

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,
Chief Justice
Mr. Justice M. Enayetur Rahim
Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 222 OF 2016.

(From the judgment and order dated 12.06.2012 passed by the High Court Division in Civil Revision No.1725 of 2007)

Mosammat Asma Khatun being
dead his heirs: Md. Anisur
Rahman and others : Appellants.

=Versus=

Md. Abdul Karim being dead
his heirs:
Rahman and others: Respondents.

For the Appellants : Mr. Kazi Akter Hamid, Senior
Advocate, instructed by Mr.
Md. Abdul Hye Bhuiyan,
Advocate-on-Record.
For the Respondent No.1: Mr. Probir Neogi, Senior
Advocate, instructed by Mr.
Syed Mahbubar Rahman,
Advocate-on-Record.
For the Respondent No.2: Mr. Sheikh Mohammad
Morshed, Additional
Attorney General,
instructed by Mr. Haridas
Paul, Advocate-on-Record.
Respondent Nos.3-13 : Not represented.

Date of hearing : 15.03.2023, 28.03.2023, 29.03.2023,
05.04.2023, 03.05.2023 & 10.05.2023.

Date of judgment : 23.05.2023.

J U D G M E N T

Hasan Foez Siddique, C. J: This civil appeal is directed against the judgment and order dated 12.06.2012 passed by the High Court Division in

Civil Revision No.1725 of 2007 making the Rule absolute.

The relevant facts, for disposal of this appeal, in short, are that respondent No.1 herein as plaintiff filed Title Suit No.166 of 1977 in the third Court of Subordinate Judge, Dhaka (which was subsequently renumbered as Title Suit No.22 of 2003) for specific performance of contract stating that the suit land measuring an area of 7 katha 9 chhataks of plot No.163A, Motijheel Commercial Area, Dhaka was leased out to Abdus Sattar Bepari, predecessor of the defendant Nos.1 to 12 for 99 years by the Government at a consideration of tk.48,301/- for construction of building. Out of the said amount, Abdus Sattar Bepari paid tk.10,640/- only and unpaid premium was tk.37,661/- which was to be paid by installments as per terms and conditions set forth in the allotment letter. Abdus Sattar Bepari, in total, paid tk.19,908/- by different installments till 21.01.1971 but he could not make any construction as per terms of the allotment letter due to his financial constraint. He was, therefore, looking for an efficient contractor to finance and supervise the construction. The plaintiff was a first class contractor and had intimacy with Md.

Ariff, one of the sons of Abdus Sattar Bepari. He agreed to invest in the suit land. Accordingly, a deed of agreement and irrevocable power of attorney were executed and registered on 02.02.1971 by Haji Abdus Sattar Bepari in favour of the plaintiff. Sattar Bepari received a sum of tk.75,000/- from the plaintiff as security money. The plaintiff was given possession of the suit land. Due to the war of liberation in 1971, the proposed construction work could not be done. Sattar Bepari also took loan of tk.30,000/- from the plaintiff. In this situation, Sattar Bepari, being unable to return the loan amount and unpaid portion of the lease money, decided to sell the suit land to the plaintiff at a consideration of tk.1,08,000/- with the liabilities. Accordingly, he executed an agreement for sale on 31.07.1971 in favour of the plaintiff and also executed a receipt acknowledging the payment of tk.1,07,000/- and handed over all original documents to the plaintiff. Due to his sudden death in August, 1971 Sattar Bepari could not execute and register the sale deed. He left behind defendants No.1 to 12 as his heirs. It was stipulated in the agreement that Abdus Sattar Bepari would collect permission from the

Government, income tax clearance and other required papers, and inform the plaintiff accordingly and, after payment of balance consideration by the plaintiff, he would execute and register the sale deed. After the death of Abdus Sattar Bepari, the plaintiff requested the defendants who initially assured him to execute and register the sale deed. Meanwhile, the plaintiff continued to pay installments of premium to the Government. He paid tk.9,244/- till 26.07.1973. All of a sudden, the plaintiff came to know that defendant Nos.1 to 12 are trying to sell the suit property elsewhere. Accordingly, the plaintiff served a legal notice dated 02.03.1976 upon the defendants requesting them to execute and register the sale deed but they did not pay any heed to his request. Hence, the plaintiff filed the instant suit.

The defendant Nos.1-7 and 10 contested the suit by filing written statement denying the material averments made in the plaint contending that late Abdus Sattar Bepari did not execute any such agreement for sale. The agreement for construction of building in the suit land was not acted upon and the plaintiff's failure to construct building caused irreparable loss to the

defendants. Late Abdus Sattar Bepari did not receive any money from the plaintiff. With a view to grabbing the suit land the plaintiff brought the suit on the basis of a forged agreement for sale. The suit should be dismissed.

