

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

Present:

Mr. Justice Md. Riaz Uddin Khan

Civil Revision No. 987 of 2020

IN THE MATTER OF :

An application under section 115(4) of the Code of Civil Procedure

-And-

In the Matter of:

Binod Kumar Mali and others

..... Defendant-Petitioners

Versus

Golam Faruk Khan Kaiser

..... Plaintiff-Opposite party

Mr. Dulal Chandra Mallick, Advocate

.... For the petitioners

Mr. Md. Abdul Mannan Bhuyean, Advocate

.... For the opposite party No. 1

Judgment on: 11.06.2026

Md. Riaz Uddin Khan, J:

This civil revision has been sent by the Hono'ble Chief Justice to be heard and disposed of by this bench.

At the instance of the defendants Rule was issued asking the plaintiff opposite party No.1 to show cause as to why the Judgment and Order dated 06.11.2019 passed by the Additional District Judge, Cox's Bazar in Civil Revision No.17 of 2013 dismissing the Civil Revision and thereby affirming the order dated 28.03.2013 passed by the Senior Assistant Judge, Cox's Bazar in Other Suit No.318 of 2010 should not be set aside and or such other or further order or orders should not be passed as to this Court may deem fit and proper.

At the time of issuance of rule the operation of the judgment and order dated 06.11.2019 passed by the Additional District Judge, Cox's Bazar affirming the order dated 28.03.2013 passed by the Senior Assistant Judge, Cox's Bazar was stayed initially for a period of 04(four) months which was extended time to time.

Facts for disposal of this Rule are that the opposite party no.1 as plaintiff instituted the suit before the Senior Assistant Judge, Cox's Bazar for specific performance of contract in relation to the schedule property through Registered deed contending *inter alia* that Kailash Chandra Bhuimali was the original owner of the disputed land who gifted the same to his two nephew namely Kumud Charon Bhuimali and Onnoda Charon Bhuimali by registered deed No.1050 dated 06.05.1937 who got equal share measuring .41½ acres of land each; Kumud died leaving Binod Kumar Mali, Roy Bahadur Mali, Lobokush Mali @ Dulal, defendants 1 to 3 as his heirs while Onnoda Charon died leaving Khirod Chandra Mali and Nirod Chandra Mali, defendants 4 & 5 respectively as his heirs; then the defendants in order to sell their property measuring .83 acres of land executed a deed of agreement for sale (bainanama) being No.3528 dated 24.12.2001 in favour of Jahangir Kashem and Golam Faruk Khan at a Tk. 4,50,000/- (Four lac fifty thousand) out of which Tk- 3,80,000/- (Three lac eighty thousand) only was paid in cash as earnest money and handed over possession to Jahangir Kashem and Golam Faruk Khan but since B.S record was not prepared in their names rather in the name of the Government the defendants could not registered the deed of sale.

Thereafter, the above defendants being plaintiffs filed Other Suit No.17 of 2004 against the government before the Senior Assistant Judge, Cox's Bazar and got decree in their favour by judgment and decree dated 30.05.2005 against which the Government preferred Other Appeal No.52 of 2006 which was dismissed. Then the defendants filed Misc. Case No.23 of 2007 for the correction of record of right and got the land mutated in their names in mutation Khatian No.7915. Thereafter, out of rest Tk-70,000/- the defendants received taka 10,000/- (ten thousand) in cash on 10.12.2003, taka 40000/- (Forty thousand) on 31.10.2005, Tk-3,000/- (three thousand) on 10.08.2007 and Tk-20,000/- (twenty thousand) on 05.05.2010 and in this way the defendant received in total Tk-73,000/- (Seventy three thousand) and gave money receipts. Then the defendants 4-5 have executed registered Kabala Deed No.2828 dated 25.05.2010 in favour of said Jahangir Kashem transferring their share of .41½ acres of land scheduled in the Bainanama without informing the plaintiff; the defendants are bound to execute a registered sale deed in favour of the plaintiff measuring rest .41½ acres of land but refused to do so on the demand of the plaintiffs for which on 09.06.2010 he filed the instant suit for specific performance of contract.

The defendants 1-3 filed written statement on 21.11.2011 denying material facts contending *inter alia* that the suit is barred by limitation and under section 17A of the Registration Act and not maintainable under section 39 of the Contract Act and under section 21A of the Specific Relief Act. The defendants also filed an application for rejection of the plaint under Order

VII, Rule 11(d) of the Code of Civil Procedure against which the plaintiff filed written objection.

