

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

**First Appeal No. 276 of 2010**

**In the matter of:**

Nazir Ahammad died his legal heirs  
Most. Rezia Begum and others.

..... Defendant-Appellants.

Vs.

Md. Anwar Hossain and others.

..... Respondents.

Mr. Mohammed. Abdus Sabur  
Khan, Advocate

...For the Defendant-

Appellants.

Mr. Zulhas Uddin Ahmed with  
Mr. Mohammad Golam Farid with  
Mr. Md. Ayub Hossain, Advocates  
....For the respondent No. 1.

**Present:**

**Mr. Justice Sheikh Hassan Arif  
And  
Mr. Justice Biswajit Debnath**

**Heard on 07.08.2023 and  
judgment on: 08.08.2023.**

**SHEIKH HASSAN ARIF, J**

1. This appeal, at the instance of defendant No. 1-appellant [substituted by his heirs on his death as appellant Nos. 1(a)-1(e)], is directed against judgment and decree dated 26.11.2009 (decree signed on 17.02.2010) passed by the Second Court of Joint District Judge, Dhaka in Title Suit No. 236 of 2005 decreeing the suit in favour of the plaintiff seeking specific performance of contract.

## 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. 236 of 2005 before the Second Court of Joint District, Dhaka seeking specific performance of contracts stating, *inter-alia*, that the property mentioned in the schedule to the plaint was allotted to defendant No. 01 by the government vide a Memo of the Ministry concerned being 6/D/262, demand letter, followed by proposal for sale by the government, being Memo No. A,P/Sakha10/181/84/578 dated 28.06.1988. Accordingly, defendant No. 01 was paying installments and residing at the house on that plot. That defendant No. 01 agreed to sell the western part of the said plot along with the house in favour of the plaintiff for consideration of Tk. 2,60,000.00 and, accordingly, executed a bayna in his favour on 19.04.1994 upon receiving Tk. 1,000,00.00 as advance money. Accordingly, the possession of the western part of the house plot was handed over to the plaintiff within the knowledge of the local people. That the plaintiff has been residing in the said  $\frac{1}{2}$  portion of the plot and

house for more than 12 years. That, subsequently, defendant No. 01 took further amount of Tk. 50,000.00 from the plaintiff on 04.07.1994 in order to prepare all necessary papers related to the house and to pay the government dues and, accordingly, gave an undertaking on the same date. Thereafter, defendant also received Tk. 2,60,000.00 from the plaintiff on different pretexts in order to pay the government dues in respect of the same house and, accordingly, gave a written acknowledgement. That, subsequently, defendant No. 01 executed another bayna on 03.11.2002 in favour of the plaintiff agreeing to sell the remaining portion of the plot and house, namely, the eastern part of the plot and house, for a total consideration of Tk. 10,00,000.00 and, accordingly, received Tk. 50,000.00 as advance. It was stipulated therein that after payment of government dues and registration of the property in the name defendant No. 01 and after obtaining sale permission, the defendant No. 01 would execute a registered kabala in respect of the said portion in favour of the plaintiff. However, the defendant avoided execution of kabala on different pretexts. The plaintiff, then, arranged a local arbitration

as against the defendant and the defendant No. 01 executed another bayna dated 22.03.2004 therein determining the entire consideration money of the house at Tk. 12,60,000.00 and, accordingly, gave an acknowledgment that he had received Tk. 6,60,000.00 in cash. Accordingly, it is stated, after adjusting the previous payment by the plaintiff, the plaintiff was liable to pay the remaining amount of Tk. 6,60,000.00. However, according to the plaintiff, after execution of the said final bayna, the defendant started delaying again and finally refused to execute registered kabala in respect of the said house on 01.05.2005, which prompted the plaintiff to file the said suit for specific performance of contract.

2.2 The suit was contested by the appellant as defendant No. 01 by filing Written Statement contending, inter alia, that the house in question was allotted in his favour by the government and, accordingly, the said agreement was signed by the government in favour of this defendant on 16.05.2005. That the plaintiff was the tenant of this defendant on the western part of the house and, because of his relationship with the plaintiff,

he allowed the plaintiff to have the electricity and other utility bills in his name. It is further contended that the plaintiff gave him certain amount of money as house rent in a lump sum and as against which obtained signature on different blank stamp papers and white papers. That the defendant, in total received Tk. 6,60,000.00, as advance rent and not as part payment of any bayna or sale agreement. That the property in question cannot be sold without permission from the government after the registration being obtained from the government. Thus, the plaintiff filed the said suit in order to grab the property of the defendant collusively with others by creating some forged documents.

2.3 With the above contesting cases of the parties, the trial Court below framed six (06) issues in the following terms:

- (i) Whether the suit is maintainable in its present form;
- (ii) Whether the suit is barred by estoppel, waiver and acquiescence;
- (iii) Whether there is a cause of action for filing the suit;

- (iv) Whether there is any valid enforceable agreement between the plaintiff and defendant;
- (v) Whether the defendant No. 01 is bound to execute registered kabala in favour of the plaintiff upon receipt of the remaining Tk. 6,000,00.00 and upon obtaining necessary permission.
- (vi) Whether the plaintiff is entitled to get decree for specific performance of contract as prayed for.

