

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice A.K. M. Zahirul Huq

First Appeal No.98 of 2006

Sultana Momtaz Begum appellant

-Versus-

Haji Abdul Jabbar Sowdagar and others

..... respondents

with

Civil Rule No.368(F) of 2006

Sultana Momtaz Begum petitioner

-Versus-

Haji Abdul Jabbar Sowdagar and others

..... opposite parties

Mr. Md. Sumon Ali with Mr. Nabil Ahmed Khan,
Advocates for Mr. Probir Neogi, Senior Advocate

..... for the appellant

(Appellant in the FA and petitioner in the civil Rule)

Mr. Saifuddin Ahmed Chowdhury with Ms.
Badrun Nahar Begum, Advocates

..... for respondents 1, 3-7, 9-11 and 12

(Respondents in the FA and opposite parties in the Rule)

Judgment on 14.05.2025

Bhishmadev Chakrabortty, J:

Since the civil rule has arisen out of the aforesaid appeal, both have been heard together and are being disposed of by this judgment.

The defendant has preferred this appeal challenging the judgment and decree of the Joint District Judge, Court 1, Chattogram passed on 21.03.2006 in Other Class Suit No.67 of 2001 decreeing the suit for specific performance of contract.

The plaint case, in brief, is that defendant 1 being owner of the schedule suit land offered to sell it. The plaintiffs agreed to purchase it at a consideration of Taka 16 lac. Plaintiffs paid Taka 3 lac to

defendant 1 as earnest money who executed an agreement for sale on 29.06.1999. In the agreement it was stipulated that the plaintiffs would pay the balance amount of Taka 13 lac to the defendant within six months and the defendant will execute and register the *kabala* failing which the plaintiffs would get the same registered through Court. But if the plaintiffs fail to make payment of the balance amount of consideration money within that period the agreement would be cancelled and 25% of the earnest money be forfeited. The plaintiffs offered the balance amount to defendant 1 within the prescribed time but she did not execute and register the *kabala*. Lastly the plaintiffs offered the balance amount on 10.05.2001 but she refused to accept it and execute the *kabala*, hence the suit for specific performance of contract.

Defendant 1 contested the suit by filing written statement where she admitted the fact of execution of the agreement for sale but stated firmly that within the period of 06 (six) months as stipulated in the agreement, the plaintiffs did not pay the balance amount of consideration money. After expiry of 6 (six) months the agreement had lost its force and as such the plaintiffs cannot get decree in the suit.

The trial Court on pleadings framed 4 (four) issues which were as to the maintainability of the suit, whether the suit is barred by limitation, whether agreement dated 29.06.1999 was executed by

defendant 1 and whether the plaintiffs were entitled to get decree as prayed for.

During trial, the plaintiffs examined 4 witnesses while the defendant examined 1. The documents of the plaintiffs were exhibits 1-2(Da). However, the trial Court decreed the suit deciding material issues in favour of plaintiffs. Being aggrieved by defendant 1 approached this Court with the present appeal.

Mr. Md. Sumon Ali, learned Advocate appearing for learned Senior Advocate Mr. Probir Neogi for the appellant taking us through the materials on record submits that the appellant in need of money for her daughter's marriage entered into an agreement for sale of the suit land. It was stipulated in the agreement that within 6 (six) months the plaintiffs would pay the balance amount of consideration to defendant 1 and the latter would execute and register the *kabala*. The plaintiffs did not pay the balance amount to the defendant within the prescribed time and as such the agreement had lost its force. He then submits that in a suit for specific performance of contract which makes time the essence of contract, the plaintiffs must succeed if his readiness and willingness to perform the obligation undertaken by him are proved. In the instant case, there is nothing in the plaint about the date of offering the balance amount of consideration money within the period prescribed in the agreement. He refers to the evidence of PWs 3 and 4 and submits that PW 3 is an interested witness who went to

the Court premises with the plaintiffs for several times told that he went to the plaintiffs on 8/10 December 1999 while defendant refused to execute and register *kabala*. PW 4 stated the date of offer of balance amount on 15 November of 1999 but stated that an amount was paid on that day which is nobodies case. The above evidence of PW4 shows that he is also interested witness. Moreover, the evidence of PWs 3 and 4 about the date of offer of balance amount within the prescribed time is beyond the pleadings and as such it cannot be taken into consideration unless such facts are incorporated by amending the plaint. In this context he refers to Order 6 Rule 7 of the Code and the case of Wares Khan and another vs. Haji Sufi Fazal Ahmed and others, 2 BLC 376 and Ranjit Kumar Rakshit vs. Sudhir Kumar Chowdhury, 38 DLR 39 and relied on the principle laid therein. He then refers to the provisions of section 55 of the Contract Act and submits that the plaintiffs promise to pay the balance amount of consideration money to the defendant within certain period but they failed to do so and as such the agreement is to be treated as *non est*. Mr. Ali finally submits that a decree for specific performance of contract is an equitable relief. Even the plaintiffs succeed in proving the execution of agreement and payment of earnest money towards the consideration, the Court is not bound to pass a decree unless the plaintiffs come to the Court with clean hands. Here the very filing of the suit is found purposeful. In the premises above, although the execution of the *bainapatra* has been proved and admitted by the

parties the plaintiffs are not entitled to get decree. The judgment and decree passed by the Court below, therefore, may be interfered with by this Court.