The application was heard on contest and after hearing, the Senior Assistant Judge was pleased to reject the same on 28.03.2013. Against the said order of rejection the defendants filed Civil Revision No.17 of 2013 before the learned District Judge. The Civil Revision was ultimately heard by the Additional District Judge, Cox's Bazar who also rejected the revision by the impugned judgment and order dated 06.11.2019 and thereby affirmed the order passed by the Senior Assistant Judge.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 06.11.2019 passed by the Additional District Judge the defendants moved this Court and obtained this Rule and order of stay as stated at the very outset.

Mr. Dulal Chandra Mallick, the learned advocate appearing for the defendant-petitioners submits that contingent was essence of time to be registered the sale deed within 1 year and later the bainanama had been infractuous by dint of mistake, misrepresentation of the both parties and not extended the time of bainanama by any subsequent contract. On the averments of the plaint the principal vendee Jahangir Kashem who purchased the .41½ acres of land in the year, 2010 by fixing a new value of Tk.32,05,000/- (thirty two lac five thousand) but the learned Judge failed to adjudicate that the bainanama was void as the tenure was ended, lacking of ingredients and the quantum of .41 ½ acres of land was not divided in the bainanama in favour of the plaintiff and it was not mentioned

specifically in bainanama that the defendant nos.1-3 took money for their shares from the plaintiff. Without considering the circumstances of the facts and the substantive law of contract under section 39 of the Contract Act, the trial court rejected the application under Order VII Rule 11(d) of the Code of Civil Procedure is not legal. The lower revisional court has also failed to consider and appreciate the facts and position of law that the suit is barred by law of Contract Act, Limitation Act, and the Specific Relief Act.

The learned advocate then submits that as per the averments of the plaint, bainanama was executed on 24.12.2001 but the plaintiff filed the suit for Specific Performance of Contract on 09.06.2010, after 9(nine) years. Therefore, the plaint has been filed in contravention of Article 113 of the Schedule of the Limitation Act, 1908. According to the plaint, the defendants received Tk-1,90,000/- (One lac ninety thousand) out of the total amount of Tk-2,25,000/- (two lac twenty five thousand) of the value of .41½ acres of land and the rest amount of Tk-35,000/- (thirty five thousand) was due. But at the time of instituting the suit for specific performance of contract the plaintiff did not deposit the balance amount before the Court which is a mandatory provision. Therefore, in this circumstances the suit for specific performance of contract is not maintainable and barred under Section 21A(b) of the Specific Relief Act, 1877.

In support of his contention the learned advocate for the petitioners cited a series of decisions: the case of Ram Chandra Das and others Vs.

Khalilur Rahman and another, 37 DLR (AD) 21; Abdul Jalil and others Vs. Islamic Bank Bangladesh Ltd and others, 53 DLR (AD) 12; Abdul Kalam (Md) Vs. Md. Mohiuddin and others, 69 DLR (AD) 239; Kazi Rafiqul Islam Vs. Md. Anowar Hossain and another, 25 BLC (AD) 150 and the case of Kazi Fazlus Sobhan being dead his heirs Kazi Fazle Rabbi and others Vs. Government of Bangladesh and others, 72 DLR (AD) 222.

On the other hand Mr. Abdul Mannan Bhuyean, the learned Advocate appearing for the plaintiff-opposite party submits that the plaintiff filed the instant suit for specific performance of contract and in his plaint the plaintiff specifically claimed how he paid the earnest money and all the agreement money to the defendants and there was no balance amount for which he need not to pay any further money in filing the suit for specific performance of contract. That's why the ground taken by the defendant-petitioners that the suit is barred by Section 21A(b) of the Specific Relief Act has no substance.

The learned Advocate then submits that by receiving the agreed money the defendants in fact extended the period of agreement hence the petitioner filed the suit in time and in that view it cannot be said that the suit is barred by limitation. To fortify his submissions the learned advocate cited a catena of decisions: the case of Panasonic Power Division Vs. Chemico Bangladesh Ltd and others, 69 DLR (AD) 333; Rustam Dhali and others Vs. Sekander Dhali and others, 1987 BLD (AD) 151; Habibullah Khan and others Vs. Qazi Md. Ishaq being dead his representative Fazal Rehman and others, 18 DLR (SC) 385; Nasima Akhter Vs. Md.

