

In the Supreme Court of Bangladesh
High Court Division
(Civil Appellate Jurisdiction)

First Appeal No. 84 of 1997
In the matter of:

Md. Anowar Hossain Mian being
dead his legal heirs Md. Azad
Rahman and others.

..... Defendant-Appellants.

Vs.

Md. Mahbubur Rahman Khan
being dead his legal heirs Md.
Mahmudul Hasan Khan and
others.

..... Respondents.

Mr. M. Masud Alam Chowdhury
with

Mr. Mostafa Golam Kibria with
Mr. Syed Al Asafur Ali Reza with
Mr. Shaikh Khairul Anam,
Advocates

...For the Defendant-Appellants.

Mr. Sabyasachi Mondal,
Advocate

.....For the Respondent No.1.

Heard on 23.07.2023 and
25.07.2023.

judgment on: 26.07.2023.

<p><u>Present:</u> Mr. Justice Sheikh Hassan Arif And Mr. Justice Biswajit Debnath</p>
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SHEIKH HASSAN ARIF, J

1. This appeal, at the instance of defendant Nos. 1 and 2,
is directed against judgment and order dated
20.03.1997 (decree signed on 27.03.1997) passed by

the then Subordinate Judge (now Joint District Judge), First Court, Khulna in Title Suit No. 24 of 1994, thereby, decreeing the suit for Specific Performance of Contract with certain directions.

2. **Background Facts:**

2.1 Facts, relevant for the disposal of the appeal, in short, are that the respondent No. 01, as plaintiff, filed the said Title Suit No. 24 of 1994 before the Court of the then Sub-ordinate Judge, First Court, Khulna seeking a decree for specific performance of contract against defendant Nos. 1 and 2 (appellant Nos. 1 and 2) in respect of a contract/bayna dated 14.04.1991.

2.2 The case of the plaintiff, in short, is that the property mentioned in the schedule, namely, .21 decimal properties under S.A. Khatian Nos. 483 and 788, has already been sold to the plaintiff and possession has been handed over in respect of remaining $.76\frac{1}{2}$ undeveloped land. That a bayna was executed between the parties on 14.04.1991 to sell the said property in exchange for Tk. 1,70,000/- with condition that out of that amount the plaintiff would spend Tk.

01 lakh for development. Accordingly, plaintiff paid Tk. 1,10,000.00 to the defendants and the defendants executed the said bayna on 14.04.1991 and handed over possession. It was the condition in the bayna that once the development work was done, the defendants would give registry in respect of the said land on the request of the plaintiff. However, the defendants did not do any development work thereafter and, finally, agreed to pay back the money to the plaintiff, which was supposed to be spent on development purpose. On that assurance, it is stated, the plaintiff spent Tk. 01 lakh for partial development of the land and gave accounts to the defendants, while the defendants paid back Tk. 70,000.00 with assurance that the remaining Tk. 30,000.00 would be paid back after completion of development work. However, the defendants did not do any development work and did not pay back the said Tk. 30, 000.00. Instead, the defendants took Tk. 36,000.00 out of the remaining Tk. 60,000.00 from the plaintiff with the final due of Tk. 24,000.00 from the plaintiff. Thereupon, when the plaintiff wanted to have the

remaining development cost back, the defendants asked them to complete the development work with the said outstanding amount. This being so, the plaintiff had to spend Tk. 30,000.00 more for the said development work and as such the plaintiff became entitled to get back Tk. 60,000.00 from the defendants as against development costs and the defendants remained entitled to get the outstanding amount of Tk. 24,000.00 as per the bayna agreement. Thereafter, when the plaintiff requested the defendants to execute the registered kabala in respect of the said land upon settlement of the outstanding amounts between the parties, the defendants refused, which prompted the plaintiff to file the said suit for specific performance of contract.