Trial Court, by its judgment and decree dated 28.05.2005, decreed the suit. Then the defendants preferred Title Appeal No.304 of 2005 in the Court of District Judge, Dhaka, which was heard by the Additional District Judge, 6th Court, who after hearing the parties allowed the appeal reversing the judgment and decree passed by the trial Court and decreed the suit in part. Being aggrieved, the plaintiff filed Civil Revision No.1725 of 2007 in the High Court Division and obtained Rule, which was made absolute. Thus, the appellants have preferred this appeal upon getting leave.

Dr. Kazi Akhter Hamid, learned Senior Counsel, appearing for the appellants, submits that the High Court Division erred in law in not holding that the alleged "bainanama" was fake, forged and fraudulent. He submits that the plaintiff failed to prove the story of talk of sale, payment of consideration as well as offer of payment of the rest consideration by the plaintiff to the heirs

of Abdus Sattar Bepari, the High Court Division erred in law in decreeing the suit.

Mr. Probir Neogi, learned Senior Counsel, appearing on behalf of the respondents, submits that all the three Courts believed that the agreement for sale was duly executed by Abdus Sattar Bepari in favour of plaintiff Abdus Karim and the same was partly performed, the High Court Division rightly made the Rule absolute. He submits that the appellate Court also found the agreement for sale genuine but erroneously dismissed the suit, the High Court Division rightly made the Rule absolute upon setting aside the judgment and decree of the appellate Court.

Md. Abdul Karim, on 29.07.1977, filed the instant suit against the successive heirs of Hazi Abdus Sattar Bepari for specific performance of contract and "to give the defendants No.1-12 a reasonable time to obtain sanction from the Government i.e. from the defendants No.14 and 15, to collect Income tax and gains tax clearance certificates and to register the sale deed on receipt of balance consideration; to give a chance to the plaintiff for payment of the balance premium to the credit of the defendant No.15 and to execute and register the sale deed in favour of

the plaintiff through due process of Court in default of the defendants to do the same and to put the plaintiff in possession of the suit land".

It was the plaint case that Hazi Abdus Sattar Bepari took lease of the suit land measuring an area of 7 kathas and 9 chhataks situated within Motijheel Commercial area being plot No.163A (South) by a lease deed dated 11.07.1962. Total lease money was fixed at tk.48,301/- to be paid to the Government. It has been admitted in the plaint that Abdus Sattar Bepari paid taka 19,908/- out of total consideration. It has further been stated in the plaint that till 21st January, 1971 he could not start any construction in the suit land and, thus, the plaintiff, being an enlisted First Class Contractor, came to an agreement with him to construct building. Accordingly, Abdus Sattar Bepari executed a Power of Attorney on 02.02.1971 in favour of the plaintiff. Estimated cost of construction of building was assessed tk.3,54,770/-. He received a sum of tk.75,000/- as security money. He again took loan of tk.30,000/- from the plaintiff and executed an agreement for sale on 31.07.1971 in favour of the plaintiff acknowledging the fact of payment of tk.1,07,000/- and handed over the original title documents to

the plaintiff. It has further been stated in the plaint that Abdus Sattar Bepari died in the first part of August, 1971 (that is, within few days from the execution of the alleged agreement for sale) leaving the defendants No.1-12 as his heirs. In his evidence P.W.1 has stated, “১৪ই ডিসেম্বর/১৯৭১ হাজী সাহেবের তিনপুত্র মোঃ আরিফ, হাজী আলিফ ও আবদুর রউফকে পাক বাহিনী হত্যা করে।” In paragraph 9 of the plaint, the plaintiff stated that he had paid a sum of tk.9,244/- through eleven challans till 26.07.1973. He came to know that defendant Nos. 1 to 12 were trying to sell the scheduled land elsewhere ignoring the terms and conditions of the agreement for sale and thus, he issued legal notice. Receiving such notice, the defendant Nos.2 and 3, hiring some terrorists, tried to dispossess the plaintiff from the suit land. He filed the Title Suit No.209 of 1976 for permanent injunction and, at one stage, he got an order of status-quo. On 03.01.1977 defendants No.2 and 3 dispossessed the plaintiff from the suit land by force. It has further been stated in the paragraph 20 of the plaint that, on the date of execution of agreement for sale, the unpaid premium was tk.26,393/- and the plaintiff paid tk.11,212/- though in paragraph 9 he stated that till 26.07.1973 he paid tk.9244/- only. In

paragraph No.23 of the plaint, the plaintiff stated,

"That the cause of action for the suit arose first on 31.07.1971 the date of execution of the bainapatra in favour of the plaintiff by the predecessor of the defendant Nos.1-12 and thereafter with the expiry of 3(three) years on 31.07.1974 the period within which the contract was to be performed and thereafter on each date of demanded by the plaintiff to the defendant Nos.1-12 and lastly in March, 1976 when the legal notices were served upon the defendants, within plot No.163A Motijheel Commercial Area where the suit properties situated within the jurisdiction of Police Station formerly Ramna and now Motijheel and within the jurisdiction of this Court'".

