

14 SCOB [2020] HCD**HIGH COURT DIVISION****(CIVIL APPELLATE JURISDICTION)**

F. A. No. 233 of 2006

**Md. Badaruddin being dead his heirs
Most. Arjuda Khatun and others**
... Defendant-Appellants.

Mr. Md.Sanwar Ahad Chowdhury,
Advocates
...for the appellants.

-VERSUS-

Md. Shahidullah Miah
... Plaintiff-Respondent.

Mr. Md. Imtiazur Rahman Farooqui (M.I.
Farooqui), with
Ms. Razia Sultana, Advocates
...for the respondent

Hasan Sarwar Khan and others
... Defendant-Respondent.

Heard on: 20.11.2019, 21.11.2019,
05.12.2019 and 09.12.2019
Judgment on: 15.12.2019

Mr. Sasthi Sarker with

Present:

Mr. Justice S.M. Emdadul Hoque
With
Mr. Justice Zafar Ahmed

Sale deeds, Article 113 of the Limitation Act, 1908, Baina dated, Time from which the period of limitation begins, Novation of contract, Performance of a contract;

Time consumed in the so called arbitration proceedings or waiting for subsequent refusal are of no assistance to the plaintiff.

Specific performance is a relief which the Court will not grant, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit. The rights of equity are rights which are given to litigants who are vigilant and not to those who sleep.
... (Para 26)

JUDGMENT**Zafar Ahmed, J:**

1. In this first appeal, the defendant Nos. 1-5 have challenged the judgment and decree dated 08.08.2006 (decree signed on 14.08.2006) passed by the Joint District Judge, 5th Court, Dhaka in Title Suit No. 255 of 2000 decreeing the suit.

2. During pendency of the appeal, the appellant No. 1 Md. Badaruddin died on 25.04.2007. His legal heirs were duly substituted in the appeal.

3. The respondent No. 1 as plaintiff filed the suit praying for *inter alia* declaration that four sale deeds ('C' schedule) executed by the defendant No. 1 in favour of his four daughters are collusive and not binding upon the plaintiff and for specific performance of contract (baina) dated 21.09.1979.

4. The case of the plaintiff, in short, is that the defendant No. 1 Badaruddin was the owner in possession through succession of .1151 acres of land in 9 annas share of the schedule 'A' property along with other properties left by his mother. After transferring portions of land to a 3rd party and to the plaintiff, the defendant No. 1 remained the owner in possession of land measuring 0.0738 acres ('B' schedule). Thereafter, the defendant No. 1 contracted to sell the same to the plaintiff for Tk. 1,40,000/- and entered into an unregistered written agreement (baina) with him on 21.09.1979 upon receipt of Tk. 10,000/- as advance. In the said baina, a period of three months from date was mentioned for payment of the balance consideration money and execution and registration of the required sale deed, but the defendant No. 1 delayed the same on the plea that he has four unmarried daughters and if he hands over the possession of the property to the plaintiff, he would face difficulty in giving the daughters in marriage. Subsequently, the defendant No. 1 received Tk. 30,000/- on different dates from the plaintiff till 1992. Thereafter, to meet the expenses of the marriage ceremony of the 2nd daughter (defendant No. 5) held on 17.06.1993, the defendant No. 1 received another sum of Tk. 20,000/- from the plaintiff in the first week of June, 1993 and then Tk. 20,000/- in the later part of April, 1997 to bear expenses of marriage ceremony of the third daughter (defendant No. 4) held on 30.04.1997. Thus, the defendant No. 1 received total sum of Tk. 80,000/- from the plaintiff as consideration money out of Tk. 1,40,000/-. The defendant No. 1 delivered possession of 1 katha land of schedule 'B' property to the plaintiff in June, 1993. The plaintiff constructed tin chapra consisting of four rooms on the said land and let out those to the tenants and has been realising rents from them.

