

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)**

**First Miscellaneous Appeal No. 372 of 2018
with
(Civil Rule No. 311 (FM) of 2018)**

In the matter of:

S.M. Murshed Alam

... Appellant-petitioner

-Versus-

Mrs. Lutfunnahar and another

... Respondents-opposite parties

Mr Md. Zulfiqur Matin, Advocate Advocate

... For the appellant-petitioner

Mr. Sasti Sarker, Advocate

.... For the respondent-opposite party no. 1

**Heard on 10.06.2024 11.06.2024
and Judgment on 11.06.2024**

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

Since the point of law and facts so figured in the appeal as well as rule are intertwined they have heard together and are being disposed of with this common judgment.

At the instance of the plaintiffs in Title Suit No. 72 of 2014 and that of the petitioner in Review Miscellaneous Case No. 08 of 2017, this appeal is directed against the judgment and order dated 06.03.2018 passed by the learned Joint District Judge, Additional Court, Kushtia in the said Review Miscellaneous Case No. 08 of 2017 allowing the same so initiated by the defendant of the Title Suit and thereby setting aside

the judgment and decree passed dated 26.09.2017 in Title Suit No. 72 of 2014.

The short facts in preferring this appeal are:

The present appellant as plaintiff filed a suit being Title Suit No. 72 of 2017 before the court of learned Joint District Judge, 1st court, Kushtia on 17.11.2014 for Specific Performance of Contract seeking following reliefs:

(ক) বাদী নালিশী সম্পত্তি বায়না নামার চুক্তিমতে ১নং বিবাদীনি দ্বারা খোষকবলা দলিল সহি স্বাক্ষরে সম্পাদন ও রেজিস্ট্রী করিয়া পাইবার বাবদ বাদী বিবাদীগণের বিরুদ্ধে ডিক্রী পান ।

(খ) আদালতের ডিক্রী মতে নির্দিষ্ট সময়ের মধ্যে ১নং বিবাদী তফসিল বর্ণিত সম্পত্তি বাবদ খোষকবলা দলিল সহি স্বাক্ষরে সম্পাদন ও রেজিস্ট্রী করিয়া না দিলে বাদী আদালত মাধা পাইবার বাবদ বাদী হিববাদীগণের বিরুদ্ধে ডিক্রী পান ।

(গ) আদালত বাদী বিবাদীগণের বিরুদ্ধে ডিক্রী পান ।

(ঘ) আদালত যে যে প্রতিকার পাইতে আইনতঃ হকদার হয়ে তাহার ও ডিক্রী পান ।

That suit was filed measuring an area of .041250 acres of land as described to the schedule of the plaint. The present opposite party as defendant no. 1 filed written statement for contesting the suit denying all the material averment so made in the plaint. In disposing of the suit, the plaintiff-appellant adduced three witnesses while defendant-respondent adduced a single witness that is, the defendant herself. The learned judge of the trial court then upon hearing the parties and considering the

materials and evidence on record by his judgment and decree dated 26.09.2017 decreed the suit on contest against the defendant-respondent no. 1 directing the defendant to register a sale deed within a period of 60(sixty) days in default it was further directed to register a sale deed through court asking the defendant to withdraw the amount so deposited by the plaintiff at the time of filing of the suit.

However, after disposing of the suit, when the defendant went to withdraw the balance amount supposed to be deposited by the plaintiff at taka 5,00000/- she found that, the plaintiff-appellant without depositing the balance amount at the time of filing of the suit only submitted the *chalan* and after coming to learn about the said fraudulent practice adopted by the plaintiff, the defendant then filed the Review Miscellaneous case under Order 47 Rule 1 of the Code of Civil Procedure. In the said Civil Review the plaintiff-appellant entered appearance but without filing any written objection contested the said review and the learned Joint District Judge, Additional Court, Kushtia upon considering the material on record allowed the review and set aside the judgment and decree passed dated 26.09.2017. It is at that stage the plaintiff as appellant came before this court and preferred this appeal. At the time of preferring the appeal, the plaintiff as petitioner also filed an application for injunction and this court vide order dated 03.07.2018 issued rule and directed the parties to maintain status quo in respect of possession of the suit land for a period of 03(three) months which was subsequently extended from time to time.