2.4 During trial, the plaintiff produced four witnesses (P.Ws. 1-4, including plaintiff himself as P.W. 01) as well as certain documents including the said three baynas which were marked as Exhibit-1 to Exhibit-5. As against this, defendant No. 01 produced three witnesses (D.W.1 to D.W.3, including the defendant himself as D.W. 01) and produced certain documents which were marked as Exhibit-‘Ka’ to ‘Ga’ series. The Court below, then, after hearing the parties, decreed the suit in favour of the plaintiff vide impugned judgment and decree dated 26.11.2009 (decree signed on 17.02.2010) and, accordingly, directed the defendant No. 01 to execute registered saf-kabala in favour of the plaintiff in respect of the said house and plot within 02

(two) months after receipt of the remaining Tk. 6,000,00.00 from the plaintiff, failing which the plaintiff would be entitled to have the registered kabala executed through the process of the Court upon paying the remaining consideration money. Being aggrieved by this judgment and decree, defendant No.1 has preferred this appeal. After necessary formalities and preparation of paper books, this appeal was taken up for hearing by different benches and, in the midst of such hearing, one of the division benches of the High Court Division, vide order dated 08.11.2017, directed the respondent No. 02 (Commissioner, Management Board of Abandoned Property) to produce 'official position of the property in respect of the said offer letter and the said বিক্রয় চুক্তি as claimed by appellant' and other related information, if any. However, record does not show anything whether the said order has been complied with or not. Be that as it may, since the said offer letter and the sale agreement of the government are admitted issue in this appeal, we are inclined to dispose of the appeal on merit relying on the materials available on record.

2.5 The appeal is contested by plaintiff-respondent No. 01 through learned advocate Mr. Zulhas Uddin Ahmed.

3. **Submissions:**

3.1 Mr. Md. Abdus Sabur Khan, learned advocate appearing for the defendant No. 01-appellant, has made the following submissions:

(a) That the bayna agreements in question were forged documents and they were created by the plaintiff after obtaining signatures from defendant No. 01 on some blank stamps and papers. However, according to him, the Court below did not consider this aspect of the case and as such passed an apparently illegal decree.

(b) By referring to the stamp papers in question of the said alleged bayna, namely, Exhibits-1, 4 and 5, he submits that the serial numbers of the stamp papers were chronological, particularly when the said stamp papers were of different denominations. This being so, according to him, it is apparent that the said stamp papers were in fact forged documents.



- (c) Further referring to Exhibits-4 and 5, namely, the alleged second and third bayna, he submits that it is apparent from the said alleged baynas that the writer of the said baynas and the vendor of the said stamp papers was same person, which, according to him, also indicates that the said baynas were manufactured by the plaintiff fraudulently.
- (d) Further referring to the first bayna dated 19.04.1994 (Exhibit-1), he submits that the said bayna was allegedly executed in respect of the western part of the suit plot and house, and the remaining two baynas were allegedly executed in respect of the eastern part of the suit plot and house. Therefore, the suit having been filed on 29.06.2005 for enforcement of all the three baynas, the suit was barred by limitation in respect of the first bayna, namely, bayna dated 19.04.1994 (Exhibit-01). However, according to him, the Court below has passed decree of specific performance of all contracts, including the first bayna, by the impugned decree, which is illegal on the face of it.

(e) That the house in question is a homestead property of the appellant. Therefore, if the baynas in question are enforced in respect of the said homestead property, this defendant-appellant shall suffer huge hardship and, accordingly, this Court should not pass such a decree, which will cause hardship to the defendant No. 01-appellant and his family members. According to him, this appellate Court should pass a decree of solatium in favour of the plaintiff so that this defendant may repay the amount he received from the plaintiff.

3.2 As against above submissions, Mr. Zulhas Uddin Ahmed, leaned advocate appearing for the respondent Nos. 1-4, 6 and 7, has made the following submissions:

(a) That the baynas having not been admitted by the defendant-appellant through pleadings before the Court below, the point of hardship cannot be considered by the Court, particularly when no such pleading has been made by the defendant No. 01 before the Court below and, as against which, the plaintiff could not produce any evidence.

(b) Further referring to the first bayna dated 19.04.1994 (Exhibit-01), he submits that it is apparent from the stipulations contained therein that there was no specific deadline given therein for execution of the registered kabala in favour of the plaintiff. The only stipulation was that the defendant No. 01 would take permissions and registration from the government and then he would execute registered kabala in favour of the plaintiff. This being so, according to him, the suit in question in respect of the said bayna of 1994 cannot be held to be barred by limitation, particularly when the period of limitation will start only when the property in question is registered in favour of the defendant No. 01. In support of his such submissions, he has referred to a decision of a division bench of the High Court Division in **Sirajul Haq vs. Aziza Begum, 27 BLC (2022)-682**. He submits that, in a similar situation, a division bench of the High Court Division has held that since there is no default

clause in the agreement in question, the limitation period cannot start.

