Present:
Mr. Justice Md. Nazrul Islam Talukder
and
Mr. Justice K. M. Hafizul Alam

Criminal Miscellaneous Case No. 39060 of 2018

In the matter of:
Lt. Commander (Retd.) Md. Moslem Uddin
.....Petitioner
-Versus-
The State and others
..... Opposite-parties
Mr. Md. Layekuzzaman Mollah, Advocate with
Mr. Zakir Hossain Bhuiyan, Advocate and
Mr. Mahfujur Rahman Roman, Advocate,
.....For the petitioner.
Mr. A.K.M. Amin Uddin, D.A.G with
Mrs. Helena Begum (China), A.A.G,
Mrs. Kazi Samsun Nahar, A.A.G,
Mrs. Mahjabin Rabbani (Deepa), A.A.G and
Mrs. Yeshita Parvin, A.A.G,
.....For the State-opposite-party.
Mr. Md.Khurshid Alam Khan, Advocate,
... For the Anti-Corruption Commission.
Mr. M Mainul Islam, Advocate,
...For the Opposite-party No. 3

Heard on: 04.12.2018 and 05.02.2019 and
judgment on: 02.02.2020

Md. Nazrul Islam Talukder, J:

On an application under Section 561A of the Code of Criminal Procedure, this Rule, at the instance of the petitioner, was issued calling upon

the opposite-parties to show cause as to why the impugned Order No.68 dated 20.02.2017 passed by the learned Special Judge, 5th Court, Dhaka in Special Case No. 16 of 2016 arising out of Kalabagan Police Station Case No. 32 dated 31.07.2012 under Section 4(2) of the Money Laundering Protirodh Ain, 2009 read with Section 4(2)(3) of the Money Laundering Protirodh Ain, 2012, rejecting the application filed by the petitioner for releasing the scheduled property in his favor from attachment, should not be set aside and/or pass such other or further order or orders as this Court may seem fit and proper.

Facts giving rise to the emergence of the present Rule, in brief, are as follows:

The instant petitioner, earlier as plaintiff, instituted Title Suit No. 686 of 2009 against one Md.

Abu Nayeem and 09 others for specific performance of contract. It was stated in the plaint of that suit, *inter alia,* that the plaintiff entered into an agreement with the defendant Nos. 2-8 of that suit represented by their Power of Attorney holder namely Sharif Madber, to purchase 1650 ajutangsha/10 Katha of land and made payment of earnest money of Taka 5,00,000/- (five lac) on the basis of a registered Bainapatra dated 31.01.2008; however, when the vendor did not execute and register saf kabala deed in favour of the plaintiff i.e the instant petitioner within time after repeated requests made by the petitioner, the petitioner filed the aforesaid suit. Thereafter, the defendants of that suit appeared in the suit initially but they failed to contest the same afterwards and the learned Joint District Judge, 2nd Court, Dhaka vide its judgment and decree dated

09.03.2011, decreed the suit for specific performance of contract in favour of the petitioner. Till date, the said judgment and decree subsists since neither the instant opposite party Nos. 3-4 nor did their predecessors file any appeal for setting aside the same.

Thereafter, the petitioner filed Title Execution Case No. 04 of 2011 for execution of decree and obtained a registered sale deed bearing No. 12897 dated 17.10.2011 by the learned Executing Court. Subsequently, the defendant Nos. 1-7 appeared in the Court and filed Miscellaneous Case No. 23 of 2011 under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure for setting aside the ex parte decree and restoration of the original suit. Subsequently, the defendant Nos. 1-7 filed an application praying for staying all further

proceedings of the Execution Case No. 04 of 2011 but the same was rejected on 01.08.2011. Thereafter, they filed another application of the same nature which was also rejected on 10.10.2011. Lastly, the said rejection order was upheld by the Appellate Division vide its judgment and order dated 04.09.2012 passed in Civil Petition For Leave To Appeal No. 2184 of 2012. Consequently, the Miscellaneous Case No. 23 of 2011 was proceeded by the learned Judge of the Executing Court pursuant to the order dated 04.09.2012 passed by the Appellate Division in the aforesaid Civil Petition For Leave To Appeal. However, on 13.04.2014, the same was dismissed for default and the aforesaid order has never been challenged by anyone till date.

Afterwards, on 12.11.2014, in pursuance of an application filed by the instant petitioner, the learned

Joint District Judge, 2nd Court, Dhaka passed an order to give possession of the suit land to the petitioner removing all the obstacles including removal of lock, if necessary. Accordingly, on 19.11.2014, the learned Joint District Judge, 2nd Court, Dhaka issued warrant to the Bailiff to give actual delivery of possession of the suit land to the instant petitioner. Thereafter, the present petitioner along with the authorized persons appointed by the learned judge of the concerned Court went to the suit land to take delivery of possession thereof but surprisingly found that the said land was totally empty and supervised by the police. It was found that the said land along with other land was being supervised by the police in pursuance of an order dated 27.11.2012 passed by the learned Senior Special Judge as well as the learned Metropolitan

Sessions Judge, Dhaka in connection with the Kalabagan Police Station Case No. 32 dated 31.07.2012.

It may be noted that one Md. Mojahar Ali Sarder, Deputy-Director of Durnity Daman Commission lodged an F.I.R. in the Kalabagan Police Station being Kalabagan Police Station Case No. 32 dated 31.07.2012 under Section 13 of the Money Laundering Protirodh Ain, 2002, Section 4(2) of the Money Laundering Protirodh Ain, 2009 read with Section 4 (2)(3) of the Money Laundering Protirodh Ain, 2012 against Md. Rafiqul Amin, Managing Director of Destiny Tree Plantation Ltd. and Destiny 2000 Ltd. and 11 others implicating them as accused. After lodgment of the F.I.R in the Kalabagan Police Station, on 21.11.2012, Md. Toufiqul Islam, Assistant Director of Durnity Daman

Commission filed an application Under Section 14 of the Money Laundering Protirodh Ain, 2012 before the learned Senior Special Judge as well as Metropolitan Sessions Judge, Dhaka for attaching the entire properties owned by Destiny Tree Plantation Ltd. and Destiny 2000 Ltd. including the scheduled property owned by the instant petitioner.

The record of the case shows that the learned Senior Special Judge as well as the learned Metropolitan Sessions Judge, Dhaka vide its order dated 27.11.2012 allowed the said application and attached the entire properties owned by Destiny Tree Plantation Ltd. and Destiny 2000 Ltd. including the scheduled property owned by the instant petitioner and appointed the Police Commissioner of Dhaka Metropolitan Police as receiver of the lands. Thereafter, pursuant to the lodgment of the F.I.R in

Kalabagan Police Station, the investigating officer started investigation into the same and after a full fledged investigation, on 20.03.2014, the investigating officer submitted an investigation report i.e charge sheet together with sanction sending up all of the aforesaid accused persons for taking cognizance and holding trial of them in Kalabagan Police Station Case No. 32 dated 31.07.2012. Afterwards, the case was transferred to the learned Metropolitan Sessions Judge and Senior Special Judge Court, Dhaka and renumbered as Special Case No. 138 of 2014 arising out of Kalabagan Police Station Case No. 32 dated 31.07.2012 and thereafter, on transfer of record to the Court of learned Special Judge, 5th Court, Dhaka for trial, the case was again renumbered as Special Case No. 16 of 2016 and at

this moment, the trial of the case is being held therein.

On coming to know about the aforesaid facts, on 28.05.2015, the present petitioner filed an application before the learned Metropolitan Sessions Judge and Senior Special Judge, Dhaka in Special Case No. 138 of 2014 arising out of Kalabagan Police Station Case No. 32 dated 31.07.2012 to release the scheduled property in his favour from attachment. However, on transfer of record to the Court of learned Special Judge, 5th Court, Dhaka for trial, the case was renumbered as Special Case No. 16 of 2016. Thereafter, on 27.11.2016, the Destiny Developers Ltd. filed a written objection against the application dated 28.05.2015 filed by the petitioner. In the Court below, the petitioner showed and submitted before the learned Judge of the Court

below that earlier the learned Advocate Md. Mizanur Rahman being engaged in favour of Sharif Madber, the Power of Attorney holder intimated the opposite-party No. 4 about the existence of different pending suits vis-à-vis the scheduled property vide a letter dated 04.03.2010 with a Warning Notice dated 26.02.2010.

