

**20 SCOB [2025] HCD**

**Present:**

**Mr. Justice Md. Ruhul Quddus**

**Civil Revision Number 1615 of 1993**

**Mir Forjet Ali**

**... Petitioner**

**-Versus-**

**Rajab Ali Matubbar and others**

**... Opposite parties**

**Mr. Md. Saidul Alam Khan for Mr. M. A. Khaleque, Advocate**

**...for the petitioner**

**No one appears for the opposite party**

Date of Hearing: 03-11-2024

Date of Judgment: 07-11-2024

**Editors' Note:**

**In Civil Revision No. 1615 of 1993, the plaintiff sought specific performance of a 1978 agreement to purchase land from the defendant, who allegedly received Tk. 18,000 as earnest money but later refused to execute the sale deed. The defendants, his sons, contested the claim, asserting that the land had already been gifted to them through a registered deed executed in 1972 and that the alleged agreement was forged. The trial court decreed the suit in favour of the plaintiff, but the appellate court reversed the decision. Upon revision, the High Court held that since the defendants claimed independent title and possession under an earlier registered gift deed, their claim should have been adjudicated within the same suit to avoid multiplicity of proceedings. Referring to precedents including *Bajrang Lal Agarwala v. Aksed Ali Shaikh* (35 DLR 110) and *Sh. Barkatullah v. Khawaja Mohammad Ibrahim* (22 DLR (SC) 419), the Court observed that under exceptional circumstances a third party's claim of possession and prima facie title may be examined in a suit for specific performance. Applying Section 25(a) of the Specific Relief Act, which disqualifies a person from seeking specific performance where the vendor has no title, the Court remanded the case for expert comparison of the vendor's thumb impressions and for determination of the defendants' possession and title, holding that such adjudication was necessary for complete justice and to prevent future litigation.**

**Key Words:**

Specific Performance of Contract for sale, Adjudication of third party's claim of title and possession in a suit for specific Performance of Contract for sale

**Under exceptional circumstances, a third party's claim of physical possession and prima-facie title can be adjudicated on merit in a suit for specific performance of contract, where he is already made a party and claims independent title and physical possession over the subject matter of the contract. This will help avoid multiplicity of litigations and future complications.**

**... (Para 23)**

## JUDGMENT

### Md. Ruhul Quddus, J

1. This rule at the instance of the plaintiff-petitioner was issued on an application under Section 115 of the Code of Civil Procedure challenging the judgment and decree dated 04.11.1992 (decree signed on 10.11.1992) passed by the Subordinate Judge (now Joint District Judge) and Artha Rin Adalat, Faridpur in Title Appeal Number 153 of 1989 allowing the same on reversing those dated 30.08.1989 passed by the Assistant Judge, Bhanga, Faridpur in Title Suit Number 91 of 1986 decreeing the suit.

2. The petitioner instituted the suit in the Court of Munsif (now Assistant Judge), Bhanga, Faridpur for specific performance of contract. His case, in brief, was that the land as described in the schedule of the plaint belonged to defendant number 1 Abdul Hamid Matubbar, predecessor of opposite parties number 1-10. He executed an agreement with the plaintiff on 30.10.1978 to sell 91 decimals of land for a consideration of Taka 20,000/- (twenty thousand), out of which Taka 18,000/- was paid as earnest money. It was stipulated that he would execute and register the sale deed receiving the remaining consideration of Taka 2,000/- (two thousand) within Boishakh-Chaitra, 1392 BS. It was further stipulated that if the defendant refunded the earnest money (Taka 18,000/-) within the month of Chaitra, 1391 BS, the agreement for sale would be returned. Since, the defendant did not refund the money, the plaintiff requested him on 01.04.1986 to receive the remaining consideration, and execute and register a sale deed, but he refused. Hence the suit.

3. Defendant number 1's two sons, namely, Rajob Ali Matubbar and Chand Miah Matubbar were added as defendants number 3 and 4 and they contested the suit by filing a joint written statement. Their case, in brief, was that defendant number 1 did not receive money from the plaintiff and also did not execute any agreement for sale. The agreement was a forged and created one. Defendant number 1 was financially solvent and he had no reason to sell the property. He had already transferred the suit land to these defendants by registered gift deed number 2185 dated 13.06.1972. These defendants were possessing the ponds situated on the suit land by rearing fishes.

