Bench:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice Md. Akhtaruzzaman

Civil Revision No. 1592 of 2018

Md. Nurul Alam and another ..... petitioners
-Versus-
Sufia Khatun being death her heirs:
1(a) Shawkat Osman and others
.....opposite parties

Mr. Rehan Husain with
Mr. Md. Jashim Uddin, Advocates
..... for the petitioners

Mr. Depayan Chandra Saha, Advocate
..... for opposite parties 1 and 2

Judgment on 15.01.2024

Bhishmadev Chakrabortty, J.

At the instance of defendants 1 and 2 this Rule was issued calling upon plaintiff-opposite parties 1 and 2 to show cause as to why judgment and order dated 25.02.2018 passed by the Joint District Judge, Court No.1, Cox's Bazar in Review Miscellaneous Case No.65 of 2017 allowing the case setting aside order dated 18.04.2017 passed by the same Court in Other Class Suit No.25 of 2014 rejecting the plaint under Order 7 Rule 11 of the Code of Civil Procedure (the Code) should not be set aside and/or such other or further order or orders passed to this court may seem fit and proper.

At the time of issuing the Rule, all further proceedings of the aforesaid other class suit was stayed for a limited period which was subsequently extended and still exists.

Facts relevant for disposal of the Rule, in brief, are that opposite parties 1 and 2 herein as plaintiffs instituted Other Class Suit No.25 of 2014 in the aforesaid Court for specific performance of contract impleading the above petitioners as defendants. In the plaint they stated the facts that defendants 1 and 2 were the owners in possession of the suit land as detailed to the schedule of the plaint. They executed and registered a *bainapatra* in favour of the plaintiffs on 06.12.2012 to sell the land at a consideration of Taka 11.00 lac taking earnest money of Taka 4.5 lac with condition to pay the balance amount of Taka 6.5 lac within 2 months. They handed over possession of the suit land to the plaintiffs. The plaintiffs erected boundary wall around the land and have been possessing the same. Subsequently, the plaintiffs paid Taka 6.00 lac to the defendants through a money receipt. They offered balance amount of Taka 50 thousand to the defendants and requested them to execute and register the deed of sale but they refused to do so. Hence the suit for specific performance of contract by depositing balance amount of Taka 50 thousand.

Defendants 1 and 2 filed a set of written statement denying the statements made in the plaint. They contended therein that the plaintiffs paid them Taka 4.5 lac as ernest money and they executed and registered the *bainapatra.* Subsequently, they received Taka 1.5 lac from the plaintiffs and put their signatures on some blank stamp

papers. The plaintiffs fraudulently inserted Taka 6.00 lac in the stamp papers showing payment of that amount and instituted the suit on false averments. In the aforesaid premises, the suit would be dismissed.

During pending of the suit, defendants 1 and 2 filed an application in the trial Court under Order 7 Rule 11 (a) and (d) of the Code for rejecting the plaint taking grounds that at the time of filing the suit, the plaintiffs had to deposit unpaid amount of Taka 6.5 lac as per *bainapatra* but they deposited Taka 50 thousand only through *chalan* which is a clear violation of the provisions of section 21A (b) of the Specific Relief Act, 1877 and as such the plaint would be rejected. The plaintiffs opposed the application by filing written objection denying the statements made in the application. The learned Judge after hearing both the parties by its judgment and order passed on 18.04.2017 rejected the plaint. In deciding so, the learned Judge held that the suit is barred under section 21A (b) of the Specific Relief Act.

The plaintiffs then filed Review Miscellaneous Case No.65 of 2017 in the same Court under Order 47 Rule 1 of the Code taking grounds that the plaintiffs submitted money receipt of further payment in the Court through a *firisti* but the learned Judge without taking it into his notice and the defendants' written statement of making further payment allowed the application for rejection of the plaint. The above error on the part of the Court is apparent on the face of the record, and

as such the order should be reviewed. After hearing, the learned Judge allowed the said miscellaneous case by the judgment and order under challenge.

In the midst of hearing of the Rule, the petitioners have filed an application to convert the instant civil revision into a first miscellaneous appeal. In support of it, Mr. Husain submits that the impugned order passed in a review miscellaneous case was appealable under Order 43 Rule 1(w) of the Code. Inadvertently, they filed this revision and obtained this Rule. Therefore, this revision is required to be converted into a first miscellaneous appeal. We kept the aforesaid application with the record to be considered at the time of disposal of the Rule on merit, if required.