It was revealed from the written objection filed by the Destiny Developers Ltd. that Md. Abu Nayeem and others sold/transferred total land of 105 decimals including the scheduled property in favour of Prochhaya Ltd represented by its Managing Director Farjana Anjum vide registered sale deed being No. 5198 dated 28.05.2009. Thereafter, the said Prochhaya Ltd; represented by its Managing Director Farjana Anjum sold out the same to the Destiny Developers Ltd. represented by the opposite

party No. 4 vide registered sale deed No. 1764 dated 20.02.2010. Afterwards, the said Destiny Developers Ltd. represented by the opposite-party No. 4 sold out the same to the Destiny 200 Ltd. represented by the opposite party No. 4 vide registered sale deed No. 3194 dated 16.03.2011.

Thereafter, on 20.02.2017, the Special Case No. 16 of 2016 arising out of Kalabagan Police Station Case No. 32 dated 31.07.2012 was fixed for further trial and the application hearing filed by the petitioner. On the same day, the learned Special Judge, 5th Court, Dhaka, after hearing both the parties and perusing the applications and records, rejected the application filed by the petitioner vide its impugned order dated 20.02.2017.

At this juncture, the third party petitioner approached this Court with an application filed under

Section 561A of the Code of Criminal Procedure, 1898 seeking setting aside the impugned order dated 20.02.2017, so far as it relates to rejecting the application filed by the petitioner and thereby refusing to release the scheduled property in favour of the petitioner from attachment and obtained the present Rule vide order dated 14.08.2018 from this Court.

Thereafter, the aforesaid Rule was fixed before us for hearing and in the midst of the Rule hearing, the present petitioner filed 02 (two) supplementary affidavits stating, *inter alia,* that on 31.03.2019, the case was fixed for further trial, however, the learned Public Prosecutor submitted an application before the learned Judge of the Court below to keep the alamats of the case in the safe custody of the Court, however, the said application was kept with the

record for hearing later on and the date was deferred till 08.04.2019 for further trial, again on 08.04.2019, the case was fixed for further trial, however, since the Jail Authority repeatedly failed to produce the accused person namely Mohammad Hossain in Court, therefore, the learned trial Judge failed to proceed with the trial of the case for non-production of the detained accused person to the Court by the Jail Authority and hence, the learned trial Judge constrained to defer the hearing and fixed the next date on 16.04.2019 for further trial; subsequently, on 16.04.2019, the case was again fixed for further trial, however, on an application for time made by the learned Public Prosecutor for the opposite party No. 2, the learned trial Judge fixed the next date on 30.04.2019 for trial; it was further stated by the petitioner that since the prosecution failed to produce

the witnesses from witness No. 6 onwards despite several orders of Summons and Non Bailable Warrant passed by the learned judge of the trial Court for proper adjudication and early conclusion of trial and hence, it was very much uncertain as to when the trial of the case would be concluded; after obtaining the judgment and decree in Title Suit No. 686 of 2009, the present petitioner being plaintiff started Execution Case No. 04 of 2011 before the concerned court for execution of the decree and thereafter during the pendency of the execution proceeding, the defendant Nos. 1-7 of that suit (the predecessor of the opposite party No. 3) appeared in the concerned court and filed Miscellaneous Case No. 23 of 2011 under Order 9 Rule 13 read with Section 151 of the Code of Civil Procedure for setting aside the ex parte decree and restoration of

the original suit in its original file and number; it was also stated by the petitioner that earlier, one Power Packaging and Printing Ltd. and others filed an application under Section 15 of the Money Laundering Protirodh Ain, 2012 before the learned Metropolitan Special Judge, Special Court, Dhaka for revoking the freezing order so far as it relates to the applicant's different bank accounts which was, on transfer, heard by the learned Special Judge, Court No. 5, Dhaka and after hearing the parties concerned, on 15.01.2017, the learned Special Judge allowed the application allowing the applicant to make transactions from those accounts subject to furnishing a bond onto a non-judicial stamp of BDT. 300.00 (three hundred) undertaking to furnish the necessary information and any lawful demand of any person or entity as determined by Court in respect of

those accounts as and when asked by the learned Judge of the Court. Subsequently, on an application filed by the present petitioner, Destiny-2000 Ltd. represented by its Managing Director and another, were added as opposite party Nos. 3 and 4 vide our order dated 09.07.2019.

The opposite party No. 2, Anti-Corruption Commission contested the Rule by filing a counter affidavit denying all the material facts and the grounds taken in the application filled by the petitioner contending, inter alia, that the property in question along with other properties was attached by the learned Special Judge pursuant to an application filed by the Anti-Corruption Commission in the course of an inquiry initiated by the Anti-Corruption Commission. It is stated therein that the property should not be released before conclusion of the trial

of the case and any order of release may also frustrate the purpose of the trial. It was also contended that the impugned order is a speaking order containing the reasons for the decision and hence, no interference by this Hon'ble Court is necessary unless there is a gross illegality which may cause miscarriage of justice.

The added opposite party No. 3 Destiny-2000 Ltd. also contested the Rule by filing a counter affidavit denying all the material facts and contending, *inter alia*, that one Abdul Barek Sarker was the owner of the disputed property and after him, his heirs Abu Nayeem Sarker and others came to the possession of the property and executed a power of attorney in favour of one Md. Shahid Uddin Khan who on behalf of the heirs of Abdul Barek Sarker sold out the property to Proschaya Ltd.

Thereafter, Proschaya Ltd. decided to sell the property and published notices to this effect in different newspapers to find out if there is any dispute in connection with the property, however, when there was no objection from any quarter, Proschaya Ltd. sold out the property to Destiny Developers Ltd. which then sold out the same to Destiny-2000 Ltd. It is further contended that Proschaya Ltd. went to the possession of the disputed land on 28.05.2009, Destiny Developers Ltd. on 10.02.2010 and Destiny-2000 Ltd. on 16.03.2011 vide different registered sale deeds but the instant third party petitioner having been fully aware of the possession of the property did not implead Proschaya Ltd. or Destiny Developers Ltd. or Destiny-2000 Ltd. as party to Title Suit No. 686 of 2009. It is further contended that in order to come

to a conclusion in this case, it requires extensive scrutiny of facts which can only be done through trial and evidence and such highly contentious and disputed questions of facts being not amenable to adjudication under section 561A of the Code of Criminal Procedure, the instant Rule is not maintainable and liable to be discharged.

At the very outset, Mr. Md. Layekuzzaman Mollah, the learned Advocate along with Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman (Roman), the learned Advocates for the petitioner, having placed the application, the supplementary affidavits and the annexures appended thereto and also having agitated all the grounds taken in the application as well as in the supplementary affidavits, submits that the impugned order dated 20.02.2017 passed by the learned Special Judge, 5th

Court, Dhaka in Special Case No. 16 of 2016 rejecting the application filed by the petitioner and thereby refusing to release the schedule property from attachment is *ex-facie* illegal, misconceived and tainted with malice in law and being based on improper reasoning and non-consideration/non-appreciation of the material facts, the same is liable to be set aside inasmuch as the executing court directed to put the petitioner i.e., the decree holder in possession by removing all obstacles, if any and the same still subsists and it is a fairly settled proposition of law that there is no bar in law to execute the decree passed in a suit for specific performance of contract to put the decree holder in possession of the land or property decreed by the trial court.

Mr. Zakir Hossain Bhuiyan, learned Advocate for the petitioner further submits that the impugned

order dated 20.02.2017 passed by the learned Special Judge, 5th Court, Dhaka in Special Case No. 16 of 2016 rejecting the application filed by the petitioner and thereby refusing to release the schedule property from attachment is violative of sections 3, 48, 52, 53 and 53B of the Transfer of Property Act, 1882 in view of the fact that the petitioner acquired valid right, title and interest in the scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009 arising out of the registered contract for sale and the said contract for sale being earlier in point of time would prevail over the subsequently executed sale deed within the meaning of Section 47 of the Registration Act and as such the impugned order is patently illegal and liable to be set aside.

Mr. Bhuiyan further submits that the impugned judgment and order dated 20.02.2017 passed by the learned Special Judge, 5th Court, Dhaka in Special Case No. 16 of 2016 rejecting the application filed by the petitioner and thereby refusing to release the scheduled property from attachment is *ex-facie* illegal and liable to be set aside in view of the fact that the present petitioner acquired valid right, title and interest in the scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009 and accordingly, he became the lawful owner of the scheduled property in question upon execution of a registered sale deed bearing No. 12897 dated 17.10.2011 by the concerned Court i.e., before 01 (one) year 01 (one) month and 04 (four) days of making of the said

application for attachment dated 21.11.2012; consequently, at the time of making the application for attachment of the property in question by the opposite party No. 2 (Anti-Corruption Commission), Destiny 2000 Ltd. did not have any right, title or interest in the said property, however, the learned Special Judge miserably failed to appreciate this aspect with reference to the documents submitted by the petitioner and passed the impugned judgment and order without applying his judicial mind to the given set of facts and therefore, the impugned order is liable to be set aside.

