

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

FIRST APPEAL NO. 706 OF 2019

Al Mamun Mirza and another

...Appellants.

-Versus-

Haji Md. Akkash Ali and another.

....Respondents.

Mr. Shishir Kanti Mazumder, Advocate

... For the appellants

Mr. Abdul Alim Mia, Advocate with

Mr. Md. Forhad Mahmud Ullah, Advocate

... For respondent Nos. 1 and 2

Heard on: 15.07.2024, 28.07.2024, 29.07.2024.

Judgment on: 01.08.2024.

Md. Badruzzaman, J:

This appeal is directed against judgment and decree dated 28.10.2019 (decree signed on 03.11.2019) passed by 2nd Court of learned Joint District Judge, Narayangonj in Title Suit No. 522 of 2018 rejecting the plaint under Order VII rule 11(d) of the Code of Civil Procedure.

Facts, necessary to dispose of this appeal, are that the appellants as plaintiffs filed Title Suit No. 522 of 2018 before 2nd Court of Joint District Judge, Narayangonj for a decree of declarations that defendant No.1 was bound to execute and register sale deed of Ka schedule suit land in terms of registered deed of agreement No. 4499 dated 7.5.2015 and that Kha schedule suit deed in respect of Ka

schedule suit land was collusive, forged, illegal, without consideration and not binding upon the plaintiffs stating, *inter alia*, that .1875 acre land was owned and possessed by defendant No. 1, who on 7.5.2015 entered into a registered deed of agreement for sale of .08 acre land including .0525 acre suit land ('Ka' schedule of the plaint) with the plaintiffs and Mr. Sohel Mahmud (brother of plaintiff No.1) at a consideration of Taka 72,00,000.00 (Taka Seventy Two Lac) only and at the time of execution and registration of the deed of agreement, he received Taka 20,00,000.00 (Taka Twenty Lac) only as earnest money and handed over possession thereof to them from adjacent to the Southern side of the suit plot and thereafter, on different dates defendant No. 1 received total Tk. 28,00,000.00 (Taka Twenty Eight Lac) only from the plaintiffs and Md. Sohel Mahmud. Defendant No. 1 sold 0.0534 acre non-suited land in favour of plaintiff No. 1 vide registered sale deed No. 12693 dated 23.12.2015 and the plaintiffs by developing the suit land including .0534 acre purchased land constructed shops therein by erecting boundary wall and have been possessing the same within the knowledge of the defendants. Thereafter, the plaintiffs approached defendant No. 1 to execute and register relevant sale deed in terms of the agreement in presence of local elites, who promised to do so within 6 (six) months. But thereafter, he collusively sold the suit land in favour of defendant No. 2 by registered sale deed No. 8671 dated 29.07.2018 and as such, the plaintiffs have been compelled to institute the suit.

Defendant-respondent Nos. 1-2 appeared in the suit and filed joint written statement denying the material averments of the plaint, contending, *inter alia*, that being owner in possession of total .1875 acre land including the suit land, defendant No. 1 executed and

registered deed of agreement in favour of the plaintiffs and Md. Sohel Mahmud on 07.05.2015 being No. 4499 for sale of .08 acre land and in terms of the bainapatra, defendant No. 1, transferred 0.0534 acre land by registered sale deed No. 12693 dated 23.12.2015 in favour of plaintiff No. 1 and 0.0266 acre land by registered sale deed No. 12694 dated 23.12.2015 in favour of Sohel Mahmud and accordingly, in terms of the registered deed of agreement, defendant No. 1 sold entire 0.08 acre land to plaintiff No. 1 and Sohel Mahmud. Defendant No. 1 being owner of rest land of the suit plot transferred .0525 acre land by a registered deed of sale being No. 8671 dated 29.07.2018 in favour of defendant No. 2. The plaintiffs by creating false acknowledgment receipts dated 13.03.2016 and 22.02.2017, fraudulently filed the suit with a plea of non-performance of the bainapatra and as such, the suit is liable to be dismissed.

Thereafter, the defendants on 11.06.2019 filed an application under Order VII rule 11 of the Code of Civil Procedure for rejection of the plaint mainly on the ground that the plaintiffs have no legal right or *locus standi* to institute the suit; that the deed of contract was executed and registered on 07.05.2015 and the tenure of the agreement was 5 (five) months which was expired on 06.10.2015 and accordingly, the plaintiffs were required to file the suit within 1 (one) year from 06.10.2015 for specific performance of the contract and as such, the suit was barred by limitation; that the plaintiffs did not acquire any title to 'Ka' schedule suit land and as such, they have no legal right to challenge 'Kha' schedule sale deed and as such, the plaint of the suit disclosed no cause of action and the reliefs sought for could not be granted in the suit as framed. Consequently, the plaint was liable to be rejected.