We have gone through the impugned order, grounds taken in the revisional application and application for converting the revision into a miscellaneous appeal. In view of the *ratio* laid in the cases of Ram Taran & others Vs. Sukumari Debi, 5 DLR 351; Jnanadasundari Nandi Vs. Narayan Chandra Sardar and others, 7 DLR 627; the land Acquisition Collector, Rawalpindi Vs. Lieutenant General Wajid Ali Khan Burki, 12 DLR (WP) 10; Azibur Rahman alias Arju Vs. Kala Miah and another, 35 DLR 77 and Israil Hossain Vs. Himalaya Ice & Cold Storage Limited, 46 DLR 44, we find no bar in converting the revision into a first miscellaneous appeal. The Rule of the instant civil revision was issued on 20.05.2018 and it came up for hearing in this

Bench in 2023. If the revision is converted now into a first miscellaneous appeal the question of admission of the appeal and service of notices upon the respondents will arise. The requisite Court fees paid in the revision as well as to be paid in the miscellaneous appeal are same. Therefore, for convenient of all and in view of the *ratio* laid in the aforesaid cases, we are treating this revision as a first miscellaneous appeal without further delay in disposal of the disputed issue.

Mr. Rehan Husain, learned Advocate for the petitioners takes us through the provisions of section 21A(b) of the Specific Relief Act and submits that as per the provisions laid in the aforesaid section the plaintiffs had to deposit the balance amount at the time of filing of the suit. The balance amount of consideration would be the amount as per *bainapatra.* But the plaintiffs deposited Taka 50 thousand showing payment of Taka 6.00 lac through a money receipt which cannot be accepted as per law. In this connection Mr. Husain refers to the cases of Abdul Kalam Vs. Md. Mohiuddin and others, 69 DLR (AD) 239 and Syed Amir Ali alias Syed Faizul Islam Vs. Syed Asaddar Ali and others, 69 DLR 349. He then refers to the provisions of Order 47 Rule 1 of the Code and submits that against the order of rejection of the plaint, the plaintiffs ought to have preferred an appeal before the competent Court but without doing so they filed review miscellaneous case which is not maintainable. Under the aforesaid Order and Rule of

the Code, a review miscellaneous case can be filed on the ground of discovery of new and important facts or any mistake or error apparent on the face of the record. But here in allowing the miscellaneous case, the Court revisited the issues he settled earlier which he cannot. No error is apparent on the face of the record in rejecting the plaint and as such the impugned judgment and order is to be interfered with by this Court. He further submits that the provisions of section 21A(b) of the Specific Relief Act is mandatory which is to be strictly complied with by the plaintiffs in filing a suit for specific performance of contract. The plaintiffs failed to comply with the provisions of law and as such the trial Court rejected the plaint under Order 7 Rule 11 (d) of the Code. The learned Joint District Judge on misconception of law reviewed the said order which is under challenge. In the premises above, the impugned judgment and order should be set aside.

Mr. Dipayan Chandra Saha, learned Advocate for opposite parties 1 and 2 refers the case of Panasonic Power Division Vs. Chemico Bangladesh Limited and others, 69 DLR (AD) 333 and submits that when the plaintiffs assert the fact in the plaint that subsequent to the agreement they paid certain balance amount of consideration to the defendants there is no requirement of depositing balance amount of consideration as stipulated in the *bainapatra*. In the plaint, the plaintiffs asserted the fact that at the time of execution and registration of the *bainapatra* they paid Taka 4.5 lac to the defendants

and subsequently they paid another 6.00 taka through a payment receipt. Therefore, the question of disposing Taka 6.5 lac at the time of institution of the suit does not arise at all. He then submits that the receipt of further payment of Taka 6.00 lac was submitted to the Court at the time of filing of the suit through a *firisti* but the learned Judge rejected the plaint under Order 7 Rule 11 of the Code failing to take it into his notice and thereby erred in law and fact. In a miscellaneous case under Order 47 Rule 1 of the Code a Court can correct its own mistake, if it is apparent on the face of the record or for any other sufficient reason. Here the learned Judge applied his jurisdiction under the aforesaid Rule and Order of the Code on the application filed by the plaintiffs. He refers to the cases of Md. Ali and others Vs. Md. Aminuddin and others, 11 BLT (HCD) 80 and Md. Abdul Jabbar Vs. Governor of Bangladesh Bank and others, 7 BLT (AD) 151 and submits that the order of rejection of the plaint was passed upon a wrong assumption. Such an erroneous assumption on material facts amounts to an error apparent on the face of the record calling for a review of the order. The instant miscellaneous case under Order 47 Rule 1 of the Code is well maintainable and the judgment and order passed by the Court below may not be interfered with by this Court in revision. The Rule, therefore, would be discharged.

