

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

CIVIL REVISION No. 2685 OF 2023.

Md. Julhas Uddin Jibon.

...Petitioner.

-Versus-

Md. Ayub Khan and others

...Opposite parties.

Mr. Habibul Islam Bhuiyan, Senior Advocate,

Mr. Md. Nurul Amin, Senior Advocate with

Mr. Minhazul Hoque Chowdhury, Advocate

... For the petitioner.

Mr. Probir Neogi, Senior Advocate,

Mr. Md. Saidul Alam Khan, Advocate,

Mr. Abdur Raihan, Advocate,

Mr. Shafiqul Islam, Advocate and

Mr. Abdullah-Al-Mamun, Advocate

... For opposite party No. 1

Heard on: 23.04.2024, 07.05.2024.

Judgment on: 09.05.2024.

Md. Badruzzaman, J:

This Rule was issued calling upon opposite party No. 1 to show cause as to why order dated 05.06.2023 passed by learned Joint District Judge, 1st Court, Kishoreganj in Other Class Suit No. 233 of 2022 rejecting an application filed under Order VII rule 11 read with section 151 of the Code of Civil Procedure filed by the defendant-petitioner for rejection of the plaint should not be set aside.

At the time of issuance of Rule, this Court vide order dated 21.06.2023 stayed further proceeding of Other Class Suit No. 233 of 2022 now pending in the aforesaid Court.

Facts, relevant for the purpose of disposal of this Rule, are that opposite party No. 1 as plaintiff instituted Other Class Suit No. 233 of 2022 in 1st Court of Joint District Judge, Kishoreganj praying for a decree of specific performance of contract in respect of 0.2123 acre land out of 0.2825 acre land agreed to be sold by defendant No. 1 by deed of agreement dated 03.11.2020. The case of the plaintiff is that defendant No. 1 entered into registered written agreement with the plaintiff on 03.11.2020 by which defendant No. 1 agreed that he would transfer 0.2841 acre land in favour of the plaintiff at a consideration of Taka 12,75,00,000/- out of which the plaintiff paid Taka 1,50,00,000/- as earnest money and it was agreed that the defendant would execute and register relevant deed of transfer within 1 (one) year from the date of execution of the agreement. It was also stipulated in the agreement that if the quantum of the land was found more or less, the consideration money would be adjusted on the basis of actual quantum of land. After the agreement, the plaintiff found that though 0.2825 acre land was agreed to be transferred but actually, there was 0.2123 acre land. Defendant No. 1 did not comply with the terms and conditions of the agreement in spite of repeated requests of the plaintiff in-person and through legal notice and finally refused to execute and register the sale deed. The plaintiff then filed the suit for specific performance of contract in respect of 0.2123 acre land by fixing its proportionate value of Taka 9,58,16,814.16. It has also stated that defendant No. 1 received Taka 1,50,00,000/- at the time of execution and registration of the agreement and thereafter, he received Taka two crore through direct cash payment in the account of the defendant maintained with Islami Bank Bangladesh Limited and that defendant No. 1 also admitted

said payment of Taka two crore in a Salish held on the same day i.e. on 06.04.2022. In the aforesaid way, the plaintiff paid total Taka 3.5 crore out of actual consideration of Taka 9,58,16,814.16 against .2123 acre land. Accordingly, the plaintiff filed the suit by depositing balance amount of Taka 6,08,16,814.16 through Treasury Challan.

Defendant No. 1 entered appearance in the suit and thereafter, filed an application under Order VII rule 11 read with section 151 of the Code of Civil Procedure for rejection of the plaint on the ground that as per agreement the plaintiff paid only Taka 1,50,00,000/- as earnest money and there was balance consideration of Taka 11,25,00,000/- but the plaintiff with false statement fixed total consideration of Taka 9,58,16,814.16 without consent of the defendant. The defendant also denied the contention in regards payment of Taka 2,00,00,000/- (Taka two crore) by the plaintiff. It has also contended that since the plaintiff was agreed to purchase 0.2825 acre land, he should have filed the suit for .2825 acre land instead of .2123 acre land and there is no scope under law to file a suit for specific performance of a part of the contract. Moreover, the plaintiff did not deposit balance consideration at the time of filing the suit and as such, the plaint is liable to be rejected in view of the provision under section 21 A(b) of the Specific Relief Act.

The plaintiff contested the application by filing written objection, reiterating the contention as stated in the plaint and further contending that a plaint cannot be rejected upon considering the statements made in an application for rejection of plaint and as such, the application was liable to be rejected.