The application for rejection of the plaint was opposed by the plaintiffs by filing written objection contending that the grounds which have been raised for rejection of the plaint could not be resolved without taking evidence by framing issues during trial and as such, the application was not maintainable.

The trial Court, upon hearing the parties, by order dated 28.10.2019 allowed the application filed under Order VII rule 11 of the Code of Civil Procedure and rejected the plaint on the ground that the suit was barred by limitation against which this appeal has been preferred by the plaintiffs.

Defendants-respondent Nos. 1-2 have entered appearance to contest the appeal.

Mr. Shishir Kanti Mazumder, learned Advocate appearing for the appellants submits that while considering the application under Order VII rule 11 of the Code of Civil Procedure the Court cannot take into account materials beyond the plaint to declare the case of the plaintiff as frivolous and vexatious and the Court is not required to take into consideration the defense set up by the defendant in his written statement or in the application for rejection of the plaint. Learned Advocate submits that the question as to whether the plaint is liable to be rejected being barred by any law must be apparent from the statements made in the plaint itself and not from the written statement or any other materials other than that has been put in the plaint. Learned Advocate further submits that the Court can reject the plaint only when it comes to the conclusion that even if all the allegations made in the plaint are proved in the suit, then the plaintiffs would not be entitled to any relief whatsoever but in the present case, the allegations that have been made in the suit

cannot be grounds for rejection of the plaint. Learned Advocate finally submits that without considering the above proposition of law the trial Court illegally rejected the plaint by the impugned judgment and decree and as such, committed illegality.

In support of his contention, learned Advocate has referred to the cases of *Abdul Malek Sawdagar vs. Md. Mahbubey Alam and others* 57 DLR (AD) 18 and *Most. Nurunnessa vs. Mohiuddin Chowdhury* 5 BLT 36.

As against the above contention, Mr. Abdul Alim Mia learned Advocate appearing with Mr. Forhad Mahmud Ullah learned Advocate appearing for respondent Nos. 1 and 2 submits that the plaintiffs have no *locus standi* or legal right to institute the suit because a party to a suit cannot seek any declaration to enforce a contract. Learned Advocate further submits that in view of the provisions under section 12 read with section 21A of the Specific Relief Act, a registered contract for sale of immovable property can only be enforced by instituting a suit for specific performance of contract upon depositing the balance consideration of the contract at the time of filing of the suit and upon payment of *ad valorem* court fees but the present suit for declarations has been instituted without paying *ad valorem* court fees as well as depositing the balance consideration. Learned Advocate further submits that since admittedly, the plaintiffs did not acquire any title to the suit land they have no *locus standi* to challenge the disputed deed. Learned Advocate further submits that a suit filed by a person under section 42 of the Specific Relief Act is not maintainable who has no legal right to property and since the plaintiffs could not acquire any legal right to the suit land, they are not entitled to declaratory decree as prayed

for. Learned Advocate further submits that if the ultimate result of the suit appears that the plaintiffs could not get any result, the suit should be buried at its inception so that no further time is consumed in a fruitless litigation and when the ultimate result is clear, the plaintiffs cannot be allowed to proceed with the suit further. Learned Advocate further submits that where a plaint cannot be rejected under Order VII rule 11 of the Code of Civil Procedure, the Court may invoke its inherent jurisdiction and reject the plaint taking recourse to section 151 of the Code of Civil Procedure. Learned Advocate further submits that since the plaintiffs do not have any legal right to the suit property the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure. Learned Advocate finally submits that the trial Court while rejecting the plaint came to a specific finding that the suit is barred by limitation and as such, the trial Court committed no illegality in rejecting the plaint under Order VII rule 11 (d) of the Code of Civil Procedure and thus, interference is not called for by this Court.

In support of his contention, learned Advocate has referred to the cases of *T. Arivandandam vs. T.V. Satyapal and another AIR 1977 (SC) 2421*, *Abdul Jalil and others vs. Islamic Bank Bangladesh Ltd and others 53 DLR (AD) 12*, *Mrs. Seemarna Azam vs. Wonderland Holding Limited & another 4 LNJ 466*, *Chowmuhani College and another vs. Md. Ismail Hossain and others 26 DLR 10* and *Mrs. Rawshan Jamil vs. Adiluzzaman and others 11 ADC 117*.