In paragraph No.23, the plaintiff categorically stated that the cause of action of the suit arose at first on 31.7.1971 and, thereafter, on 31.07.1974, the period within which the contract was to be performed. Article 113 of the first schedule to the Limitation Act provides three years limitation (before amendment) from the date fixed for the performance, or if no such date is fixed, when the plaintiff has notice that performance is refused. When date is fixed for performance of contract, the suit should be

regulated by the first part of the Article 113 of the first schedule to the Limitation Act. In deciding the issue as to the application of first part, the Court shall take into consideration the surrounding circumstances as well. The case at hand does not fall in the first category of Article 113 of the first schedule to the Limitation Act because no date was fixed in the alleged agreement for its performance. Thus the case is to be governed by the second part, that is, when the plaintiff has a notice that performance is refused. In paragraph 23 of the plaint, the plaintiff specifically stated that first cause of action arose on 31.07.1971 and as per first part of Article 113 of the first schedule to the Act the plaintiff was entitled to get 3 years to enforce specific performance of contract, which expired on 31.07.1974. We have found that the suit was filed on 29.07.1977. The expression "date fixed for the performance" is a crystalized notion. When a date is fixed it means that there is a definite time fixed for doing a particular act. The date fixed for the parties for performance of the agreement should be ascertained on the basis of terms and conditions of the contract. In a case, where no time for performance

was fixed, the court had to find out the date, on which, the plaintiff had noticed that the performance had been refused by the defendants.

For getting benefit of second part of Article 113, in paragraph 23 of the plaint, it was inter alia, stated, "----- with expiry of 3(three) years on 31.07.1974 the period within which the contract was to be performed and thereafter on each date of demand by the plaintiff to the defendants 1-12-----". In his evidence, P.W.1 said, "১-১২নং বিবাদীগনকে আমি নালিশী সম্পত্তি বাবদ আমার বরাবরে সাফ কবলা দলিল সম্পাদনের জন্য অনুরোধ করা স্বত্বেও তাহারা টাল বাহানা ক্রমে আমাকে ঘুরাইতে থাকেন।" The aforesaid portion of the pleading and evidence clearly indicate that inspite of repeated demand, the defendants did not execute the sale deed. That is, his approach to execute and register the sale deed was denied repeatedly by the defendants. It was the attempt of the plaintiff to get benefit of the second limb of Article 113 of the first schedule to the Limitation Act. In that case, it was the obligation of the plaintiff to state the definite date of refusal in the pleading which is absent in paragraph 23 of the plaint as quoted earlier. It is difficult for the Court to find the actual date to ascertain as to whether the suit was filed within three years or not or whether the plaintiff

is entitled to get benefit of second limb of Article 113 of the first schedule to the Limitation Act or not. It is the spirit of law that suit was required to be filed within three years from the date fixed for the performance, in the event no date is fixed for the performance within a period of three years from the date when the plaintiff has notice that performance is refused. Such specific assertion is absent in the pleading. Since the instant suit was filed on 29.07.1977 it is apparent that the same was barred by limitation.

It appears from the plaint that the plaintiff has stated that the total lease money was fixed at tk.48,301/-. Out of that amount, Abdus Sattar Bepari paid tk.19,908/- till 21.01.1971 by challan. (paragraph 3 of the plaint). That is, unpaid amount was tk.48301/ - tk.19908/=tk.28393/- . In the plaint, the plaintiff stated that till 26.07.1971 he deposited tk.2000/- and, thereafter, till 26.07.1973 he deposited tk.9,244/-. It was stated that he had deposited tk.11,244/-. According to the plaint a sum of tk.17,149/- remained unpaid to the Government. In order to adjudicate the issues properly, we directed Sheikh Mohammad Morhsed, learned Additional Attorney

General to produce the respective record from concerned Office, that is, the Ministry of Public Works and Housing who produced the same in this Court for our consideration. He submits that pursuant to the terms and conditions to pay the premium the lease itself is liable to be terminated since no construction was made in time and lessee Abdus Sattar Bepari failed to deposit the lease money in time. He submits that the suit land is situated within Motijheel Commercial Area, the present market price of the same is more than taka one hundred crore. He submits that the story of payment of consideration by the plaintiff is inconsistent with the payment as appeared in the concerned record.

