

IN THE SUPREME COURT OF BANGLADESH
 HIGH COURT DIVISION
 (CIVIL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.
And
Ms. Justice Aynun Nahar Siddiqua
First Appeal No. 677 of 2019.

Sheikh Abdur Rouf

...Appellant.

-Versus-

Md. Abul Hossain and another

....Respondents.

Mr. Md. Zakir Hossain, Senior Advocate

... For the appellant

Mr. Ali Imam Khaled Rahim, Advocate with

Mr. Md. Tariqul Islam Khan, Advocate

... For the respondents.

Heard on: 12.01.2026, 20.01.2026 and 22.01.2026.

Judgment on: 25.01.2026.

Md. Badruzzaman, J:

This appeal is directed against judgment and decree dated 01.07.2019 (decree signed on 09.07.2019) passed by learned Joint District Judge, 2nd Court, Munshigonj in Title Suit No. 35 of 2008 decreeing the suit.

Facts, relevant for the purpose of disposal of this appeal, are that respondent No. 1 as plaintiff instituted Title Suit No. 35 of 2008 in 2nd Court of Joint District Judge, Munshigonj praying for a decree of specific performance of contract against the defendant appellant contending, *inter alia*, that defendant No. 1 entered into a registered written agreement on 26.12.2006 with the plaintiff by which defendant No. 1 agreed to transfer 0.68 acre land in favour of the plaintiff at a consideration of Tk. 6,80,000/- out of which the plaintiff paid Tk.

5,60,000/- as earnest money to the defendant on the same day and it was further agreed that the defendant would execute and register relevant deed of sale in favour of the plaintiff within 31.01.2008. Defendant No. 1 did not comply with the terms of the agreement in spite of repeated requests of the plaintiff made in-person and through legal notice and finally refused to execute and register the sale deed on 31.01.2008 and as such, the plaintiff was compelled to institute the suit.

Defendant No. 1 (appellant) contested the suit by filing written statement contending *inter alia* that the suit is not maintainable and barred by limitation. His positive case was that the plaintiff and defendant are brothers-in-law and for urgent need of money the defendant received total Tk. 5,60,000/- from the plaintiff on the basis of an earlier unregistered deed of agreement of sale of .03 acre land of another mouza on 14.07.2005 in favour of the wife of the plaintiff Haria Begum but said land was under mortgage in a bank and that the defendant could not redeem said land in time and execute the relevant deed of sale following which a salish was held with the intervention of the local elites and it was agreed upon by the parties that the defendant would execute and register the sale deed after redemption of mortgage within 31.01.2008, in default, the defendant would sell the suit property in favour of the plaintiff and accordingly, the present agreement was executed by the defendant in favour of the plaintiff on 26.12.2006. In fact, no earnest money was received by the defendant on that day against agreement dated 26.12.2006 and it was not an agreement for sale of the suit property rather, for security of the earlier bainapatra, the defendant executed and registered the present agreement. Though the defendant was always ready to execute and register the deed of sale against the earlier bainapatra dated

14.07.2005 within 31.01.2008 but the plaintiff did not take any initiative to get the sale deed executed and registered from the defendant and filed the present suit by suppressing facts and as such, the suit is liable to be dismissed.

During trial, both parties adduced evidence, oral and documentary, and the trial Court after considering the evidence of the parties decreed the suit vide judgment and decree dated 01.07.2019 and being aggrieved by and dissatisfied with said judgment and decree defendant No. 1 has preferred this appeal.

Mr. Md. Zakir Hossain, learned Senior Counsel appearing for the defendant-appellant submits that against the present agreement in respect of the suit property dated 26.12.2006 no earnest money was paid by the plaintiff to the defendant on 26.12.2006 and in fact, it was not a bainapatra rather, it was a security deed against the earlier bainapatra dated 14.07.2005 and as such, the present agreement cannot be treated as a bainapatra and specifically enforced. Learned Advocate further submits that even if the present contract is taken as deed of agreement for sale of the suit property, the suit is not maintainable in view of the provisions under section 21A(b) of the Specific Relief Act because, as per said provision the plaintiff was required to deposit at the time of filing of the suit the balance consideration of Tk. 1,20,000/- but he did not deposit any amount at the time of filing of the suit and as such, the contract for sale of the suit property cannot be enforced and accordingly, the plaintiff is not entitled to any decree as prayed for. On this point learned Advocate has referred to *Abul Kalam (Md) vs. Md Mohi Uddin and others 69 DLR (AD) 239* and *Md. Julhas Uddin Jibon vs. Md. Ayub Khan and others 19 SCOB (2004) HCD 130*.