Mr. Bhuiyan next submits that the learned Special Judge, 5th Court, Dhaka failed to understand the purport and scope of Section 15(3) of the Money Laundering Protirodh Ain, 2009 and on erroneous view rejected the application of the petitioner who is

a *bona-fide* purchaser of the property in question for consideration and he acquired valid right, title and interest in the scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Court of Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009, therefore, the impugned order passed by the learned Special Judge, 5th Court, Dhaka is patently illegal and hence, the impugned order is liable to be set aside and the property in question be released in his favour of the petitioner being released from the attachment.

Mr. Bhuiyan also submits that the learned Special Judge, 5th Court, Dhaka failed to understand the purport and scope of Section 15(3) of the Money Laundering Protirodh Ain, 2009 and on erroneous view rejected the application of the petitioner in view of the fact that Destiny 2000 Ltd. purchased the

schedule property in question during the pendency of Title Suit No. 686 of 2009 before the learned Joint District Judge, 2nd Court, Dhaka and the fact of pendency of the said suit was intimated to the Destiny 2000 Ltd. by a Cautionary Notice dated 26.01.2010 and therefore, Destiny 2000 Ltd. should be subjected to the result of the suit in view of the settled proposition of law that a transfer of the land in suit being subject-matter of the pending suit is hit by the doctrine of *lis pendens* as enshrined in Section 52 of the Transfer of Property Act, 1882 and accordingly, such a transfer is void in the eye of law pursuant to Section 53B of the said Act, 1982, and accordingly, the impugned order passed by the learned Special Judge, 5th Court, Dhaka is *ex-facie* illegal and hence, the impugned order is liable to be set aside and the property in question is liable to be

released from attachment in favour of the petitioner after releasing it from attachment.

Mr. Mahfujur Rahman Roman, another learned Advocate for the petitioner, submits that Section 53B of the Transfer of Property Act, 1882 clearly stipulates that no immovable property under a contract for sale can be transferred except to the vendee as long as the contract subsist, unless the contract is lawfully rescinded, and any transfer made otherwise shall be void, however, the learned Special Judge, 5th Court, Dhaka failed to appreciate the statutory proposition of law and the purport and scope of Section 53B of the Transfer of Property Act, 1882, and on erroneous view rejected the application of the petitioner, and as such, the impugned order is liable to be set aside.

Mr. Roman next submits that since the schedule property in question has got no minimum connection with the alleged money laundering or any such offence/s and the instant petitioner is in no way directly or indirectly connected with the alleged money laundering or any such offence/s and the petitioner is neither an accused in the Special Case nor he is a nominee or in any way representative of the accused person/s of the said case and Destiny 2000 Ltd. does not have any right, title or interest in the said property, on the other hand, the petitioner is a *bona-fide* purchaser of the property in question with value and he acquired valid right, title and interest in the scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Court of Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009, therefore, the

impugned order dated 20.02.2017 passed by the learned Special Judge is liable to be set aside and the property in question should be released in favour of the petitioner.

Both Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman Roman candidly submit that the petitioner could not file appeal against the impugned order in time and having no other alternative remedy, the petitioner prefers this application under Section 561A of the Code of Criminal Procedure before this Court since this Court has the jurisdiction to interfere with the judgment or order passed by the learned Special Tribunal under Section 561A of the Code to prevent the abuse of process of Court and also to secure the ends of justice and on this point, the learned Advocates for the petitioner made some lengthy arguments at the time of motion hearing and

only then, after being satisfied with the aforesaid proposition regarding the maintainability of the case, this Court was pleased to issue the instant Rule.

Both Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman Roman next submit in chorus that since the schedule property in question has not any connection with the alleged money laundering or any such offence/s and the petitioner is in no way directly or indirectly connected with the alleged money laundering or any such offence/s and the petitioner is neither any accused of the special case nor he is a nominee or in any way representative of the accused person/s of the said case and Destiny 2000 Ltd. does not have any right, title or interest in the said property; on the other hand, the petitioner is a *bona-fide* purchaser of the property for value and he has acquired valid right, title and interest in the

scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009, therefore, the impugned order dated 20.02.2017 passed by the learned Special Judge is liable to be set aside and the property in question is liable to be released in his favour of the petitioner being released from attachment.

Both Mr. Bhuiyan and Mr. Mahfujur Rahman Roman further submit that pursuant to Section 14(3) of the Money Laundering Prevention Act 2012 if a freezing or attachment order is passed by the court, in that event the complete statement of the attached or freezed property should be published in the form of a notice in the official Gazette and at least in two widely circulated national dailies, however in the instant case it appears from the attachment order that

no such order was made for publishing the statement either in the official Gazette or in the widely circulated dailies which is a gross violation of statutory provision and as such, the impugned order dated 20.02.2017, passed by the learned Special Judge, 5th Court, Dhaka in Special Case No. 16 of 2016 rejecting the application filed by the petitioner and thereby refusing to release the schedule property from attachment is illegal and liable to be set aside.

Both Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman Roman further submit that the order dated 27.11.2012 attaching the scheduled property owned by the petitioner was passed without hearing the instant petitioner in violation of the fundamental principles of natural justice as such the impugned order dated 20.02.2017 passed by the learned Special Judge, 5th Court, Dhaka in Special

Case No. 16 of 2016 rejecting the application filed by the petitioner and thereby refusing to release the schedule property from attachment should be set aside.

In order to buttress up the above contentions, both Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman Roman, advert to the decisions taken in the case of *Chairman, RAJUK and others vs. Khan Mohammad Ameer and others, reported in 26 BLT (AD) 11, Atif Atiq (Md.) and another vs. Nurun Nahar Begum and others, reported in 18 MLR (AD) 65, Ibrahim Khalil vs. Mujibir Rahman, reported in 18 BLC (AD) 23, Rafiqul Islam vs. Mir Abdul Ali, reported in 44 DLR (AD) (1992) 176, Yeakub Ali and another vs. Md. Ali Akbar Howlader,* reported in *6 MLR (AD) (2001) 232***,** *Mir Abdul Ali vs. Md. Rafiqul Islam,* reported in *40 DLR (AD) (1988) 75,*

Hameswar Barua vs. Poal Chandra Bora and another, reported in *A.I.R. 1928 Calcutta 754, Muzaffar Ali vs. Monwara Hospital, reported in 51 DLR 341, Jamir Ahmed vs. Siddique Ahmed Sowdagor and others reported in, 14 BLT (AD) 16, Mian Asif Islam vs. Mian Mohammad Asif and others, reported in PLD 2001 SC 499, Osman Gani vs. Mainuddin Ahmed, reported in 27 DLR (AD) 61, Husan Ali vs. Azmal Uddin, reported in 14 DLR 392, Subitri Bari vs. Asst. Custodian of Enemy Property and Additional Deputy Commissioner (Rev), Pakistan and others, reported in 39 DLR 172; Chittaranjan Chakraborty vs. Abdur Rab, reported in 2 MLR (AD) 58, Abdul Awal and others vs. Narayan Chandra Das, reported in 13 MLR (AD) 71, Rupali Bank Ltd., Dhaka vs. M/S. Brick Linkers Ltd. and others, reported in 31 BLD (AD) 92; S. N.*

Kabir vs. Mrs. Fatema Begum and others, reported in 4 LNJ (AD) 133, Nazimuddin vs. Bangladesh, reported in 17 BLC (AD) 10, Rabeya Khatun vs. Moniruddin, reported in 8 BLC (AD) 121, Raquibuddin Ahmed vs. SAM Iqbal, reported in 50 DLR 209 and State of Maharashtra vs. Ramdas Shrinivas Nayak, reported in AIR 1982 SC 1249.

Per contra, Mr. Md. Khurshid Alam Khan, the learned Advocate appearing for the opposite party No. 2, submits that submits that the learned Special Judge considering the facts and circumstances of the case and the materials on the record has rightly passed the impugned order which appears to be very justified and that the impugned order is a speaking order containing the reasons therein and as such, the Rule should be discharged.

He next submits that the issue at hand in the instant case is a disputed question of fact which requires to be decided at the trial on evidence and that there is scope to decide the issue in question under Section 561A of the Code of Criminal Procedure and in that view of the matter, the Rule should discharged.

