IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique

Chief Justice

Mr. Justice M. Enayetur Rahim

Mr. Justice Md.Ashfaqul Islam

CIVIL APPEAL NO.404 OF 2016.

(From the judgment and decree dated 02.11.2010 passed by the High Court Division in First Appeal No.519 of 1999)

Laxmi Narayan Chowdhury being dead his heirs: Liton Chowdhury and others.	Appellants.
=Versus=	
Md. Harun Fakir being dead his heirs: Akter Hossain and others:	Respondents.
For the Appellants :	Mr. Abdul Wadud Bhuiyan, Senior Advocate, instructed by Ms. Nahid Sultana, Advocate-on-Record.
For the Respondent No.1(a)-1(f) & 2:	Mr. Khayer Ezaz Maswood, Senior Advocate, instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.
Respondent No.3:	Not represented.

Date of hearing and judgment: 16.05.2023

JUDGMENT

Hasan Foez Siddique, C. J: Respondent Nos.1 and 2 filed Title Suit No.18 of 1995 in the Court of Joint District Judge, Barisal for specific performance of contract. Their case was that the suit land belonged to

defendant No.1 who entered into an agreement with them to sell the suit land for a consideration of tk.147,000.00. The plaintiffs paid tk.67,500/- on 19.01.1995, tk.30,500.00 on 03.02.1995, tk.32,000.00 on 20.02.1995. That is, in total tk.1,30,000.00 was paid as part of consideration. The defendant executed a "bainapatra" on 20.02.1995 in favour of the plaintiffs and made over possession of the suit land to them on the same day. There was a stipulation in the "bainapatra" that the plaintiffs would pay the rest consideration within a month and, thereafter, the defendant would execute and register the sale deed within one month, in default, the plaintiffs would be entitled to get the sale deed registered through Court upon payment of the outstanding consideration. As the defendant failed to honour his promise, the plaintiffs were constrained to file the suit.

The case of defendant No.1 was that the plaintiffs, by creating false "bainapatra", has filed the suit to grab the suit land. The possession of the suit land was never

handed over to the plaintiffs, and the defendant has been possessing the same. He never entered into any contract with the plaintiffs. He also contended that he sold some other land to Imam Fakir and Siddique Fakir, who are full brothers of plaintiff Nos.1 and 2, and that by forging signature of the defendant, the plaintiffs created the said "bainapatra". The government as defendant No.2 in its pleading contended that since the original owners of the suit land had left for India after partition in 1947, the suit land was vested in the government. The "bainapatra" produced by the plaintiffs was a fake document created by the plaintiffs to grab the suit land.

The trial Court dismissed the suit on 13.09.1998. On appeal, however, the High Court Division reversed the judgment and decree of the trial Court on 02.11.2010 on the finding, inter alia, that the plaintiffs succeeded to prove the agreement for sale and the payment of tk.1,30,000.000 to the defendant as consideration money. It also cautioned the learned Joint District Judge,

to be careful in future in writing judgments, by following relevant laws. Against the judgment and decree of the High Court Division, the defendants have preferred this appeal upon getting leave.

Mr. Abdul Wadud Bhuiyan, learned Senior Counsel appearing for the appellants, submits that the High Court Division has committed an error of law in not considering the material evidence, oral and documentary, particularly, the "bainanama" shows that the name of executant has been written first on a blank papers and then recital was written and that the schedule was mentioned subsequently in the second page and statement about the receipt of earnest money and delivery of possession was inserted subsequently and that in the body of the "bainapatra" there was no statement as to delivery of possession which was inserted subsequently after the alleged signature of the executant and that P.W.2 in his cross examination stated that he does not know when talk of agreement took place and that P.W.3 stated in his cross examination that he was not present at the time of talk

of sale and he did not see the executant and that P.W.4 stated in cross examination that he does not know anything about the sale or purchase and that P.W.5 stated in his cross that he cannot say when the installment money were paid. He submits that those important portions of evidence have not been considered by the last Court of facts. Such non consideration of material evidence, resulted in an erroneous decision and, therefore, the judgment and decree of the High Court Division is not at all sustainable. He further submits that the trial Court on correct assessment of evidence and on consideration of "bainapatra" came to a definite finding that the plaintiffs have failed to prove their case, the High Court Division did not advert the reasoning of the trial Court. He, lastly, submits that the judgment and decree of the High Court Division is not a proper judgment of reversal since it has not reversed the finding arrived at by the trial Court on the relevant issues as to the genuineness of the "bainapatra".

Mr. Khayer Ezaz Maswood, learned Senior Counsel appearing for the respondent No.1(a)-1(f) and 2, submits that the last Court of facts, upon proper appreciation of the materials on record, found that the defendant, in order to sell the suit property to the plaintiffs at consideration of tk.1,47,000/-, received a sum of tk.67,500/- on 19.01.1995, tk.30,500/- on 03.02.1995 and tk.32,000/- on 20.02.1995 and after the payment so made, the contesting defendant executed the agreement for sale (exhibit-3) and pursuant to the agreement possession of the property, in question, was delivered to the plaintiffs, thereby, partly performed the contract and there is no error of law in the judgment and decree of the High Court Division, so the appeal should be dismissed.

The grant of decree for specific performance is a matter of discretion. The Court is not bound to grant such relief merely because it is lawful to do so but the discretion is not required to be exercised arbitrarily. It is to be exercised on sound and settled judicial principles. In a suit

for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so.

