

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique, C.J.

Mr. Justice M. Enayetur Rahim

CIVIL APPEAL NO.428 OF 2019

(Arising out of C.P. No.3775 of 2016)

(From the judgment and order dated the 29th August, 2016 passed by this Division in Civil Revision No.1261 of 2014).

Sree Porikshit Mondal being dead : . . . Appellants
his heirs: 1(a) Janmojoy Mondol
and another

-Versus-

Sree Paresh Chandra Biswas and : . . . Respondents
others

For the Appellants : Mr. Abdul Wadud Bhuiyan, Senior
Advocate instructed by Mr. Md.
Abdul Hye Bhuiyan, Advocate-on-
Record

For Respondent Nos.1, 2(kha) & 3 : Mr. Khaled Ahmed, Advocate
instructed by Ms. Mahmuda Begum,
Advocate-on-Record

For Respondent Nos.2(ka) & 4-5 : Not represented

Date of Hearing : **The 07th & 11th day of June, 2023**

Date of Judgment : **The 20th day of June, 2023**

J U D G M E N T

M. Enayetur Rahim, J: This appeal, by leave, is directed against the judgment and order dated 29.08.2016, passed by the High Court Division in Civil Revision No.1261 of 2014, making the Rule absolute and thereby setting aside the judgment and decree dated 28.01.2014 passed by the learned Additional District Judge, 2nd Court, Dhaka, in Title

Appeal No.387 of 2012 affirming those dated 29.08.2012 passed by the learned Senior Assistant Judge, Nawabganj, 7th Court, Dhaka decreeing Title Suit No.131 of 2006.

The relevant facts for disposal of the instant appeal, in short, are that, Sree Porikshit Mondal, predecessor of present appellants, as plaintiff instituted Title Suit No.131 of 2006 in the 7th Court of Senior Assistant Judge, Nawabgonj, Dhaka for specific performance of contract against the present respondents, stating, *inter-alia*, that the schedule property originally belonged to Ramananda Biswas. To meet his medical expenses he wanted to sell the suit property and the plaintiff agreed to purchase the same at a consideration of Tk.1,20,000/-. The plaintiff paid an amount of Tk.1,10,000/- to the said Ramananda Biswas as part payment of the total consideration money who upon receipt of the same executed a bainanama on 02.02.2001 in favour of the plaintiff and delivered possession of suit property to the plaintiff; but through inadvertence of scribe the fact of delivery of possession has not been mentioned in the bainanama. In the said bainanama there was a stipulation that after payment of the balance amount the said Ramananda Biswas would execute the sale deed and register the same without

any objection. Ramananda Biswas died on the following day i.e. on 03.02.2001 in an accident when he went to catch fish, leaving behind the defendants to inherit his properties. After his death, the plaintiff on several occasions requested the defendants to execute and register the sale deed on receipt of the balance amount from the plaintiff. But the defendants on different pretext killed time. In the middle of June 2001 the plaintiff went to the defendants' house and demanded execution and registration of the sale deed on receipt of the balance money but the defendants did not respond to the same. Thereafter, in the month of January, 2002 the plaintiff again went to the house of the defendants and requested them to execute the sale deed by accepting balance consideration money of Tk.10,000/- when the defendant Nos.1 and 2 told the plaintiff that since defendant No.3 went to his father-in-law's house at Mymensingh they will execute the sale deed and register the same on his return. The plaintiff again on 30.06.2002 went to the house of defendants and the defendant No.1 and 2 informed that the defendant No.3 has not yet come from his father-in-law's house. In this way, the defendants continued killing time up to 2004. Thereafter, the plaintiff again went to the defendants' house on 06.07.2005 and asked them to go

to the Registration Office for registration of the sale deed but the defendants demanded further amount of Tk.2,00,000/- from the plaintiff on the plea that the price of the property now has been increased in the locality. When the plaintiff did not agree with the said proposal the defendants denied to execute and register the sale deed in favour of the plaintiff unless the said extra amount is paid. Lastly the plaintiff again on 23.11.2005 requested the defendants to execute and register the sale deed on receiving the balance amount of Tk.10,000/- but they refused to accept the money and execute the sale deed. Being refused the plaintiff served a legal notice on 14.12.2005 upon the defendants through his lawyer demanding execution and registration of the sale deed on receiving the balance consideration money but the defendants instead of doing so sent a reply on 19.01.2006 to the plaintiff through their advocate denying execution of the bainapatra by their father in favour of the plaintiff. Under such circumstances, the plaintiff finding no other alternative instituted the instant suit for specific performance of contract.

The defendant Nos. 1 to 3 contested the suit by filing written statement denying the material statements made in the plaint contending, inter-alia,

that the suit is not maintainable in its present form, the suit is barred by limitation and there is no cause of action for filing the suit. The case of the defendants is that their father died on 23.01.1999. The plaintiff for the first time on 14.12.2005 sent a legal notice to the defendants demanding execution and registration of the sale deed claiming that the father of the defendants on 02.02.2001 executed a bainapatra in favour of the plaintiff on receipt of Tk.1,10,000/- as part payment of the total consideration money of Tk.1,20,000/-. The defendants in reply to the said notice stated that their father was not alive on the date of alleged execution of bainanama as he died on 23.01.1999 and as such, it was practically impossible for him to execute a bainanama in favour of the plaintiff. It is also stated that the alleged bainanama is forged, anti dated and fabricated by the plaintiff for the purpose of grabbing the property and for filing of the instant suit.