He then submits that the subject-matters of the instant case are the proceeds of organized crimes and that being the reason, the land in question cannot be released in favour of the petitioner in view of Section 15 (2)(1)(Gha) of the Money Laundering Protirodh Ain, 2012.

Mr. Khan categorically submits that the impugned order is an appealable order under the Money Laundering Protirodh Ain, 2012 but since the petitioner could not prefer appeal before the

appropriate forum on time, the application under Section 561A of the Code of Criminal Procedure is maintainable but the issues at hand cannot be resolved by this court at this forum as those are required to be decided before the trial court on taking evidence from the witnesses of the respective parties and making out such submissions, the learned Advocate for the petitioner has not pressed the argument on the point of maintainability, rather he concedes that the instant application is maintainable as has been settled by this Division as well as by the Appellate Division in a good number of cases.

In contrast to submissions advanced by the learned Advocates for the petitioner, Mr. M. Mainul Islam, the learned Advocate appearing for the opposite-party No.3, submits that the order of the Special Judge was passed on 20.02.2017 and the

petitioner had 30 days to prefer appeal against that order, however, the petitioner filed this instant application about 18 (eighteen) months later without offering any plausible explanation for the delay.

He further contends that in the instant case, Section 5 of the Limitation Act shall not apply in view of Section 3 and Section 29 of the said Act because the Money Laundering Protirodh Ain, 2012 is a special law and it has a special provision to file an appeal within 30 days from the date of the order and therefore, the Rule is not maintainable and liable to be discharged.

It is his further contention that Section 561A of the Code of Criminal Procedure enables the High Court Division to invoke its inherent jurisdiction to give effect to any order under the Code or, ii) to prevent the abuse of the process of the Court or, iii)

otherwise to secure the ends of justice, however, in the instant case there is no allegation that the Special Court was *corum non judice* or that there was any legal bar to the case nor is there any allegation of abuse of the process of the Court and hence, the instant application does not come within the purview of Section 561A and accordingly, the Rule is liable to be discharged. In support of the above submission, the learned Advocate refers to the decision in the case of *Mir Mohammad Ali* vs. *State reported in 46 DLR 175* wherein it was held that section 561A CrPC cannot be conceived to give the High Court Division jurisdiction to retrieve the case from the moratorium after they have been buried by limitation.

Mr. Mainul further contends that at the time of filing of the Title Suit No. 686 of 2009, the title no

longer rests in the vendors since the vendors earlier sold the entire property to Proschaya Ltd. vide a registered sale deed being No. 5198 dated 28.05.2009 long before the filing of the said suit and since the instant opposite party Nos. 3-4 or their predecessor were not made party to that suit, the judgment and decree simply fails.

It is his further contention that Destiny-2000 Ltd. was a necessary party to that suit for specific performance of contract and since they were not made party to that suit, the suit was not maintainable and the judgment and decree passed in the suit is bad for defect of parties and hence, the Rule issued in the instant case is liable to be discharged. In support of the above submission, the learned Advocate refers to the decision in the case of *Ezaher Meah vs. Shaher Banu* reported in *49 DLR (AD) 85* wherein it was

held that the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff in order to avoid all controversies. The learned Advocate also puts reliance on the decision in the case of *Nurul Islam and others vs. Jamila Khatun* and others reported in *53 DLR (AD) 45* wherein it was also held that in a suit for specific performance of contract for sale of immovable property plaintiff is entitled to delivery of possession; a trespasser in the suit property is liable to be impleaded in the suit and evicted from the suit property to give effective relief to the plaintiff. In respect of this submission, the learned Advocate has also emphasized on the decisions of the cases of *Jahangir Alam Sarker vs.*

Motaleb and another, reported in *11 BLC 391; Sooraya Rahman vs. Hajee Md. Elias and others,* reported in *8 BLC (AD) 7 and Abdul Khaleque Sowdagar and another vs. Mohammad Fazlul Huq* and another, reported in *26 DLR 247.*

Mr. Mainul next contends that the opposite party No. 3 is a subsequent transferee for value who had paid his money on good faith without notice of the original contract for sale and he has been possessing the same from the date of purchase and hence, the opposite party No. 3 is a *bonafide* purchaser of the entire property for consideration/value thereof and as such, his right should not be affected and he is entitled to hold his title against the plaintiff of the suit (the instant petitioner) for specific performance of contract in view of Sections 53 and proviso of 53A of the

Transfer of Property Act, 1882 read with Section 27 (b) of the Specific Relief Act, 1877.

Mr. Mainul also contends that since the opposite party No. 3 was a necessary party and in his absence, the judgment and decree for specific performance of contract fails in view of aforesaid provisions of law and hence the title is seriously disputed in between the instant petitioner and the opposite party No. 3 which is a disputed question of facts and unless the registered sale deed executed in favour of the opposite party No. 3 is declared null and void by a competent civil court, the same cannot be adjudicated in the instant case by this Court exercising its jurisdiction under Section 561A of the Code of Criminal Procedure.

In support of the above submissions, Mr. M Mainul Islam also refers the decisions taken in the

cases of *Ezaher Meah vs. Shaher Banu, reported in 49 DLR (AD) 85, Nurul Islam and others vs. Jamila Khatun and others, reported in 53 DLR (AD) 45, Jahangir Alam Sarker vs. Motaleb and another, reported in 11BLC391, Sooraya Rahman vs. Hajee Md. Elias and others, reported in 8BLC (AD) 7, Abdul Khaleque Sowdagar and another vs. Mohammad Fazlul Huq and another, reported in 26 DLR 247, Mir Mohammad Ali vs. State, reported in 46 DLR 175 and Chairman, RAJUK and others vs. Khan Mohammad Ameer and others, reported in 26BLT (AD) 11.*

In reply to the submission of the learned Advocate for the opposite party No. 3 regarding maintainability of the instant case, Mr. Zakir Hossain Bhuiyan, the learned Advocate for the petitioner submits that the High Court Division has wide power

and ample jurisdiction to pass order/s to secure the ends of justice and this jurisdiction is a special extra ordinary jurisdiction, the main aim and object of which is to save the people from any agony of the abuse of the process of the Court and also this jurisdiction is designed to do substantial justice.

He further puts reliance on his submission referring the case of *Bangladesh vs. Shahajahan Seraj*, reported in *32 DLR (AD) 1*, wherein by a majority decision, it has been held that although the High Court Division has no power to revise any order, judgment or sentence passed by the Special Judge but the Court has wide jurisdiction under Section 561A of the Code of Criminal Procedure in an appropriate case to prevent the abuse of the process of any Court to secure the ends of justice.

He goes further to submit that the instant case is a fit case to be interfered with by this Court in view of the fact that the impugned order dated 20.02.2017, so far as it relates to rejecting the application of the instant petitioner, suffers from serious illegality and the same is manifestly illegal for being passed on the basis of non-consideration of the materials, evidence and settled propositions of law and therefore, this Court should intervene with the impugned order for the prevention of gross miscarriage of justice.

In reply to the submission of the learned Advocate for the opposite party No. 3 regarding maintainability of the earlier suit for specific performance of contract and judgment and decree passed therein being bad for defect of parties, Mr. Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman

Roman, the learned Advocates for the petitioner vehemently contend that in a suit for specific performance of contract only the parties to the contract are necessary parties and addition of 3rd Party without any reason in such a suit would convert it into a suit for determination of title and this is not permissible in law. In support of this submission, the Advocates have placed reliance on several decisions reported in the case of *Md. Atif Atiq and another* represented by their lawful attorney *SK. Abdul Hye Bacchu Vs Nurun Nahar Begum* and others, reported in *18 MLR (AD) 65* wherein it was held by the Hon'ble Appellate Division that if the property under contract of sale is sold to a third party or remains in possession of third party, the right, title and interest of the person with whom contract was first entered into, shall not, in any way, be affected.