We have heard the learned Advocates, perused the plaint, written statement, the application filed under Order VII rule 11 of the Code of Civil Procedure, the written objection filed by the plaintiffs,

the impugned judgment and decree and other materials available on record.

On perusal of the plaint, it appears that the plaintiffs filed the suit for the following relief:

“ক) নালিশা নিম্ন ‘ক’ তফসিল বর্ণিত সম্পত্তির বিষয়ে ১ নং বিবাদী কর্তৃক বিগত ০৭/০৫/২০১৫ ইং তারিখে রেজিস্ট্রিকৃত বায়নাপত্র দলিল নং ৪৪৯৯ এর শত মোতাবেক বাদীগণের বরাবর সাব-কবলা রেজিঃ করিয়া দিতে বাধ্য মর্মে ঘোষণার ডিক্রি দিতে ;

খ) নালিশা নিম্ন ‘ক’ বর্ণিত তফসিল বর্ণিত সম্পত্তি সম্পর্কে খ তফসিল বর্ণিত দলিলটি বেআইনি, জাল-জালিয়াতি, পন-প্রবৃত্তিহীন, যোগসাজসিক এবং বাদীগণের উপর বাধ্যকর নহে মর্মে এক ঘোষণার রায় ও ডিক্রি দিতে ;

গ) মোকদ্দমার যাবতীয় ব্যয় বাদীপক্ষের অনুকূলে এবং বিবাদী পক্ষের প্রতিকূলে ডিক্রি দিতে ;

ঘ) আইন ও ইকুইটিসহ বাদীপক্ষ আর যে, যে, প্রতিকার ভাজন হয় তাহাও রায় ও ডিক্রি দিতে আজ্ঞা হয়।”

Prayer ‘Ka’ of the plaint is for the declaration that defendant No. 1 is bound to register the sale deed in terms of the registered deed of agreement dated 07.05.2015 being No. 4499 in respect of the ‘Ka’ schedule suit land.

Admittedly, a registered deed of agreement for sale of 0.08 acre land including .0525 acre land (‘Ka’ schedule land as per the plaint) was executed and registered by defendant No. 1 in favour of the plaintiffs and another at a consideration of Tk. 72,00,000.00 (Taka Seven Two Lac) only on 07.05.2015 and defendant No. 1 received Taka 20,00,000.00 (Taka Twenty Lac) only as earnest money. It has been alleged by the plaintiffs that defendant No. 1 received total Tk. 48,00,000.00 (Taka Forty Eight Lac) only from the plaintiffs and another out of which he received total Tk. 31,50,000.00 (Taka Thirty One Lac Fifty Thousand) only from the plaintiffs as earnest money against 0.0525 acre suit land and executed several undertakings against the payments but thereafter, sold the same to

defendant No. 2 vide 'Kha' schedule sale deed No. 8671 dated 29.07.2018 and defendant No. 1, having denied to execute and register the required sale deed as per the terms of the deed of agreement for sale, the plaintiffs filed the suit to enforce the contract by way of declaration as per prayer 'Ka' of the plaint.

From the averment of the plaint as well as the prayer 'Ka,' it is clear that the plaintiffs sought to perform the contract by defendant No. 1 by way of declaration that defendant No. 1 is bound to execute and register the required sale deed in respect of 'Ka' schedule suit land in terms of the registered deed of agreement dated 07.05.2015. The plaintiffs paid fixed court fees of Tk. 300.00 (Taka three hundred) only for this declaration and another declaration for prayer 'Kha' of the plaint.

Now question arises whether the plaintiffs are entitled to such declaration in view of the provisions of the Specific Relief Act. Chapter II of the Specific Relief Act which contains sections 12-30 provides provisions in regards contracts which may be specifically enforced or not. For the purpose of disposal of this appeal sections 12 and 21A of the Specific Relief Act are relevant.

