

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**Present:**

Mr. Justice Obaidul Hassan, *Chief Justice*  
Mr. Justice M. Enayetur Rahim  
Mr. Justice Md. Ashfaquul Islam  
Mr. Justice Md. Abu Zafor Siddique

**CIVIL APPEAL NO.399 OF 2019**

*(From the judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008)*

Md. Dabir Uddin .....**Appellant**

**-Versus-**

Md. Moniruddin and others .....**Respondents**

**For the appellant** : Mr. Sharif Uddin Chaklader, Advocate, instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

**For respondents No.1-2** : Mr. Md. Mozibur Rahman, Advocate-on-Record.

**For respondents No.3-4** : Not represented.

**Date of hearing and judgment** : The 05<sup>th</sup> day of March, 2024

**JUDGMENT**

**Obaidul Hassan,C.J.** This Civil Appeal by leave granting order dated 06.05.2019 in Civil Petition for Leave to Appeal No.2780 of 2015 is directed against the judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008 discharging the Rule and thereby affirming the judgment and decree dated 16.05.2007 passed by the learned Joint District Judge, 2<sup>nd</sup> Court, Manikganj in Title Appeal No.26 of 2007 allowing the appeal while setting aside the judgment and decree dated 10.01.2007 passed by the Court of learned Senior Assistant Judge, Sadar Upazilla, Manikganj in Title Suit No.130 of 2005 decreeing the suit.

The relevant facts necessary for the disposal of this Civil Appeal are that the appellant herein as plaintiff instituted the Title Suit No.130 of 2005 in the Court of Senior Assistant Judge, Sadar Upazilla, Manikganj for specific performance of contract. The averment of the plaintiff are, in a nutshell, that the land described in the schedule to the plaintiff was acquired by the defendants through purchase and *heba-bil-ewaj* from their father. The plaintiff being separated from his family purchased 59 decimals land and got possession therein. The plaintiff went abroad and from there he sent remaining Tk.5,000.00(five thousand) and also money for registration costs to the defendants. But the defendants committed breach of trust and it was disclosed later that the deed was obtained in the name of the plaintiff and the defendants. After returning from abroad the plaintiff asked the defendants about the matter and they again took Tk.2,00,000.00(two lac) for the purpose of *kabala*, but the defendants did not purchase the land in the name of the plaintiff and misappropriated the money. As a result, the plaintiff filed a criminal case against the defendants. Before that the plaintiff also gave Tk.1,00,000.00(one lac) to the defendant No.1 for his daughter's marriage ceremony and in this way the defendants misappropriated a sum of Tk.3,00,000.00(three lac) from the plaintiff. The local Public Prosecutor Advocate Azad Hossain tried to negotiate between the plaintiff and the defendants and there was an '*aposhnama*' on 14.10.2003. On the basis of that '*aposhnama*' there was another sitting

on 18.10.2003 wherein it was agreed that the cases pending between the parties would be withdrawn and thereafter, the defendants would execute and register the *kabala* in favour of the plaintiff in respect of the land described in schedule 'Ka' and 'Kha' to the plaint. A deed was also written in respect of 'Ka' and 'Kha' schedule land in absence of the defendant No.3. The Public Prosecutor took the responsibility of taking signature of the defendant No.3 on the deed who was absent at that time. As per terms and condition of the '*aposhnama*' the plaintiff also executed a deed in favour of the defendants in respect of the homestead measuring an area of 11 decimals and the aforesaid deeds along with '*aposhnama*' was under the custody of the Public Prosecutor. The defendants violated the terms and conditions of '*aposhnama*' and made a conspiracy to deprive the plaintiff from getting the land in pursuant to '*aposhnama*'. Thereafter, the plaintiff instituted the present suit for getting the *kabala* registered through Court.

