

Present:
Mr. Justice Sheikh Abdul Awal
and
Mr. Justice Md. Mansur Alam

First Appeal No. 56 of 2015

In the Matter of:

Memorandum of appeal from original decree.

In the Matter of:

Md. Abdul Gafur and another

...Plaintiff-appellants.

-Versus-

Md. Badsha Matbor and others

...Defendant-respondents.

Mr. Md. Shariful Islam, Advocate

.... For the appellants.

Mr. Mohammad Yunus Mia, Advocate

....For the respondent No. 01.

Heard on: 30.10.2024, 10.11.2024 and
19.11.2024.

Judgment on: 26.11.2024.

Md. Mansur Alam, J:

This appeal is directed against the judgment and decree dated on 13.11.2014 (decree signed on 20.11.2014) passed by the learned Joint District Judge, 2nd Court, Narayangonj in Title Suit No. 92 of 2008.

The facts relevant for disposal of this appeal, in brief, are that the plaintiff-respondent filed Title Suit No. 92 of 2008 in the Court of learned Joint District Judge, 2nd Court, Narayangonj, impleading the defendant-appellant for specific performance of contract of a registered agreement deed for sale of 4.50 decimal lands as described in the schedule of the plaint. The scheduled land while owning and possessing by the defendant-appellant, they entered into a contract of sale with the plaintiff-

respondents for a consideration of Taka 16,74,000/-. Thereafter on 10.05.2007 they executed and registered a baina deed no. 4003 and took taka 10,000/- out of the said value of the land and thereafter they also took taka 70,000/- from the plaintiff-respondent on 27.07.2007 as consideration money but subsequently refused to receive the remaining amount of taka 6,04,000/- from the plaintiff and thereby cause of action arose to file the suit.

Defendant-appellants entered in the suit filing written statement denying all the material allegations made in the plaint contending inter alia, that there is no cause of action for filing the suit, that the learned Joint District Judge without considering the facts and circumstances, evidences and the provisions of law most illegally decreed the suit. Admittedly the defendant-appellants entered into a registered agreement for sale with the plaintiff-respondent that the plaintiff-respondent will get the impugned deed as a registered one within a period of 4 (four) months from the date of execution of the agreement for sale dated 07.05.2007 on payment of balance consideration of amount and with further condition that if the plaintiff-respondent failed to take registration of the sale deed on payment of the balance amount within the prescribed period of 4 months, the agreement for sale (bainapatra) will be treated as cancelled. As the plaintiff-respondent failed to take registration on payment of the balance consideration of money within the stipulated period of time the agreement for sale was automatically cancelled as per the terms of the Bainapatra and hence there is no existence of the said agreement after

07.09.2007. As the plaintiff-respondent filed the suit without adhering the terms and condition of the agreement for sale, so he is not entitled to get any relief in this suit. Learned Joint District Judge without considering the terms and condition of the agreement for sale, decreed the suit erroneously. Plaintiff case is bad in law and fact. So the suit is liable to be dismissed.

The learned Joint District Judge upon considering the pleadings of the parties framed the following issues:

1. Whether the suit is maintainable in its present form and manner?
2. Whether the suit is barred by limitation?
3. Whether the agreement for sale (bainapatra) between plaintiff and defendant is operative?
4. Whether the defendant transferred the land legally without rescinding the registered agreement for sale?
5. Whether the transfer of the suit property to a third party is valid while the impugned deed is in force?
6. Whether plaintiff is entitled to get relief as prayed for?

At the trial the plaintiff examined 3 witnesses and defendant side examined 2 witnesses. Defendant respondent submitted some papers exhibited as 1 to 6 and defendant-appellant submitted a legal notice as exhibit 'ka'.

The learned trial Judge upon hearing the parties and on considering the evidence and materials on record decreed the suit mainly on the ground that the plaintiff by adducing evidence has been able to prove his

contention to the effect that as the defendant-appellant transferred the suit land within the period of existence of the alleged Bainanama, so the said transfer to defendant no.4 is totally illegal and the plaintiff-respondent therefore is entitled to get the relief of specific performance of contract and the plaintiff-respondent complied with all the requirements of the bainanama.

Being aggrieved and dissatisfied by the aforesaid impugned judgment and decree dated 18.11.2014 passed by the learned Joint District Judge, 2nd Court, Narayangonj, the defendant-appellant preferred this instant appeal.