Section 12 of the Specific Relief Act reads as follows:

"12. Cases in which specific performance enforceable.- Except as otherwise provided in this Chapter, the specific performance of any contract may in the discretion of the Court be enforced-

- (a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
- (b) when there exists no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done;
- (c) when the act agreed to be done is such that pecuniary compensation for its non-

performance would not afford adequate relief;
or

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.- Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved. ”

The provisions under section 12 of the Specific Relief Act are unambiguous and clear which deals with the contracts that may be specifically performed and in a suit for specific performance of contract the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Clauses (a)-(d) of section 12 of the Act lay down the principles on which specific performance should be granted. To seek and get specific performance, first of all, there must be a valid and legal contract. When the contract is valid one and enforceable, specific performance will be decreed in the cases coming under the purview of clauses (a)-(d) of section 12 of the Act.

It is settled principle of law that the Court can grant relief treating the prayer as one for relief sought in a suit for specific performance of contract, when the required court-fees has been paid, even though the prayer in a particular case was made in the form of a mandatory injunction. [Ref: S. Sibtain Fazli vs. M/S Star Film Distributors and another 16 DLR (SC) 198].

But there is another embargo for such suit because of introduction of section 21A in the Specific relief Act which was

incorporated by Act No. 27 of 2004 with effect from 01.07.2005 which reads as follows:

“21A. Unregistered contract for sale not specifically enforceable- Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, no contract for sale of any immovable property can be specifically enforced unless-

- (a) the contract is in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof; and
- (b) 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.”

A reading of section 21A of the Specific Relief Act clearly suggests that no contract for sale of any immovable property can be specifically enforced unless (i) the contract is in writing and registered, and (ii) 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 contract. These requirements of the statute are mandatory leaving no discretion with the Court to allow a plaintiff any departure from these requirements. The very specific provisions of section 21A(b) of the Act provides that the balance amount of consideration of the contract is required to be deposited in the Court at the time of filing of the suit for specific performance of contract.

In *Abul Kalam (Md) vs. Md. Mohiuddin and ors.* 69 DLR (AD) 239 our appellate Division held that the deposit of the balance consideration of the contract before filing a suit for specific performance of contract is a condition precedent and if not done, the suit is barred under section 21A(b) of the Specific Relief Act, and the

pliant is liable to be rejected under Order VII, rule 11 of the Code of Civil Procedure.

In the prevailing context, a registered contract for sale of immovable property can be specifically enforced by filing a suit for specific performance of contract under Chapter II of the Specific Relief Act only, subject to deposit of the balance consideration of the contract before filing the suit as provided under section 21A(b) of the Specific Relief Act and upon payment of *ad valorem* court fees. In view of the above, no other alternative remedy in the form of declaratory relief under section 42 of the Specific Relief Act is available for a vendee of the contract for sale to enforce the contract.

As per prayer 'Ka' of the plaint, the plaintiffs sought for a decree of declaration that defendant No. 1 was bound to execute and register sale deed in favour of the plaintiffs in respect of 'Ka' schedule suit land in terms of registered deed of agreement dated 7.5.2015 being No. 4499. Admittedly, the plaintiffs did not deposit the balance consideration of the contract in Court before filing the suit as per provision of section 21A(b) of the Specific Relief Act and did not pay *ad valorem* court fees. Accordingly, the suit is not maintainable under section 42 of the Specific Relief Act as well as barred under section 21A(b) of the Specific Relief Act and the plaint is liable to be rejected under Order VII rule 11 of the Code of Civil Procedure.

So far as the 'Second Declaration' as per prayer 'Kha' of the plaint is concerned, it attracts the mischief of section 42 of the Specific Relief Act. It is better to quote the said section:

"42. Discretion of Court as to declaration of status or right—Any person entitled to any legal character, or to

any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.”

Section 42 of the Specific Relief Act spelt out that a declaratory decree is available to a person only if he can show that he has some legal character or some legal right to any property and that his adversary is either denying or interested in denying such legal character or right. Under section 42 of the Specific Relief Act a declaratory decree cannot direct the defendant either to perform the contract or to pay anything to the plaintiff.

Now question arises, whether the plaintiffs acquired any legal right to the suit land to be declared by Court under section 42 of the Specific Relief Act by dint of the deed of agreement for sale.

As per Transfer of Property Act, a deed of agreement for sale of immovable property does not create any title to a landed property in favour of the vendee. It bestows title to the vendee as and when the required sale deed is executed and registered in terms of the agreement for sale. Accordingly, the plaintiffs could not acquire title to the suit property by dint of the registered deed of agreement for sale, as alleged by the plaintiffs.