During trial both the parties adduced both oral and documentary evidence.

The suit was decreed by the trial court by the judgment and decree dated 29.08.2012. The defendants being aggrieved by the said judgment and decree filed Title Appeal No.387 of 2012 before the learned

District Judge, Dhaka which was ultimately heard by the learned Additional District Judge, 2nd Court, Dhaka, who after hearing the same dismissed the appeal by the judgment and decree dated 28.01.2014 and thereby affirmed the judgment and decree of the trial court.

Being aggrieved by the said judgment and decree the defendants moved before the High Court Division by filing a Civil Revision No.1261 of 2014. A single Bench of the High Court Division after hearing issued the Rule by the judgment and order dated 29.08.2016 made the Rule Absolute and thereby set aside the judgment and order of the courts below.

Feeling aggrieved by the said judgment and order, the plaintiff filed the civil petition for leave to appeal No.3775 of 2016 before this Division for redress and eventually, leave was granted.

Hence the present appeal.

Mr. Abdul Wadud Bhuiyan, learned Senior Advocate appearing for the appellants submits that the High Court Division exceeded its revisional jurisdiction in setting aside the judgment and decree of the courts below based on concurrent findings of facts without any finding of misreading or non-consideration of the material evidence by the courts

below and therefore, the judgment and order of the High Court Division is not sustainable in law.

Mr. Bhuiyan further submits that the High Court Division fell into an error of law in dismissing the suit for specific performance of contract on the ground of delay in filing the suit i.e. the suit has been filed within 1(one) year from the date of refusal to perform the contract and therefore the judgment and order of the High Court Division are not sustainable in law.

Mr. Bhuiyan lastly submits that the High Court Division fell into an error of law in finding that the plaintiffs were not ready or interested to get the sale deed registered or that they had waived their right to get the sale deed executed and registered for about 5(five) years or that the same tantamount to abandonment of contract and waiver of their right to sue for specific performance which are all inconsistent with the evidence on record and therefore, the judgment of the High Court Division is not sustainable in law.

Per contra Mr. Khaled Ahmed, learned Advocate appearing for the respondents having supported the impugned judgment submits that question of law may be raised at any stage of the proceeding including Appellate Court to the Appellate Division. In the

present case, the trial court as well as the appellate court did not consider the mandatory provision of law to deposit the balance amount of consideration of the contract in the court at the time of filing the suit for specific performance for contract as per provision of section 21 A (b) of the Specific Relief Act as amended by Act No. XXVII of 2004.

Mr. Khaled further submits that the plaintiff failed to prove the execution of the bainanama and handing over of possession of the suit case by the defendant by examining the scribe and other independent attesting witnesses and thus, he is not entitled to get a decree for specific performance of the contract and therefore the appeal is liable to be dismissed

Mr. Khaled lastly submits that both the trial court and the appellate court below needed to exercise the power of examining the signature with great caution. The courts below failed to adopt the best course of action that is the microscopic enlargement and expert advice, therefore, the plaintiff was not entitled to get a decree for specific performance of contract as per the decision reported in 1 ADC 481 and therefore, the appeal is liable to be dismissed.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and order passed by the High Court Division as well as the judgment and orders passed by the courts below.

In the instant case the trial Court decreed the suit for specific performance of contract which was affirmed by the court of appeal below.

However, the High Court Division in revision set aside the judgment of the courts below and thereby dismissed the suit.

It transpires from the alleged bainanama exhibit-4, allegedly executed on 01.02.2001 was written on stamp paper for Tk.3/- only and the said stamp was purchased in the name of the Ramananda Shill on 27.02.1984. The plaintiff did not explain in the plaint or adduced any evidence before the Court why he used a stamp of Tk.3/- after about 18 years which was issued in the year 1984.

Admittedly, the scribe of bainanama, Okhil Chandra Day was not examined and in the bainanama the full particulars of the attesting witnesses have not been mentioned.

It is undeniable fact that the bainanama was allegedly executed on 02.02.2001 but the suit was filed on 02.07.2006 i.e. after about 5 years of the

alleged execution of bainanama. In the plaint and deposition the plaintiff stated that in the month of June-2001, January-2002, June-2004 and July-2005 he visited the house of the defendants and had approached them to execute and register the sale deed.

However, from the evidence of P.W-1 or other P.Ws. we do not find any evidence to the effect that in whose presence the plaintiff went to the house of the defendants and made offer to accept the balance consideration money and requested to execute and register the sale deed. Even, Pws-2 and 3 did not support the assertions of the plaintiff to the effect that on those particular dates the plaintiff visited the house of the defendants and he offered the defendants to accept the balance consideration money and asked for execution and registration of sale deed.