Mr. Md. Zulfiquer Matin, the learned counsel appearing for the appellant-petitioner upon taking us to the impugned judgment and order and all other document appended there with in the application for injunction and that of the application praying for allowing the appellant-petitioner to deposit the balance amount at taka 5,00000/- at the very outset submits that, the money which was required to be deposited at the time of filing of the suit had not been deposited by mistake occurred on the part of the learned Advocate for the appellant who conducted the suit for plaintiff-appellant in the trial court for which the appellant cannot suffer.

The learned counsel next contends that, since it has been unearthed that the balance amount of taka 5,00000/- had not been deposited at the time of filing of the suit so if the appellant is allowed to deposit the same then the decree so passed in his favour can be sustained and if such deposit is made none of the parties to the suit will be prejudiced. With those two submissions, the learned counsel finally prays for allowing the appeal and making the rule absolute.

On the contrary, Mr. Shasti Sarker, the learend counsel appearing for the defendant-respondent-opposite party no. 1 very robustly opposes the said contention of the learned counsel for the appellant-petitioner and contends that, since it is admitted that without depositing the balance amount shown in the *bainapatra* the suit has been filed so there has been no scope to allow the appeal and to decree the suit since there has been a clear legal provision that at the time of filing of the suit, the balance amount so have been mentioned in the *bainapatra*

has to be deposited and since that very deposit has not been made so there is no scope but to dismiss the suit. However, in support of his such submission, the learned counsel has cited two decisions one, delivered by the Appellate Division reported in 69 DLR (AD) 332 and a decision of the High Court Division reported in 60 DLR (HCD) 597 and contends that, in the decision of the Appellate Division it has been held with regard to the provision of section 21A(b) of the Specific Relief Act that, until and unless the balance amount of the agreement for sale (বায়নাপত্র) is deposited a suit for Specific Performance of Contract cannot lie and since it has been detected that, the plaintiff has committed a gigantic fraud by not depositing the balance money so there is no reason but to set aside the judgment and decree so passed by the trial court. On that legal score, the learned counsel finally prays for dismissing the appeal and discharging the rule.

We have considered the submission so advanced by the learned counsel for the appellant-petitioner and that of the respondent opposite party no.1. We have also gone through the impugned judgment and order and that of the judgment passed in the Title Suit and the evidence so have been adduced and produced made by the plaintiff and the defendant in the suit. On going through the impugned judgment, we find that, when the plaintiff opposed the Review Petition, he clearly asserted that, inadvertently he did not deposit the amount so have been mentioned in the *challan* which exemplifies that, the plaintiff has not deposited the balance of taka 5,00000/- willfully while filing the suit so there has been no scope to shift the said liabilities upon the learned

Advocate for the plaintiff-petitioner as canvassed by the learned counsel for the appellant before us because such fault has been asserted by the plaintiff himself before the court below. However, the learned counsel appearing for the appellant pleaded that, the plaintiff-appellant was ready to deposit the balance amount during the review even before this Hon'ble court but law does not permit so because it is incumbent upon the plaintiff to deposit the balance amount before filing the suit though it is not the case of the plaintiff that he had no money at the time of filing the suit so mere filing the *chalan* is a classic case of committing fraud upon the court and fraud vitiates everything. Since the plaintiff without depositing the money has rather asserted in his plaint that, he deposited the said amount and the defendant who then agreeing the decree went to withdraw the balance money so under no circumstances can the prayer for depositing the balance amount at this moment can be entertained. On top of that, the provision of section 21A(b) of the Specific Relief Act empowers the trial court to reject the application so filed for Specific Relief Act if the balance amount is not deposited.

Given the above legal proposition and the facts and circumstances stated herein above we don't find any illegality or impropriety in the impugned judgment and order

Accordingly, the appeal is dismissed however without any order as to costs resulting in Title Suit No. 72 of 2014 is dismissed.

Since the appeal is dismissed, the connected rule being Civil Rule No. 311(FM) of 2018 is hereby discharged.

The order of status quo granted at the time of issuance of the rule and extended from time to time stands recalled and vacated.

Let a copy of this order along with the lower court records be communicated to the court concerned forthwith.

Md. Bashir Ullah, J.

I agree.

Kawsar/A.B.O.