

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique
-Chief Justice

Mr. Justice Md. Nuruzzaman

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Ms. Justice Krishna Debnath

CIVIL APPEAL NO.431 OF 2019

(From the judgment and order dated 10.08.2016 passed by the High Court Division in Civil Revision No.624 of 2004).

Delwar Hossain Majhi alais Dulal Majhi :Appellants.
and others.

=Versus=

Al-haj Mokhlesur Rahman Bepari Son of :Respondents.
late Master Tamijuddin Bepari and others.

For the Appellants. : Mr. Abdul Wadud Bhyiyan, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record.

For Respondent No.1. : Mr. Khair Ezaz Maswood, Senior Advocate instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record.

For Respondent Nos.2-4. : Not represented.

Date of Hearing. : The 20th July, 2022.

Date of Judgment. : The 26th July, 2022.

J U D G M E N T

Borhanuddin, J: This civil appeal by leave is directed against the judgment and order dated 10.08.2016 passed by the High Court Division in Civil Revision No.624 of 2004 discharging the Rule.

The facts, leading to the disposal of the appeal, in brief, are that the respondent herein as plaintiff instituted Title Suit No.33 of 2002 in the Court of Assistant Judge, Damudya, Shariatpur, for specific performance of contract in respect of land described in the second schedule of the plaint contending inter alia that the land originally belonged to 5(five) brothers namely Rostom Ali Majhi, Sobhan Majhi, Jinnat Ali Majhi, Abdul Mannan Majhi and Abdul Hannan Majhi; As the plaintiff was in Saudi Arabia, his wife Lutfa Begum entered into an oral agreement with the original owners of land named above on 16.10.1983 and price of the land was fixed at Tk.16000/- which was settled in presence of witnesses and the money was paid on 19.10.1983; Possession of the land was delivered in favour of Lutfa Begum on 19.10.1983; The sellers of the land promised to execute and register a sale deed within a few days but despite several requests they did not do so; After returning from Saudi Arabia, the plaintiff also requested the sellers for several times to execute and register a sale deed but to no avail; Lastly, a non-judicial stamp

was purchased by Jinnat Ali Majhi and a bainapatra was executed by Rostom Ali Majhi and Jinnat Ali Majhi on 22.07.1986 for the land measuring 40 decimals infavour of the plaintiff in presence of witnesses; Due to the illness and death of some of the land owners, sale deed could not be executed before their death thus, the heirs of those land owners were requested to execute a sale deed which they refused to do, as such, a salish was held on 10.02.2000 at the instance of the plaintiff in presence of local respectable persons; Defendant nos.14 and 15 were present in the salish and an award was written and signed by the mediators settling that the defendants would execute and register a sale deed infavour of the plaintiff in respect of 35 decimals of land out of total 80 decimals of land and 10 decimals was excluded as it was included in the road; The defendants finally refused to execute and register a sale deed in December, 2000 and hence, the plaintiff filed the suit.

Defendant nos.1-21 contested the suit by filing a written statement denying material allegations made in the plaint and stating interalia that the bainapatra is

forged and created with an ill motive to grab the property of the defendants. They also denied that any salish was held on 10.02.2000 or any other date.

The plaintiff examined 4(Four) witnesses and defendant examined DW.1 only.

Upon hearing the parties and perusing the evidence on record, learned Senior Assistant Judge, Damudya, Shariatpur, decreed the suit by his judgment and decree dated 28.11.2002.

Being aggrieved, the defendants as appellants preferred Title Appeal no.7 of 2003 in the Court of learned District Judge, Shariatpur. The said appeal on transfer heard and disposed of by the learned Joint District Judge, 1st Court, Shariatpur, who after hearing the parties dismissed the appeal by his judgment and decree dated 09.09.2003 and thereby affirmed the judgment and decree passed by the trial Court.

Being dissatisfied, the defendants filed Civil Revision No.624 of 2004 before the High Court Division

and obtained Rule, which upon hearing the parties was discharged.

Feeling aggrieved, the defendants as petitioners filed Civil Petition for Leave to Appeal No.2724 of 2017 before this Division and obtained leave granting order dated 08.07.2019.