- (c) Further referring to the depositions of the P.W. 01 to P.W.4 as against the cross-examination of the D.W. 1 to D.W.3, he submits that the plaintiff has produced sufficient evidences and witnesses to prove his case and, accordingly, the Court below has lawfully decreed the suit in favour of the plaintiff.
- (d) That although the defendant claimed by way of written statement that the baynas in question were forged document, the burden lies on the defendant to prove by adducing sufficient evidence, which, according to him, defendant failed.

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

- 4.1 Only point for determination in this appeal is whether the plaintiff is entitled to get a decree for enforcement of the baynas in question, namely, Exhibits-1, 4 and 5.
- 4.2 It appears from the deposition of the witnesses of the plaintiff that the said witnesses consistently supported

plaintiff's case and produced the said baynas dated 19.04.1994 (Exhibit-1), 03.11.2002 (Exhibit-4) and 22.03.2004 (Exhibit-5) and proved the contents of the said bayna

4.3 As against this, the case of the defendant before the Court below was that the contents of the said baynas were manufactured by the plaintiff after obtaining signatures of the defendant on the black stamp papers. However, unfortunately, defendant No. 01 did not produce any witness, or evidence, in support of such claim. Therefore, as against these two contesting versions, a Court of law cannot, in any way, support the case of the defendant without any evidence. Therefore, to that extent, we have no option but to hold that the defendant has failed to prove its case that the said baynas in question were created, or manufactured, by the plaintiff and that they were forged documents. Unless such allegations are proved by the defendants, no Court of law can take a view that such baynas are manufactured documents, particularly when defendant No. 01 admitted that the signatures thereon were his signatures.

4.4 Apart from that, the plaintiff has produced witnesses including himself, who deposed before the Court in support of plaintiff's case. The witnesses of the said bayna, namely P.W. 2, who was witness to the first bayna, supported the execution of such bayna and handing over possession in favour of the plaintiff in respect of the western part of the suit plot and house. This deposition of P.W. 2 could not be shaken, in any way, by extensive cross-examination of the defendant No. 01. Defendant also failed to establish any special relationship between the plaintiff and this P.W. 02. P.W. 3 also supported such position and, in cross-examination, he particularly deposed that he was present at the time of execution of the bayna and that he signed the bayna. He also deposed that some other people, namely, Motahar Hossian, Motaleb, Younus, Dhalu and Siraj Mia, were present. In support of his deposition, Md. Dhalu Mia deposed as P.W. 04 and consistently supported plaintiff's case as witnesses of two baynas, namely, second and third bayna dated 03.11.2002 and 22.03.2004 (Exhibit-4 and 5). The

deposition of this witness also could not be shaken by extensive cross-examination.

4.5 As against above, if we examine the depositions of the witnesses produced by the defendant, namely, D.W. 01 to D.W. 03, it appears that apart from mere oral statements, he could not produce any witness, or evidence, in support of his claim that the plaintiff took his signatures on different blank stamp papers. This being so, it appears that the preponderance of evidence on record supports plaintiff's case of execution of the said baynas and that the said baynas were genuine bayna. On the other hand, the case of the defendant No. 01 has collapsed because of lack of any evidence in support of his case that the plaintiff had fraudulently manufactured those baynas, as he failed to discharge his onus to prove his case in view of the provisions under Section 101 of the Evidence Act.

4.6 Now, the point of limitation as raised by the defendant-appellant. It appears from the first bayna dated 19.04.1994 (Exhibit-1) that in fact there was no default clause therein. There was no specific stipulation agreed by the parties that within certain date, the saf-kabala

would be given by the defendant in favour of the plaintiff. This being so, the period of limitation could not even start to determine whether the suit became barred by limitation. The stipulation in all the agreements were that the defendant No. 1 would get registered kabala from the government and after obtaining necessary permission from the government, he would execute registered saf-kabala in favour of the plaintiff in respect of the entire property. Therefore, the period of limitation would commence, for the purpose of counting, from the date on which the defendant No. 01 got registration and permission from the government in respect of the suit plot and house, which was absent in the pleading of the defendant. Therefore, we are of the view that the suit was not barred by limitation in respect of the first bayna or any of the baynas. We find support of this position of law in a well-reasoned decision of a division bench of the High Court Division in **Serajul Haque vs. Aziza Begum, 27 BLC (2022)-682**, as cited by the learned advocate for the respondent No. 01. Therefore, on the point of limitation as well, we do not find any case in favour of the defendant-appellant.



4.7 Now, the question of hardship. Admittedly, there is no statement in the written statement filed by the defendant No. 01 that once the baynas are enforced, defendant will face huge hardship or he will lose his only homestead property. Besides, when a vendor denies execution of any bayna at all, he can hardly take the plea of hardship. Therefore, we have no option but to hold that without any materials on record as regards hardship of the defendant, we cannot refuse enforcement of the bayna on that point, particularly when our discretion to refuse has to be a judicial discretion as well. In view of above, we do not find any case in favour of the defendant-appellant to interfere into the impugned judgment and decree dated 26.11.2009 (decree signed on 17.02.2010) passed by the Second Court of Joint District Judge, Dhaka in Title Suit No. 236 of 2005.

4.8 In the result, the appeal is dismissed. Ad-interim order, 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)**