The defendants No.1-2-respondents No.1-2 contested the suit by filing a written statement denying the averments made in the plaint and contended, *inter alia*, that with the negotiation of Mr. Azad Hossain, the Public Prosecutor and Advocate Anwar Hossain a sitting was held on 14.10.2003 wherein an '*aposhnama*' was executed. In the said '*aposhnama*' there was a condition between plaintiff and the defendants that after fulfillment of the conditions they would mutually withdraw their cases at their own responsibility and would

execute a deed in favor of the plaintiff in respect of 'Ka' schedule land and in respect of 32 decimals land described in 'Kha' schedule. The defendant No.3 was agreed to execute and register a deed in favor of the plaintiff while the plaintiff was agreed to execute and register a deed in respect of his 11 decimals of land. But the defendant No.3 did not execute the '*aposhnama*' by putting his signature therein and the plaintiff also failed to comply with the condition of the '*aposhnama*' and he did not execute any deed in respect of his 11 decimals land in favor of the defendants. The plaintiff also did not withdraw the cases filed by him and thereby the terms and conditions of the compromise had not been fulfilled. In fact, there was no payment of consideration for the deed in respect of any land and there was no valid contract for sale between the parties and it was a mere talk of exchange, but the plaintiff filed the suit on false averments which was afterthought and filed only with a view to obtain unlawful gain by harassing the defendants. Hence, the suit is liable to be dismissed.

The trial Court framed four issues during the trial of the suit. The plaintiff and the defendants No.1-2 examined four witnesses each. The documentary evidences adduced by the plaintiff had been marked as Exhibits-1 series to 2 while those adduced by the defendants No.1-2 had been marked as Exhibits-A series.

The trial Court on completion of the trial decreed the suit by judgment and decree dated 10.01.2007. Being aggrieved by the

judgment of the trial Court the defendants No.1-2 preferred Title Appeal No.26 of 2007 before the learned District Judge, Manikganj which was eventually transferred to the learned Joint District Judge, 2<sup>nd</sup> Court, Manikganj for trial. Upon hearing the learned Joint District Judge, 2<sup>nd</sup> Court, Manikganj vide judgment and decree dated 16.05.2007 allowed the appeal.

Challenging the judgment and decree dated 16.05.2007 passed by the appellate Court below the plaintiff filed Civil Revision No.1603 of 2008 before the High Court Division. Upon final hearing the High Court Division was pleased to discharge the Rule vide judgment and decree dated 16.07.2014.

Being disgruntled with the judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008 the plaintiff as petitioner filed Civil Petition for Leave to Appeal No.2780 of 2015 before this Division and hence the instant appeal.

Mr. Sharif Uddin Chaklader, learned Counsel appearing on behalf of the appellant taking us through the judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008, judgment and decree of the appellate Court below and the trial Court as well as the other materials on record contends that the High Court Division has committed illegality in totally misconceiving the case of the appellant upon misreading and misconstruing the evidence and materials on record and thereby

misdirected beyond the law and facts of the case in passing the erroneous decision discharging the Rule which caused serious miscarriage of justice and as such the impugned judgment and decree is liable to be set aside. The learned Counsel for the appellant contends next that P.Ws.3 & 4 categorically stated that possession of the suit land was delivered to the plaintiff on the next day, but the High Court Division failed to appreciate the evidence of record and as such the impugned judgment is liable to be set aside. The learned Counsel for the appellant argues next that the sale deed as well as the compromise deed are in possession of the local elites including local Public Prosecutor Azad Hossain Khan, who are biased with the defendants, and despite the order of the learned Senior Assistant Judge he did not produce the deeds and in such position, the plaintiff has no option but to pray for getting the land by registration of *kabala*. The learned Counsel for appellant submits further that the appellate Court below as well as the High Court Division totally overlooked the role of learned Public Prosecutor, Azad Hossain Khan and it is on record that he admitted in a proceeding before the ADM that he is in possession of the concerned deeds as such the appellate Court below ought to have compelled him to produce the deeds including the *kabala* to arrive at a definite finding over the dispute, in absence of which the decision arrived at by the appellate Court below and affirmed by the High Court Division is made totally on surmise. The learned Counsel for the appellant argues next that the appellate

Court below as well as the High Court Division did not discuss and assess each and every findings of the trial Court with reasonable grounds which is required under the Code of Civil Procedure and as such the appellate Court below as well as the High Court Division committed error of law occasioning failure of justice. Therefore, the impugned judgment and decree passed by the High Court Division is liable to interfered with by this division.

