

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Abu Zafor Siddique

Mr. Justice Md. Shahinur Islam

CIVIL PETITION FOR LEAVE TO APPEAL NO.494 AND 495 OF 2018

(From the judgment and decree dated the 16th day of May, 2017 passed by the High Court Division in First Appeal No.106 of 2009 and Cross Objection No. 795 of 2011 respectively.

Engr. Md. Shaheedullah : . . . Petitioner
(In both the cases)

-Versus-

Mrs. Shahana Neyamat and others : . . . Respondents
(In both the cases)

For the Petitioner : Mr. Mohammad Mehadi Hassan
(In both the cases) Chowdhury, Senior Advocate
instructed by Mr. Mohammad Ali
Azam, Advocate-on-record

For Respondent No.1 : Mr. Saifur Rashid, Advocate
(In both the cases) instructed by Mr. Md. Azimuddin,
Advocate-on-Record

For Respondent Nos.2-3 : Not Represented
(In both the cases)

Date of Hearing and Judgment : **The 24th day of July, 2024**

JUDGMENT

M. Enayetur Rahim, J: Civil petition for leave to appeal No.494 of 2018 is directed against the judgment and order dated 16.05.2017 passed by the High Court Division in First Appeal No.106 of 2009(heard along with Cross Objection No.795 of 2011) allowing the appeal, and Civil Petition for leave to Appeal No. 495 of 2018 is directed against the order passed by the High Court Division in Cross Objection No. 795 of 2011 rejecting the same.

The relevant facts leading to the filing of these civil petitions for leave to appeal are that, the present respondent No.1 as plaintiff instituted Title Suit No.11 of 2004 in the Court of Joint District Judge, 3rd Court, Dhaka

for specific performance of contract contending, *inter alia*, that defendant No.1 (present petitioner) is the owner of Plot No.42 of Sector 3, Uttara Model Town, Mentioned in the schedule of the plaint, who erected a six storied building having 10 apartments in the suit plot No.42. Thereafter, he sold out some of the apartments to different persons along with 1/10th portion of undivided and un-demarcated land of 594 square yards (7.5 kathas) of the suit plot to each apartment owner. The defendant No.1 in need of money offered in May 2002 to the plaintiff to sell out the suit apartment in the fourth floor (eastern side) of the said building along with 1/10th portion of 594 square yards (7.5 kathas) land in undivided and un-demarcated shares. The plaintiff agreed to purchase the suit flat. Accordingly, the plaintiff and defendant No.1 came to an oral agreement on 16.05.2002 in presence of Sabbir Zaman, Nurul Islam, Habibur Rahman and others for the sale of the suit apartment at a price of Tk.18,20,000/- (Eighteen Lac Twenty Thousand) only. In accordance with the terms of oral agreement dated 16.05.2002 the plaintiff paid an amount of Tk.2,00,000/- (Two Lac) in advance to the defendant No.1 on the same date. Husband of the plaintiff Mr. Neyamat Ullah issued a cheque to the defendant being No.3098557 dated 16.05.2002 of the United Commercial Bank Ltd. Gulshan 2 Branch, Dhaka for the said amount of Tk. 2,00,000/- (Two lac). After receiving the cheque on 16.05.2017 the defendant No.1 delivered vacant possession of the suit property to the plaintiff on the same date and since then the plaintiff has been residing therein with her husband and daughters. An oral agreement was made between the parties that defendant No.1 shall execute and