4. Defendant number 1 also filed a written statement on similar averment affirming the transfer of the suit land to his sons by way of registered gift deed dated 13.06.1972. Thereafter, defendant number 1 died and his remaining heirs were substituted by order dated 29.03.1989 and they also contested the suit adopting the said written statement by filing an application dated 16.07.1989.

On the aforesaid pleadings, the trial court framed issues, namely, (i) whether the suit was maintainable in its present form and manner, (ii) whether the suit was barred by limitation, (iii) whether the sale agreement in question was executed by defendant number 1 on 30.10.1978 in accordance with law, and (iv) whether the plaintiff was entitled to the relief of specific performance of contract as prayed for.

5. In course of hearing, the plaintiff deposed as PW 1, where he supported the plaintiff's case as reproduced above stating that the defendant number 1's son Jonab Ali and some other persons, namely, Ohab, Danesh, Mamun and Siraj Mir were present at the time of execution of the sale agreement. The negotiation for sale was held at the house of Siraj Mir. He himself paid the money to defendant number 1 in presence of the attesting witnesses and also the scribe of the sale agreement, Suriya Kumar (PW 3).

6. In cross-examination, PW 1 stated that he could not recollect the date of execution of the sale agreement and could also not say about the denomination of the currency that was given as consideration money.

7. PW 2 Siraj Mir, an attesting witness to the sale agreement in question, deposed supporting the plaintiff's case and payment of earnest money amounting to Taka 18,000/- at the time of execution of the sale agreement.

8. PW 3 Suriya Kumar, scribe of the agreement for sale proved his signature thereon. He stated that the executant Hamid signed it in his presence, but could not recollect whether the earnest money was paid in his front.

9. PW 4 Danesh Sharif stated that he was present at the time of negotiation before execution of the sale agreement. There was a settlement for sale of 89 decimals of land. He knew the suit land and claimed himself to be the owner of adjacent land.

10. On the other hand, defendant number 1 (ka) Jonab Ali Matubbar deposed as DW 1. He outright denied the plaintiff's case claiming the sale agreement to be a forged and created one. He asserted that the plaintiff did never possess the suit land. He denied his signature, which was allegedly put on the sale agreement as an attesting witness. He further stated that the plaintiff was his maternal uncle, who was a person of bad reputation and so many criminal cases were pending against him. He could not submit the original gift deed containing the signature of his father, because those were seized by the Anti-Corruption Office. His father did not sign the sale agreement, nor did he receive the earnest money. He affirmed the written statement filed by his father (defendant number 1) and asserted that PW 4 Danesh had no land adjacent to the suit land. The land appertaining to plot number 2770 belonged to Amjad, Latif and him. He denied the suggestion that the gift deed was collusive.

11. The defendant side examined three local witnesses, namely, DW 2 Mannan, DW 3 Shorab Matubbar and DW 4 Azraf Ali. All of them deposed in support of the defendants' case and asserted their (defendants') physical possession over the suit land.

12. After conclusion of hearing, learned Assistant Judge decreed the suit in favour of the plaintiff by judgment and decree dated 30.08.1989 (decree signed on 05.09.1989). Being aggrieved, the defendants preferred Title Appeal Number 153 of 1989 in the Court of District Judge, Faridpur. Learned Subordinate Judge, Faridpur ultimately heard the appeal and allowed the same by the impugned judgment and decree reversing those of the trial court. In that event, the plaintiff-petitioner moved in this court with the present revisional application and obtained the rule.

13. Mr. Saidul Alam Khan, leaned advocate for the petitioner submits that the plaintiff proved his case by producing the written agreement for sale, examining two attesting witnesses and the scribe of the sale agreement, and also by examining a local witness (PW 4). The plaintiff clearly proved the payment of earnest money to defendant number 1, Abdul Hamid Matubbar. The trial court, on proper consideration of the evidence on record, decreed the suit but the appellate court, on usual variation in the oral evidences of the plaintiff's witnesses, disbelieved the contract and allowed the appeal.

14. Mr. Khan further submits that in a suit for specific performance of contract, the validity of sale agreement and payment of consideration money are the prime considerations,

which the plaintiff has been able to prove in this case. In a suit for specific performance of contract, there is no scope to examine the title of a third party and to refuse specific performance on that ground. In support of his submission, Mr. Khan refers to the case of *Ibrahim Khalil and others vs Mujibir Rahman and others*, X ADC (2013) 72.