5. The further case of the plaintiff is that on 15.05.1997, the plaintiff requested the defendant No. 1 to execute and register the sale deed upon receipt of the balance consideration money of 60,000/-, but the defendant No. 1 evaded the request on flimsy grounds. Thereafter, the plaintiff filed a petition against the defendant No. 1 before the Commissioner of the local Ward No. 58, Dhaka on 11.12.1997, whereupon, being summoned, the defendant No.1 appeared before the Ward Commissioner and contested the plaintiff's claim and though he admitted receipt of Tk. 80,000/- from the plaintiff, he refused to execute and register the required sale deed. The Ward Commissioner passed the award on 05.10.2000, whereby he directed the defendant No. 1 to execute and register the sale deed in respect of the suit property in favour of the plaintiff within 30 days from date upon receipt of balance consideration of money of Tk. 60,000/-, but the defendant No. 1 did not comply with the same.

6. The further case the plaintiff is that on inspection of the Tazdik records he came to know that behind his back and beyond his knowledge, the defendant No. 1 created 4 sale deeds in favour of his four daughters (defendant Nos. 2-5) in respect of a portion of the suit property (schedule 'C').

7. The suit was contested by the defendant Nos. 1-5 by filing a joint written statement and better statement. The case of the contesting defendants, in short, is that the defendant No. 1 did not enter into any written agreement on 21.04.1979 upon receipt of Tk. 10,000/- from the plaintiff by putting the alleged signature on the same. The story of receiving money from the plaintiff on different dates is false and concocted. The further case of the defendants is that after receiving consideration money, the defendant No. 1 transferred portions of the land in question to his four daughters (defendant Nos. 2-5) on 25.06.1998 and 30.06.1998 respectively, vide separate registered sale deeds and handed over possession thereof. The defendant Nos. 2-5 constructed semi pucca structure thereon and they have been paying rents

and taxes after mutating their names with knowledge of the plaintiff and others. The defendant No. 1 did not deliver possession of any portion of the suit land to the plaintiff.

8. In respect of the award dated 05.10.2000 passed by the Ward Commissioner, the defendants' case is that the said award is concocted and was passed beyond the knowledge of the defendant No. 1.

9. The trial Court framed the following issues:

- 1) Is the suit maintainable in its present form.
- 2) Does the suit disclose a cause of action.
- 3) Is the suit barred by limitation.
- 4) Is the plaintiff entitled to get the relief as prayed for.
- 5) To what other reliefs except the relief prayed for, the plaintiff is entitled to.

10. The plaintiff examined 3 witnesses and produced documentary evidences which were marked as exhibits 1-6 series. The defendants examined 5 witnesses. Documentary evidences produced by them were marked as exhibits A-G series. The trial Court decreed the suit and hence, the first appeal at the instance of the defendant Nos. 1-5.

11. Mr. Sasthi Sarker, the learned Advocate appearing on behalf of the defendant-appellants made submissions on two points; firstly, the plaintiff failed to prove that the unregistered baina dated 21.09.1979 was executed at all and, secondly, even the execution of the said baina is proved, the suit is barred by limitation under the first part of Article 113 of the Limitation Act, 1908.

12. Mr. M.I. Farooqui, the learned Senior Counsel appearing along with Ms. Razia Sultana on behalf of the plaintiff-respondent No. 1, submits that the execution of the unregistered baina has been proved and that the suit is not barred by limitation inasmuch as the agreement for sale was novated which is evidenced by the subsequent conduct of the parties. The learned Advocate next submits that under the substituted agreement, no specific date was fixed for performance and therefore, the first part of Article 113 does not apply to the case. The learned Advocate finally submits that evidences on record prove that the second part of Article 113 shall apply to the case and the suit has been filed within the period of limitation. The learned Counsel submits that the trial Court has rightly decreed the suit.