register the sale deed in favour of the plaintiff by 15.05.2003 after receiving the remaining money. Thereafter, on 27.11.02 in compliance with the terms of oral agreement, the plaintiff issued a cheque being No.2302965 of the Al Baraka Bank Ltd. (at present Oriental Bank Ltd.) Gulshan Branch for an amount of Tk.10,00,000/- (Ten lac) to the defendant No.1 and he encashed the said cheque and received the amount. Although, the plaintiff paid Tk.12,00,000/- (twelve lac) to the defendant No.1 in advance, defendant No.1 did not provide any receipt to her in spite of repeated requests on several occasions. On 30.04.2003 when the second daughter of the plaintiff asked defendant No.1 to receive the rest of the amount of Tk.6,20,000/- (six lac and twenty thousand) and asked to execute and register the sale deed in favour of the plaintiff, the defendant No.1 refused to do so. The plaintiff again on 10.05.2003, 17.07.2003 and 30.10.2003 offered to receive the said amount and requested the defendant No.1 to execute and register the sale deed in her favour, but the defendant No.1 refused. Lastly on 08.01.2004 the plaintiff sent a legal notice to the defendant No.1 asking him to execute and register the sale deed in favour of the plaintiff within 7 (seven) days of the date of receipt of the notice, in default the plaintiff would file suit against him for specific performance of contract, but the defendant No.1 did not pay any heed, rather without giving any reply to the legal notice of the plaintiff, he sent a legal notice to the plaintiff on 21.01.2004 through his lawyer stating that the plaintiff and her husband are the tenants of the scheduled flat and the defendant No.1 wanted to sell out the scheduled property

within 1 (one) month and also asked the plaintiff to vacate the possession of the scheduled flat by 01.02.2004. Since the plaintiff was inducted into possession and she has given an amount of Tk.10,000/- (ten thousand) to the defendant No.1 towards payment of electricity bills. However, the defendant No.1 has not given any receipt whatsoever despite repeated requests by the plaintiff except a handwritten note calculating the electric bill for a period of 112 days from 01.09.2002. The plaintiff has also given an amount of Tk.8,000/- (Eight thousand) only towards payment of gas bill. The plaintiff after being inducted into possession is paying an amount of Tk.2000/- (two thousand) only as service charge which includes security, water and sewerage. The defendant No.1 was issuing receipts for the same in the name of the plaintiff. However, since July, 2003 with *mala fide* intention, the defendant No.1 is filling up the receipts in his own name and the defendant No.1 refused to execute and register the sale deed in favour of the plaintiff. Hence, the plaintiff filed the suit.

The defendant No.1 contested the suit by filing written statement denying all the material allegations made in the plaint contending that he is the owner and possessor of the suit property, and being the owner and possessor, he mortgaged the same with the Islami Bank Bangladesh Ltd. Uttara Branch on 15.09.1999 for loan to construct 6 (six) storied building with the approved plan from RAJUK in which there are 10 flats. To pay the construction bills the defendants No.1 sold 6 (six) flats in the 1st, 2nd and 3rd floor after getting clearance from the Islami Bank Bangladesh Ltd. and after making mortgage deed dated 25th of

May 2003, the defendant No.1 sold 6 (six) flats to different persons and the rest 4 flats are being possessed by the defendant No.1 for residing there off and by letting out. As per revised mortgage deed the defendant No.1 cannot sale the flats of 4th and 5th floor without permission from the Bank and he can reside or rent the flats only. The husband of the plaintiff was inducted as a monthly tenant in the suit flat, i.e. at flat No.4/A, in the 4th floor (eastern side) from 1st June 2002 at a monthly rent (including service charge) of Tk.20,000/- (twenty thousand) and a sum of Tk.2,00,000/- (two lac) was paid by the husband of the plaintiff as advance rent on 16.05.2002 of the United Commercial Bank Ltd. Gulshan-2 Branch, Dhaka; like all other tenants in the building the plaintiff is to pay all other charges like electricity and Gas bill as utility bill. There is or was no written contract to let or no rent receipt issued; the husband of the plaintiff is related with the Manpower export to foreign countries. Knowing this the defendant No.1 requested the husband of the plaintiff to send two relatives of the defendant No.1 to Italy namely Md. Sharif Ullah, son of Md. Fazlul Haq Sarker, Passport No.00812101, issued on 14.09.1999 and Md. Sirajul Islam, son of Md. Azahar Ali, Passport No. Q 0849431, issued on 03.12.2001. The Husband of the plaintiff agreed and claimed Tk.10,00,000/- (ten lac) only and committed to send them to Italy within 3 (three) months and if failed to do so, he will return the money after 3 (three) months. The defendant No.1 paid Tk.10,00,000/- (Ten lac) in cash including their passports to the husband of the plaintiff on 10.08.2002. The husband of the plaintiff through M/s. HEAVEN ASSOCIATES of Gulshan