In another case of *Ibrahim Khalil and others Vs Mujibir Rahman and others,* reported in *18 BLC (AD) 23* wherein the Hon'ble Appellate Division held that in a suit for specific performance of contract, the question to be decided whether there had been a valid contract between the parties and whether consideration money was paid as per terms of the contract. Furthermore, in a suit for specific performance of contract, the 3rd Party is not a necessary party to the suit and in this connection, the learned Advocates have referred several decisions including the case of *Nurun Nahar Begum vs Abdul Khaleque Choukder, reported in 43 DLR (AD) 107 wherein our Apex Court held that* addition of party in a suit for specific performance of contract – the appellants averments in the application for addition of party setting up an independent title to the land

disentitle them to be included as parties within the framework of the present suit wherein the real question to be determined is whether the contract for sale between the parties therein was genuine and whether on the basis thereof the plaintiffs are entitled to get a decree. The averments for addition of party will convert the present suit into one for determination of title which is not permissible in law. The similar view was also adopted in several cases of Jamir Ahmed Vs. Siddique Ahmed Sowdagor and others, reported in *14 BLT (AD) 16,* Feroja khatoon vs. brajalal nato & others, reported in *43 DLR 160 and* Muzaffor Ali and another vs. Messrs Monwora Hospital and others, reported in *51 DLR 341.*

Refuting the last submission advanced by the learned Advocate for the opposite party No. 3, Mr.

Zakir Hossain Bhuiyan and Mr. Mahfujur Rahman Roman, the learned Advocates for the petitioner, submit that the predecessor of the opposite party No. 3 namely, Proschaya Ltd. got the registered sale deed being No. 5198 on 28.05.2009 when the registered contract for sale executed in favour of the petitioner subsisted and the same was never lawfully rescinded and accordingly, in view of Section 53B of the Transfer of Property Act, 1882, the subsequent sale deeds shall be deemed to be void *ab-initio*; additionally, at the time of selling the property to the said Proschaya Ltd., the original vendors did not have subsisting interest, right and title over the suit schedule property in view of Section 7 of the said Act since they earlier entered into a registered contract for sale with the instant petitioner and hence, the later executed and registered sale deed/s

is/are void *ab-initio* and the said proposition has been settled by our Apex Court by a series of judicial pronouncements. The learned Advocates for the petitioner further contend that before purchasing the suit scheduled property, the Proschaya Ltd. or the opposite party No. 3 was required to take reasonable care to ascertain that the transferors (the original vendors) had power to make the transfer and/or they have acted in good faith in the transaction in view of Section 41 of the Transfer of Property Act, 1882, otherwise they cannot take the plea of *bona fide* purchasers for consideration/value without notice of the original contract for sale; in order to determine the valid right, interest and title of the vendors over the property, the opposite party No. 3 or their predecessors should have checked up the concerned Sub-Registrar's Office what transfers, if any, had

been made by the transferor. Since registration of any document constitutes sufficient notice in view of Explanation I to Section 3 of the Transfer of Property Act, 1882, the opposite party No. 3 cannot take the plea of their being *bona fide* purchasers for consideration/value without notice of the original contract for sale since the existence of the registered deed of contract for sale executed in favour of the petitioner would be revealed if the opposite party No. 3 or their predecessor would take reasonable care to ascertain the title of their vendor and hence, they cannot be protected by Sections 41, 53 and 53A of the Transfer of Property Act, 1882. In support of this submission, the learned Advocates for the petitioner have placed reliance on a catena of decisions as reported in the case of *Abdul Awal and others Vs Narayan Chandra Das, reported in 13*

MLR (AD) 71 wherein it was held that where the deeds are *void ab-initio* the plaintiff is not required to seek declaration or cancellation thereof. In another case of *Most. Nazera Bibi and another Vs. Abdul Mazid and others, reported in ALR (2018) (1) (AD) 118* it was held that when the document in question is void one, the question of seeking its cancellation would not be necessary; it is only when a document is a voidable, that is valid until it is declared as void, in that case the question of seeking its cancellation would arise. The similar view was also adopted in the cases of *Chitta Ranjan Chakraborty and others Vs. Abdur Rab, reported in 2 MLR (AD) 58, Rabeya Khatun and others Vs. Moniruddin and others reported in 8 BLC (AD) 121, Husan Ali and Another Vs. Azmaluddin and Others, reported in 14 DLR 392, Wahidha Begum Vs. Tajul Islam, reported in 8 BLT*

238 and Nagendra Chandra Bhattacharjee Vs. Parameswari Ray, reported in 9 DLR 476.

The present criminal miscellaneous case has been hotly contested and the learned Advocates for the respective parties have debated the points raised therein at sufficient length. We have passionately heard the submissions of the learned Advocates for the contending parties at length, perused the decisions relied upon by them with utmost circumspection and the relevant provisions of law and also perused the application of the miscellaneous case, supplementary affidavits filed by the petitioner, counter affidavits and relevant Annexures appended thereto.

The case of the present petitioner mainly rests upon four propositions, namely, the consequences of the judgment and decree and subsequent orders

passed in favour of the present petitioner by a competent civil court having jurisdiction to pass the same, the fate of the subsequently registered sale deed executed by the original vendors in favour of the predecessors of the instant opposite party No. 3 and the subsequent sale deeds registered in favour of the opposite party No. 3, whether the opposite party No. 3 or his predecessor was necessary party in the Title Suit filed by the present petitioner and whether there is any error of law apparent on the face of the impugned judgment and order dated 20.02.2017 passed by the learned Special Judge, Dhaka.

We will definitely endeavor to address these propositions along with all other connected issues involved in the Rule in proportion to their relative weight and importance.

Now before looking into the merits of the case, let us examine the maintainability of the instant case and powers of this Court under section 561A of the Code of Criminal Procedure to interfere with the decision pursuant to the order dated 20.02.2017 passed by the learned Special Judge, 5th Court, Dhaka. Although on repeated demands and queries by us, both Mr. Md. Khurshid Alam Khan and M. Mainul Islam primarily concede that the instant case is maintainable and this Court possesses wide jurisdiction to interfere with the decision of the learned Judge of the Court below in order i) to give effect to any order under the Code or, ii) to prevent the abuse of the process of the Court or, iii) otherwise to secure the ends of justice but at the time of hearing Mr. Mainul Islam backtracked from his earlier position and made submissions regarding the

maintainability of the present Rule and hence, it is imperative on our part to examine the laws as well as the decisions of various jurisdictions on the significance and scope of this Court under section 561A of the Code to interfere with the decision of the learned Special Judge if required.

For the ready reference Section 561A is quoted below in verbatim:

"561A. Saving of inherent power of High Court Division

561A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Before we consider the question on the point of maintainability, it is to be noted that every Court, in the absence of any express provision in the Code for that purpose, must be deemed to possess, as inherent in its constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice. This principle flows from the maxim "*quande lex aliquid alicui concedit concedera videtor id sine quores ispsa ease non polest,*" which means, when law gives a person anything it gives him that without which it cannot exist. Section 561A saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. This section was added by the Criminal Procedure Code

Amendment Act (Act XVIII of 1923). In the statement of objects and reasons for this amendment, it was mentioned that “By this section it is prepared to give statutory recognition to the inherent powers of the High Court, a principle which is well recognized.” This section came to a reminder to the High Courts that they were not merely Courts of law, but also Courts of justice and as such, they possessed inherent powers to remove injustice. This section emphasizes that the inherent powers possessed by the High Courts have not in any manner been abridged or limited by the Code. In the case of *Emperor vs Nazir Ahmed, reported in AIR 1945 PC 18 (22), it was held that* “This section gives no new powers; it only provides that those which the Courts already inherently possess shall be preserved and is inserted lest it should be considered that the only

powers possessed by the Court are those expressly conferred by the Code and that no inherent power had survived the passing of the Act."

In the case of *Lala Jairam Dass vs Emperor, AIR 1945 PC 94,* the Privy Council laid down that this section confers no powers. It merely safeguards all existing inherent powers possessed by the High Court necessary (among other powers) to secure the ends of justice.

In this context we would like to point out that the Supreme Court of Bangladesh with 02 (two) Divisions has been established under Article 94 of the Constitution. Under Article 101 of the Constitution, the High Court Division has been conferred such original, appellate and other jurisdictions and powers by the Constitution or any other law. Under Clause 6 of the Fourth Schedule of

the Constitution, all original, appellate and other jurisdiction which was vested in the High Court constituted by the Provisional Constitution of Bangladesh Order 1972 has vested in and is exercised by the High Court Division. Consequently, Courts sub-ordinate to the Supreme Court are established under Article 114 of the Constitution and this Article contemplates the establishment of Tribunals, sub-ordinate to the High Court in view of the fact that Article 109 vested the High Court Division with the powers of superintendence and control over all courts and Tribunals sub-ordinate to it. Article 109, therefore, vests the High Court Division with the powers of superintendence in judicial matters over all courts and tribunals sub-ordinate to it, which implies such courts and

Tribunals which are also set up under other laws as well as those under the Code of Criminal Procedure.