13. We have heard the learned Advocates of both sides and perused the materials on record.

14. The points for determination in the instant appeal are:

- (1) whether the deed of agreement dated 21.09.1979 (baina) was executed,
- (2) whether the suit is barred by limitation,
- (3) whether the plaintiff has proved the case, and
- (4) whether the judgment and decree under challenge can be sustained.

15. The first question we need to address is whether the unregistered baina dated 21.09.1979 was executed by the defendant No. 1. PW1 (plaintiff) gave deposition supporting his claim that the baina was duly executed by the defendant No. 1. PW2 Hafej Md. Sirajuddin, who is an Imam of a mosque, deposed that the baina was executed in front of him and that he is an attesting witness. He further deposed that the defendant no. 1 put his signature in English in the baina in his presence. The defendant No. 1 deposed as DW2. In

examination-in-chief, he denied the execution of the baina by him. In cross-examination, DW2 stated that he cannot see the signatures contained in the sale deeds executed by him in favour of his daughters and the signature contained in the baina. He further stated, “উক্ত বায়না পত্রের সই আমার কিনা তা আমি বুঝিতেছি না”. At the time of deposition, DW2 was about 87 years old. Having gone through the entire deposition of DW2, it appears to us that his memory was faded due to old age. The trial Court compared the signature of the defendant No. 1 contained in the baina with that contained in the sale deeds executed by him in favour of his daughters and came to the conclusion that it was the signature of the defendant No. 1. In view of the evidence given by the attesting witness (PW2) and the finding of the trial Court, we have no hesitation to hold that the baina was duly executed by the defendant No. 1.

16. Now, the second question is whether the suit is barred by limitation under Article 113 of the Limitation Act, 1908. Prior to the amendment, Article 113 provided a period of limitation of three years from the date fixed for performance or if no such date is fixed, when the plaintiff has notice that performance is refused. Article 113 was amended in 2004 which was given effect from 01.07.2005. Under the amended Article, the period of limitation is one year. In the instant case, the period of limitation of three years shall apply as the case was filed before the amendment.

17. In the Indian case of *Ramazan vs. Hussaini*, AIR 1990 SC 529, it has been held that for the purpose of limitation and the date fixed for performance within the meaning of Article 54, mention in the deed of particular date from calendar is not necessary. It is sufficient if the basis of calculation which makes the date of performance certain is mentioned in the deed. Be it mentioned that Article 54 of the Indian Limitation Act and Article 113 of our Limitation Act contain identical provisions except that in India, period of limitation to file a suit for specific performance of contract is still three years.

18. Reverting back to the case in hand, in the baina dated 21.09.1979, a period of three months from the date of execution was mentioned for payment of the balance consideration money and execution and registration of the required sale deed. Accordingly, the last date for filing the suit was 20.12.1982. The suit was filed on 30.11.2000 beyond the prescribed period of limitation. This is precisely the argument advanced on behalf of the defendant-appellants that the suit is barred under the first part of Article 113 of the Limitation Act.

19. Mr. M.I. Farooqui, the learned Senior Counsel for the plaintiff, on the other hand, draws our attention to the plaint and to the deposition of the plaintiff (PW1). He refers to Section 62 of the Contract Act and submits that the original written agreement for sale (baina) has been novated by the subsequent oral agreement between the parties which is evidenced by the conduct of the parties and proved by oral evidence given by PW1 which is permissible under Explanation 3 of Section 91 and proviso 3 and 4 of Section 92 of the Evidence Act. Mr. Farooqui further submits that under the substituted oral agreement, no date was fixed for the performance. Therefore, the 2nd part of Article 113 shall apply to the case so far as limitation is concerned.