Siraj Miah and another, 57 DLR (AD) 38; Mahua Khair Vs. Amena Begum Ali Ispahani, 21 BLT (AD) 192; Nur Mohammad and Company Ltd Vs. Government of Bangladesh and others, 61 DLR (AD) 77 and the case of Md. Mahbubul Haque Vs. Md. A. Kader Munshi, 2000 BLD (AD) 82.

I have heard the learned Advocates for both the parties, perused the application along with the annexures. I have also examined the order passed by the trial court as well as the impugned judgment and order passed by the revisional court below.

The main contention of the defendant-petitioners is that the suit is barred under section 21A(b) of the Specific Relief Act, 1877 as the plaintiff failed to deposit the balance amount of the agreement at the time of filing the suit. The petitioners' another contention is that the suit is barred by limitation as it has not been filed within 3 years of the cause of action.

Let us deal with the 1st contention of the petitioners that whether the suit is barred under section 21A of the Specific Relief Act. Section 21A of the Specific Relief Act, 1877 read 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 immoveable 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 contract.”

From plain reading of the above section it is clear that after coming into effect of this Section there is no scope to file any suit for specific performance of contract if the agreement for sale of immovable property is not written and if any amount is unpaid that unpaid or rest amount, i.e balance amount must be deposited at the time of filing of the suit in respective of whether he took possession of the suit property or not.

In the present case admittedly there was a agreement for sale between Jahangir Kashem and the plaintiff, Golam Faruq Kaiser in one side and Binod Kumar Mali, Roy Bahadur Mali @ Prokash Bahadur, Lobokush Mali @ Dulal, Khirod Chandra Mali and Nirod Chandra Mali on the other side at the consideration of Tk.4,50,000/- amount amongst which Tk.3,80,000/- was paid at the time of the agreement and rest Tk.70,000/- was unpaid. The agreement was signed on 24.12.2001 and in that agreement for sale or Bainanama there was a condition that from one year of the date of execution rest Tk.70,000/- is to be paid and the deed is to be registered. The plaintiffs filed the suit on the contention that as per the agreement of sale two executants out of five gave registration of half of the suit land, i.e 41½ decimals out of 83 decimals on 29.10.2001 in favour of Jahangir Kashem. The plaintiffs filed the suit for specific performance of contract for rest 41½ decimals of land out of 83 decimals. The plaintiffs in his plaint specially stated that-

“রেজিঃযুক্ত বায়নানামা দলিলের দাতাগণ অর্থাৎ ১-৩ নং মূল বিবাদী ও ক্ষিরোদ চন্দ্র মালী, নিরোদ চন্দ্র মালী ৫ জনে উপরে বর্ণিত বি,এস, খতিয়ান সংশোধন সংক্রান্তে অপর ১৭/২০০৪ ইং নং মামলা অপর আপীল ৫২/২০০৬ ইং নং মামলা এবং রেকর্ড সংশোধনী মিচ মামলা নং- ২৩/২০০৭ ইং নং মামলা সমূহ পরিচালনা সংক্রান্তে তাহাদের টাকার খুবই প্রয়োজন হইয়াছিল। বায়নানামা দাতাগণের টাকার প্রয়োজন হইলে বায়না নামার অবশিষ্ট ৭০,০০০/- (সত্তর হাজার) টাকা বিভিন্ন কিস্তিতে অধীন বাদী ও জাহাঙ্গীর কাশেমের নিকট হইতে তলব করিয়াছিল। অতঃপর অধীন বাদী ও জাহাঙ্গীর কাশেম ২ জনে যৌথভাবে বিগত ১০/১২/২০০৩ ইং তারিখে নগদে ১০,০০০/- (দশ হাজার) টাকা, বিগত ৩১/১০/২০০৩ ইং তারিখে নগদে ৪০,০০০/- (চল্লিশ হাজার) টাকা বিগত ১০/০৮/২০০৭ ইং তারিখে নগদে ৩,০০০/- (তিন হাজার) টাকা বিগত ০৫/০৫/২০১০ ইংরেজী তারিখে নগদে ২০,০০০/- (বিশ হাজার) টাকা সর্বমোট (১০,০০০+৪০,০০০+৩০০০+২০,০০০)= ৭৩,০০০/- (তিয়ত্তর হাজার) টাকা ১-৩ নং মূল বিবাদী এবং ক্ষিরোদ চন্দ্র মালী, নিরোদ চন্দ্র মালীকে নগদে পরিশোধ করিয়াছি। ১-৩ নং মূল বিবাদী ও ক্ষিরোদ চন্দ্র মালী, নিরোদ চন্দ্র মালী তাহারা বায়না নামার বকেয়া টাকা পরবর্তীতে বিভিন্ন তারিখে নগদে বুঝিয়া নিয়া বিগত ১০/১২/২০০৩ ইং তারিখে, ৩১/১০/২০০৫ ইং তারিখে, ১০/০৮/২০০৭ ইং তারিখে, ০৫/০৫/২০১০ ইং তারিখে মোট ৪ খানা টাকা বুঝিয়া পাওয়ার রসিদ পত্র বাদী ও জাহাঙ্গীর কাশেম বরাবরে সম্পাদন করিয়া দেন। ১-৩ নং মূল বিবাদী ও ক্ষিরোদ চন্দ্র মালী ও নিরোদ চন্দ্র মালী কর্তৃক সম্পাদিত উপরে বর্ণিত টাকা বুঝিয়া পাওয়ার রসিদপত্র সঠিক শুদ্ধ, পণ্যযুক্ত এবং কার্যকরী হয়।” Wherein the plaintiff-opposite party claimed that the plaintiff and Jahangir Kashem jointly on 10.12.2003 paid Tk. 10,000/-, on 31.10.2003 paid Tk.40,000/-, on 10.03.2007 paid Tk.2000/-, on 05.05.2010 paid Tk.20,000/- and thus in total paid Tk.73,000/- to defendant Nos.1-5 and thereafter the defendant Khirrod Chandra Mali gave money receipts on 10.02.2003, 31.10.2005, 10.08.2007 and 05.05.2010. The contention of the plaintiff is that he has filed the instant suit within time and there was no need to deposit any money as there was no unpaid or balance amount. In the reported case of 69 DLR (AD) (Supra) the Appellate Division of the Supreme Court held that-