It is a settled proposition set out by our Apex Court in a good number of cases that the inherent jurisdiction is attracted firstly “to make such orders as may be necessary to give effect to any order under the Code”, secondly, “to prevent abuse of the process of any Court” and lastly “otherwise to secure the ends of justice.” In the present case, the inherent jurisdiction under the first category is not attracted. In the second category, the inherent jurisdiction is exercised to “prevent the abuse of the process of any Court.” Process of the Court has been interpreted judicially to anything done by the Court. ‘Abuse’ means misuse, make bad use of, perversion or an unjust or corrupt practice. In a proceeding if the Court does anything unjust or makes bad use of its

powers in so doing, it comes within the meaning of "abuse of process of any Court." The word 'any' in the context of Section 561A cannot be confined only to criminal courts set up under the Code, rather it also includes the Tribunals as well. Consequently, Section 561A emphasizes that the High Court has the widest jurisdiction to pass order or orders to secure the ends of justice. The High Court under this section has the power to entertain applications which are not contemplated under other provisions of the Code or under any other law. A similar view was expressed by Mr. Chagla CJ in the Full Bench decision of the Bombay High Court in the case of the *State of Bombay vs Nilakanth Shripad Bhave and another,* reported in *AIR 1954 Bom. 65.*

In the case of *Mir Mohammad Ali vs State,* reported in *46 DLR 175* as referred by Mr. Mainul

Hossain, it was held by this Division that Section 561A of the Code cannot be conceived to give the High Court Division jurisdiction to retrieve the cases from the moratorium after they have been barred by limitation. On a close reading of the facts of the aforesaid case, it transpires to us that the moot question of the said case was whether the case having been disposed of and their appeal being barred by limitation, they are amenable to the jurisdiction of the High Court under Section 561A of the Code. It was held in that case that when a trial was concluded by a Special Tribunal and judgment and order of conviction and sentence was pronounced, it would be for an Appellate Court to assess the evidence; but when the appeal against such judgment and order of conviction and sentence is barred by limitation, an application under Section

561A of the Code cannot be a substitutive for an appeal unless the Tribunal had no jurisdiction to try the case or that the Tribunal arrived at absurd or preposterous conclusions from the evidence on record. However, the Division Bench also supported the observation made in the *Shahjahan Siraj* case and held that jurisdiction conferred upon the High Court by Section 561A of the Code can be exercised by it for a limited purpose at least in respect of pending cases before the Special Tribunal. The said Bench also held that there is no reason to differ from the view that the High Court can exercise its jurisdiction under Section 561A over the Special Tribunal which is now subordinate to it.

Now, coming back to the case in hand, it is our considered view that the High Court Division has widest jurisdiction to pass order/s to secure the ends

of justice and this jurisdiction is a special extra ordinary jurisdiction, the main aim and object of which is to save the people from any agony of the abuse of the process of the Court and this jurisdiction is also designed to do substantial justice. Hence, the instant case is a fit case to be interfered by this Court for ends of justice as well as for the prevention of miscarriage of justice since the impugned order dated 20.02.2017, so far as it relates to rejecting the application of the petitioner, suffers from serious illegality and the same is manifestly illegal being passed on the basis of non-consideration of the materials, evidence, entrenched provisions, principles and precedents. The unreasonably lengthy submission on this point by Mr. M. Mainul Islam is totally imaginary, beyond reasons and without any basis.

Now, coming to the next proposition of the case as to the consequences of the judgment and decree and subsequent orders passed in favour of the instant petitioner by a competent civil court having jurisdiction to pass the same. It is to be noted that Section 114 (e) of the Evidence Act, 1872 provides that every judicial and official acts have to be presumed to have been rightly done.

Section 114 of the Evidence Act, runs as follows:

Court may presume existence of certain facts-

114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and

public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume –

(a) ……

(b) …….

(c) ……

(d) ……

(e) that judicial and official acts have been regularly performed;

In this case, the present petitioner obtained judgment and decree on 09.03.2011 and got the registered sale deed bearing No. 12897 dated 17.10.2011 and the learned Joint District Judge, 2nd Court passed an order in favour of the petitioner as to giving possession of the suit scheduled land to the petitioner by removing all obstacles including

removal of lock, if necessary and thereby issued writ of delivery of possession to the bailiff to give actual delivery of possession of the suit property to the petitioner. However, the learned Advocate for the opposite party No. 3 raised serious objection as to the enforceability of the judgment and decree and subsequent execution of Sab-Kabala deed in favour of the petitioner by the learned Joint District Judge, 2nd Court, Dhaka pursuant to the judgment and decree. In this point, the learned Advocate for the opposite party no. 3 argued that since there was suppression of material facts, the said judgment and decree and subsequent execution of saf-kabala deed is without jurisdiction.

We do strongly disapprove of this type of unfounded submission advanced by the learned Advocate for the opposite party No. 3 rather it is our

considered view that by now it is fairly settled by a good number of authorities that the onus to prove fraud or material suppression of facts is squarely upon the party who alleges it and a registered document has a presumption of correctness under clause (e) of section 114 of the Evidence Act, 1872.

In this regard a Division Bench of the Supreme Court of India in *State of Maharashtra vs Ramdas Shrinivas Nayak,* reported in *AIR 1982 Supreme Court 1249=1982 Cri. L. J. 1581* held that "*.....the Court is bound to accept the statement of judges recorded in their judgment, as to what transpired in court. It cannot allow the statement of Judges to be contradicted by statements at the Bar or by affidavit and other evidences. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the*

subject. The principle is well settled that the statements of facts as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of facts so stated and no one can contradict such statements by affidavit or other evidences."

In the case of *Raquibuddin Ahmed vs SAM Iqbal and another,* reported in *50 DLR (1998) 209,* a Division Bench of the High Court Division held that "*There is no bar in law to execute the decree passed in a suit for specific performance of contract to put the decree holder in possession of land or property decreed by the trial Court".*

In this regard, we think it is profitable to quote the ratio settled in the case of *Maksud Ali and another vs Eskander Ali,* reported in *28 DLR (AD) 99,* wherein our apex court held as under:

"Possession can be granted by the executing court in a decree for specific performance of contract to sell as it is incidental of the document of sale. Although in this case the decree is silent about delivery of possession but possession in the present suit being incidental to the document of sale the executing court has all jurisdiction to execute the decree by giving possession to the decree holder".

In the present case in hand, the aforesaid judgment and decree dated 09.03.2011 passed by the learned Joint District Judge, 2nd Court and subsequent orders are still in force since neither the opposite party No. 3 nor did their predecessors has filed any appeal for setting aside the same till today. On perusal of the record of the case, we have noticed that the opposite party No. 3 had been intimated

about the pendency of the Title Suit No. 686 of 2009 vide an intimation letter attaching a Cautionary Notice and the same was received on 15.03.2010 by the opposite party No. 3 (Annexure L and L-1 to the petition). Since then the opposite party No. 3 has been sleeping over the matter for years together and has not been awaken till date. Neither the opposite party No. 3 nor did their representatives or predecessors have yet taken any appropriate recourse to challenge the judgment and decree dated 09.03.2011 and hence, there should not be any bar whatsoever to put the decree holder of that suit (the present petitioner) in the possession of the suit scheduled property.

The next proposition of the case is the fate of the registered sale deed registered by the original vendors in favour of the predecessors of the instant

opposite party No. 3 and the subsequent sale deeds registered in favour of the opposite party No. 3 and whether the opposite party No. 3 or his predecessor was a necessary party in the aforesaid title suit filed by the present petitioner.

In this regard we find force in the arguments advanced by the learned Advocates for the petitioner who have strenuously submitted that the present petitioner first came to learn about the opposite party No. 3 when the petitioner and the Bailiff went to the suit scheduled property to have the delivery of possession in favour of the petitioner pursuant to the order of the Executing Court and also when the opposite party No. 3 filed a written objection before the Special Judge against the application filed by the petitioner. The petitioner only then came to know that during the existence of the registered agreement

for sale and during the pendency of the title suit, the vendors transferred the entire property to one Proschaya Ltd. and subsequently to the instant opposite party No. 3 and hence, there arose no question of impleading them in the said suit since by that time the petitioner got the sale deed registered pursuant to the judgment and decree passed in Title Suit No. 686 of 2009. Apart from this, neither the opposite party No. 3 nor their predecessor is a necessary party in the suit for specific performance of contract.

In this context we think it profitable to quote the ratio of *Jamir Ahmed vs Siddique Ahmed Sowdager and others,* reported in *14 BLT (AD) 16,* wherein our apex court held as under:

> *"In a suit for specific performance of contract, the claim of title of a third party cannot be*

considered and as such, the plea of the petitioner that having title in the suit property he is required to be impleaded as defendant does not inspired us at all to interfere in the matter."

