

Present:-

Mr. Justice Mahmudul Hoque

Civil Revision No. 663 of 2015

Hajee Md. Azad Khan

... Petitioner

-Versus-

Md. Abdul Hannan being dead his heirs;
1(a) Khodeza Begum and others

...Opposite-parties

Mr. Taufiq Anwar Chowdhury with

Ms. Monoara Belgum, Advocates

...For the petitioner

Mr. Humayun Kabir with

Ms. Tasmin Akter, Advocate

...For the opposite-party Nos. 5 and 6.

Heard on 23.05.2024, 27.05.24, 28.05.2024

and Judgment on 29th May, 2024.

In this application under Section 115(4) of the Code of Civil Procedure, by granting leave to revision to the petitioner, Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned judgment and order dated 04.09.2014 passed by the learned Additional District Judge, 2nd Court, Brahmanbaria in Civil Revision No. 17 of 2013 allowing the same and thereby reversing the judgment and order dated 02.07.2012 passed by the learned Senior Assistant Judge, Brahmanbaria in Title Suit No. 304 of 2009 rejecting the application for rejection of plaint and directing the plaintiff to deposit the deficit balance consideration of the contract

by 15.05.2013 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Shorn of unnecessary details, fact of the case lies in a very narrow compass. The petitioner, as plaintiff, filed Title Suit No. 304 of 2009 in the Court of Senior Assistant Judge, Brahmanbaria against the opposite-party No. 1, as defendant, for a decree of Specific Performance of Contract, stating that the plaintiff entered into a registered agreement for sale dated 13.04.2008 with the defendant No. 1 for a consideration of Tk. 3,50,000/- out of which the defendant received Tk. 50,000/- as earnest money in presence of witnesses and handed over possession of the suit land to the plaintiff. It was stipulated in the agreement for sale that the plaintiff would pay the balance consideration money of Tk. 3,00,000/- to the defendant within 06(six) months and the defendant would execute and register the sale deed. The plaintiff subsequent to deed of agreement for sale upon request of defendant No. 1 make further payment of Tk. 92,090/- on account of loan of defendant No. 1 payable to Dr. Md. Serajul Haque in presence of witnesses on 21.09.2008. In the manner aforesaid the plaintiff paid Tk. 1,42,090/-

out of total consideration to the defendant No. 1 leaving a balance of Tk. 2,07,910/-. The plaintiff along with witnesses Sohrab Khan and others approached the defendant No. 1 to execute and register a sale deed in favour of the plaintiff on receipt of balance consideration amounting to Tk. 2,07,910/-, but the defendant No. 1 refused to execute and register the sale deed in favour of the plaintiff on 26.09.2009. Consequently, the plaintiff has constrained to file this suit for Specific Performance of Contract depositing the balance consideration of the contract in court.

Defendant No. 1 appeared in suit, filed written statement and an application on 02.07.2012 praying for rejection of plaint under Order 7 Rule 11(d) of the Code of Civil Procedure. The plaintiff filed written objection on 18.02.2013 against the application for rejection of plaint. The trial court heard the application and after hearing by its judgment and order dated 02.04.2013 rejected the same directing the plaintiff to deposit deficit amount of Tk. 92,090/- in court by 15.05.2013, in default order will be passed in accordance with law.

Being aggrieved by the order of the trial court the defendant No. 1 filed Civil Revision No. 17 of 2013 before the learned District Judge, Brahmanbaria. Eventually, the said revision was heard and disposed of by the learned Additional District Judge, 2nd Court, Brahmanbaria who after hearing by the impugned judgment and order dated 04.09.2013 allowed the revision and set aside the impugned judgment and order of the trial court and allowed application for rejection of plaint. At this juncture, the present petitioner, moved this Court by filing this application under Section 115(4) of the Code seeking leave to revision and obtained the present Rule and order of stay.

Mr. Taufiq Anwar Chowdhury with Ms. Monoara Begum, learned Advocates appearing for the petitioner submits that under the provision of Section 21A(b) of the Specific Relief Act, a suit for Specific Performance of Contract should be filed upon deposit of balance consideration of the contract in court. In the instant case, the plaintiff deposited the balance consideration of the contract in court, stating in the plaint at paragraph 3 that subsequent to execution and registration of agreement for sale, the plaintiff made further payment

of Tk. 92,090/- to the plaintiff against his loan owes to Dr. Md. Serajul Hoque in presence of witnesses. He submits that the claim of the plaintiff as made in the plaint is a matter to be decided on evidence at the time of hearing of the suit. However, to avoid complicity in the matter the plaintiff pursuant to order passed by the trial court already deposited said amount of Tk. 92,909/- in court.