The trial Court, upon hearing the parties and considering the materials on record, dismissed the application by impugned order

dated 05.06.2023 which has been challenged by defendant No. 1 by filing this application under section 115(1) of the Code of Civil Procedure and obtained the instant Rule and order of stay, as stated above.

Plaintiff-opposite party No. 1 filed counter affidavit to contest the Rule. By annexing deposit slip and money receipt dated 6.4.2022 (Annexure II and II-A) to the counter-affidavit in respect of payment Tk. 2,00,00,000/- (Taka two crore) plaintiff-opposite party No.1 stated that after execution of the deed of agreement, he paid Taka two crore to the defendant in cash in his account maintained with Islami Bank Limited and a Salish was held on 06.04.2022 wherein the defendant by admitting the payment of Taka two crore gave a money receipt in his business Letter-pad in presence of witnesses.

Mr. Habibul Islam Bhuiyan, learned Senior Counsel appearing with Mr. Md Nurul Amin, learned Senior Counsel and Mr. Minhazul Hoque Chowdhury, learned Advocate for the petitioner submits that in view of the provisions under section 21A(b) of the Specific Relief Act, the plaintiff was required to deposit at the time of filing of the suit the balance consideration of Taka 9,25,00,000/- but the plaintiff did not deposit any amount at the time of filing of the suit on 12.10.2022, but deposited only Taka 6,08,16,814.16 on 24.10.2022 and as such, the plaint was liable to be rejected under section 21A(b) of the Specific Relief Act. In support of this contention learned Advocate has referred to the case of *Abul Kalam (Md) vs. Md Mohi Uddin and others* 69 DLR (AD) 239, *Panasonic Power Division vs. Chemico Bangladesh Limited and others* 69 DLR (AD) 333, *Imran (Md) vs. Shamim Kamal and others* 60 DLR 597 and some other

unreported decisions of the Appellate Division and the High Court Division.

Learned Advocate further submits that there is no scope under law to enforce a contract partially by payment of proportionate value but the plaintiff unilaterally reduced the agreed land to .2123 acre instead of .28 25 acre and fixed consideration of said land at Tk. 9,58,16,814.16 and deposited less balance amount out of time for specific performance of a part of the contract and as such, the plaint is liable to be rejected on this ground also. Mr. Bhuiyan finally submits that the Court below without taking into consideration of the expressed provision of law as well as settled principles declared by our Apex Court illegally refused to reject the plaint by rejected the application for rejection of the plaint and as such, committed an error of law resulting in an error in the decision occasioning failure of justice.

Mr. Probir Neogi, learned Senior Counsel appearing with Mr. Md. Saidul Alam Khan, learned Advocate appearing for opposite party No. 1 submits that as per letters of section 21A(b) of the Specific Relief Act, if the balance consideration is not deposited at the time of filing of the suit a plaint cannot be rejected for that reason and for that fault, the agreement might not be enforced upon trial of the suit. The learned Advocate further submits that the balance amount was paid within the period of limitation of filing of the suit and as such, it cannot be said that the deposit was not made at the time of filing of the suit and the decisions as have been relied upon by the learned Advocate for the petitioner are not applicable in this particular case. Learned Advocate further submits that there is no bar to file a suit for specific performance of a part of the contract

and whether the quantum of land which has been agreed to be transferred was found more or less after measurement is a disputed question of fact which can only be decided during trial upon taking evidence and on this ground, a plaint cannot be rejected. Learned Advocate finally submits that the trial Court, upon considering the relevant provisions of law and facts of the case, rightly refused to reject the plaint and as such, interference is not called for by this Court.

We have heard the learned Advocates, perused the plaint, the application for rejection of plaint, counter-affidavit filed by the plaintiff-opposite party, the impugned order and other documents available on record. It is not denial of the fact that defendant No. 1 agreed to transfer 0.2825 acre land to the plaintiff at a consideration of Taka 12.75 crore and entered into a registered deed of agreement on 03.11.2020 with the plaintiff and on that date, defendant No. 1 received Taka 1.5 crore as earnest money. The plaintiff contended that he again paid Taka 2 (two) crore on 06.04.2022 to defendant No. 1 through depositing in cash in the account of defendant No. 1 maintained by him with Islami Bank Limited and the defendant by admitting the payment gave a money receipt on the same day on 06.04.2022 in presence of the witnesses in his business Letter-pad. In course of hearing though the learned Advocate for the petitioner denied subsequent payment of Taka two crore made by the plaintiff to defendant No. 1 but at the time of pronouncement of this judgment, defendant No. 1, who is present before us, admits that he received said 2 (two) crore Taka in cash through his bank account on 06.04.2022 and he gave money receipt. In that view of the above, it is admitted that defendant No. 1 received total Taka 3.5 crore against

the total consideration as per agreement dated 03.11.2020. Mr. Bhuiyan candidly submits that if the Rule is made absolute and the plaint is rejected, his client is ready to refund said 3.5 crore Taka if he is allowed 90 (ninety) days time from date to pay the amount.