Shopping Center (Gulshan-1) Dhaka, a recruiting agency tried, but within 3 (three) months he could not succeed. Then on request of the defendant the husband of the plaintiff returned the passports of the two persons and issued a cheque of Tk.10,00,000/- (ten lac) being No.1202965 dated 27.11.2002 of Al Baraka Bank, Gulshan Branch, Dhaka to the defendant No.1 on 27.11.2002. The cheque of Tk. 2,00,000/- (two lac) of advance rent was issued by the husband of the plaintiff and the returned cheque of Tk.10,00,000/- (ten lac) was issued by the husband of the plaintiff in favour of the defendant No.1 for the above manpower business purpose. The defendant did not make any oral agreement for sale. The plaintiff's case is false.

The respective parties adduced evidence both oral and documentary before the trial Court and the trial Court on conclusion of the trial dismissed the suit.

Being aggrieved by the said judgment and decree the plaintiff preferred First Appeal No.106 of 2009 before the High Court Division. The contesting defendant No.1 also filed Cross Objection No.795 of 2011 in the High Court Division, which was heard along with the said First Appeal.

After Hearing, a Division Bench of the High Court Division by the impugned judgment and decree dated 17.05.2017 allowed the appeal and decreed the suit upon setting aside the judgment and decree passed by the trial Court and rejected Cross Objection No.795 of 2011 filed by the contesting defendant.

Being aggrieved by the said judgment and decree the defendant has preferred these civil petitions for leave to appeal before this Division.

Mr. Mohammad Mehadi Hassan Chowdhury, the learned Senior Advocate appearing for the petitioners submits that the plaintiff's case is solely based on oral agreement alleged to have been executed between the plaintiff and the defendant and in the plaint few persons have been named who were said to be present at the time of alleged oral agreement on 16.05.2002, and in the plaint though the plaintiff stated that at the time of oral agreement, she, the defendant No.1, one Sabbir Zaman, Habibur Rahman and Nurul Islam were present but to prove her statement made in the plaint in respect of this oral agreement, the plaintiff herself did not depose as witness in the suit and her daughter deposed on her behalf, the attorney was not a party to the agreement and also not present at the time of agreement as such, she was incompetent to depose in the suit and her evidence was inadmissible, which was not considered by the High Court Division.

Mr. Chowdhury further submits that an agreement for sale contains some terms and condition as to the consideration money, time of payment of consideration money, time to execution of transfer deed etc. but neither the plaintiff nor the witnesses could make detail statement in respect of all their terms and condition and as such the plaintiff failed to prove that there was any oral agreement for sale of the flat and the High Court Division failed to consider this aspect of the matter.

The defendant No.1 published notice about letting the flat in the Daily Ittefaq dated 12.04.2002 on taking such information about the rent, the plaintiff took rent of the flat from the defendant No.1 and, thereafter, she paid

monthly rent and utility bills as a tenant on behalf of the defendant No.1 but ultimately he did not pay rent though she has enjoying the flat as tenant and, thereafter, the defendant No.1 had to lodge G.D. No.1953 dated 27.10.2003 but this fact was not considered by the High Court Division.