In a suit for specific performance of contract to sell relief is given by ordering the person who contracted to sell to do the act which he is under an obligation, a duty enforceable by law, to do that is to say, in the case of a contract to sell land, to execute a sale deed. We have seen the claim of the plaintiff in the plaint as to payment of consideration and obligation of payment of premium and alleged payment of the same. **When a condition was incorporated at the instance of both the parties, such conditions would be binding on**

the parties. In the instant case it was the condition that the plaintiff would deposit the installments of premium. The plaintiff claimed that he had deposited the same. The deposit of premium was essential term of contract. But on perusal of the record, produced from the office of Housing Settlement, it appears that on 16.12.1970, a Certificate Case was started for realization of arrear salami of tk.5,986/- and unpaid interest was tk.1068/-. Certificate debtor of that Certificate Case was Sattar Bepari who paid tk.4000/-, that is, unpaid amount was only tk.1986/- and interest was tk.1068/-. From the office note it further appears that on 24.05.1971, Certificate debtor paid tk.1500/-. Rest unpaid amount was only tk.486/- and interest was tk.1068/-. From the office note dated 21.11.1973, it further appears that unpaid amount and interest was tk.6,670.63/- only. The lessee deposited tk.1494/-. It further appears from the office note dated 09.04.1974, that Certificate debtor had deposited tk.13025/-. Thereafter, he paid premium of 14th installment which was excess amount.

From the amount paid as appeared from the office notes it appears to us that the same does not support the plaintiff's case as pleaded in his

plaint. Moreso, the plaintiff did not comply with the terms and conditions of the alleged agreement for sale even if the same is accepted as genuine one. Non compliance of the mandatory condition itself disentitles the plaintiff from obtaining an equitable remedy for specific performance.

The conduct of the plaintiff is very suspicious. In his cross examination, the P.W.1 admitted that Abdus Sattar Bepari had business of timber, rice mill, saw mill and cargo. He further said, “তহার বাড়ীতে আমার আসা-যাওয়া ছিল না।” Thereafter, he said, “নালিশী জায়গায় ০২/০২/৭১ইং সর্ব প্রথম আসি।” He further said, “চুক্তিপত্র, বায়নার দিন হাজী সাহেবের সাথে আমার ২/ ৩ দিন দেখা হয়।” Thereafter, he said, “হাজী সাহেব সুস্থ ছিলেন না অসুস্থ ছিলেন আমার জানা নাই।” He added, “হাজী সাহেবের ২ ছেলেকে জানতাম আরিফ ও আলিফ সাবালক ছিল। বাকী ছেলে মেয়েরা নাবালক কিনা জানি না।” He admitted that three sons of Haji Sattar, namely, Md. Arif, Alif and Rouf were killed in 14th December, 1971. In the plaint, it appears that some of the heirs of Haji Sattar, that is, defendant Nos.9,10, 12 and 13 were shown as minors.

From the evidence quoted above it is apparent that there are some inconsistencies regarding the claim of the plaintiff, that is, in respect of talk of sale, settlement of consideration, execution of “bainanama”, payment of premium to

the Government by the plaintiff, offer made by the plaintiff to the defendants on the basis of alleged agreement to get the sale deed executed and registered upon payment of rest consideration and as to the delivery of possession of the suit land. All those inconsistencies created a doubt about the genuineness of the alleged agreement for sale and transaction.

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 pleading and the evidence adduced by the plaintiff and the other materials on record raised a doubt about the talk of sale, payment of consideration, execution of bairanama, delivery of

the possession of the disputed property and making construction in the suit land. Without taking any permission and even without making any prayer to the Government to get permission to transfer the suit land, the story of agreement for sale advanced by the plaintiff creates suspicion. Taking into account the fact that during the war of Liberation when every citizen of this country was afraid of saving his life and the fact that Haji Sattar Bepari died subsequent after alleged execution of "bainanama" and the admitted fact that his three sons were killed during the war of Liberation and having regard to the conduct of the plaintiff, we are of the view that the instant case was not fit case for exercising discretion for enforcement of contract and the plaintiff was not entitled to get any relief, the High Court Division has committed an error of law in not exercising its discretion judiciously and, thereby, erroneously made the Rule absolute.

Considering the aforesaid facts and circumstances, we find the substance of the appeal.

Thus, the appeal is allowed. The judgment and order dated 12.06.2012 passed by the High Court

Division in Civil Revision No.1725 of 2007 is
hereby set aside.

C.J.

J.

J.

The 23rd May, 2023.
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