

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Mahmud Hossain

Chief Justice

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

Ms. Justice Zinat Ara

Mr. Justice Abu Bakar Siddiquee

Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.89 OF 2007.

(From the judgment and decree dated 23.05.2004 passed by the High Court Division in F.A. No.91 of 1986 (Jessore) F.A. No.92 of 1991 (Dhaka).

Kazi Fazlus Sobhan being dead his heirs: Appellants.

Kazi Fazle Rabbi and others:

=Versus=

Government of Bangladesh Respondents.
and others :

For the Appellants: Mr. A.J. Mohammad Ali,
Senior Counsel, instructed
by Mr. Mvi. Md. Wahidullah,
Advocate-on-Record.

For the Respondents: Mr. Murad Reza, Additional
Attorney General (with Mr.
Sheikh Saifuzzaman, D.A.G.
and Mr. Biswajit Debnath,
D.A.G.), instructed by Mr.
Haridas Paul, Advocate-on-
Record.

Date of hearing : 07-11.2018 & 20.11.2018

Date of judgment: 28.11.2018

JUDGMENT

Hasan Foez Siddique, J: This appeal is directed against the judgment and decree dated 23.05.2004 passed by the High Court Division in First Appeal No.92 of 1991 (Dhaka) reversing those

dated 14.05.1986 passed by the then Subordinate Judge, First Court, Khulna in Title Suit No.152 of 1984 and Title Suit No.79 of 1983.

The relevant facts, for the disposal of this appeal, are that Kazi Abdus Sobhan, predecessor-in-interest of the appellants as plaintiff instituted Title Suit No.79 of 1983 in the First Court of the then Subordinate Judge, Khulna against the respondents for specific performance of contract for sale of the suit land stating, inter alia, that the plaintiff had a business of manufacturing furniture and allied timber products in a rented premises at Khanjahan Ali Road, Khulna in the name and Style of "Modern Furnitures". The plaintiff got acquainted with the defendant No.1, Jafor Ali Sayani, when he had been working as an employee of a Saw mill, namely, S. Hossain and Co., at Rupsa. When Jafar Ali Sayani lost his employment and fell in difficulty to maintain his family, he approached the plaintiff who employed him in his business on 28.1.1959. Thereafter, on being satisfied with his sincerity and performance, the plaintiff took defendant No.1, Jafar Ali Sayani, as his partner in the business by executing and registering a partnership deed dated 20.11.1959

on the terms and conditions stipulated therein. The plaintiff always trusted Sayani and never had any doubt as to his conduct and sincerity. Taking advantage of the sincerity and simplicity of the plaintiff, the defendant No.1 secretly diverted funds of the partnership business and started his own furniture business in the name and style of " Eastern Furnitures". Since the income of the partnership business dwindled, the plaintiff became suspicious and, on enquiry, he found that the defendant No.1 opened a separate bank account in the name of S. Jafar and Co. and carried on separate furniture business and acquired .22 acre of land and building thereon in Tutpara Mouza, Khulna violating the terms and conditions of the said partnership deed. Against this backdrop, the partnership business was dissolved with the intervention of the common friends of both the parties on the basis of the dissolution of partnership deed dated 26.6.1965. It was stipulated in the said deed of dissolution of partnership that both the parties shall receive Rs.1,00,000/- (one lac) each by way of 50% of the total assets minus liabilities of 3(three) business concerns, namely Modern Furnitures, S.

Jafar and Co. and Eastern Furnitures. It was also mutually agreed that the defendant No.1 would hold the said land measuring .22 acre and the building thereon for running his own business and, in consideration thereof, he would pay Rs.50,000/- (tk. fifty thousand) and also Rs.300/- (tk. three hundred) only per month as rent for use and occupation of the share of the plaintiff in the aforesaid land and building within 15 years from the date of dissolution of partnership on 26.06.1965. In the event of failure to do so within the stipulated period of 15 years, the defendant No.1, Jafar Ali Sayani, would execute and register necessary transfer deed in respect of the suit land in favour of the plaintiff on receipt of Rs.1,00,000/- (Rupees one lac) and the rent minus Rs.50,000/- (Rupees fifty thousand) in favour of the plaintiff or, in his absence, to his wife, Anwara Begum, within 3(three) months of the expiry of the stipulated period of fifteen years; failing which, the plaintiff or in his absence his wife shall have the right to get the sale deed executed and registered through court by filing suit for specific performance of the contract. Since the defendant No.1, Jafar Ali

Sayani, failed to pay the said money the plaintiff filed the suit for specific performance of the contract.

Begum Shahidunnessa filed Title Suit No.152 of 1984 in the same court for specific performance of contract in respect of the same property, stating, inter alia, that the defendant, Jafar Ali Sayani, with a view to sell the suit property, executed an agreement for sale in her favour on 8.10.1970 for a consideration of tk.60,000/- and on receipt of tk.20,000/- inducted her into possession of the suit property on condition that the sale deed would be executed and registered as soon as possible. During liberation movement, defendant No.1 (Jafar Ali Sayani) temporarily left Khulna and the Government, after liberation war, declared the suit land as abandoned property and took over possession of the same. Begum Shahidunnessa then filed the said suit for specific performance of contract.

In both the suits, the Government was impleaded as a defendant and it (Government) contested both the suits by filing written statement claiming the suit property as abandoned property.

The trial Court heard both the suits analogously and, by the judgment and decree dated 14.05.1986, decreed Title Suit No.79 of 1983 filed by the plaintiff petitioner, Kazi Fazlus Sobhan, on the finding that suit land was not an abandoned property and dismissed Title Suit No.152 of 1984 filed by Begum Shahidunnessa on the ground that her suit was barred by limitation and agreement for sale was ante dated and forged.