Learned Advocate finally submits that the trial Court, upon misreading and non-considering of the evidence and misconception of law illegally decreed the suit which is liable to be set aside.

Mr. Ali Imam Khaled Rahim, learned Advocate appearing with Mr. Md. Tariqul Islam, learned Advocate for plaintiff-respondent No. 1 submits that though the plaintiff could not deposit the balance consideration at the time of filing of the suit as per provision under section 21A(b) of the Specific Relief Act but he deposited it after 11 days of the filing of the suit and as such the suit was maintainable. Learned Advocate further submits that the plaintiff, upon adducing sufficient evidence, could prove that defendant No. 1 executed the registered written agreement for sale of the suit property on 26.12.2006 in favour of the plaintiff by which he agreed that he would transfer 0.68 acre land in favour of the plaintiff at a consideration of Tk. 6,80,000/- out of which the plaintiff paid Tk. 5,60,000/- as earnest money on the same day to the defendant and that the defendant failed to prove that the agreement dated 26.12.2006 was a security agreement against so-called bainapatra dated 14.07.2005 and accordingly, the trial court rightly held that defendant executed and registered the deed of agreement on 26.12.2006 for sale of the suit property at a consideration of Tk. 6,00,000/-by receiving earnest money of Tk. 5,60,000/- to the defendant. Learned Advocate finally submits that if the suit fails only on the ground of being not maintainable, the plaintiff is entitled to refund back the earnest money from the defendant with interest.

We have heard the learned Advocates, perused the pleadings of the parties, evidence adduced by them and the impugned judgment and decree.

Upon the pleadings of the parties, the trial Court framed the following issues:-

- (i) Whether the suit is maintainable in its present form.
- (ii) Whether the suit is barred by limitation.
- (iii) Whether the agreement in respect of the suit property was executed and registered between the plaintiff and defendant No. 1.
- (iv) Whether the plaintiff is entitled to get the sale deed registered as prayed for.

To prove his case the plaintiff adduced four oral witnesses and produced the original deed of agreement dated 26.12.2006 which was marked as exhibit-1. On the other hand, the defendant adduced two oral witnesses and produced unregistered deed of agreement dated 14.07.2005 which was marked as exhibit-'Ka'. P.W.1, Abul Hossain is the plaintiff who deposed in support of the plaint. In examination-in-chief he stated, 'আমি বাদী। নালিশী জমির মালিক ছিল রাউফ। সে নালিশী জমি বিক্রীর ঘোষনা করলে আমি কিনতে রাজী হই। ৬.১২.০৬ ইং তারিখে সাক্ষীগনের উপস্থিতিতে ১নং বিবাদী বাদীর নিকট হতে ৫.৬০,০০০/-টাকা গ্রহণ অঙ্গীকার করে যে, ১৩ মাসের মধ্যে বক্রী ১,২০,০০০/-টাকা নিয়ে ১নং বিবাদী আমাকে রেজিঃ করে দিবে। কিন্তু পরে না দেয়ায় এবং সর্বশেষ ৩১.১.০৮ তারিখে ১নং বিবাদী অঙ্গীকার করায় অত্র মোকদ্দমা করি।' In his cross-examination he denied the suggestion that the deed of agreement dated 06.12.2006 was a security deed against the earlier baianpatra dated 14.07.2005. P.W.2, Delwar Hossain deposed that he was present at the time of execution of the deed of agreement for sale of the suit land and transaction was made in front of him. P.W.3 Rafiqul Islam who was former Chairman of the local Union Parishad and a witness of the agreement dated 26.12.2006 deposed that the agreement was executed in his presence on 26.12.2006. He identified his signature in the agreement which was marked as Exhibit-1(ka). In cross-examination he stated that the plaintiff and defendant