The similar view has also been adopted in the case of *Md. Atif Atiq and another vs Nurun Nahar Begum and others*, reported in *18 MLR (AD) (2013) 65,* wherein our Apex Court held that "*if the property under contract of sale is sold to a third party or remains in the possession of the third party, the right, title and interest of the person with whom contract was first entered into, shall not, in any way, be affected."*

In the case of *Ibrahim Khalil and others vs Mujibur Rahman and others*, reported in *18 BLC (AD) (2013) 23,* Mr. Justice Syed Mahmud Hossain,

the incumbent Chief Justice of Bangladesh held as under:

> "*In a suit for specific performance of contract, the question to be decided whether there had been a valid contract between the parties and whether consideration money was paid as per terms of the contract (paragraph-13).*
>
> *This Division even did not approve of addition of party who set up independent title in a suit for specific performance of contract in the case of Golam Kader being dead his heirs: Nurun Nahar Begum vs Abdul Khaleque Choukder, reported in 43 DLR (AD) 107.*
>
> *In the aforesaid case, it has been held that "the appellants' averments in the application for addition of party setting up an independent title to the land disentitle them to be included as*

parties within the framework of the present suit wherein the real question to be determined is whether the contract for sale between the parties therein was genuine and whether on the basis thereof the plaintiffs are entitled to get a decree. It has further held that the averment for addition of party will convert the present suit into one for determination of title which is not permissible in law (paragraph-14).

If defendant Nos. 4-9 is prejudiced by the judgment and decree passed in the suit for specific performance of contract for sale, they may have recourse to legal measures before appropriate forum but they do not have any right to dispute the contract between the plaintiffs and the defendant Nos. 1 and 2 (paragraph-16) (emphasis as laid is ours)".

Now, reverting to the case in hand, in so far as it relates to the registered sale deed in favour of the opposite party No. 3 and its predecessors, the learned Advocates for the petitioner emphatically submit that the predecessor of the opposite party No. 3 namely Proschaya Ltd. got the registered sale deed being No. 5198 on 28.05.2009 when the registered contract for sale in favour of the petitioner subsisted and the same was never lawfully rescinded and accordingly, in view of Section 53B of the Transfer of Property Act, 1882, the subsequent sale deeds shall be deemed to be void *ab-initio*. Additionally, at the time of selling the property to the said Proschaya Ltd., the original vendors did not have subsisting interest, right and title over the suit schedule property in view of Section 7 of the said Act since they earlier entered into a registered contract for sale with the instant

petitioner and hence, the later executed and registered sale deed/s is/are void *ab-initio* and the said proposition has been settled by our Apex Court in a catena of judicial precedents including the case of *Abdul Awal and others vs Narayan Chandra Das* as reported in *13 MLR (AD) 71,* wherein our apex court held as under:

> *"Where the deeds are void ab-initio, the plaintiff is not required to seek declaration or cancellation thereof".*

The similar view has also been expressed in the case of *Most. Nazera Bibi and another vs Abdul Majid and others ALR (2018) (1) (AD) 118,* wherein our Apex Court has held that "*When the document in question is void one, the question of seeking its cancellation would not be necessary. It is only when a document is voidable, that is valid until it is*

declared as void, in that the question of seeking its cancellation would arise." This finds endorsement in a good number of cases including the one of *Sree Chitta Ranjan Chakraborty being dead his heirs Ashish Chakraborty reported in 2 MLR (AD) 58* and the ratio thereof is not reproduced herein for the sake of brevity.

On the contrary, the learned Advocate for the opposite party No. 3 did not agree with the submission advanced by the learned Advocates of the petitioner on Section 53B of the Transfer of Property Act, 1882 mainly on the ground that the section has been added to the Act recently and by this addition all the previous decisions of the Court regarding Sections 53 and 53A have lost binding effect and pursuant to this section, an immovable property under a contract for sale cannot be

transferred except to the vendee, any transfer made shall be void. According to him, this argument is fully misconceived for the reasons that section 53B of the Act, 1882 has got no *non obstante* clause and hence, it has no overriding effect on other provisions of the said Act. This section cannot be read alone when the other sections of the Act are specifically giving some rights to the transferee in good faith for consideration who has no notice of prior contract for sale. Therefore, section 53B of the Act, 1882 must be read in juxtaposition with other relevant sections of the said Act i.e. Section 53, 53A and section 27 (b) of the Specific Relief Act, 1877. Therefore, from a combined reading of those relevant sections together it clearly transpires that the right of the subsequent purchaser for consideration, as in the

present case, having no prior notice of the contract for sale, is fully protected.

Now in order to come to a conclusion in this context, we need to see the relevant provisions as referred by the learned Advocates for both the parties. Sections 53, 53A and 53B of the Transfer of Property Act, 1882 run as follows:

“Fraudulent transfer

53.(1) Every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf, or for the benefit of, all the creditors.

(2) Every transfer of immoveable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

"Part performance

53A. Where any person contracts to transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the

transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract:

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

"Immoveable Property under a contract for sale not to be transferred

53B. No immoveable property under a contract for 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."

Again, Section 27 of the Specific Relief Act, 1877 runs as under:

“Relief against parties and persons claiming under them by subsequent title

27. Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

(a) ……;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) ……;

(d) …….;

(e) ……..”

In deciding this issue it may be noted further that in the case of *Md. Nazimuddin vs Bangladesh*

and others, reported in *17 BLC (AD) 10,* our Apex Court held that "*it is the cardinal rules of interpretation that interpretation of any provision in isolation without taking into consideration the allied provisions is not permissible.*"

The similar view has also been taken by our Apex Court in the case of *S. N. Kabir vs Mrs. Fatema Begum and others,* reported in *4 LNJ (AD) 133,* wherein it has been observed that "*One of the basic rules of interpretation of statutes is that to understand the meaning of a particular provision of an Act one is to read the Act as a whole each part shedding light on the other.*"

Similarly, in the case of *Rupali Bank Ltd., Dhaka vs M/s. Brick Linkers Ltd. and others*, reported in *31 BLD (AD) 93,* our Apex Court observed that "*It sometimes happens that there is*

repugnancy between enacting clauses and the question then arises, how the Act, taken as a whole, to be construed. The generally accepted Rule with regard to the construction where there are two sections dealing with the same subject matter, one section being unqualified and the other containing the qualification, effect must be given to the section containing the qualification."

Accordingly, although there is no *non obstante* clause in Section 53B of the Act, 1882, but the said section provides a negative or prohibitory form in default of following them the consequences have also been stated their being the acts or actions beyond the negative or prohibitory form shall be void. In this connection, the case of *Osman Gani vs Mainuddin Ahmed* reported in *27 DLR (AD) 61, may be referred to, wherein* the Apex Court held that

"*The second proviso to the seventh paragraph of the Fourth Schedule has been cast in a negative or prohibitory form. It is a cardinal rule of construction that where statutory restrictions are couched in negative terms they are almost invariably held to be mandatory*". The similar view has also been taken by the Supreme Court of Pakistan in the case of *Asif Islam vs Muhammad Asif,* reported in *PLD 2001 SC 499,* wherein a Division Bench held that "*Statute is understood to be directory when it contains matter merely direction but not when those directions are followed up by an express provision that in default of following them the acts shall be null and void. If the provision is mandatory, disobedience entails serious legal consequences amounting to the invalidity of the Act done in disobedience to the provision."*

On the contrary, although the proviso of Section 53A of the Act, 1882 starts with negative form but the said provision has not spelt out any consequent effect and therefore, the said provision will not put any bar on the qualified provision as spelt out in Section 53B of the Act, 1882 and therefore, Section 53A will not be applicable in the case in hand.

Having carefully gone through the aforesaid provisions as well as other relevant provisions, we find force in the arguments advanced by the learned Advocates for the petitioner to the effect that before purchasing the suit scheduled property, the Proschaya Ltd. or the opposite party No. 3 was required to take reasonable care to ascertain that the transferors (the original vendors) had power to make the transfer and/or they have acted in good faith in

the transaction in view of Section 41 of the Transfer of Property Act, 1882, otherwise they cannot take the plea of their being *bonafide* purchasers with consideration/value. In order to determine the valid right, title and interest of the vendors in the property, the opposite party No. 3 or their predecessors should have checked up the Registrar's Office as to what transfers, if any, had been made by the transferor. Since registration of any documents constitutes sufficient notice in view of Explanation I to Section 3 of the Transfer of Property Act, 1882, and hence, the opposite party No. 3 cannot claim to be a *bonafide* purchaser for consideration/value without notice since the existence of the registered deed of agreement for sale would be revealed if the opposite party No. 3 or their predecessor would take reasonable care to ascertain the title of their vendor

and hence, they cannot be protected by Section 41, 53 and 53A of the Transfer of Property Act, 1882 and section 27 (b) of the Specific Relief Act, 1877.