He further submits that when the plaintiff claimed that he made payment of further amount of Tk. 92,090/- out of balance consideration of the contract there was no necessity of depositing the balance consideration of the contract, but he is to deposit the amount actually remained balance to be paid to the vendor, accordingly, the plaintiff deposited the said amount in court at the time of filing the suit. Therefore, the trial court though wrongly directed the plaintiff to deposit further amount of Tk. 92,090/- in court, but rightly rejected the application of the defendant No. 1 for rejection of plaint. He argued that the revisional court while allowing the revision and application for rejection of plaint rejecting plaint in suit, unfortunately failed to appreciate the fact that it is the definite assertion made in the plaint that the plaintiff paid further amount of

Tk. 92,090/- to the defendant in cash in presence of witnesses which is required to be proved by the plaintiff, as such, the revisional court has committed an error of law in the decision occasioning failure of justice.

Mr. Humayun Kabir with Ms. Tasmin Akter, learned Advocates appearing for the added-opposite-party Nos. 5 and 6 submits that defendant No. 1, Abdul Hannan (now deceased) exchanged the property with one Zahidul Hoque by a registered Deed of Exchange No. 2954 dated 26.12.2015. Thereafter, Zahidul Hoque by a registered Deed of Heba-bil-Ewaz No. 8605 dated 19.07.2016 transferred the property to one Shah Alam who by a registered Sale Deed No. 14264 dated 25.10.2018 transferred 5.25 sataks of land to added-opposite party Nos. 5 and 6 named Shahidul Islam and Zulhas Uddin. He further submits that Abdul Hannan transferred the property after judgment and order passed by the revisional court on 04.09.2014 rejecting the plaint in suit. Therefore, there was no legal impediment to transfer the land in favour of Zahidul Hoque. He argued that by consecutive transfers the property now acquired by added-opposite party Nos. 5-6 and their vendor

Shah Alam. He submits that the original owner, the defendant No. 1 died, his heirs have been substituted in his place, but none is coming forward to contest the Rule. Since the added-opposite party Nos. 5 and 6 purchased the property from Shah Alam they have interest in the Rule, as such, by filing an application they have been added-opposite party Nos. 5 and 6.

He submits that as per Section 21A(b) of the Specific Relief Act, the balance consideration of the contract should be deposited in court at the time of filing the suit, but in the instant suit the plaintiff failed to deposit the balance consideration of the contract, as such, the suit is barred by law. The trial court while rejecting the application for rejection of plaint failed to appreciate the provisions of law and directed the plaintiff to deposit the deficit amount which it cannot do. The revisional court while allowing the revision rightly appreciated the provision of law and set aside the order of the trial court, allowed the application for rejection of plaint and rightly rejected the plaint in suit.

Heard the learned Advocates of both the sides, have gone through the revisional application, plaint in suit, application for

rejection of plaint, written objection thereto filed by the petitioner by a supplementary-affidavit and the impugned judgment and order passed by both the courts below.

In the instant case, there is no dispute that the defendant entered into a contract for sale of the suit property with the plaintiff at a consideration of Tk. 3,50,000/- out of which he received Tk. 50,000/- as earnest money from the plaintiff. The plaintiff claimed that, he subsequently, made payment of Tk. 92,090/- out of balance consideration of the property to the plaintiff against payment of his loan to Dr. Md. Serajul Hoque in presence of some witnesses. At the time of filing the suit he deducted said amount from balance consideration and filed the suit upon deposit of Tk. 2,07,910/-. To that affect the plaintiff in his plaint at paragraph 3 stated as follows:

“প্রোক্তরূপে বাদী নালিশা ভূমি রেজিস্ট্রীকৃত বায়নাপত্র দলিলমূলে খরিদ করিয়া ভোগ দখল করিতে থাকাবস্থায় পণ মূল্যের বক্রি টাকা যোগাড় করিতে থাকে এবং ইতিমধ্যে ১নং বিবাদী উক্ত ডাঃ মোঃ সিরাজুল হক বরাবরে দেনা মং ৯২,০৯০/- টাকা পরিশোধ করার জন্য জরুরী ভিত্তিতে ৯২,০৯০/- টাকা দাবী করায় বাদী উক্ত টাকা নালিশা ভূমির বক্রি পণ মূল্য আন্দরে পরিশোধ করিতে রাজি হইলে বাদীর পক্ষে পূর্বোক্ত সোহরাব খান ১নং বিবাদীর ঋণ ৯২,০৯০/- টাকা ১নং বিবাদীর কথা মতেই নগদে ডাঃ মোঃ সিরাজুল হককে ২১/০৯/২০০৮ইং তারিখে ১নং বিবাদী ও কতেক স্বাক্ষীর মোকাবেলায় পরিশোধ করে। প্রকাশ থাকে যে, ডাঃ মোঃ সিরাজুল