In opposition, Mr. Mozibur Rahman, learned Advocate-on-Record appearing on behalf of the respondents No.1&2 contends that admittedly the plaintiff and the defendants No.1-3 are the full brothers and there were series of criminal cases and counter cases among them and hence the local Public Prosecutor Advocate Azad Hossain Khan tried to negotiate between the plaintiff and the defendants and there was an '*aposhnama*' on 14.10.2003. On the basis of that '*aposhnama*' there was 2<sup>nd</sup> sitting on 18.10.2003 and there was a talk in that sitting that the cases pending between the parties would be withdrawn and thereafter, the defendants would execute and register the *kabala* in favor of the plaintiff in respect of the land described in the schedule 'Ka' and 'Kha' to the plaintiff. Accordingly, a sale deed was written in respect of 'Ka' and 'Kha' schedule land in absence of the defendant No.3. Learned Public Prosecutor took the responsibility of taking signature of the absent defendant No.3 on the deed. As per terms and conditions of the '*aposhnama*' another sale deed was also written and signed by the plaintiff in favor of the

defendants in respect of his homestead measuring an area of 11 decimals and the aforesaid two deeds along with the '*aposhnama*' were under the custody of the learned Public Prosecutor. Subsequently, both the parties failed to comply with the terms and conditions of the '*aposhnama*' and they did not withdraw any case amicably and hence the learned Public Prosecutor, Advocate Azad Hossain Khan did not proceed with the said '*aposhnama*' and consequently the aforesaid two written sale deeds were not registered and as such the suit instituted by the plaintiff for getting *kabala* registered through Court is quite absurd and not tenable in the eye of law and as such the instant appeal is liable to be dismissed for the ends of justice. The learned Advocate-on-Record argues next that the suit of the plaintiff is for specific performance of contract which is not maintainable since in view of the pleadings of the parties there is no valid contract for sale between the parties and admittedly there was no payment of consideration. As per provisions of Section 54 of the Transfer of Property Act sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. But in the instant case it is evident that under the ambit of the said Section it is not at all a sale and it cannot be treated as sale and this legal aspect was rightly considered by the learned Judge of the appellate Court below as well as by the High Court Division and as such the impugned judgment and decree is not liable to be interfered with by this Court. The learned Counsel for the

respondents No.1&2 submits next that in the instant case '*aposhnama*' which was executed between the parties was such a nature that non-compliance of the condition of that '*aposhnama*' will make the same revocable and it is apparent from the evidence and admission of the parties that the conditions of the said '*aposhnama*' were not fulfilled and accordingly it was impliedly revoked. Since as per section 21 of the Specific Relief Act the contract which is in its nature revocable cannot be specifically enforced and in view of the aforesaid aspects the learned appellate Court below as well as the High Court Division legally decided that the original suit is not maintainable and as such the impugned judgment and decree is quite justified. The learned Counsel for the respondents No.1&2 contends lastly that as per provisions of Sections 12, 21 and 22 of the Specific Relief Act, the original suit for specific performance of contract is barred. In reality, there was no contract for sale between the parties and in view of the aforesaid aspects, the appellate Court below as well as the High Court Division legally decided that the suit is not maintainable and there is no tangible evidence in favor of the plaintiff to prove the specific performance of contract and there is no illegality or irregularity and no misreading and non-reading of evidence and non-consideration of material facts resulting in an error in the decision occasioning failure of justice and as such the impugned judgment and decree does not call for interference by this division.

We have perused the judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008. We have also considered the submissions of the learned Counsel for both sides and gone through the judgment and decree of the appellate Court below and the trial Court, evidences as well as other materials on record.