Mr. Md. Shariful Islam, the learned counsel appearing for the defendant-appellant in course of argument takes us through the impugned judgment, plaint and written statement of the suit, deposition of witnesses and other materials on records and submits that the learned trial court below without applying its judicial mind into the facts of the case and law bearing subject most illegally decreed the suit on the finding that the plaintiff-respondent has been able to prove his case by adducing sufficient evidence.

Learned counsel further submits that it appears from the reading of the impugned Bainanama that it is executed on 07.05.2007 for 4 (four) months. It indicates that within 4 (four) months of the date on 07.09.2007, the impugned deed must be registered, failing which the same will be automatically rescinded.

Learned counsel further submits that the term of the impugned Bainanama deed expired on 07.09.2007 from the date of 07.05.2007 but the plaintiff-respondent never took any attempt before 07.09.2007 to pay the rest amount. So, the contract became rescinded on the date of 07.09.2007. Learned counsel referring the provision section 55 of the Contract Act submits that no cause of action arises for non fulfillment of reciprocal promise by nonpaying the rest consideration before 07.09.2007 and there was no refusal upto 07.09.2007 on the part of the defendant-appellant to execute the sale deed in favour of the plaintiff-respondent.

In this context learned counsel referred the case of Hafizur Rahman (Md) vs. Abdur Rahman and another reported in 68 DLR at Page 110. Hon'ble division bench comprising of their Lordships Mr. Justice Sheikh Abdul Awal and Mr. Justice Shahidul Karim held that:

“Law is well settled that where in any contract, time is intended to be of the essence of the contract, it is not sufficient to find whether there was such intention or not, but it is necessary to find whose unwillingness to perform his part of the obligation under the contract eventually led to the non-performance of the contract. In a suit for specific performance of the contract which makes time the essence of the contract, the plaintiff must succeed if his readiness and willingness to perform the obligations undertaken by him are proved.”

Learned counsel with referring section 22 of Specific Relief Act, 1877 further submits that though the plaintiff-respondent seeks for an

equitable relief in this case, but his intention is not honest as he never took any attempt to pay the rest consideration amount before 07.09.2007.

On the contrary learned counsel Mr. Mohammad Eunos appearing for the plaintiff-respondent stated that there are mentioning 4 months time limitation of said Baina but the specific date of limitation is not mentioned. So in this circumstances the limitation to file the suit is within 1(one) year from the date of refusal to give registration by the defendant-appellant. Learned counsel for the plaintiff-respondent argues that one of the defendant-appellant took taka 70,000/- from the plaintiff-respondent as consideration on 27.07.2007. This plaintiff-respondent gave notice of the plaintiff-appellant on 11.11.2007 to get the deed registered. Learned counsel further submits that the plaintiff-respondent did not hand over the mutation and subdivision khatian in their favour which the defendant-appellant undertook in the Bainanama. In this way the defendant-appellant has failed to perform their reciprocal promises as they have been assigned to perform. Learned counsel referred the case of Amir Hossain Sowdagor vs Md. Harun-or-Rashid in 65 DLR (AD) at page 130 which is very much applicable in this case. Learned counsel further submits that the provision of section 53B of the Transfer of Property Act expresses that "No immovable property under a contract for sell shall be transferred except to the vendee so long the contract subsists, unless the contract is lawfully rescinded and any transfer made otherwise shall be void. Therefore, the subsequent transfer by the defendant-appellant to the defendant no. 4 on 13.01.2008 is illegal. So as being illegal and void the defendant no. 4

Abdus Salam has no right, title and possession over the suit land. The appeal is liable to be dismissed.

Having heard the learned Advocate from both the sides and having gone through the materials on record including the impugned judgment of the trial court, the only question that calling for our consideration in this appeal is whether trial court below was justified in arriving at the findings that the plaintiff-respondent have been able to prove the impugned bainanama that executed on 07.05.2007 subsists after 4 months from the date of 07.09.2007 and whether the plaintiff-respondent got possession over the suit land.

Now let us scrutinize the evidences adduced by both the parties.

Plaintiff-respondent examined 3(three) witnesses namely Mahbubul Alam Selim as Pw 1, Md. Eunos Mollah as Pw 2 and Md. Kamal as Pw 3. Also the plaintiff-respondent submitted some documents Exhibited as 1 to 6.