Leave was granted considering the submissions made by the learned Advocate for the petitioners which are as follows:

"Mr. Abdul Wadud Bhuiyan, learned Senior Advocate appearing on behalf of the petitioners submits that the alleged agreement dated 22.07.1986 contains no recital as to handing over possession by the vendor to the vendee of the land described in the schedule to the agreement and also contains no stipulation for execution of any instrument of transfer by the vendor infavour of the vendee and after about 14 years from the date of agreement the plaintiff introduced the story of salish on 10.02.2000 in which the defendants did not take part and neither party signed the award so as to be bound by the same and as such, there was no agreement for sale of any land by the defendants with the plaintiff at any stage and the Trial Court, Appellate Court and the High Court Division misread and

misconstrued the agreement and, therefore, the judgment of the High Court Division and of the Courts below are not sustainable in law. He further submits that the High Court Division fell into an error of law in not considering that the bainapatra was allegedly executed on 22.07.1986 and the suit for specific performance of contract was filed on 15.07.2002, i.e. after about 16 years and the Trial Court did not consider the question of limitation and the Appellate Court did not decide the question of limitation with reference to Article 113 of the Limitation Act and the High Court Division also did not decide the question of limitation as such, the judgment of the High Court Division and those of the Courts below are not sustainable in law. He further submits that the High Court Division fell into an error of law in not considering that from the averments made in the plaint it is clear that the plaintiff did not demand execution of the sale deed within 12 years from the date of the alleged agreement for sale dated 22.07.1986 and the suit is also barred under Article 113 of the Limitation Act. He submits that the Trial Court and the Appellate Court decreed the suit relying on the decision of the salish, but the defendants did not participate in the salish, did not agree to the decision thereof and the salish does not create any right of specific performance of contract infavour of the plaintiff and does not also save the period of limitation for filing the

suit and therefore, the judgment of the High Court Division and of the Courts below are not sustainable in law."

Consequently, this civil appeal arose.

Mr. Abdul Wadud Bhuiyan, learned Senior Advocate summaries his argument in light of the submissions made in the leave granting order. In support of his submissions, learned Advocate referred to the case of *Nur Mohammad and Company Limited vs. Government of Bangladesh and others*, reported in 61 DLR (AD) 77 and the case of *Ziaul Hasan Tarafder vs. Mir Osman Ali and others*, reported in 73 DLR (AD) 250.

Mr. Khair Ezaz Maswood, learned Senior Advocate appearing for the respondents in support of the impugned judgment and order passed by the High Court Division submits that all the Courts below including the High Court Division found that Rostom Ali Majhi, predecessor of the defendant nos.1-7 and defendant no.14 Jinnat Ali Majhi executed an agreement for sale of the land described therein infavour of the plaintiff which was produced and marked as exhibit-'A'. He also submits that

the appellate Court below considering socio-economic condition of our rural area and also considering relationship between the vendors and vendee arrived at a finding that the sale agreement dated 22.07.1986 was executed by the vendors, a salish was held on 10.02.2000, the defendants finally refused to execute and register deed of sale on the last part of December, 2000, and thereafter the plaintiff filed the suit for specific performance in 2002 and thus addressed the question of limitation under Article 113 of the Limitation Act which was also concurred by the High Court Division and as such there is nothing to be interfered with the impugned judgment and order passed by the High Court Division. He next submits that after mediating by the local elites in the salish dated 10.02.2000 the plaintiff requested to execute and register a sale deed infavour of the plaintiff but the defendants refused on the last week of December, 2000 as such the plaintiff instituted the suit for specific performance of contract on 15.07.2002 within 3(three) years from the date of refusal as prescribed under Article 113 of the Limitation Act.

Heard learned Advocates for the respective parties.
Perused the papers/documents contained in the paper book.

We have gone through the judgment and order passed by the trial Court, appellate Court below and the High Court Division. The trial Court framed the following issues for determining the case-

- ১) বর্তমান আকারে ও প্রকারে অত্র মোকাদ্দমাটি চলতে পারে কিনা?
- ২) মোকাদ্দমাটি তামাদিতে বারিত কি না? এবং
- ৩) বাদীপক্ষ প্রার্থীত মতে চুক্তি প্রবলের ডিক্রী পেতে পারে কিনা?