Admittedly, on 14.10.2003 an unregistered '*aposhnama*' was executed between the plaintiff and defendants. In the said '*aposhnama*' there was a condition between plaintiff and the defendants that after fulfillment of the conditions they would mutually withdraw their cases at their own responsibility and the defendants would execute a deed in favor of the plaintiff in respect of 'Ka' and 'Kha' schedule land while the plaintiff would execute a deed in favor of the defendants in respect of homestead measuring 11 decimals. The main contention between both the parties is that whether due to non-fulfillment of terms and conditions of said '*aposhnama*' the plaintiff is entitled to get the decree of specific performance of contract on the basis of said '*aposhnama*'.

The plaintiff claims that subsequent to '*aposhnama*' the defendants No.1-3 written two sale deeds in favour of the plaintiff on 18.10.2003, however, although the defendants No.1-2 put their signatures in the deeds, the defendant No.3 did not put his signature therein. The plaintiff filed the photocopies of the said deeds which were marked as Exhibits-1 series. Now let us examine whether as per

the terms and conditions of '*aposhnama*' dated 14.10.2003 the cases pending between the parties were withdrawn or not.

P.W.1 stated in his cross-examination that-

“৫/৬ টা মামলা করেছি ফৌজদারী। বিবাদীরা ৮টা মামলা করে। ১টা মামলা পি.পি.র তদবিরে জেল হয়। ঐ মামলায় ০৮ জন আসামী ছিল। সাক্ষীরা ঐ মামলায় আসামী ছিল। শালীস হয় ১৪/১০/০৩ ইং। খোন্দকারের চেম্বারে বসে হয়। শালীসের শর্ত আমি মানতে রাজি। বিবাদীরা মানে নাই। বর্তমানে আমার দায়েরী ০৩টা ও বিবাদীদের দায়েরী ০১টা মামলা বিচারাধীন আছে।”

It is evinced from the above that both the plaintiff and defendants did not withdraw criminal cases filed against each other and as such no compromise was made between the parties. Since the terms and conditions described in the '*aposhnama*' dated 14.10.2003 regarding the withdrawal of criminal cases had not been fulfilled the said '*aposhnama*' was impliedly revoked. In the premises made above, the plaintiff cannot get relief on the strength of '*aposhnama*' dated 14.10.2003.

It divulges from the record that referring the unregistered sale deeds (Exhibits-1 series) the plaintiff claims that the defendants executed those deeds in pursuant to '*aposhnama*', but those deeds were not registered by the defendants, therefore, the plaintiff prays for specific performance of contract.

In this regard, it is pertinent to discuss Section 54 of the Transfer of Property Act, 1882 which is stated below:

54. “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

(underlines supplied by us)

Thus, a sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. But in the case in hand no pecuniary consideration was dealt with between the parties and as such the transaction in question cannot be termed as sale. Moreover, as it has already been found that due to non-compliance of the terms and conditions of '*aposhnama*' dated 14.10.2003 there is no scope to claim right and title over the suit land by virtue of the alleged unregistered sale deeds.

In view of the discussions made above as well as the legal provisions as stated above, we hold that the plaintiff is not entitled to get a decree of specific performance of contract, but the trial Court without proper appraisal of the oral as well as documentary evidence available on the record and the proposition of law decreed the suit. The appellate Court below lawfully set aside the judgment and decree of the trial Court and the High Court Division on proper scrutiny of the record affirmed the judgment of the appellate Court below. We do not find any deviation in the impugned judgment and decree of the High Court Division.

In view of the reasons stated above and in the light of the above discussions, it does not warrant interference with the impugned judgment and decree dated 16.07.2014 passed by the High Court Division in Civil Revision No.1603 of 2008. Therefore, we do not find any merit in the submissions of the learned Counsel for the appellant and as such the instant Civil Appeal is liable to be dismissed.

Consequently, the instant Civil Appeal is **dismissed** without any order as to costs.

C.J.

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