Pw 1 Mahbubul Alam Selim for the plaintiff stated that plaintiff Badshah Matbor accepted the proposal of defendant Gafur and Matin for purchasing the suit land and accordingly the impugned bainanama was executed between both the parties and the same was registered on 10.05.2007, 10 lacs consideration money was paid on the date of execution, thereafter 70,000/-taka also paid to the defendant-appellant which acknowledged by the defendant-appellant by putting signature on the back side of the stamp, plaintiff-respondent repeatedly urged the defendant-appellant to get the deed registered, thereafter on 11.11.2007

plaintiff-respondent served a legal notice to the defendant-appellant to have the impugned deed registered. At last the plaintiff-respondent urged the defendant-appellant on 27.01.2009 to have the deed registered, which the defendant-appellant refused to do. To cross Pw1 admitted that he did not identify the dag khatian of the suit land, he was present at the time of commission done in the suit land, defendant Salam applied for that commission, they served a legal notice to the defendant on 11.11.2007, Pw 2 Younus Molla stated in his depositions that he was present at the time of execution of the alleged bainanama, possession was handed over according to the bainanama, the term of the baina was for 4 months, the defendant did not register the sale deed at the request of the plaintiff-respondent. To cross he stated that defendant Matin sold out some portion of land to Salam, he could not say the quantum of land that Salam purchased, he did not know how many rooms are there in the suit land or whether Salam has any shop beside the road. Pw3 Kamal stated in his examination that the plaintiff-respondent urged the defendant-appellant for 4/5 times to register the sale deed in favour of them and lastly they requested defendant-appellant on 27.01.2008, he was with both the plaintiff-respondent and the defendant-appellant, defendant-appellant refused to register the sale deed on 27.01.2008. To cross he narrated that he did not know whether there was any inspection on the suit land, who deals with the shop set up on the suit land he did not know. He admits that Salam possess his land attached to the suit land. He did not deny whether the house set up on the suit land belonged to Salam. He further stated that

there is lamp lit in the shop of the suit land. He did not know whether Salam took connection of that lamp or not. Also he is ignorant whether Salam bought the suit land or Salam deals with the shop or not. He stated clearly that plaintiff does not deal with the shop of the suit land.

On the other hand, defendant-appellant examined 2 witnesses namely Abdul Matin as Dw 1 and Md. Nurul Islam as Dw2. Also the defendant submitted copy of legal notice exhibited as 'ka'.

Dw 1 Abdul Matin stated that they executed a bainanama with the plaintiff on 07.05.2007 regarding the suit land and the term of that bainanama was for 4 (four) months. Plaintiff did not come to them even after the expiry of that 4 (four) months, they informed the plaintiff orally and thereafter by a legal notice through learned Advocate Nurul Islam but the plaintiff did not respond, they did not get any notice from the plaintiff respondent, alleged legal notice on the part of the plaintiff-respondent is seen to be sent after 4 (four) months of their (defendant-appellant) notice. To cross he stated that he got prepared to sell out the land to the others on expiry of the deadline of 4 (four) months. He sold out the land to Salam and handed over the possession thereby. Salam built 13 rooms and a shop therein. Defendant No. 3 deals with the shop, they got connected the gas and electric line there. They got possession in the suit land through a commission. To cross he stated that he did not buy another piece of land though he received taka from the defendant no. 4. This witness further stated that the term of the bainanama expired on 10.09.2007, he sold out the land on 13.01.2008. Dw2 Md. Nurul Islam an Advocate for the

defendant stated that he served a legal notice upon the plaintiff on 24.10.2007, he identified his signature he put in the notice. He asserted that there was a condition in the bainapatra that on failure of getting the sale deed registered within the term of alleged 4 (four) months, the bainanama will automatically be rescinded. To cross he admitted that a suit for specific performance can be filed within 1 (one) year on expiry of the stipulated period of 4 (four) months. He denied that the recipient did not get the legal notice.

On careful perusal of the evidences and materials on record, we find that the plaintiff respondent brought the original Title Suit no. 92 of 2008 praying for the issuance of an order for execution and registration of the kabala deed. Plaintiff- respondent also praying for further order that on failure of the defendant, Court itself would be kind enough to execute and register the kabala deed to this plaintiff on the part of the defendant. Defendant-appellant on the other hand, contended that the bainanama was executed between plaintiff and the defendant for a term of 4 (four) months and the transferee of that bainanama i.e. the plaintiff-respondent could not pay the whole amount of consideration within that stipulated period, on failure which the bainanama automatically be rescinded.