In this context it may further be stated that in the case of *Rabeya Khatun vs Moniruddin and others*, reported in *8 BLC (AD) 121* the Apex Court held that "*The ratio of judicial pronouncements is that for applicability of section 41 of the Act, 1882 primarily two things must concur, 1) that the person i.e., ostensible owner, who has no real title was clothed with the insignia of ownership with the consent, express or implied, of the real owner; and 2) that the person purchasing for value from the ostensible owner shall take reasonable care to ascertain that his transferor has authority to make the transfer. Because of authoritative of pronouncement of series of cases it is also the settled*

matter that a person purchasing from a person who is not the real owner can only protect himself by showing that he acted as a prudent man and that if he makes no inquiry into title, such as a prudent purchaser would make, or avoids prosecuting such an inquiry he cannot claim protection and the principle that a man cannot give what he has not must applied." Now, as to making reasonable inquiry by the purchaser, such as a prudent purchaser would make, a Division Bench of the High Court Division in the case of *Husan Ali and another vs Azmaluddin and others,* reported in *14 DLR 392* has held that "*Section 41 of the Transfer of Property Act makes it incumbent upon the transferee to act in good faith and to take reasonable care to ascertain that the transferor had power to make the transfer. It is obvious that the first step which the transferee is*

expected to take is to search the registration office to ascertain what transfers, if any, had been made by the transferor. The transferee is not entitled to the benefit of section 41 of the Act, 1882 if he or she fails to do so (para-15) (emphasis as laid is ours).”

In another case a Division Bench of the High Court Division held that “*If one wants to be protected under Section 41 of the Transfer of Property Act, 1882 he is required to prove that he took all reasonable care to ascertain the title of his vendor. He inquired at least in the local sub-registrar’s office to know if the land had charge or previous encumbrance or not to establish his bonafide (8 BLT 238)*. More so, in another case the High Court Division held that “*Registration is sufficient notice when the document is compulsorily registrable* (*9 DLR 476)*.”

Accordingly, the contention of the learned Advocate for the opposite party No. 3 as to his claim being *bonafide* purchaser for consideration without notice of the previous contract for sale does not satisfy us at all. In this regard, in order to effectuate the right, title and interest of the opposite party No. 3 pursuant to the registered sale deeds executed in his favour, the opposite party No. 3 ought to have filed a separate suit seeking adequate reliefs for protecting its right, title or possession, if any, in the suit property and having failed to do so, their contention cannot be considered in the instant case in view of the fact that the present petitioner relies on his right, title and interest in the property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Judge in Title Suit No. 686 of 2009 and subsequent registered deed of sale dated 17.10.2011

executed by Court and the same being subsisting, is binding on all concerned, whereas, the opposite party No. 3 only relies on the registered deed of sale and the same is void *ab-initio* in view of Sections 7, 41 and 53B of the Transfer of Property Act, 1882. The plea of subsequent transferee with value and that he had no notice of the previous sale agreement was settled by the Appellate Division in the case cited in *21 DLR (AD) 333,* wherein, it was held that "*The onus lies on the subsequent transferee to prove absence of such notice and mere denial in the written statement that he had no notice of the previous sale is not sufficient to discharge onus*."

Now again coming to the case in our hand, in dealing with the application for releasing the property from attachment filed by the petitioner, the learned Special Judge ought to have considered that

the schedule property in question has not any connection with the alleged money laundering or any such offence/s and the instant petitioner is in no way directly or indirectly connected with the alleged money laundering or any such offence/s and the petitioner is neither any accused of the special case nor is he any nominee or in any way representative of the accused person/s of the said case and the learned Special Judge failed to consider that Destiny 2000 Ltd. did not have any right, title or interest in the said property; on the other hand, the petitioner is a *bona-fide* purchaser of the property in question with value and he acquired valid right, title and interest in the scheduled property on the strength of the judgment and decree dated 09.03.2011 passed by the learned Joint District Judge, 2nd Court, Dhaka in Title Suit No. 686 of 2009.

The learned Special Judge further failed to consider that the petitioner acquired valid right, title and interest in the scheduled property and since the judgment and decree dated 09.03.2011 and subsequent orders passed by the learned Joint District Judge and the registered sale deed in favour of the petitioner still subsist and the opposite party No. 3 or their predecessor had never attempted to challenge or set aside the same in spite of having definite and specific knowledge about the said judgment and decree and subsequent orders of a competent civil court, and hence, the petitioner is entitled to have the scheduled property released in his favour from attachment.

Finally coming to the next contention as to whether there is any error of law on the apparent face of the impugned order dated 20.02.2017 passed by

the learned Special Judge, Dhaka it is needless to mention that the learned Special Judge on erroneous view arrived at a wrong conclusion and the learned Special Judge failed to consider the proposition of Section 47 of the Registration Act in view of the fact that sale deed executed earlier but registered later in point of time will prevail over the sale deed executed later but registered earlier. The criterion in such cases for the purpose of determining when the sale takes effect is not the date of registration but the date of execution of the deed itself. Therefore, in rejecting the application of the petitioner for non-consideration of law the Court did unjust or made bad use of its powers in so doing, and hence it should come within the meaning of “abuse of process of any Court” for which the instant case is

very much maintainable under section 561A of the Code of Criminal Procedure, 1898.

Mr. Mainul Islam, the learned Advocate for the opposite party No. 3 draws our attention to the decision taken in the case of *Chairman, RAJUK and other vs Khan Mohammad Ameer and others,* reported in *26 BLT (AD) 11,* wherein our Apex Court held as under:

"*A decree for specific performance of contract is discretionary. Even if the plaintiff is able to prove the execution of an agreement and the 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 meantime 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.

Defendants acknowledged the receipt of Tk. 55,50,000.00 although the plaintiff is claiming that he has paid Tk. 2,19,80,000.00 but his claim is inconsistent, inasmuch as, he claimed that a portion of the amount has been kept with the attorney. The defendants are disputing the claim of the plaintiffs. On consideration of the facts and circumstances of the matter, this Court is of the view that if the plaintiff is given a solatium ends of justice would be made and multiplicity of proceedings would also be curtailed over the property."

The facts of the aforesaid case are quite distinguishable from the present one since in the present case the suit for specific performance of contract for sale has already been decreed in favour of the present petitioner by the concerned Court considering all the determining factors for decreeing such suit and the same still subsists. Other distinguishable factor in the present case is that the plaintiff (the petitioner herein) could categorically prove his eagerness in the said suit to perform his part of obligation considering which the suit was decreed in his favour. Furthermore, the present petitioner has never expected any solatium from the opposite party No. 3 or from his predecessors and therefore, we do not find any reason to support the submission advanced by the learned Advocate for

the opposite party No. 3 since the same has no manner of application in the instant case.

On the other hand, all the decisions referred to us by the learned Advocates for the petitioner as mentioned and quoted above so far as it relates to the facts of the instant case are binding upon us as per the rules of interpretation and as such, we are constrained to hold that the opposite parties have hopelessly failed to prove their pleas. On the other hand, the petitioner has been successfully able to prove his supplications by referring to the relevant statutory provisions, entrenched legal principles and judicial pronouncements of convincing nature.

Having considered all the facts and circumstances of the case, the submissions advanced by the learned Advocates for the respective parties,

the propositions of laws cited and discussed above and the foregoing discussions, observations and reasons, we find merit in the Rule for which it succeeds.

In the result, the Rule is made absolute without any order as to costs.

In consequence thereof, the impugned order dated 20.02.2017 passed in Special Case No. 16 of 2016 by the learned Special Judge, 5th Court, Dhaka refusing to release the schedule property infavour of the petitioner releasing the same from attachment is, hereby, set aside.

The learned Special Judge, 5th Court, Dhaka is directed to release schedule property in favour of the petitioner releasing the same from the attachment

within 30 days from the date of receipt of this judgment and order.

The learned Special Judge, 5th Court, Dhaka is further directed to proceed and conclude the trial of the case in accordance with law.

Communicate the judgment and order to the learned Judge of the concerned court below at once.

K. M. Hafizul Alam, J:

I agree.