took him before Sirazdikhan Sub-registry Office. P.W.4, Fazlul Haque Bhuiya is another witness of the deed of agreement identified his signature in the agreement which was marked as Exhibit-1(kha). On the contrary, the defendant pleaded that the deed of agreement dated 26.12.2006 was a security deed against the earlier bainapatra. Abdur Rouf is defendant No. 1 who deposed as D.W.1 made testimony to prove his plea. In cross-examination he stated, “বায়নাপত্র দলিল রেজিস্ট্রি হয় কেরানীগঞ্জে। সিরাজদিখানের জমিটি জামানত হিসাবে রাখি। সত্য নয় যে, এগুলো আমার জবাবে নেই। বায়না হয় সিরাজদিখান থানার খিলগাঁও মৌজার ৬৮ শতক জমি। ৩১/০১/০৮ ইং তারিখের মধ্যে জমি রেজিস্ট্রি করে দেয়ার কথা ছিল। আমি এর মধ্যে কোন কবলা সম্পাদন করে দেইনি।” He did not deny his signature appearing in the deed of agreement dated 26.12.2006. D.W.2 Md. Didar is brother-in-law of both parties though supported the case of the defendant but in cross-examination he deposed that an agreement for sale was executed later.

On perusal of Exhibit-1, the original deed of agreement dated 26.12.2006, it appears that it is an agreement for sale of the suit property which was executed by the defendant himself by which he agreed to sale the suit property at a consideration of Tk. 6,80,000/- out of which he received Tk. 5,80,000/- as earnest money. It was not the case of the defendant that deed of agreement dated 26.12.2006 was a product of forgery or it was obtained from him under threat or inducement. The witnesses of the plaintiff also supported the case of the plaintiff that the deed of agreement dated 26.12.2006 (exhibit-1) was for sale of the suit property in favour of the plaintiff and was executed and registered by defendant No. 1. As per recital of the deed of agreement dated 26.12.2006 defendant No. 1 received earnest money of Tk. 5,60,000/- out of total consideration of the suit property of Tk. 6,80,000/- during its execution and registration. Defendant No.1 claimed that against the present contract for sale of the suit property

dated 26.12.2006 (exhibit 1) no earnest money was paid by the plaintiff to him on 26.12.2006 and in fact, it was not a baina patra rather, it was a security deed against the earlier baina patra dated 14.07.2005 and as such, the present agreement cannot be specifically enforced. On perusal of the entire evidence adduced by the defendant it appears that he could not adduce or produce any witness or document to prove such plea. Except adducing oral evidence, the defendant failed to produce any evidence to contradict the written terms of the deed of agreement dated 26.12.2006.

According to the provision of section 92 of the Evidence Act the oral evidence is always excluded by the documentary evidence and the oral evidence cannot invalidate the contents of the document unless it is proved to be a product of forgery. This view finds support in the case of *Abdul Hai vs. Madhab* 60 DLR 212. It has been also settled by our Apex Court in *Gopal Goyala vs. Molina Rani* 67 DLR (AD) 240 that the oral or extraneous evidence contradicting the contents of a written instrument is not admissible.

Since the defendant did not claim that the deed of agreement dated 26.12.2006 was a product of forgery, the recital incorporated in the deed of agreement dated 26.12.2006 'that defendant No. 1 received earnest money of Tk. 5,60,000/-out of consideration of the suit property of Tk. 6,80,000/- during its execution and registration' is binding upon him.

Our conclusion is that the plaintiff successfully proved that defendant No. 1 entered into a registered written agreement on 26.12.2006 with the plaintiff by which he agreed that he would transfer the suit land in favour of the plaintiff at a consideration of Tk. 6,80,000/- out of which he received Tk. 5,60,000/- as earnest money

from the plaintiff at the time of execution and registration of the deed. Accordingly, the trial Court rightly held that the plaintiff could prove the bainapatra.

It further appears that as per agreement dated 26.12.2006 the defendant did not execute and register the relevant deed of sale in favour of the plaintiff within the stipulated period and thereafter, the plaintiff filed the suit within the period of limitation.

Now question arises whether the suit is maintainable and the plaintiff is entitled to the decree as prayed for.

This is a suit for specific performance of contract comes under the umbrella of the Specific Relief Act. It is contended by the defendant that the plaintiff did not deposit balance consideration at the time of filing of the suit and as such, the suit is not maintainable in view of the provisions under section 21A(b) of the Specific Relief Act and the suit is liable to be dismissed.