It is the case of the plaintiffs that the defendant No.1 came to an agreement with plaintiffs to sell the suit land for consideration of a sum of tk.1,47,000/-. The plaintiffs paid tk.67,500/- on 19.01.1995, tk.30,500/- on 03.02.1995 and tk.32,000/- on 20.02.1995 as consideration out of the total settled consideration. The defendant No.1, accordingly, executed an agreement for sale on 20.02.1995 and made over possession of the suit land on the same day.

It appears from the exhibit-3, the "bainanama" that the writer of the same was one Mohammad Shahidul Islam Biswas, of village Sarkal. That Shahidul Islam has not been examined by the plaintiff to prove the alleged "bainanama". P.W.1 in his cross-examination has said, "---------নালিশী জমি ক্রয় বিক্রয়ের চুক্তি

সম্পর্কে প্রথম কথাবার্তা হয় বাংলাদেশের কোন তারিখে স্মরণ নাই।" Thereafter, he said, "চুক্তিপত্রের স্ট্যাম্প কবে খরিদ করি স্মরণ করি নাই। ----------চুক্তিপত্রে সুধীর কুমারের স্বাক্ষরের উপরের অংশে চুক্তির রুল লেখা হইয়াছে দেখা যায়। চুক্তিপত্রের উপরের অংশের লেখা অপেক্ষা নীচের অংশের লেখা আকারে তুলনামূলক ছোট। চুক্তিপত্রের লেখক মুখলেছুর এর বাড়ি কোথায় জানি না।" It further appears that Taleb Sarder, Md. Shah Alom Khalifa and Shahjahan Matubber were the witnesses of that "bainanama". Of them, Taleb Sarder was examined as P.W.2 and Shah Alom Khalifa was examined as P.W.5. In his cross examination, P.W.2 has said inter alia, "চুক্তির কথা কবে হয় তারিখ জানি না।" P.W.5 Shah Alam Khalifa in his cross examination has, inter alia, said, "আমি লেখকের কলম দিয়া স্বাক্ষর করি। আমি লেখাপড়া কিছুই জানি না।" But the signature of P.W.5 Shah Alam Khalifa as appeared in the "bainanama" shows that P.W.5 is an educated man. If P.W.5 is an illiterate man then definitely signature appeared in the "bainanama" is fictitious one since it bears his signature. Considering the evidence quoted above and the place, nature and manner of the signatures of alleged executant Sudhir Kumar Chowdhury as appeared in the "bainanama" itself, we find force in the submissions made by Mr. Bhuiyan that the

genuineness of the "bainanama" is highly doubtful.

From the "bainanama", it appears that Sudhir Kumar Chowdhury allegedly executed the said "bainanama" for transferring 2.90 acres of land. The trial Court, on consideration of the evidence on record, particularly khatian No.1059, drew conclusion that Sudhir Kumar Chowdhury is the co-sharer of the land to the extent of 4 annas shares of the suit land, so he had no authority to transfer or make agreement for sale in respect of the entire 2.90 acres of land as described in the schedule to the "bainanama" and plaint. Repeatedly we have observed that the courts of law are meant for imparting justice between the parties. One who comes to the Court, must come within clean hands. Sudhir Kumer having had no sellable interest in the entire 2.90 acres of land his alleged agreement for sale the entire property cannot be approved.

It is the case of the Government that Sudhir Kumar Chowdhury had left this country for India after partition in 1947. P.W.1 in

his cross examination admitted that he does not know about the existence of other co-sharers. In his cross examination, P.W.1 has, inter alia, said, "আমার অংশের মালিক ১২ আনা অংশের মালিকগণ কেহ বা তাদের সমান ওয়ারিশ, আমার সাথে কোন চুক্তি করে নাই।..... ১২ আনা অংশের মালিকদের কাউকে আমি দেখি নাই। কে কোথায় আছে তাহা আমি বলিতে পারি না।" On perusal of the judgment of the High Court Division it appears that it did not consider those portions of evidence, thereby, erroneously drew conclusion as to the acceptability of the "bainanama".

Moreover, the plaintiffs failed to adduce any reliable evidence as to payment of consideration of tk.67,500/- on 19.01.1995, and tk.30,500/- on 3.02.1995. The plaintiffs also failed to prove their readiness and willingness of payment of rest consideration which are essential requirements to get the decree for specific performance of contract. In a suit for specific performance it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details, he must go further and plead that he asked the defendant No.1 specifically to perform the agreement pleaded by him but the defendant did not do so. It is the duty of the plaintiff to prove that he has been and is still ready and

willing to specifically perform his part of the agreement. It was the legal obligation to the plaintiff that he was, since the date of the agreement for sale, continuously ready and willing to perform his part of the agreement. If he fails to do so, his claim for specific performance must fail (Ardeshir Mama V. Flora Sassoon, 1928 SCC online PC 43). P.W.1 (plaintiff) in his evidence did not say that he offered at any time to the defendant No.1 the alleged rest amount of consideration.

Considering the aforesaid facts and circumstances, we find substance in the appeal.

Accordingly, the appeal is allowed. The judgment and decree dated 02.11.2010 passed by the High Court Division in First Appeal No.519 of 1999 is hereby set aside.

C.J.

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The 16th May, , 2023

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