20. We note that it has been stated in the plaint that after execution of the baina dated 21.09.1979, the defendant No. 1 delayed the execution and registration of the sale deed till marriage of his four unmarried daughters. Evidences on record show that three daughters were given in marriage in 1983, 1993 and 1997 respectively. It has been further stated in the plaint that at the time of execution of the baina, the defendant No. 1 took Tk. 10,000/- from the plaintiff out of total consideration money of Tk. 1,40,000/-. Then he took Tk. 30,000/- on

different dates from the plaintiff till 1992, Tk. 20,000/- in the 1st week of June, 1993 and 10,000/- in the later of April, 1997. The plaintiff gave oral evidence supporting these portions of the plaintiff's case, but could not produce any documentary evidence. The defendant No. 1 denied the execution of baina as well as acceptance of any money. Mr. Farooqui submits that relationship between the parties and the surroundings circumstances must be taken into consideration to understand as to why the plaintiff did not feel it necessary to keep any record in respect of payment of money. Mr. Farooqui points out that the plaintiff is the next door neighbour of the defendant No. 1; that earlier the mother of the defendant No. 1 sold a piece of land to the plaintiff's mother in 1966; that the defendant No. 1 also sold a piece of land to the plaintiff in 1975; that PW2, who is an independent witness, deposed that 30 years back the defendant No. 1 used to work under the plaintiff in his ration shop. Mr. Farooqui submits that due to earlier transactions and relationship between the parties, the plaintiff, upon bonafide belief, did not care about keeping any record as to subsequent payment of money on different dates under the original baina and the substituted oral agreement. Mr. Farooqui further submits that cause of action consists of bundle of facts for the purpose of determining the relevant time from which the period of limitation begins to run and in the particular facts and attending circumstances of the case, a specific date should not be considered to count the period of limitation inasmuch as the original agreement was novated by a subsequent oral agreement which does not provide any specific date for performance, and that the defendant accepted payment of money of Tk. 80,000/- on different dates beyond the prescribed period provided under the original agreement, and that the plaintiff was always willing to perform part of his obligation. Now the defendant cannot use the Article 113 as a shield and take benefit of his own laches. In support of the argument, Mr. Farooqui refers to a passage from the text book "*The Specific Relief Act, 1877 with An Exhaustive Commentary*" by Sardar Muhammad Iqbal Khan Mokal, Law Publishing Company, Lahore, Pakistan (1978, 3rd edition, p.60). The relevant passage runs as follows:

"The time at which the mutuality must exist, in order that it may produce these binding effects, is that of concluding the agreement between the parties. The contract should properly be mutual *ab initio*. Two questions may arise concerning the time: (1) Whether the quality of mutuality, originally existing, must continue to the time of bringing the suit or rendering the decree? (2) Whether, if the quality did not originally exist, the objection would be obviated by subsequent acts or events which render the obligation and remedy mutual. In respect of the first of these question, it is settled that if the agreement possesses the requisite element of mutuality, when it is concluded, so that the plaintiff can then maintain a suit for its specific execution, his right to such relief will not be subsequently defeated or diminished, because the defendant, through his delay or other acts or omissions, afterwards loses the right to enforce the contract against the plaintiff, which he originally had; a valid defence cannot thus arise from the defendant's own laches."

21. Mr. Farooqui argued strenuously on points of novation of contract, mutuality of parties under the substituted oral agreement and that the suit is not barred by limitation.

22. One of the essential requirements of 'novation' as contemplated by Section 62 of the Contract Act is that there should be complete substitution of a new contract in place of the old one. A substituted contract should rescind or alter or extinguish the previous contract (*Lata Construction vs. Dr. Rameshchandra Ramniklal Shah*, AIR 2000 SC 380). After execution of a new contract, the substituted contract gives rise to new cause of action and obligates the earlier one. If there is no intention to rescind the prior contract altogether, there is no substitution (*Renuza Begum and others vs. Md. Waziullah Mia and others*, 18 BLC

(AD) 201). In *The Central Bank of India, Ltd. vs. Md. Islam Khan*, 14 DLR (SC) 86, it was held that by the mere extension of time for the performance of a contract, novation does not necessarily take place, but the promisee gets certain rights under Section 63 of the Contract Act.