2.3. The suit was contested by the appellants as defendant Nos. 1 and 2 by filing joint written statement admitting the execution of the bayna. However, they contended that the said bayna was executed under undue influence. The case of the defendants is that when defendant No. 01 was an

employee of Atra Ajack Jute Mills as purchase officer, the plaintiff used to supply raw materials there and a friendship developed between them. The plaintiff then proposed defendant No. 01 to join his firm as partner. Thereafter, defendant No. 01 gave up the job and joined plaintiff's firm as Manager. That the plaintiff No. 01 used undue influence on the defendant to execute the said bayna patra and, accordingly, the same was drafted in accordance with the desire of the plaintiff and the value of the property was determined as Tk. 70,000.00, but it was shown as Tk. 1,70,000.00 and only Tk. 10,000.00 was paid by the plaintiff. It was conditioned that the remaining Tk. 60,000.00 would be paid by the plaintiff within 03 (three) months of the execution of the bayna. However, the plaintiff subsequently paid only Tk. 5,000.00 and did not pay remaining Tk. 55,000.00 in violation of the terms of the agreement. On the other hand, the bayna being executed under un-due influence and since the plaintiff did not pay the remaining amount as per the terms of the bayna, the bayna became un-executable

and, accordingly, the case of the plaintiff should be dismissed.

2.4. Upon above contested pleadings, the Court below reframed the following six (06) issues, namely:

- i) Whether the suit is maintainable in its present form;
- ii) Whether the suit is barred by limitation;
- iii) Whether the Court fees is correct;
- iv) Whether the defendant Nos. 1 and 2 executed the said bayna on their own volition;
- v) Whether the plaintiff is entitled to get a decree for specific performance of contract;
- vi) Whether the plaintiff is entitled to get any other relief;

2.5. During trial, the plaintiffs produced three witnesses (P.W. 1 to P.W. 3) along with certain documents, in particular the said bayna dated 14.04.1991 (Exhibit-3). As against which, defendants produced two witness (D.W. 1 to D.W. 2) and certain documents. Thereafter, the Court below, after hearing the parties and assessment of evidences on record, decreed the suit in favour of the plaintiffs on the ground that the plaintiffs succeed in proving the bayna as well as

most of the other terms of the contract as against which the defendants failed to prove that the bayna was executed under un-due influence. Accordingly, vide impugned judgment and decree dated 20.03.1997, the Court below directed the plaintiff to pay the remaining consideration money of Tk. 55,000.00 in favour of defendant Nos. 1 and 2 within fifteen (15) days, failing with the suit would be dismissed. Upon such payment of such remaining consideration money, the defendants were directed to execute the registered kabala in favour of the plaintiff within thirty (30) days, failing which the plaintiff would be entitled to get such kabala through the process of the Court. Being aggrieved by this judgment, the defendant Nos. 1 and 2 have preferred the instant appeal. After admission of the appeal and on an application filed by the defendant-appellants, this Court issued Rule, vide order dated 12.06.1997, calling upon the plaintiff-respondents to show cause as to why the Title Execution Case No. 03 of 1997, as has been filed by the plaintiff in the meantime to execute the decree, should not be stayed and, at the

time of issuance of the Rule, this Court stayed all further proceedings of the said Title Execution Case No. 03 of 1997 pending before the First Court of Subordinate Judge, Khulna for a period of two months, which was subsequently extended time to time.

2.6. The appeal is contested by the plaintiff-respondent No. 01 through learned advocate Mr. Sabyasachi Mondal.

3. **Submissions:**

3.1 In the course of hearing, we have heard the learned advocates of the appellant as well as the respondents, who have taken us to the evidences on record in order for re-assessment of the same. Accordingly, we have done such re-assessment as against the respective cases of the parties.