Moreover, it is settled principle of law that the plaintiff is not entitled to a simple declaration that the defendant's kabala is false and fraudulent without first establishing his title to the suit land. [Ref. again *Md. Joshimuddin vs. Md. Ali Ashraf*, 42 DLR (AD) 289].

Admittedly, the plaintiffs, by claiming Ka schedule suit land by registered deed of agreement for sale of the suit land dated 07.05.2015, sought for a decree of declaration that kabala dated

29.07.2018 executed by defendant No.1 in favour of defendant No. 2 in respect of Ka schedule suit land was illegal, fraudulent, without consideration and not binding upon them. Since the plaintiffs could not acquire title to the suit land by any transfer deed, they did not have any legal right to get such declaratory decree.

Now, another question arises, whether a plaint can be rejected by resorting to the provision under Order VII rule 11 or section 151 of the Code of Civil Procedure.

In *T. Arivandandam vs. TV Satyapal* and another AIR 1977 (SC) 2421 it has been held as follows:

“The learned Munsif must remember that if on a meaningful - not formal -reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise his power under Order VII rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under O. X, C.P.C. An activist judge is the answer to irresponsible lawsuits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage.”

In *Abdul Jalil and others. vs. Islamic Bank Bangladesh Ltd* and others 53 DLR (AD) 12 our Appellate Division held as follows:

“It is well settled that a plaint may be rejected on a plain reading of the same.....where a plaint cannot be rejected under Order VII rule 11 of the Code of Civil Procedure the Court may invoke its inherent jurisdiction and reject the plaint taking recourse to section 151 of the Code of Civil Procedure.....As the ultimate result of the suit is as clear as daylight such a suit should be properly buried at its inception so that no further time is consumed in a fruitless litigation.”

In *Mrs. Rawshan Jamil vs. Adiluzzaman and others* 11 ADC in paragraphs 17 and 19, the Hon'ble Appellate Division held as follows:

17. If the plaintiffs do not have any legal character/interest in the suit property, in such a situation, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure.”

.....

“19. If a perusal of the plaint reveals that the suit is not prohibited under any law, then the provision of Order VII rule 11 of the Code of Civil Procedure cannot be invoked. But if the suit is prohibited under the law in the sense that it is barred under legal provisions, the plaint may be rejected by invoking section 151 of the Code of Civil Procedure.”

In *Rasheda Begum vs. M.M Nurussafa and others* 24 BLD (AD) 223, the Appellate Division held that:

“Rejection of plaint is not confined to the provision of Order VII rule 11 of the Code of Civil Procedure. In an appropriate case while the proceeding itself is an abuse of the process of the Court, the Court having recourse of section 151 will be competent to reject the plaint.”

The principle of law deduced in the above cases is that the trial Court would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage and if the ultimate result of the suit is as clear as daylight such a suit should be properly buried at its inception so that no further time is consumed in a fruitless litigation. If the plaintiffs do not have any legal character/interest in the suit property, in such a situation, the plaint can be rejected by resorting to the provision of section 151 of the Code of Civil Procedure.

A suit may be specifically barred by law and, in such an event, the matter would come under the express terms of clause (d) of rule 11 of Order VII of the Code of Civil Procedure, but even in a case

where a suit is not permitted by necessary implication of law in the sense that a positive prohibition can be spelt out of legal provisions, the Court has an inherent jurisdiction to reject the plaint and this really amounts to saying that Order VII, rule 11 of the Code is not exhaustive and a plaint can be rejected by resorting to section 151 of the Code.

From the impugned judgment, it appears that the trial Court rejected the plaint by invoking jurisdiction under Order VII rule 11 (d) of the Code of Civil Procedure on the ground that the suit was barred by limitation. It appears that the trial court, upon calculation from the very reading of the plaint, found that the suit is barred by limitation.

Considering the facts and circumstances of this case, it is apparent that the plaintiffs have no chance to get a decree as prayed for in the plaint. Accordingly, in view of the settled principle of law, as discussed above, the plaint of the present suit is liable to be rejected on two counts i.e by resorting to Order VII rule 11 of the Code of Civil procedure, as the suit is barred under sections 21A of the Specific Relief Act and by exercising inherent power of the Court under section 151 of the Code of Civil Procedure as the plaintiffs could not acquire title to the suit land and did not have any legal right/interest as required under section 42 of the Specific Relief Act.

Accordingly, we find no merit in this appeal and as such, interference is not called for by this Court.

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

The order of *status-quo* passed earlier is hereby vacated.

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

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)