From the above facts it is clear that the defendant agreed to transfer .2825 acre land to the plaintiff at a consideration of Taka 12.75 crore and a registered deed of agreement for sale was concluded upon receiving Tk. 1.5 crore as earnest money on the date of agreement and then defendant No.1 received Tk. 2 (two) crore. Accordingly, total Taka 3.5 crore was paid by the plaintiff to defendant No. 1 and balance consideration stood at Tk. 9.25 crore. Accordingly, the plaintiff was required to file the suit for specific performance of the contract upon depositing balance consideration of Tk. 9.25 but he deposited Tk. 6,08,16,814.16 as balance consideration with a plea that he, upon field measurement, found only .2123 acre land instead of .2825 acre land and the proportionate value of said .2123 acre land was Tk. 9,58,16,814.16. The plaintiff filed the suit for specific performance of a part of the contract in respect of .2123 acre land.

Now question arises whether a decree can be passed in a suit for specific performance of a part of the contract.

The general presumption is that it is an entire contract intended by the parties to be dealt with as a whole and not piecemeal, unless and until the contrary is shown (Ref: Hiralal v. Janardan, AIR 1938 Bom. 134). All agreements, as a rule, must be considered in their entirety. If the court is not in a position to compel the plaintiff coming for specific performance to perform the whole of the

contract, it will not compel the defendant to perform his part (Ref: Kuraum v. Gakul, AIR 1938 Cal. 234).

It is of the essence of specific performance that except under special circumstances the court shall not direct specific performance of a part of a contract (Ref. Cutts v. Brown ILR 6 Cal. 398). The general rule is that a contract is either to be performed in its entirety or not to be performed at all. This General rule of law is embodied in section 17 of the Specific Relief Act. For ready reference section 17 is quoted below:

“17. Bar in other cases of specific performance of part of contract-The court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.”

“.....except in cases coming under one or other of the three last preceding sections” employed in section 17 of the Specific Relief Act are sections 14, 15 and 16 of the Act. Those **three exceptions** contemplated in sections 14, 15 and 16 of the Specific Relief Act exhaust all the circumstances under which a partial performance of a contract will be enforced (Ref. William Graham Krishna Chandra Dey AIR 1925 PC 45).

Section 14 of the Act is quoted verbatim below:

“14. Specific performance of part of contract where part unperformed is small. – Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.”

Section 14 of Specific Relief Act contemplates the **first exception** to the general rule laid down in section 17. For application of the provisions of section 14 of the S.R Act two conditions must co-exist, namely, (1) the part left unperformed bears only a small portion to the whole in value and (2) the part performed admits of compensation in money.

Section 15 laid down **second exception** of the general rule, which reads as follows:

“15. Specific performance of part of contract where part unperformed is large. – Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all rights to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.”

Under section 15 of the Specific Relief Act, if the unperformed part is large, or does not admit of compensation in money, the case falls under **second exception** as employed in section 15 of the Act. Under this section if the part of a contract left unperformed is considerably large or does not admit of compensation in money, the party (vendor) who cannot perform his promise in full is not entitled to a decree for specific performance of contract. But the other party (purchaser) can sue for specific performance on payment of full consideration without abatement of price provided he relinquishes

all claims to further performance and all rights to compensation either for the deficiency, or for the loss or damage sustained by him due to the defendant's fault.

Illustration (a) of section 15 of the Act reads as follows :

(a) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A, and the other 50 bighas to a stranger, who refuses to part with them. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed upon, and to take the 50 bighas which belong to A, waiving all right to compensation either for deficiency or for loss sustained by him through A's neglect and default, B is entitled to a decree directing A to convey those 50 bighas to him on payment of the purchase-money.