3.2 Mr. Masud Alam Chowdhury, learned advocate appearing for the appellants, submits that the Court below has passed the impugned decree upon non-consideration of material aspect of the case, namely that the bayna in question was executed under the

un-due influence of the plaintiff as the defendant No. 01 was the Manager of the plaintiff's firm. Therefore, according to him, the said contract was not a lawful contract in view of the provisions of Section 16 of the Contract Act. He further submits that the plaintiff having failed to fulfill the condition of the bayna patra dated 14.04.1991, in particular having failed to pay the remaining consideration money within stipulated time, the bayna patra became an un-executable agreement and, accordingly, the defendants, by issuing legal notice, repudiated the said contract. This being so, according to him, the Court below committed gross illegality in decreeing the suit for specific performance of contract in favour of the plaintiff mainly basing on the said bayna (Exhibit-3).

3.3 As against above submissions, Mr. Sabyasachi Mondal, learned advocate appearing for the respondent No.1, submits that the Court below has categorically held that since the issue as regards un-due influence has been raised by the defendants, the onus was on the defendants to prove such issue in

view of the relevant provisions of the Evidence Act. Therefore, according to him, the trial Court rightly held that since the defendants failed to discharge such onus by adducing any evidence, the case of the defendants as regards un-due influence totally collapsed. By referring to the written statement as well as different parts of the impugned judgment, learned advocate for the plaintiff-respondents submits that the execution of bayna is admitted in the written statement, but the only point raised by the defendant was that the said bayna was executed under un-due influence of the plaintiff, which the defendant failed to prove. Therefore, according to him, this Court has got nothing to interfere into the impugned judgment, particularly when by the impugned judgment and decree, the Court below has directed the plaintiff to pay the remaining amount of money and, accordingly, the plaintiff has already paid the said amount, namely, Tk. 55,000.00 and filed the execution case to get the registered kabala through the process of the Court as per the terms of the decree.

4. **Deliberations, Findings and Orders of the Court:**

4.1 The only point for determination in this appeal is whether the Court below has decreed the suit lawfully in favour of the plaintiff by taking the view that the defendants have failed to prove that the bayna was executed under un-due influence. In this regard, we have examined the documentary evidences produced by the parties, in particular Exhibit-3 (the bayna patra dated 14.04.1991). It appears from the said bayna patra that it does not give any minimum indication to draw a minimum inference that it was executed under any un-due influence. Therefore, since the bayna patra itself is apparently a genuine one, the onus is on the executants of the said bayna patra to prove any allegation of un-due influence in respect of the same. However, although the defendants have specifically pleaded such un-due influence, no evidence has been produced by them before the Court below to prove such specific allegation. Therefore, in view of the provisions of Section 101 of the Evidence Act, it was the onus on the defendants to prove their assertion that the said bayna was

executed under un-due influence. Apparently, they failed to discharge their such onus fixed by law.

4.2 Therefore, we have no option but to hold that the main case of the defendants as regards the execution of the said bayna patra has collapsed, as against which the case of the plaintiff as regards lawful execution of the said bayna patra has succeed, particularly when the defendants admitted in their written statement that it was executed by them. This being so, since the parties, after execution of the said bayna patra, have exchanged some money between them for the purpose of development of the land in question, the Court below, after adjustment of such transactions properly, has rightly held that the plaintiff is required to pay the remaining consideration money of Tk. 55,000.00 within 15 (fifteen) days and, upon such payment, the defendants are obliged to execute registered kabala in favour of the plaintiff within 30 (thirty) days in respect of the said land. This being so, we do not find any merit in this appeal which calls for any interference with regard to the impugned

judgment and decree. Accordingly, this appeal should fail.

4.3 In the result, the appeal is dismissed. Thus, the impugned judgment and order dated 20.03.1997 (decree signed on 27.03.1997) passed by the then Subordinate Judge (now Joint District Judge), First Court, Khulna in Title Suit No. 24 of 1994 are, hereby, affirmed. The connected Rule issued in this appeal is also discharged. The ad-interim order of stay, if any, thus stands recalled and vacated.

Send down the lower Court records.

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(Sheikh Hassan Arif, J)

I agree.

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(Biswajit Debnath, J)