Though the trial court and the court of appeal below found the signature of Ramananda Biswas as genuine but the High Court Division in deciding the said issue has observed to the effect:

“From the face of the alleged bainanama and the very position of writing, this court finds the even if we for the sake of argument, concede that the signature contained therein is the signature of

Ramananda Biswas, in the case also, it appears that the agreement was written subsequently on a blank stamp containing signature of Ramananda Biswas which might have been used for another purpose.

In the plaint, the plaintiff stated nothing why he did not approach the defendants to register the bainanama after amendment of the Registration Act which come into force on 01.07.2005. Execution of bainanama on a stamp paper of Tk.3/- dated 27.02.1984 in the name of Ramananda Shil and style of writing of the same, absence of full details of scribe and witness, contradiction of the PWs regarding place and time of execution of the said bainanama, source of money paid and long silence of the plaintiff for 6 years about the transaction after payment of major portion of consideration money leaving only a balance of Tk.10,000/-, non-obtaining of expert opinion by sending the signature to the hand writing expert gives rise to a doubt about genuineness of the bainanama."

We are fully agreeing with the above observations made by the High Court Division.

Mr. Khaled Ahmed, learned Advocate for the defendant-respondent submits that the suit was not

maintainable in view of the provision of section 21A(b) of the Specific Relief Act where it is provided that depositing the balance consideration of contract before filing a suit for specific performance of contract is a condition precedent and since the plaintiff did not fulfill the said mandatory provision the suit is barred by above the provision of law. In reply to that Mr. Abdul Wadud, learned Advocate appearing for the plaintiff-appellant referring to the order sheet of the case submits that on the day of filing of the suit the balance consideration money was paid through chalan and relevant documents were submitted before the Court.

We have perused the order sheet and we find substance in the submission of the learned Advocate for the appellant that the suit is not barred by section 21A(b) of the Specific Relief Act.

Mr. Khaled also having referred to sections 17A and 17B of the Registration Act submits that since the alleged binanama is an unregistered binanama, thus in view of the above provision of law it had to be presented for registration within a period of 6(six) months from the date of the commencement of said law i.e. from 1st July, 2005; but in the instant case the plaintiff did not present the said

unregistered binanama before the registration authority for registration of the same and there is also no proof of the fact that he approached to the defendants for registration of the said bainanama and as such the binanama has become void in operation of the above law.

Sections 17A and 17B of the Registration Act, 1908 (hereinafter referred to as the Act, 1908) are as follows:

"17A. Registration of contract for sale

etc.- (1) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, a contract for sale of any immovable property shall be in writing, executed by the parties thereto and registered.

(2) A contract for sale referred to in subsection (1) shall be presented for registration within thirty days from the date of execution of the contract and the provisions regarding registration of instruments shall apply.

17B. Effect of unregistered contract for sale executed prior to section 17A becomes

effective- (1) Where a contract for sale of immovable property is executed but not

registered prior to coming into force of section 17A-

- (a) the parties to the contract shall, within six months from the date of coming into force of that section,- (i) present the instrument of sale of immovable property under the contract for registration, or (ii) present the contract for sale itself for registration; or
- (b) either of the parties, if aggrieved for non-compliance with any of the provisions mentioned in clause (a), shall, notwithstanding anything contained to the contrary in any law for the time being in force as to the law of Limitation, institute a suit for specific performance or recession of the contract within six month next after the expiry of the period mentioned in clause (a), failing which the contract shall stand void.

(2) The provision of sub-section (1) shall not apply to any contract for sale of immovable property on the basis of which a suit has been instituted in a civil court before coming into force of section 17A."

(Underlines supplied)

If we meticulously analyze the above provision of law, it will be abundantly clear that provision of subsection 17B(b) of the Act, 1908 will come into play, in the event of non-compliance of the provision of section 17B(a) of the Act, 1908.

The evidence adduced by the plaintiff does not show that he had taken any step(s) for registration of the unregistered baidanama within a period of 6(six) months. In view of the provision of section 17B(1) of the Act of 1908, it is our considered view that as the plaintiff failed to make registration of the baidanama within the period of 6(six) months from the date of commencement of the act and, that he failed to approach to the defendants within the said period to register the baidanama, we are of the view that the baidanama has become void in operation of the law.

Further, the plaintiff in a suit for specific performance of contract must prove-

- i) that there was a concluded contract between himself and the defendant;
- ii) that he had performed or was ready and willing to perform his part of contract;
- iii) that he was ready and willing to do all acts on his part thereafter to be done.

[Reference: Nur Mohammad and Company Ltd. Vs. Government of Bangladesh and others 61 DLR(AD) 77.]

If the plaintiff is desired to enforce a contract, he must put himself in a right position by performing his part of contract or being willing to perform it.

In the instant case, upon scrutiny of the evidence we find laches on the part of the plaintiff to perform his part of contract and willingness. On this score also, the plaintiff is not entitled to get a decree for specific performance of contract.

Having considered and discussed as above we find no merit in the appeal.

Accordingly, the appeal is dismissed.

However, there is no order as to costs.

C.J.

J.