The trial Court discussed the issues analogously. Though issue no.2 relates to limitation but on perusal of the discussions it appears that the trial Court did not arrive at a finding regarding the point of limitation. The appellate Court below formulated the points for determination as under:

- 1.Has the court below erred in law in passing the impugned judgment and decree?
- 2.Are the appellant defendants entitled to get relief as prayed for?
- 3.To what other relief, if any, entitled to?

The appellate court below arrived at a finding that after executing bainapatra the vendors delivered possession infavour of the vendee. Regarding limitation,

the appellate Court below arrived at a finding in the following manner:

"Under the facts and circumstances of their case, we opined that the plaintiff should not be put off court due to delay caused in filing this suit, circumstance of the case also leads us to presume that plaintiff & defendant vendors being in relation to each other, plaintiff waited for performance of contract by the vendors, lastly he resorted to the salish, after flouting of award by the defendants pushed him to knock the door of the civil court after ceaseless efforts turned into fiasco. Having regard to discussion made above, we hold that the suit is not barred by the provision of the law of limitation and it is maintainable in its present form." (Sic)

The High Court Division discharged the Rule concurring the findings of the appellate Court below.

In the plaint, the cause of action of the suit narrated in the following manner:

"মোকদ্দমার কারণ: নালিশী ভূমির ছাপ কবালা বিক্রয় দলিল বিবাদীগণ কর্তৃক লিখিত পঠিতক্রমে সম্পাদনে বাদীপক্ষ বরাবরে রেজিস্ট্রি করিয়া দিতে বিগত ইং ২০০০ সালের ডিসেম্বর মাসের শেষ সপ্তাহ তথা বাংলা ১৪০৭ সালের পৌষ মাসের মাঝামাঝি অস্বীকার করার পর হইতে অত্রাদালত অধীন ডামুড্যা থানার নওগাঁও মৌজার কিসমতে অত্র মোকদ্দমার কারণ উদ্ভব হইয়াছে। বাদীপক্ষ অত্র মোকদ্দমার নালিশী ভূমি বাবদ চুক্তিমূলে খরিদা স্বত্বে ভোগ দখলকার নিয়োজিত থাকার গন্য ছাপ কবালা দলিল পাওয়ার জন্য মোকদ্দমা দায়ের করিয়াছে বটে। নালিশী ভূমির চুক্তিকৃত মূল্যের ১৬০০০/০০ টাকা অত্র

মোকদ্দমার তায়দাদ ধার্যে আদালতের এলাকা ও কোর্ট ফি নির্ণয়ার্থে ধার্যকৃত মূল্যের উপর Advalorem Court Fee প্রদানে অত্র মোকদ্দমা রুজু করা হইল।”

From exhibit- 'A' i.e. agreement for sale it appears that the agreement executed on 22.07.1986 with the recitals-

এগ্রিমেন্ট বা চুক্তিপত্র মং-৮০০০/০০ ৮০ নং নওগাঁও মৌজার ৪০ দাগ থানা ডায়ুড্যা
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কস্য এগ্রিমেন্ট বা চুক্তিপত্র মিদং কার্যধগগে আমাদের স্বত্ব দখলীয় নিল্ল তপশীল চৌহদ্দিস্থিত নাল জমি বাবদ মং-৮০০০/০০ আট হাজার টাকা নগদ গ্রহণ অদ্য তারিখ আপনার নিকট হইতে গ্রহণ করিলাম সদজ্ঞানে নগদ টাকা বুঝিয়া পাইয়া অত্র এগ্রিমেন্ট বা চুক্তিপত্র লিখিয়া দিলাম। -ইতিসন ১৬৯৩/৫ই শ্রাবণ ইং ২২/৭/৮৬। (Sic)

The agreement contains no recital as to handing over possession by the vendors to the vendee of the land and also fixed no date for performance.