“When the plaintiff asserted that he paid the balance amount of the consideration of the contract and that there was no outstanding on the date when the suit

was filed, there was no requirement of depositing the balance amount of consideration of the contract to file a suit for specific performance of contract.”

In the light of the above decision it can safely be said that in the present suit the plaintiff specifically claimed in paragraph No.16 of his plaint that on various dates he paid the whole amount of the agreement and there was no outstanding or balance amount hence there was no need to deposit any amount at the time of filing of the suit. Consequently, the 1st contention of the petitioners has no merit.

The 2nd contention of the petitioners is that the suit is barred by limitation. It is noticeable that in the agreement for sale there was a condition that the registration is to be given within 1 year from the date of execution of the agreement but by taking rest of the money giving money receipts, the parties impliedly extended the time for registration. In this regard the case reported in 1987 BLD (AD) (Supra) is applicable wherein it is held that-

“whether limitation will run from the expiry of the period mentioned in the notice by the plaintiff to the defendant to perform the contract after obtaining necessary permission for execution and registration of the sale deed or from the expiry of the Ordinance putting embargo on execution and registration of the sale deed with permission- Upon true construction of the relevant clause of the agreement it would appear that the plaintiff could ask for the deed amicably or through court both after the expiry of the Ordinance and during the continuance of the Ordinance upon fulfilling conditions thereof”.

In the instant case since it is the averment of the plaintiff that the defendants took money even in the year 2010 and issued money receipts, this suit is filed in the year 2010 within the limitation period. Whether the averment of the plaintiff that he paid the rest of the money and or whether the defendants took that money and issued money receipts is highly disputed question of facts which is to be decided by the trial court after taking evidence and without taking evidence in a summary proceedings sitting in revisional jurisdiction to consider application for rejection of plaintiff under Order VII, Rule 11 of the Code of Civil Procedure, this Court cannot decide this highly disputed facts. Consequently, the submission that the suit is barred by section 39 of the Contract Act, 1872 also has no substance.

It is to be noted that the averment as stated in the plaintiff is to be proved by the plaintiff before the trial Court and the onus heavily lie upon the plaintiff to prove the case of the plaintiff and the defendant has every right to controvert those averments by cross examining the witnesses and or adducing or producing witness and or documents before the trial Court.

In the facts and circumstances as discussed above and the position of law, I am of the view that at this stage the plaintiff cannot be rejected or thrown away on the contention of the defendant-petitioners. In such view of the matter as there is no substance in the contention of learned advocate for the petitioners, I am constrained to discharge the Rule being devoid of merit.

Resultantly, the rule is **discharged**. However, without any order as to cost.

The order of stay earlier granted by this Court stands vacated. The trial Court is directed to dispose of the suit as early as possible keeping in mind that the original suit was filed in the year 2010.

Communicate the judgment and order at once.