So the only question that calls for our considerations in this appeal is that whether the bainanama subsists after the specified period incorporated in it. Learned counsel for the plaintiff-respondent with referring the case of Additional Deputy Commissioner vs Md. Sirajul Islam reported in 6 BLT (AD) at page 132 submits that the plaintiff-

respondent has a statutory right as per the provision of Limitation Act to file a case of specific performance of contract within 1 (one) year of refusal of registration. Learned counsel further submits that under the provision of section 51 of the Contract Act and the condition of bairanama gave rise to mutual responsibility which is called the reciprocal promises. In this regard learned counsel referred the case of Amir Hossain Sowdagor vs Md. Harun-or-Rashid reported in 65 DLR (AD) at page 130, where it is well described how the reciprocal promises to be simultaneously performed. No promise giver need to perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Learned counsel further contended that under section 53B of the transfer of property act no immovable property under a contract for sell shall be transferred except to the vendee so long the contract subsists, unless the contract is lawfully rescinded and any transfer made otherwise shall be void.

On the other hand learned counsel for the defendant-appellant referring the provision of section 55 of the Contract Act, 1872 opined that where the time is the essence of a contract and if it is not performed by any party, then the contract becomes voidable for the party who is failed to perform. Section 55 of the Act reads as follows:

“When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified times and fails to do any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promisee, if

the intention of the parties was that times should be of the essence of the contract.”

As we find on carefully perusal of the impugned bainanama that the validity of the same was for 4 (four) months. It is incorporated in the bainanama that if the plaintiff Badshah Matbor (vendee) failed to make payment of the rest consideration the contract shall stand cancelled. Learned counsel contended that the term of the impugned deed was till 07.09.2007. So under the provision of section 55 of the Contract Act, the plaintiff-respondent failed to do the thing of payment of the rest consideration within the specified times, learned counsel for the plaintiff-respondent concluded that the defendant-appellant did not pay any heed to their request to have done the sale deed registered but on perusal of the case record and evidence of the plaintiff-respondent it is found that they could not prove the demand that they want defendant-appellant to have the impugned deed registered. No witness on the part of the plaintiff-respondent categorically mentioned which date and time and where they asked the defendant-appellant to register the kabala deed. The plaintiff-respondent claimed that they served a legal notice to the defendant-appellant on 11.11.2007.

Pw1 Mahbubul Alam Selim deposed in his chief that they served legal notice on 02.11.2007, where Pw3 Kamal stated that legal notice was issued on 27.01.2008. So the issuance of any legal notice to the defendant-appellant is very doubtful and untrustworthy. Moreso the defendant-appellant did not get any such notice from the plaintiff

respondent and the claim of the defendant-appellant to the effect that they did not get such notice is well proved by the appellant. On the contrary the defendant-appellant served a legal notice upon the plaintiff-respondent on 24.10.2007 and Dw2 Advocate Md. Nurul Haq deposed that he himself served the legal notice and identified that notice which is exhibited as 'ka'. In this context it is presumed that the plaintiff-respondent did not show his willingness to pay the rest consideration of the bainanama and to have the impugned deed registered.

The next contention of the plaintiff-respondent is that before the expiry of the term of the impugned bainanama, it was the mandatory duty of the defendant-appellants to hand over the document of mutation and subdivision of khatian to the plaintiff-respondent as per R.S. records of right. In this context learned counsel for the plaintiff-respondent contended that the defendant-appellant promised them to hand over the aforesaid mutation and subdivision of khatian which is a reciprocal promise on the part of the defendant-appellant but the defendant-appellant did not comply with their promise. Learned counsel here referred the case of Amir Hossain Sowdagor vs Harun-or-Rashid cited in 65 DLR (AD) at page-130. Learned counsel for the defendant-appellant claimed that they have complied with their promise and to that effect they served a legal notice upon the plaintiff-respondent but the plaintiff-respondent did not respond. It is well corroborated from the aforementioned discussion that the plaintiff-respondent was totally silent till 11.11.2007.

Learned counsel on the part of the defendant-appellant referring the case of Hafizur Rahman (Md) vs Abdur Rahman Mia and another in 68 DLR at page-110 where their Lordships observed that where in any contract time is the prime essence, then the plaintiff must succeed if his readiness and willingness to perform the obligations undertaken by him are proved. In this appeal we find that the term of the alleged bairanama is 4 months and as the term of 4 months expires, soon expiry of the 4 months the impugned bairanama does not subsist.