Mr. Chowdhury also submits that the oral agreement is to be proved very strictly but in the instant case, the plaintiff having failed to appear to depose in the Court to prove the plaint and the P.W-2 deviated from the statement made in the plaint, similarly the P.W-4 also deviated from the plaint case of oral agreement and case of part performance, the P.W-4 gave altogether a different statement deviating from the plaint, P.W-5 did not support the plaintiff's case but the High Court Division altogether failed to consider this deviations of the P.Ws from the plaint story and thus erred in law in holding that there was an existence of the oral agreement between the plaintiff and the defendant No.1 in respect of sale of the flat in question.

It was further argued by the learned Advocate for the petitioner that under section 53A of the Transfer of Property Act the party asserting part performance of contract must prove the existence of a contract in writing but there is no such written agreement and as such the plaintiff does not have any right of protection under section 53A of the Transfer of Property Act and since the plaintiff failed to prove the contract with reasonable certainty about its terms of the contract even if presumed (not admitted) to be in existence, the same cannot be enforced and as such the suit was liable to be dismissed and

the Trial Court rightly dismissed the same but the High Court Division erred in law in decreeing the suit which is ex-face not tenable in law and liable to be set aside.

Mr. Chowdhury lastly submits that P.W-1 is the daughter of the plaintiff, P.W-2 is the son-in-law of the plaintiff, P.W-3 is also nephew of the plaintiff and the P.W-4 is the husband of the plaintiff and all of them are interested witnesses, on the other hand P.W-5 did not support the plaintiff's case and, as such, there was no neutral witness in favour of the plaintiff but the Court of appeal below, the final Court of facts, did not consider this vital aspect when deciding a suit for specific performance of contract based on oral agreement and as such the impugned judgment and decree is liable to be set aside.

On the other hand, Mr. Saifur Rashid, learned Advocate for the respondent made submissions in support of the judgment and decree passed by the High Court Division.

We have heard the learned Advocates for the respective parties, perused the judgment of the trial Court as well as the same of the High Court Division and other materials as placed before us.

In the instant case, the plaintiff has sought relief of specific performance of contract on the basis of an oral agreement. It is well settled principle of law that such type of oral agreement has to be looked at with some suspicion unless it is proved by reliable evidence. In the case of **Moslemuddin (Md) and others vs. Md. Jonab Ali and another**, reported in **50 DLR (AD) 13**, it has been held that: "We should observed here that so far as the oral agreement is concerned it should always be very

closely scrutinized and taken with a grain of salt. Although oral agreement is not barred by any law it has to be looked at with some suspicion unless proved by very reliable evidence and circumstances. In *Ouseph Varghese vs. Joseph Aley, (1969) 2 SCWR 347* the Supreme Court of India discouraged a decree for specific performance of contract on the basis of an agreement supported solely by oral evidence.”

In the case of **Government of Bangladesh vs. Mrs. Noorjahan Khan and others**, reported in **2000(VIII)BLT(AD)**, this Division held that in a suit for specific performance of contract the genuineness of the agreement of sale is the prime consideration.

In order to decree a suit for specific performance of contract the plaintiff must prove that there was a concluded contract between himself and the defendant. Where there is no concluded contract there will be no enforcement [Reference: **Nur Mohammad and Co. Ltd vs. Bangladesh, 61 DLR (AD)77; H.N. Babrics Ltd. vs. Mallick Textile Industries, 1985 BLD (AD) 271**].

Upon perusal of the evidence on record, it is very difficult for us to come into a definite conclusion that the alleged oral agreement between the plaintiff and the defendant was/is a concluded contract.

In the instant case it appears from the impugned judgment that the High Court Division itself has determined the price of the suit flat as Tk.36,00,000/- (Thirty lac) and directed to pay the rest amount Tk. 24,00,000/- (twenty four lac) to the defendant No.1 with a direction to the defendant No.1 to execute the sale deed of the disputed apartment in the next 30 days. Failing which the plaintiff is at liberty to initiate proceeding in accordance with law.

