabna (supra) is squarely applicable. And we hold that the plaintiff was entitled to get exclusion of the time of the absence of defendant Nos.1 and 2, the heirs of Syed Salamat Ali from Bangladesh and the High Court Division rightly gave the said benefit and held that the suit was not barred by limitation. We further hold that time was not the essence of the contract and with the execution and registration of the general power attorney in favour of the plaintiff by Salamat Ali, the earlier contract dated 06.03.1978 was novated and the High Court Division rightly held so.

27. As regards, the argument of the learned Attorney General that the plaintiff had no cause of action to file the suit, we are of the view that since the original lessee entered into an agreement with the plaintiff to sell the suit property and in part performance of the contract, he was put into the possession of the suit property and admittedly he is in possession thereof and he paid good amount of money being taka 15,90,000.00 in 1978 and after the death of Syed Salamat Ali, his heirs did not execute and register the sale deed, he had every right to file the suit to pray for specific performance of contract.

28. We find substance in the submission of Mr. Mahmudul Islam that cancellation of lease in favour of lessee, Syed Salamat Ali after filing the suit was absolutely *malafide* as in the suit, the Government and its other functionaries concerning the suit property were very much parties and in the suit, the plaintiff prayed for declaration of title to the suit property along with the other reliefs. The suit being pending by no logic, the Government could cancel the lease. We also cannot ignore the submission of Mr. Mahmudul Islam that the cancellation order was an antedated one inasmuch as the defendant Government though filed written statement in the suit on 12.05.2004, did not say the said fact in the written statement.

29. However, like a drowning man catches a straw, the learned Attorney General made a last argument that the suit property having been listed as abandoned property, the suit was barred under the provisions of Ordinance No.54 of 1985. He has filed the Gazette Notification with the application for modification of the order dated 22.04.2013. From a perusal of the said Gazette Notification it appears that although the suit property comprises two holdings, namely, holding Nos. 4 and 5, Motijheel Commercial Area, in the Gazette Notification published on 23<sup>rd</sup> September, 1986 it appears that it is the property of holding Nos.4 and 21 of Motijheel Government Market which were treated as Abandoned Property. Further admittedly Syed Salamat Ali was in Bangladesh and he owned and managed the property till 1978 when he entered into an agreement to sell the suit property with the plaintiff and since then, it is the plaintiff who is possessing and managing the property, so the question of property being abandoned does not arise at all. To us it appears that the Government did not act *bonafide* in contesting the case of the plaintiff on the plea that the suit property was an Abandoned Property.

30. Lastly, we also find substance in the submission of Mr. Mahmudul Islam that Syed Salamat Ali having constructed a two storied building, there was no necessity to obtain prior permission to enter into the contract to sell the suit property as provided in clause 19 of the lease agreement. And we approve the finding of the High Court Division in that respect.

31. So far as C.P. No. 2883 of 2013 is concerned, we find no substance in the submission of Mr. Mainul Hossain and also in the prayer for addition of party filed by the petitioner inasmuch as after Title Suit No.57 of 1978 abated against Syed Salamat Ali, defendant No.1 by the order of the High Court Division on 11.01.1995 and the same having been affirmed by this Division on 23.06.1996, the plaintiff of Title Suit No.57 of 1978, Nasir Muhammad Khan could not proceed with the suit and the decree obtained by him in the suit, in fact, was a nullity as the same was passed against a dead person.

32. So far as the application for addition of party by one Ariful Islam is concerned, we are of the view that he being an admitted tenant under the plaintiff cannot pray for adding him in the leave petition filed by the Government and the other 3<sup>rd</sup> party.

33. For the discussion made above, we find no merit in the leave petitions and accordingly, the petitions are dismissed.