Learned counsel for the defendant-appellant refuting the contention of the plaintiff-respondent stated that the provision of section 53B of Transfer of Property Act will not be applicable here in this case. Section 53B speaks: "No immovable property under a contract for sell shall be transferred except to the vendee so long the contract subsists, unless the contract is lawfully rescinded and any transfer made otherwise shall be void." But it is found from the above observation that on expiry of 4 months on 07.09.2007 and thereafter on nonresponding of the legal notice sent on 24.10.2007, the impugned bairanama is automatically rescinded. From that date, the bairanama is no more subsists. So the argument advanced by the learned counsel of the plaintiff-respondent is not relevant here in this case.

Learned counsel for the defendant-appellant submits that the suit land now is in the possession of defendant no.4 Abdus Salam. In this context we find the support of cross examination of Pw2 Younus Molla and of Pw 3 Kamal. They indirectly supported the possession of defendant

Abdus Salam over the suit land which transpires from their cross examination. Pw1 Mahbubul Alam Selim admitted that he was present at the time of commission done on the suit land. Pw 3 Kamal did not deny that there was a commission. This is a positive case of the defendant-appellant that defendant Abdus Salam got the possession over the suit land through a commission. It is the specific assertion of the defendant-appellant that Abdus Salam, the subsequent transferee got possession of the suit land by way of his kabala deed on 13.01.2008 and got mutated of the same. It is of the evident that Abdus Salam built 13 rooms and a shop house on the suit land and has taken gas and electricity connection there. Plaintiff-respondent's witnesses did not deny this fact that these rooms and shops belonged to Abdus Salam and the gas and electricity connection is set up by him. Here in this contest we can refer the case of Minhazuddin Talukdar vs Abdul Jahid Howlader cited in 3 MLR (AD) 1998, where it is observed:

“In a suit for specific performance of contract the essential legal requirements that need to be proved are that the deed of agreement bainapatra was genuine, consideration money passed between the parties and delivery of possessions was given in pursuance thereof. When all these essential ingredients are found to have been proved by the concurrent findings of the court of appeal and revisional court and when the learned Advocate for the petitioner failed to assail any of the concurrent findings and show any illegality in the

impugned judgment such finding does not call for any interference.”

So it is apparent from the above decision that in a case for specific performance of contract consideration money must be passed between the parties and delivery of possession must be handed over in pursuance thereof. But it is evident in this case that neither total consideration money is passed nor the possession of the suit land is handed over to the plaintiff-respondent. So the impugned bairanama did not exist on expiry of its term of 4 months and the possession of the suit land is not handed over to the plaintiff-respondent.

As we found that subsequent purchaser Abdus Salam got the suit land by way of a kabala deed on 13.01.2008 and got possession over suit land, got his name mutated and built several rooms and shop there and has taken gas and electricity connection and moreover that he has no knowledge about the alleged bairanama, so as a bonafide purchaser Abdus Salam will get the priority under section 48 of the Transfer of Property Act, 1881. The section reads:

“ Where a person purports to create by transfer at different times rights in or over the same immoveable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

The doctrine of bonafide purchaser for value without notice is applicable in a case when the plaintiff wants to enforce the agreement for sale not only against the vendor but also

against the transferee of vendor's title arising subsequent to the plaintiff's agreement for sale."

On meticulous and close perusal of the entire evidence both oral and documentary, it appears that the plaintiff-respondent has failed to prove that he showed his willingness to perform the contract by paying the rest consideration money within the specified period as incorporated in the bainanama. The impugned bainanama did not subsist on the expiry of its term of 4 months and plaintiff-respondent lost its right again in non responding the legal notice of defendant-appellant served on 24.10.2007.

The defendant-appellant has been succeeded to discharge his onus adducing oral and documentary evidence. Therefore, we are constrained to hold that the impugned judgment of the learned trial court does not deserve to be sustained. The learned trial judge erred in law and facts as he failed to properly evaluate the evidence on record as to the existence of the impugned bainanama and the possession over the suit land, learned trial judge erroneously concluded that the plaintiff-respondent by adducing evidence proved his case and he is entitled to get the relief of specific performance of contract which is perverse being contrary to the evidence and materials on record.

In view of our discussions made in above by now it is clear that the instant appeal must succeed.

In the result, the appeal is allowed. The impugned judgment and decree dated 13.11.2024 passed by the learned Joint District Judge, 2nd

Court, Narayangonj in Title Suit No. 92 of 2008 decreeing the suit is set aside.

Send down the lower Courts record with a copy of this Judgment to the Courts below at once.

Sheikh Abdul Awal, J:

I agree.