15. I have considered the submission of the learned advocate and gone through the record. Since this a judgment of reversal, I have gone through the evidence and other materials available in the lower courts' files. It appears that defendant number 1 (ka) Jonab Ali Matubbar (DW 1) was an attesting witness to the sale agreement dated 30.10.1978, who denied his signature thereon. He stated that the original gift deed dated 13.06.1972 was seized by the then Bureau of Anti-Corruption (now Anti-Corruption Commission) in connection with a criminal case that was lodged against the plaintiff. The defendants side produced the original seizure list with photocopies of the original gift deed dated 13.06.1972 with another gift deed, and eleven rent receipts showing payment of rent against the suit land. For unknown reason, the said documents except the rent receipts were not exhibited/marked. These documents are still lying in the trial court's file, which I have examined and found that the sale agreement and gift deed are bearing the left thumb impressions (for short, LTI) of defendant number 1, Abdul Hamid Matubbar on their back pages. The written statement filed by him is also bearing his left thump impression on its front pages. So, there was sufficient scope to compare the LTIs of defendant number 1 from the said two documents calling the gift deed from the then Bureau of Anti-Corruption and arrive at a decision whether he had executed the sale agreement in question.

16. It is important to notice that defendants number 3 and 4 were added in the suit and contested the same claiming their title and physical possession over the suit land on the basis of gift deed dated 13.06.1972 executed and registered by the same vendor (defendant number 1) long before execution of the sale agreement dated 30.10.1978. In such a case, if the suit is decreed without determining their case on merit, would they be non-suited as against the present plaintiff? In the present case, defendant number 1 himself denied the sale agreement and stated that he had gifted the property to his sons by registered gift deed dated 13.06.1972. DW 1 deposed affirming the said gift and DWs 1-4 affirmed their possession over the suit land. In such a case, the trial court ought to have examined the title and physical possession of defendant number 1 in the suit property and been extra cautious in giving the decree on the basis of an unregistered sale agreement.

17. Section 25 (a) of the Specific Relief Act disqualifies a person from specific performance of contract, who knowing himself not to have any title to a property, contracts to sell it. However, such contract makes him liable for payment of damages. On the effect of Section 25 of the Act, we find the case of *Bajrang Lal Agarwala vs Aksed Ali Shaikh and others*, 35 DLR 110. In this case, the plaintiff instituted a suit for specific performance of contract, where an application for addition of party under Order I, rule 10 of the Code of Civil Procedure was filed by a third party, who claimed title and possession over the suit land. Learned trial judge rejected the application. Challenging the rejection order, the applicant moved in the High Court Division with a revisional application and obtained rule. A Division Bench heard the rule and made it absolute. In passing the judgment, ATM Afzal, J (as his lordship then was) speaking for the court observed:

*“In a suit for specific performance the general rule is that a stranger to the contract cannot be sued upon it. Only the parties to the contract are, according to that rule, necessary and sufficient parties. But the general rule is subject to certain*

*modifications. For instance, strangers are made parties as an exception to the rule in cases of novation; and in cases where it is desirable to avoid multiplicity of suits.*

*“... the petitioner’s presence is very much necessary because he claims to be in possession of the suit property. If his possession is proved, no decree for possession can be passed against him and the suit for specific performance would fail although a suit for damages may lie against the vendor. ...”* (emphasis supplied) (paragraphs 5 and 11)

18. We also find the case of *Sh. Barkatullah and another vs Khawaja Mohammad Ibrahim*, 22 DLR (SC) 419, 424 where there was a contract for leasing out a shop between the plaintiff and defendant number 1. Before handing over the possession, a dispute over fixing the monthly rent of the shop arose between them. The defendant leased out the shop to a third party and also put him in possession. The plaintiff instituted the suit for specific performance of the said contract for lease. The trial court dismissed the suit on the findings amongst others that the third party, who was in physical possession of the shop and was carrying on business there, was a necessary party to the suit. On an appeal, the appellate court reversed the judgment and on second appeal, a Division Bench of the High Court affirmed the judgment of the appellate court. The matter was taken to the Supreme Court of Pakistan, where the Supreme Court granted special leave and after hearing allowed the appeal and restored the judgment of the trial court. In so doing, the Supreme Court of Pakistan observed:

*“... As a general rule the second lessee cannot be sued upon the contract to which he was not a party i.e. no decree for possession can be passed against him. The suit for specific performance would therefore fail though a decree for damages may be passed against the lessor for breach of contract. However, if the second lessee is in possession and has notice of the contract on which the suit is based, he would then be sued upon and a decree for possession passed against him. ...”* (emphasis supplied)

19. It is to be kept in mind that the decisions of the Supreme Court of Pakistan passed before emergence of Bangladesh are having binding effect on the Supreme Court of Bangladesh, High Court Division. (reliance placed on *Terab Ali and others vs Syed Ullah and others*, 75 DLR (AD) 233; *Siddique Farazi vs State*, 73 DLR 79 and *Ahmed Nazir on behalf of AKM Golam Kabir vs Bangladesh through Secretary, Ministry of Home Affairs, Government of Bangladesh, and others* 27 DLR 199, 224)

20. In the case of *Ibrahim Khalil and others* as cited by the learned Advocate for the petitioner, the title of an ***ejmali* land** was subsequently devolved upon two SA recorded tenants, namely, **Gurudas Sarker and Debendra Mondal. Defendants number 1, whose title was derived from Debendra Mondal**, entered into an agreement for sale with the plaintiff. **Defendants number 4-9 were co-sharers of the suit land having ejmali title therein derived from Gurudas Sarker**, who tried to resist the plaintiff’s claim of specific performance (see paragraphs 4 and 13). **The executants of the sale agreement (defendants number 1 and 2 did not contest the suit**, but defendants number 4-9. The trial court dismissed the suit, while the High Court Division being appellate court decreed the same and the Appellate Division upheld the High Court’s judgment on the grounds that the executants of the sale agreement did not contest the suit, the contesting defendants number 4-9 were co-sharers of the suit land and the issue of their independent title was beyond the scope of adjudication in a suit for specific performance of contract. In the cited case, there was alternative remedy to bring a suit for partition praying all necessary reliefs on the part of the defendants number 4-9. Moreover, whether defendants number 1 and 2 in the cited case had

exclusive title and possession over the land under contract and defendant number 1 was disqualified under Section 25 of the Specific Relief Act, were not raised and discussed there.

21. In the case in hand, defendants number 3-4 were added by court's order, which was not challenged by the plaintiff. The proposed vendor (defendant number 1) filed written statement denying the execution of the sale agreement, his legal heirs contested the suit on the basis of his written statement and the suit land was not *ejmali* in nature. The defendants claimed title and possession over the selfsame suit land from the same person by a gift deed registered long before execution of the unregistered sale agreement of the plaintiff. The bar also failed to bring into notice of the court its previous decision given in the case of *Sh. Barkatullah and another*. So, on many counts, the decision cited by the learned advocate for the petitioner is distinguishable with the case in hand.

22. In view of the discussions made and the decisions cited above, we can safely hold that under exceptional circumstances, a third party's claim of physical possession and prima-facie title can be adjudicated on merit in a suit for specific performance of contract, where he is already made a party and claims independent title and physical possession over the subject matter of the contract. This will help avoid multiplicity of litigations and future complications.

23. Under the facts and circumstances of the present case, I think it would be just and proper to send the suit on remand to the trial court for determination of the genuineness of the sale agreement in question by comparing the LTIs of defendant number 1, Abdul Hamid Matubbar as put on the back pages of agreement for sale dated 30.10.1978 and those of the original gift deed dated 13.06.1972, or that on the front pages of his written statement, which is lying with the record, if the gift deed is not found available. Before that, for exercising the discretionary power of the court in granting the relief of specific performance, physical possession and prima-facie title of defendants number 3 and 4 should also be determined taking into consideration the registered gift deed dated 13.06.1972 for the purpose of complete adjudication of the dispute and also to avoid multiplicity of litigations.

24. In the result, the rule is made absolute and the suit is sent back on remand to the trial court for determination of physical possession and prima-facie title of defendants number 3-4 over the suit land and validity of sale agreement dated 30.10.1978 (Exhibit-1) comparing the thumb impressions of defendant number 1 Abdul Hamid Matubbar by an expert in the manner stated above.

25. On receipt of this judgment, the trial court will serve fresh notice upon the plaintiff as well as the contesting defendants, frame an issue as to whether defendants number 3 and 4 had physical possession and prima-facie title over the suit land and adjudicate the same. The plaintiff will take necessary steps for expert examination of the thumb impressions of deceased defendant number 1 in the manner stated above within 04 (four) months from receipt of this judgment.

26. Send down the records.