হককে ১নং বিবাদী নালিশা ভূমি বিক্রয়ের অধিকার আমমোক্তারনামা মূলে ০৩/১০/২০০৭ইং লিখিয়া দিলেও তিনি সম্পত্তি বিক্রয় করিতে পারে নাই, তবে ১নং বিবাদী তাহার প্রয়োজনে ডাঃ মোঃ সিরাজুল হক হইতে বিভিন্ন তারিখে মং- ৯২,০৯০/- টাকা কর্ত্ত গ্রহণ করে। যাহা ১নং বিবাদী নালিশা ভূমি বাদীর নিকট বিক্রীর পর ডাঃ মোঃ সিরাজুল হক দাবী ও চাপে পড়িয়া টাকা পরিশোধ করিতে বাধ্য হইলে ১নং বিবাদীর নির্দেশ ও অনুরোধে নালিশা ভূমির মূল্যের অবশিষ্ট টাকা হইতে ডাঃ মোঃ সিরাজুল হক এর পাওনা পরিশোধ করা হয়। এইজন্য অত্র নালিশা দায়ের কালে উক্ত টাকা বাদে বক্রী টাকা জমা করিয়া অত্র নালিশা রুজু করা হইয়াছে। সংশোধিত আদেশ নং-১৮, তাং-১৫/০৭/২০১২ইং।”

It is true that at the time of hearing of the application for rejection of plaint the plaintiff could not show any papers before the trial court in writing to show that subsequent amount of Tk. 92,090/- was paid to the plaintiff out of balance consideration money, but he asserted that the payment was made in presence of some witnesses. The trial court while rejecting the application for rejection of plaint directed the plaintiff to deposit the deficit amount of Tk. 92,090/- in court within a fixed time and rightly observed that the averment made in the plaint are all matters of evidence and those can be considered at the time of trial of the suit, but wrongly directed the plaintiff to deposit the said deficit amount in violation of provision of Section 21A of the Specific Relief Act. However, the plaintiff did not move before the higher court against the order of the trial court,

but in compliance of direction he deposited the deficit amount in court, it does not mean that the plaintiff conceded that he was required to deposit the balance amount of consideration of the contract in the court at the time of filing the suit. The defendant moved before the revisional court against the order passed by the trial court who set aside the same. Section 21A(b) of the Specific Relief Act provides that the person who seek Specific Performance of Contract by filing a suit is to deposit the balance amount of consideration of the contract in court at the time of filing the suit. Here, the plaintiff specifically stated in the plaint that subsequent to the agreement for sale he made further payment of Tk. 92,090/- to the plaintiff in presence of some witnesses.

As per plaint, after part payment made by the plaintiff, out of total consideration, he was supposed to deposit the balance amount of the consideration in court, accordingly, he deposited Tk. 2,07,910/- at the time of filing the suit. Whether further to the agreement the plaintiff made any payment to the defendant, whether the defendant duly received the same, are matters of evidence as rightly observed by the trial court. In a similar situation in the case of

Panasonic Power Division Vs. Chemico Bangladesh Limited and others reported in *69 DLR (AD) 333* it has been held that any payment made by the purchaser subsequent to the agreement for sale to the seller and to that effect averments have been made in the plaint are matters of evidence and in that case only on the ground of non-deposit of balance consideration of contract in court at the time of filing the suit, the plaint cannot be rejected in limine. In this situation, if the plaintiff asserted that he has made further payment to the vendor in addition to payment of earnest money at the time of execution of the agreement, claim of the plaintiff should be left until hearing of the suit and recording evidence to that effect.

In the event of finding that the plaintiff actually made further payment to the vendor, the court considering the facts and circumstances in its entirety would grant Specific Performance of Contract and in the event of failure of the plaintiff to prove that no further payment was made to the vendor in that case the suit will fail, but before adjudication of the matter in dispute and recording evidence to that effect rejection of plaint in limine ousting a litigant from getting relief upon adjudication is not proper and supported by

law. The language employed in Section 21A(b) “the balance amount of consideration of the contract” does not mean that the balance consideration mentioned in the agreement itself, it includes further payment of consideration to the seller and it means that the balance amount of consideration of the contract is the balance of the consideration after making payment before filing of the suit, but there is no scope for the plaintiff to deposit the deficit amount in court and the court cannot direct the plaintiff to deposit any amount after filing the suit, as such, the revisional court though rightly set aside the order of the trial court, but has committed error in the decision by rejecting the plaint in suit before proving payment of a part of the consideration to the vendor by the plaintiff. However, in the instant case, it is hard to prove the fact of payment of further amount to the vendor as there is no written document and the vendor died, but the plaintiff may get a chance to prove his case before the trial court and get the suit disposed of on merit.

Apart from this the added-opposite parties purchased the property during subsistence of a registered agreement for sale, as such, the sale is hit by Section 53B of the Transfer of Property Act.

Taking into consideration the above, this Court finds merit in the Rule as well as in the submissions of the learned Advocate for the petitioner calling for interference.

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

The impugned judgment and order of the revisional court is hereby set aside, so far as it relates to rejection of plaint in suit.

The trial court is hereby directed to dispose of the suit within 06(six) months positively without fail and without allowing any unreasonable adjournments to the parties.

Order of *stay* granted at the time of issuance of the Rule stands vacated.

Communicate a copy of the judgment to the Court concerned at once.