We have considered the submissions of both the sides, gone through the impugned order, the documents appended with the

application and *ratio* of the cases cited. It appears that the plaintiffs instituted the aforesaid suit for specific performance of contract dated 06.12.2012. In the plaint, it has been stated that in the *bainapatra* consideration was fixed at Taka 11.00 lac out of which Taka 4.5 lac was shown to have been paid at the time of its execution and registration. Subsequently, the plaintiffs out of balance amount of Taka 6.5 lac paid Taka 6.00 lac to defendants 1 and 2 through a payment receipt. Then they requested the defendants to execute and register the *kabala* receiving Taka 50 thousand but the defendants refused to do so which prompted them to institute the suit depositing balance amount of Taka 50 thousand. Defendants 1 and 2 appeared in the suit and filed written statement and thereafter filed an application under Order 7 Rule 11 of the Code for rejection of the plaint. They took only ground therein that as per the provisions of section 21A(b) of the Specific Relief Act, the plaintiffs did not deposit balance amount of Taka 6.5 lac shown as unpaid in the *bainapatra.* The learned Joint District Judge allowed the said application on 18.04.2017 holding-"উভয় পক্ষের বক্তব্য সহ নথী পর্যালোচনায় দেখা যায় বাদী পক্ষ তার বক্তব্যের সমর্থন শুধুমাত্র ৫০,০০০/- টাকার চালানের কপি দাখিল করেছেন। কিন্তু ৬,০০,০০০/- টাকা বাবত কোন রশিদ দাখিল করেন নাই।

এমতাবস্থায়, বাদী পক্ষ মামলা দায়ের করার সময় বায়নানামায় উল্লেখিত বকেয়া টাকা জমা না দিয়ে বর্তমান মামলা দায়ের করায় তাই The Specific Relief Act এর 21A

ধারায় বারিত হওয়ায় বিবাদী পক্ষের আরজির খারিজের প্রার্থনাটি মঞ্জুর যোগ্য।" (*emphasis added*)

Against it, the plaintiffs initially filed an application under section 151 of the Code to recall the aforesaid order and thereafter filed Review Miscellaneous Case No.65 of 2017 under Order 47 Rule 1 read with section 151 of the Code. In the application the plaintiffs stated that after execution and registration of the *bainapatra,* the defendants received Taka 6.00 lac from them. The defendants in the written statement admitted of receiving a part payment of the balance amount. Moreover, the receipt of payment of Taka 6.00 lac was submitted in the Court through a *firisti* but it was not at all taken into notice by the learned Judge, and as such the judgment and order of rejection of the plaint is required to be reviewed.

On perusal of paragraphs 12 and 13 of the written statement, we find that the defendants admitted further payment of Taka 1.5 lac. The *firisti* form proves that the receipt of payment Taka 6.00 lac to the defendants has been submitted to the trial Court at the time of presenting the plaint. Whether the plaintiffs subsequently paid Taka 6.00 lac to the defendants or Taka 1.5 lac as admitted by the defendants are disputed question of facts which are to be decided in trial on taking evidence. Since the plaintiffs asserted the fact in the plaint that they subsequently paid Taka 6.00 lac to the defendants and deposited unpaid amount of Taka 50 thousand at the time of filing of

the suit, therefore, the provisions of section 21A(b) of the Specific Relief Act in no way help the defendants to get an order of rejection of the plaint under Order7 Rule11 of the Code. Therefore, the order of rejection of the plaint was wrong which is apparent on the face of the record. Learned Joint District Judge correctly reviewed it by the impugned order. In this regard, we find the *ratio* laid in Panasonic Power Division's case [69 DLR (AD) 333] befitting. We further find that in rejecting the plaint the Joint District Judge erred both in facts and law which is apparent on the face of the record. Under the provisions of Order 47 Rule 1 of the Code, if an error is found apparent on the face of the record which happed for the fault of the learned Judge or any other officer of the Court, he can review the said order in a miscellaneous case. The learned Judge rejected the plaint upon wrong assumption. Such an erroneous assumption of material fact amounts to an error apparent on the face of the record calling for a review of the order. Therefore, the instant miscellaneous case filed by the plaintiffs for review of the order passed by the Court is well maintainable. Even a learned Judge can correct his own mistake applying his inherent power under section 151 of the Code.

In passing the impugned judgment and order allowing the review miscellaneous case by setting aside the order of rejection of the plaint passed by the selfsame Court, the learned Joint District Judge committed no error which can be interfered with by us. The

submission made by Mr. Husain thus bears no substance and the *ratio* of the cases cited by him do not match this case.

In view of the discussion made hereinabove, we find no merit in this Rule.

Accordingly, the Rule is discharged without any order as to costs. The order of stay stands vacated.

However, the trial Court is directed to proceed with the suit and dispose of it expeditiously.

Communicate the judgment and order to the concerned Court.

Md. Akhtaruzzaman, J.

I agree.