23. In view of the above discussed judicial pronouncements, even we accept the arguments advanced by Mr. Farooqui, the original written agreement dated 21.09.1979 has not been novated simply because the subject matter and the consideration have remained the same except extension of time for performance which has been extended till marriage of the defendant No. 1's daughters. In that case, the 2nd part of Article 113 comes into the scenario since no date was fixed for performance.

24. It has been stated in the plaint that on 15.05.1997 and then on 07.11.2000, the defendant No. 1 refused to execute and register the sale deed. In the deposition, PW1 (plaintiff) mentioned the date 15.05.1997, but did not mention the date 07.11.2000. The plaintiff's case is that after 15.05.1997 the local Ward Commissioner held an arbitration in respect of the performance of the baina and gave a written award on 05.10.2000 directing the defendant No. 1 to execute and register the sale deed within 30 days upon receipt of balance consideration money of Tk.60,000/-. PW1 deposed that after the award, he requested the defendant No. 1 to execute and register the sale deed, but he refused. Be that as it may, Mr. Farooqui frankly concedes that the arbitration and the award have no sanction of law. We also find that the so-called arbitration is not a relevant fact and therefore, refrain from commenting on that.

25. In respect of 2nd part of Article 54 of the Indian Limitation Act (in Bangladesh the corresponding Article is the 2nd part of 113), it has been commented in "*Rustomji on Limitation Act*", 9th edition (2010) by S.P. Sen Gupta at p. 861 that, "Time ... runs when the plaintiff first had notice that performance was refused. ... time runs, not necessarily from date of refusal, but from plaintiff's knowledge of the refusal *Bathula Venkanna v Namuduri* ILR (1917) 41 Mad 18". Although Section 23 of the Limitation Act has not been argued by the plaintiff's learned Counsel, yet we have considered that. According to Section 23, in the case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of the time during which the breach continues. A continuing contract is one to do a thing *toties quoties* (meaning 'as often as') as the the exigency of the case may require which is not the case here. On the other hand, a cause of action which is complete cannot be a recurring cause of action. In *Panna Khan and others vs. Birendranath Halder*, 52 DLR 640, it has been held that for recurring refusal, the limitation in a suit for specific performance of contract cannot be extended and that the suit is to be filed within 3 years from the date of first refusal. The limitation will not be extended for subsequent refusal or recurring refusal or on the basis of causes of action as founded on the last date of refusal.

26. In the case in hand, even we accept the plaintiff's case that time for performance of the contract dated 21.09.1979 was extended, then according to the plaint and deposition of PW1, 15.05.1997 is the relevant date when the plaintiff first had notice / knowledge that performance was refused by the defendant No. 1. The plaintiff opted for arbitration which has no sanction of law. The so called award was given on 05.10.2000. The suit was filed on 30.11.2000. Meanwhile, more than 3 years have elapsed and the period of limitation has expired. Time consumed in the so called arbitration proceedings or waiting for subsequent refusal are of no assistance to the plaintiff. The case of the plaintiff, as narrated in the plaint and in the deposition of the plaintiff witnesses, clearly shows that in the entire transactions

there was utter negligence and laches on the part of the plaintiff. Specific performance is a relief which the Court will not grant, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will admit. The rights of equity are rights which are given to litigants who are vigilant and not to those who sleep. Since the plaintiff's case, considered in its entirety, is barred by limitation under Article 113 of the Limitation Act, we need not to dwell upon whether the plaintiff has proved his case. The trial Court overlooked the facts of the case in proper perspective and thus, wrongly held that the suit is not barred by limitation. Hence, the judgment and decree allowing the suit cannot be sustained.

27. In the result, the appeal is allowed. The impugned judgment and decree dated 08.08.2006 (decree signed on 14.08.2006) passed by the Joint District Judge, 5th Court, Dhaka in Title Suit No. 255 of 2000 decreeing the suit are set aside. The suit is dismissed. No order as to costs. Send down the L.C.R.

28. Communicate the judgment and order at once.