From the order sheet of the trial Court, it appears that the plaintiff instituted the suit by presenting the plaint before the trial Court on 07.02.2008 without depositing any balance consideration money and he deposited the Tk. 1,20,000/- in the Bank vide Treasury Challan No. 31 dated 18.02.2008 and filed the Challan in Court on 24.02.2008. So, it has proved that the plaintiff did not deposit balance consideration at the date of filing of the suit.

Section 21A(b) of the Specific Relief Act provides that no contract for sale of any immovable property can be specifically enforced unless the balance amount of consideration of the contract is deposited in the Court at the time of filing of the suit for specific performance of the contract.

In *Abul Kalam (Md) vs. Md Mohiuddin and others* 69 DLR (AD) 239, similar issue was raised before the Hon'ble Appellate Division who resolved the issue holding as follows:

"We have considered the provision of section 21 A(b) of the Act. The language of the section is so unambiguous that it does not require any interpretation to come to conclusion that in case of failure of depositing the balance amount at the time of filing the suit for specific performance of the contract, the suit cannot be maintained. Even then, from the impugned judgment and order, it appears that the High Court Division considered various decisions of this Court and of the Indian jurisdiction and came to the finding that the deposit of the balance consideration of the contract before filing a suit for specific performance of the contract is a condition precedent and that having not been done in the instant case, that suit was barred under the provision of section 21A(b) of the Act. Therefore, the plaintiff was liable to be rejected under Order VII, rule 11 of the Code of Civil Procedure. We find no error with the view taken by the High Court Division in view of the language used in section 21A(b) of the Act."

The above view of the Hon'ble Appellate Division has been applied *Md. Julhas Uddin Jibon vs. Md. Ayub Khan and others* 19 SCOB (2024) HCD 130 (where one of us was a party).

Now the question is no longer a res integra. As per provision of section 21A(b) of the Specific Relief Act no contract for sale of any immovable property can be specifically enforced unless the balance amount of consideration of the contract is deposited in the Court at the

time of filing the suit for specific performance of the contract. In other words, Failure of depositing the balance amount of the consideration money by the plaintiff at the time of filing the suit for specific performance of the contract for sale of immovable property it cannot be specifically enforced in view of the provisions under section 21A(b) of the Specific Relief Act, 1877 and such suit cannot be maintained.

Since, in the instant case, the plaintiff did not deposit the balance amount of the consideration at the time of filing of the suit, it is not maintainable and as such, he is not entitled to the decree as prayed for. It appears from the impugned judgment that the trial Court, upon misconception of law and without addressing this vital legal issue came to the erroneous finding that the suit was maintainable and illegally decreed the suit. Since the suit is not maintainable, the trial Court should have dismissed the suit.

From the materials on record, it has further proved that the plaintiff paid Tk. 5,60,000/- to the defendant at the time of execution and registration of the deed of agreement dated 26.12.2006. If the said amount was deposited in a Bank, the plaintiff might get interest from the bank as per available bank interest rate. Since the deed of agreement as well as the payment of earnest money of Tk. 5,60,000/- has been proved but the suit fails only on the maintainability ground, we are of the view that the plaintiff is entitled to refund back the earnest money from defendant No.1 with interest. He is also entitled to refund back Tk. 1,20,000/- deposited as balance consideration before the Court.

In view of the above, we find merit in this appeal.

In the result, the appeal is allowed, however, without any order as to costs.

The impugned judgment and decree dated 01.07.2019 (decree signed on 09.07.2019) are set aside and the suit be dismissed without any order as to costs.

The defendant-appellant is directed to pay Tk. 5,60,000/- (Taka five lac sixty thousand only) with interest @ 8% per annum with effect from 26.12.2006 to the plaintiff-respondent within 60 (sixty) days from the date of receipt of the L.C.R by the trial Court in default, the plaintiff would be at liberty to realize said amount as a money decree through execution process. The trial Court is also directed to pass necessary order for refund of Tk. 1,20,000/- to the plaintiff-appellant without any delay.

Send down the L.C.R along with a copy of this judgment to the Court below at once.

(Justice Md. Badruzzaman)

I agree.

(Justice Aynun Nahar Siddiqua)