The Government filed First Appeal No.91 of 1986 and Begum Shahidunnessa filed First Appeal No.165 of 1986 in the High Court Division, whereupon the High Court Division heard and disposed of both the appeals analogously by the impugned judgment and decree dated 23.5.2004 dismissing the appeal filed by Begum Shahidunnssa concurring the finding of the trial Court and allowing the appeal filed by the Government on the finding that Ext-B, deed of dissolution of partnership, was not genuine.

Thus, the appellants have preferred this appeal after getting leave.

Mr. A.J. Mohammad Ali, learned Senior Counsel appearing for the appellants, submits that the High Court Division erred in law in

holding that the deed of dissolution of partnership executed on 16.06.1965 was not genuine document by discussing the evidence of P.Ws.1 and 4 and upon comparing the signature of Jafar Ali Sayani appeared in the deed of dissolution of partnership with those of his signatures in the admitted documents as appeared in exhibits-"G", "H" and "J" without taking opinion of the expert and upon proper evaluation of the evidence. He submits that P.Ws.1 and 2 deposed that Jafar Ali Sayani put his signature in Exhibit -B in their presence which has not been considered properly by the High Court Division . He further submits that the High Court Division drew conclusion abruptly, without properly evaluating and analysing the evidence on record, that the suit property is an abandoned property.

Mr. Murad Reza, learned Additional Attorney General appearing on behalf of the respondents, submits that the property, in question, is an abandoned property and, as such, the instant suit was not at all maintainable. He further submits that the plaintiff instituted the instant suit in 1983 for enforcement of contract inasmuch as the same was a fraudulent deed and

was allegedly made in 1965 so the suit was apparently barred by limitation. He further submits that the High Court Division upon proper appreciation of the evidence on record, found that the impugned deed of dissolution of partnership dated 26.06.1965 was fraudulent one.

In paragraph 14 of the plaint, it has been stated that "the plaintiff is not aware of the whereabouts of the defendant No.1 and it is learnt that the defendant No.5 is purported to have become custodian of the property under P.O. No.16 of 1972 and is in the management thereof." In the plaint, the plaintiff made the following prayer:

"i) That a decree for specific performance of contract be passed against the defendant No.1 and as custodian under P.O.16/72 against the defendant No.3 also on behalf of the defendant No.1 and they be both jointly and severally directed to execute and register necessary sale deed in favour of the plaintiff within the time to be prescribed by the learned court.

ii) In the event of failure by the defendant No.1 to execute and register necessary sale deed within the prescribed time, the learned court do execute and register necessary sale deed on accepting drafting of the plaintiff and receiving request stamps, fee and charges etc. in this behalf.

iii) Cost of the suit be decreed against the defendants.

iv) Other relief's legal and equitable be also given to the plaintiff."

It appears that in his evidence, the plaintiff has said, "পরিত্যক্ত সম্পত্তি কর্তৃপক্ষ অন্যান্য বিবাদীর সহিত যোগসাজসে নাঃ জমি পরিত্যক্ত সম্পত্তি ঘোষণা করিয়াছে বলিয়া আমি তাহাদের এই মামলায় পক্ষ করিয়াছি । এ,পি, কর্তৃপক্ষের নিকট এই মামলার ১৫/২০ দিন পূর্বে যাইয়া নালিশী জমির দলিল করিয়া দিতে বলিয়াছিলাম । তাহারা অস্বীকার করিলে এই মামলা করিয়াছিল ।" That is, the plaintiff admitted that the property, in question, is abandoned property and the government is the custodian of the same as per provision P.O. No.16 of 1972.

The plaintiff, as P.W.1, in his cross examination has stated, "১৯৭২ হইতে ১৯৮৩ সালের মে পর্যন্ত জাফর সায়নীর খোঁজ লইয়াছি । ২/ ৩ বার নালিশী বাড়ীতে গিয়াছি ও বাড়ীতে তাল মারা দেখিয়াছি ।" That is, admittedly Jafar Ali Sayani was a Non-Bengoli and found untraced since 1972 and the plaintiff did not approach the defendant No.1 to get sale deed executed and registered pursuant to the alleged deed of dissolution of the partnership business. The plaintiff instituted this suit in 1983 to get decree for specific performance of contract in respect of the land as described in the schedule

to the plaint on the basis of the deed of dissolution of partnership of 1965. The plaintiff, in cross examination, has said, “আমার দাখিলী দলিল বায়নাপত্র নহে।” That is, a valid and enforceable agreement for sale has not been proved and the suit was not filed within the time in view of article 113 of the Limitation Act since the alleged negotiation was made about 18 years before filing the suit. In such circumstances, we are of the view the instant suit was not at all maintainable and the same was barred by limitation.

Furthermore, it appears from the judgment of the High Court Division that it compared the signatures of Jafar Ali Sayani as contained in the deed of dissolution of partnership those with his signatures appeared in the partnership deed and it found that those are quite different. Accordingly, High Court Division held that the dissolution of partnership deed as exhibit-B is not genuine one. That finding of the High Court Division is finding of fact.

It is settled principle of law that giving a decree for specific performance is a matter of discretion of the Court. In exercising its discretionary power, the Court will act with

more freedom than when exercising its ordinary powers, and will grant or withhold relief according to the case presented. In this case, there was no agreement for sale. In fact, the plaintiff came to the Court to enforce the terms and conditions of an alleged unregistered deed of dissolution of partnership to dissolve their partnership deed which has not even been proved to be a genuine document. In view of such facts and circumstances, the plaintiff is not entitled to get any relief.

Accordingly, we do not find any substance in the appeal.

Thus, the appeal is dismissed.

C.J.

J.

J.

J.

J.

J.

J.

The 28th November, 2018.

hainm/words-2030/