The above finding of the High Court Division proves that the alleged oral agreement, even if taken to be true, was not a concluded contract and the High Court Division exceeded its jurisdiction in determining the value/price of the flat in question sitting in the Court of Appeal.

In a suit for specific performance of contract, neither the trial Court nor the appellate Court has any jurisdiction/authority to determine the price of suit property afresh, exercising its judicial power ignoring the terms of contract. Court cannot re-fix the consideration, i.e. the value of the suit property and go beyond the terms of the contract, and it cannot impose or add any term(s) in the contract.

In the instant case the High Court Division most erroneously itself re-fix the value of the suit flat, i.e. the consideration and decreed the suit.

The trial Court relying on section 21 (b) of the Specific Relief Act, 1877 has observed:

“এমতাবস্থায়, বাদিনী ও ১ নং বিবাদীপক্ষের মধ্যে নালিশী ফ্লাটটি বিক্রয়ের বিষয়ে একটি মৌখিক চুক্তি সম্পাদন হওয়ার বিষয়টি প্রমাণিত হইলেও উক্ত চুক্তির মূল শর্তাবলী নির্ভরযোগ্য প্রমাণিত না হওয়ায় বাদীপক্ষের দাবীকৃত মৌখিক চুক্তিটি আইনত: বলবদযোগ্য নহে বলিয়া আমি মনে করি। ৩ নং বিচায়্য বিষয়টি সেই মতে বাদিনী পক্ষের প্রতিকূলে নিষ্পত্তি করা হইল।”

However, the High Court Division without adverting to the said finding with reference to evidence on record passed the impugned judgement and decree and thus, committed serious error of law.

In the case of **Kamrunnessa vs. Abul Kashem**, reported in **2 MLR (AD) 220**, it has been held that the discretionary relief of decreeing specific performance depends on two cardinal

principle-(i)the plaintiff must prove the execution of the deed of agreement and (ii) passing of consideration. In the case of **Kaniz Fanema vs. Bangladesh**, reported in 6 MLR (AD) 203, this Division held that where the genuineness of an agreement is not established the suit for specific performance cannot succeed.

In the instant case, the defendant categorically asserted that the flat in question along with the other flats of the suit plot was given mortgage to the Bank. But, the bank has not been made a party in the suit. In the case of **Sooraya Rahman vs. Hajee Md. Elias**, reported in 8 BLC (AD) 7, this Division affirmed the findings of the High Court Division that in a suit for specific performance of contract the defendant No. 1 was a lessee for 99 years and the property belonged to RAJUK. There was a provision in the lease deed that permission from RAJUK would be necessary for transfer of the property. Permission was obtained on 10.03.1973 which was cancelled subsequently on 21.10.1974. RAJUK was not a party in the suit, thus suit to be bad for defect of party holding RAJUK is a necessary party thereto.

In the instant suit the mortgagee Islami Bank, Uttara Branch is a necessary party, but the plaintiff did not make it party, though the defendant in his written statement categorically made statements to that effect. Thus, the suit is bad for defect of party.

Having considered and discussed as above, we are of the opinion that the High Court Division committed serious error of law in passing the impugned judgment and decree decreeing the suit for specific performance of contract on the basis

of an oral agreement which was not proved by the plaintiff in accordance with law and on reliable evidence.

Since we have heard the learned Advocates for the respective parties, we are inclined to dispose of the civil petition for leave to appeal without granting any leave to avoid further delay to dispose of the case.

Accordingly, Civil Petition No. 494 of 2018 is disposed of. The impugned judgment and decree passed by the High Court Division is hereby set aside.

However, the defendant-petitioner is directed to return taka 12 (twelve) lakh to the plaintiff within a period of 30 (thirty) days from the date of receipt of this judgment and order. Since 2002, the plaintiff has been enjoying the flat in question without paying any rent to the appeal, thus we refrain to give any solitium to the plaintiff.

Civil Petition for Leave to Appeal No. 495 of 2018 is disposed of in the light of the above judgment.

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