Article 113 of the schedule to the limitation Act reads as follows:

Description of suit	Period of limitation	Time from which period begins to run.
113. For Specific Performance of a contract.	Part VI- Three years. (contd) [One year]	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

From the Article 113 of the Limitation Act, it is clear that when date is fixed it means there is a definite date fixed for doing particular Act. Even in the second part the stress is on 'when the plaintiff has

notice that performance is refused'. Here again, there is a definite point of time, when the plaintiff notices the refusal. In that sense both the parts referred to definite dates. So, there is no question of finding out of an intention from other circumstances. Whether the date was fixed or not, the plaintiff had notice that performance is refused and the date thereof are to be established with reference to materials and evidence to be brought on record. Reference to the case of *Thakamma Mathew vs. M. Azmatullah Khan and others*, reported in AIR 1993 SC 1120.

Furthermore, the alleged agreement was executed for 40 decimals of land but in the plaint the plaintiff claimed 35 decimals of land pursuant to the award made in the salish. The salishnama contains no signature of the parties. The defendants denied any execution of agreement for sale or holding of any salish on 10.02.2000 or any date. Though the plaintiff claim that the defendants executed deed of agreement for sale on 22.07.1986 but the suit for specific performance of contract filed on 15.07.2002 long after 16 years of the execution of

agreement for sale. Plaintiff claims that a salish was held on 10.02.2000 and defendants refused to execute and register the deed of sale on the last week of December, 2000, which is apparently afterthought to save the limitation. Admittedly, the plaintiff did not demand performance of the contract for the long 14 years i.e. from 22.07.1986 to 09.02.2000. In the case of *Md. Mohar Ali vs. Md. Mamud Ali and others*, reported in AIR 1998 Gau 92, the High Court of Gauhati held:

"In the latest decision it has been stated that the Court in decreeing the suit for specific performance of contract must take into account that the suit must be filed within reasonable time and if the suit is filed beyond the reasonable time, it should be dismissed on that ground alone inasmuch as it cannot be expected that the party will sit tight for all these years and in the meantime the character of the property is changed, value of the property will go up. All these factors must be taken into account as pointed out by the apex Court."

The plaintiff filed the suit for performance of the agreement dated 22.07.1986 but recital of the alleged deed of agreement and averments made in the cause of

action of the plaint contradicts squarely regarding consideration money as well as quantum of land.

From the averments of the plaint and deposition of P.Ws it appears that the plaintiff was not at all willing to perform his part of the contract. The plaintiff stated that a salish was held on 10.02.2000 and award was given. The alleged undated award, Exhibit-'B', bears no signature of the parties in dispute. The suit was filed on 15.07.2002. Meanwhile, more than 16 years have been elapsed and surely the period of limitation has expired. It is apparent that there was utter negligence and laches on the part of the plaintiff. In the case of *Sandhya Rani Sarkar vs. Sudha Rani Debi and others*, reported in AIR 1978 SC 537, The Supreme Court of India held:

"The question whether relief of specific performance of the contract for the purchase of immovable property should be granted or not always depends on the facts and circumstances of each case and the Court would not grant such a relief if it gives the plaintiff an unfair advantage over the defendant. A few relevant facts of the case would unmistakably show that if a decree for specific performance in this case is granted

it would give the plaintiff an unfair advantage over the defendant."

It is true that the concurrent findings of fact arrived at by the Courts below cannot be disturbed unless those are perverse or beyond the scope of law but there is exception also. In the case of *Ziaul Hasan Tarafder (Md) vs. Mir Osman Ali and others*, reported in 73 DLR (AD) 250, this Division held:

"It appears that the principle not to interfere with concurrent findings of fact is not a cast-iron practice and that the High Court Division in appropriate cases may depart from that principle where there is any violation of any rule of law or procedure or where there have been misreading or non-consideration of evidence affecting the ultimate decision of the courts below."

In a suit for specific performance, it is incumbent upon the plaintiff to prove the existence of a concluded contract between the parties and that the plaintiff is ready and willing at all material dates to perform its part of the contract. The plaintiff has failed to prove the same. From the date of deed of agreement, exhibit-'A', and the date of refusal as stipulated in the averments of

the plaint it is evident that the suit is barred by limitation under Article 113 of the Limitation Act.

Accordingly, the appeal is allowed.

The impugned judgment and order dated 10.08.2016 passed by the High Court Division in Civil Revision No.624 of 2004 is hereby set aside.

No order as to costs.

CJ.

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