Mr. Saifuddin Ahmed Chowdhury, learned Advocate for respondents 1, 3-7, 9-11 and 12 in the appeal and opposite parties to the Rule supports the judgment and decree passed by the trial Court. He refers to the evidence of PWs 3 and 4 and submits that by the evidence of aforesaid two witnesses the plaintiffs proved that they offered the balance amount of consideration to the defendant within the prescribed time who told them that there had been enough time for execution and registration of the *kabala*. The evidence of PW 1 corroborates the evidence of PWs 3 and 4. The Court below on correct assessment of fact and law decreed the suit which may not be interfered with by this Court in appeal.

We have considered the submissions of both the sides and gone through the plaint, evidence of witnesses, documents produced by the parties and the impugned judgment. It is admitted by the parties that an agreement for sale was executed by the defendant on 29.06.1999 to sell a piece of land as described in the schedule to the plaint. It is also admitted by the parties that a condition was stipulated in the agreement that the plaintiffs would pay the balance amount of consideration of Taka 13 lac to defendant 1 within six months and the latter would execute and register the *kabala* and failing to perform the

plaintiffs' part the agreement would be ceased and 25% of the earnest money be forfeited.

The plaintiffs asserted the facts in the plaint that they offered the balance amount of consideration to defendant 1 within the prescribed period of 06 (six) months but the defendant did not accept it and perform her part by executing and registering the *kabala*. In the plaint it was also stated that lastly defendant 1 on 10.05.2001 refused to accept the consideration and execute and register the *kabala*. Then the suit was filed within the stipulated period of limitation under Article 113 of the Limitation Act. The aforesaid fact has been supported by PW1, one of the plaintiffs in evidence as “বাকী তের লক্ষ টাকা ছিল। ১৩ লক্ষ টাকা মেয়াদ মধ্যে যাচনা করি, মেয়াদ ছিল ছয়মাস। আমাকে কবলা দেয়নি। তাগাদা দিলে দেয়নি। শেষ যাচনা করি ১০.০৫.২০০১ ইং তারিখে। কবলা দিতে অস্বীকার করে।” In his cross-examination nothing came out adverse. PW3 in evidence stated “বাদীর সাথে আমি গিয়াছিলাম বিবাদীর বাড়ীতে ১৯৯৯ ডিসেম্বর এর ৮/১০ তারিখে। আমাকে বায়নানামা মতে কবলা করার দাবীর জন্য নুরুল আমিন সাব ডেকে নিয়ে যায় এবং দেখা হয় তখন বাদী বলে বাদ বাকী টাকা নিয়ে কবলা করে দিতে তখন বিবাদী বলে সময় আছে দিয়ে দেব।” PW 4 in evidence stated, “১৯৯৯ সনে ১৫ নভেম্বর তারিখে খাতুনগঞ্জ সুমন ট্রেডিং এ যাই পুলিন এর দোকানে। সঞ্জয় ও আমি দোকানের মালিককে দেখি, জানায় ব্যবসায় বায়নানামা হয়েছে বাদী বিবাদীর মধ্যে। যেয়ে দেখি টাকা পয়সা লেন দেন হয় ব্যাংক হতে আর কিছু বাকী আছে। ঐ দিন সঞ্জয় দেব বিবাদীকে কাগজ দিতে বলে, জানায় কাগজ মানে (অপাঠ্য) কিন্তু মেয়েলোকটা সুলতানা মমতাজ বলে পরে দেব।”

In the evidence as aforequoted it is found that one of the plaintiffs PW1 has been able to prove that they offered the balance amount of consideration money within six months as stipulated in the agreement. Although PWs 3 and 4 stated in their evidence about the date of offer of balance amount in December and November respectively but if we assess the evidence of PWs 1, 3 and 4 as a whole, it is found that the plaintiffs offered the balance amount of consideration money within the prescribed time stipulated in the agreement. On scanning the evidence of PWs 3 and 4, we do not find that they are interested witnesses. It cannot be said that the evidence of PW1 is beyond the pleadings in respect of offer of balance amount in time. The evidence of PWs 3 and 4 is also not beyond the pleadings because they stated two different dates which are also within 6 (six) months. Therefore, the *ratio* in the cases referred to by Mr. Ali on this point shall not apply in this case.

Undoubtedly time is the essence of contract under which parties thereto undertake mutually to perform certain obligations. Here the plaintiffs undertook that they would pay the balance amount of consideration to defendant 1 within 6 (six) months and the latter would execute and register the *kabala* to the plaintiffs. If the defendant succeeds in proving that the agreement could not be performed in time due to the plaintiffs, in that case plaintiffs are not entitled to get a decree in the suit because time is the essence of

contract. On scanning the evidence of both the parties including the evidence of DW1, sole witness of the defendant it is found that defendant failed to make out a specific case that the agreement could not be performed for the fault of the plaintiffs. Therefore, the case as referred to by Mr. Ali reported in 37 DLR (AD) 21 do not match this case.

However, we find that the suit was instituted on 24.05.2001 *i.e.*, after expiry of 1½ year of the stipulated period of 06 (six) months in the agreement and in the meantime 24 years have passed. Therefore, the defendant-appellant is entitled to get a solicium in this case which would be not less than Taka 10 lac.

In view of the discussions made hereinabove, we find no merit in this appeal. Accordingly, the appeal is dismissed. No order as to costs. The judgment and decree passed by the trial Court is hereby affirmed in a modified form. The plaintiff-respondents will pay solicium of Taka 10 lac to the defendant-appellant in addition to the balance amount of consideration money.

The order of stay stand vacated. The Rule issued in Civil Rule No.368 (F) of 2006 is accordingly disposed of.

Communicate the judgment and send down the lower Court records.

A.K. M. Zahirul Huq, J.

I agree.