

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)**

Present:

Mr. Justice Zafar Ahmed

Civil Revision No. 2937 of 2006

Ferdousi Amin Mithun and others

...Petitioners

-Versus-

Abdul Sabur and others

...Opposite Parties

Mr. Mohammad Ziaul Hoque, with
Ms. Nusrat Jahan, Advocates

...For the petitioners

None.

...For the opposite parties

Heard on: 23.04.2025

Judgment on: 05.05.2025

Defendant Nos. 3 and 4 are petitioners in the instant revision. They have challenged the judgment and decree dated 14.06.2006 (decree signed on 20.06.2006) passed by the Additional District Judge, 4th Court, Chattogram in Other Appeal No. 227 of 2003 rejecting the same and affirming those dated 13.05.2003 (decree signed on 20.05.2003) passed by the Senior Assistant Judge, Satkania, Chattogram in Other Suit No. 71 of 1999 decreeing the suit in part. This Court issued the Rule on 14.08.2006.

None of the opposite parties including the plaintiffs has filed vokalatnama in the Rule.

The opposite party Nos. 1-3 as plaintiff filed the suit for specific performance of contract of sale in respect of 66½ decimals of land situated at Banshkhali, Chattogram. Defendant No. 1 was the seller. He filed written statements but ultimately did not contest the suit by giving oral evidence or cross-examining the PWs. Defendant No. 2 is the Government. The present petitioners are successors-in-interest of defendant Nos. 3 and 4. They contested the suit by filing a joint written statement and by giving oral evidence. Defendant Nos. 3 and 4 were added to the suit by way of amendment of plaint.

The case of the plaintiffs, in short, is that defendant No. 1 entered into an unregistered bainapatra with the plaintiffs on 23.02.1997 (exhibit-1) to sell the suit land to them. The purchase price was fixed at Tk. 1,00,000.00. The plaintiffs advanced Tk. 90,000.00 to the defendant No. 1 and obtained possession of the land. On 22.04.1997, the plaintiffs gave Tk. 10,000.00 to the defendant No. 1. Thereafter, the plaintiffs on several dates asked the defendant No. 1 to execute the sale deed and to get it registered. However, the defendant No. 1 refrained from executing the sale deed. On 25.12.1998, the plaintiffs went to the home of the defendant No. 1 and requested him to execute the sale deed and to get it registered, but defendant No. 1

refused to execute the sale deed. Hence, the suit for specific performance of contract.

The case of the contesting defendant Nos. 3 and 4 is that defendant No. 1 executed a bainapatra with defendant Nos. 3 and 4 on 28.11.1997 (exhibit-Kha) in respect of the suit land. The price of the land was fixed at Tk. 5,00,000.00. Defendant Nos. 3 and 4, who are husband and wife, paid Tk. 4,00,000.00 to the defendant No. 1. Defendant Nos. 3 and 4 obtained possession of the suit land. Thereafter, on 30.05.1999, defendant Nos. 3 and 4 paid Tk. 1,00,000.00 to the defendant No. 1 and he executed the sale deed in their favour and the same was registered on 30.05.1999.

The trial Court decreed the suit in part which was upheld by the appellate Court below. Mr. Mohammad Ziaul Hoque, the learned Advocate appearing for the defendant Nos. 3 and 4-petitioners submits that both the Courts below failed to consider the fact that the plaintiffs could not prove the plaint case. Learned Advocate took me through the evidence of PW1 and PW2 and submits that the evidence on record of PWs are totally silent as to the willingness of the plaintiffs to perform their part of the obligations under the contract of sale which is one of the ingredients to obtain a decree for specific performance of contract. In support of the argument the learned Advocate refers to some reported and unreported cases.

Plaintiffs examined two witnesses. PW1 is Abdul Sabur who is plaintiff No. 1. PW2 is Mir Ahmed who is the witness of bainapatra dated 23.02.1997 (exhibit-1). Surprisingly, both PW1 and PW2 are totally silent as to when the plaintiffs asked the defendant No. 1 to execute the sale deed and to get it registered. The plaint story to the effect that the plaintiffs demanded execution of the sale deed on 25.12.1998 has not been reflected in the deposition of the PWs. Moreover, PW1 stated in cross-examination conducted on behalf of defendant Nos. 3 and 4 that no witness was present at the time of payment of money to the defendant No. 1. PW2 in cross-examination conducted on behalf of defendant Nos. 3 and 4 stated that the plaintiffs paid Tk. 10,000.00 to the defendant No. 1 in his presence. Apart from oral evidence, the plaintiffs did not produce any documentary evidence regarding payment of money to the defendant No. 1 although it is stated in the plaint that the payment of money to the defendant No. 1 was put in writing and was signed by him.

In *Chairman, RAJUK and others vs. Khan Mohammad Ameer and others*, 26 BLC (AD) (2021) 219, the Appellate Division held:

“A decree for specific performance of contract is discretionary. Even if the plaintiff is able to prove the execution of the agreement and payment of advance money towards the consideration, the court is not bound to pass a decree. Court is required to look into other factors, such as, the bonafide of the plaintiff and his eagerness in performing

his part of obligation; the hardship of the defendants, if a third party purchases the property in the mean time without notice to the previous contract. If any of the said conditions is found against the plaintiff, he will not get any decree for specific performance.”

In *Mosammat Asma Khatun being dead her heirs and others vs. Md. Abdul Karim being dead his heirs and others*, Civil Appeal No. 222 of 2016, date of judgment 23.05.2023 (unreported), the Appellate Division observed:

“Specific performance of contract is an equitable and discretionary relief to be given by the competent Court exercising the same judiciously. To get relief it is imperative upon the plaintiff to prove that there was agreement for sale and consideration was settled and pursuant to the agreement a considerable amount was paid out of settled consideration, the plaintiff has already performed or was always ready and willing to perform the essential terms of agreement which were to be performed by him. The Court shall judge the conduct of the plaintiff having regard to the entirety of the pleadings as to the evidence brought on records.”

The trite law is that the plaintiff has to prove his own case. The weakness of the defendant’s case or even an *ex parte* proceedings does not relieve the plaintiff of his legal obligation to prove his own case. In the case in hand, the evidence adduced by the plaintiffs failed to prove that the plaintiffs were willing to perform their obligation. Moreover, the evidence in respect of consideration money paid to the defendant No. 1 has not been proved on a balance of probability. Both

the Courts below failed to consider those aspects of the case. The Courts below relied on the written statements of the defendant No. 1 (seller) in which it is stated that he (defendant No. 1) had executed the bainapatra with the plaintiffs and obtained money. It is already noted that the defendant No. 1 ultimately did not contest the suit. Therefore, the written statements of defendant No. 1 was not proved and the same must be kept out of consideration. This proposition of law is supported by the *ratio* laid down in ***Md. Serajul Islam vs. Mrs. Hosneara Begum and others***, 21 BLT 411 at para 19. Thus, the Courts below committed an error of law resulting in an error in the decision occasioning failure of justice. Therefore, the Rule succeeds.

In the result the Rule is made absolute. The judgments and decrees passed by the Courts below are set aside. The suit is dismissed.

Send down the L.C.R.