In *Pokhar Das v. Mela Ram*, AIR 1927 Lah. 773; 102 I.C. 754 it is held that "where vendor agrees to sell certain property to vendee, but he is not legally entitled to sell whole of the property, the vendee can claim specific performance of contract to the extent of the property as is lawfully saleable by vendor provided vendee is ready to pay the full price". Section 15 of the Specific Relief Act applies only when "a party to contract is unable to perform the whole of his part of it".

As per **second exception** laid down in section 15 of the Specific Relief Act the following criteria are to be complied with to give a decree for specific performance of part of the contract against the seller:

- (a) The seller is unable to perform the whole of his part.
- (b) Substantial part of the contract can be performed.
- (c) The part unperformed is a considerable portion of the whole, or does not admit of compensation in money.

- (d) The purchaser-plaintiff relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him through default of the defendant-seller, and the plaintiff elects to take part of the contract as the defendant is capable of performing on payment of the consideration agreed for the whole.
- (e) Specific performance of the remaining part of the contract cannot be granted under s. 15 unless the plaintiff is willing to pay the consideration stipulated for the entire contract for a portion only of the property.

Section 16 of the Specific Relief Act laid down **third exception** of the general rule which reads as follows:

“16. Specific performance of independent part of contract. – When a part of a contract which, taken by itself, can and ought to be specially performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part.”

Section 16 of the Specific Relief Act assumes that the parts of the contract are severable, and that performance of one part has become either impossible or unlawful. Section 16 differs from sections 14 and 15 in including the element of illegality. In sections 14 and 15 only inability is contemplated as to a part of the contract. On the other hand, in section 16 is included the case where a part of the contract though it can be, but ought not to be specifically performed. This section recognizes the distinction between divisible and indivisible illegal contracts.

In this case, the plaintiff filed the suit for specific performance of part of the contract where part unperformed is large. As per claim of the plaintiff the defendant is unable to perform the whole of his part because the quantum of land, after measurement, was found less and that substantial part of the contract can be performed and the part unperformed is a considerable portion of the whole. Accordingly, this suit obviously comes under the **second exception** provided in section 15 of the Specific relief Act. As such, to get a decree of specific performance of the part of the contract (i.e for .2123 acre land), the plaintiff must be willing to pay total consideration of Tk. 12.75 crore for said .2123 acre land though as per contract said amount was fixed as the value of entire .2825 acre land. But the plaintiff unilaterally measured the suit land as .2123 acre instead of .2825 acre as was agreed to purchase by him and he is willing to pay part consideration of Tk. 9,58,16,814.16 as value of .2123 acre land instead of entire consideration of Tk. 12.75 crore and with such calculation the plaintiff deposited balance consideration of Tk. 6,08,16,814.23 instead of agreed balance of Tk. 9.25 crore. As per section 15 of the Specific Relief Act the plaintiff was required to file the suit for specific performance of the part of the contract for .2123 acre land by depositing Taka 9.25 crore out of total consideration of Tk. 12.75 crore and being failed to do so, the suit is barred under section 15 of the Specific Relief Act.

It is contended by the defendant that the plaintiff filed the suit on 12.10.2022 and deposited Taka 6,08,16,814.16 as the balance consideration through Treasury Challan on 24.10.2022, that is, after 12 days from the date of filing of the suit. Now, question arises,

whether such deposit can be considered that it was made as per provision of section 21A(b) of the Specific Relief Act.

From the order sheet of the trial Court, it appears that the suit was instituted on 12.10.2022 without depositing any balance consideration money and the plaintiff vide Treasury Challan No. 31 dated 24.10.2022 deposited Taka 6,08,16,814.16. So, admittedly, the plaintiff did not deposit said amount at the date of filing of the suit.

Section 21A(b) of the Specific Relief Act provides that no contract for sale of any immovable property can be specifically enforced unless the balance amount of consideration of the contract is deposited in the Court at the time of filing the suit for specific performance of the contract. In the case of *Abul Kalam (Md) vs. Md Mohiuddin and others* 69 DLR (AD) 239, similar issue was raised before the Appellate Division and the Appellate Division resolved the issue holding as follows:

“We have considered the provision of section 21 A(b) of the Act. The language of the section is so unambiguous that it does not require any interpretation to come to conclusion that in case of failure of depositing the balance amount at the time of filing the suit for specific performance of the contract, the suit cannot be maintained. Even then, from the impugned judgment and order, it appears that the High Court Division considered various decisions of this Court and of the Indian jurisdiction and came to the finding that the deposit of the balance consideration of the contract before filing a suit for specific performance of the contract is a condition precedent and that having not been done in the instant case, that suit was barred under the provision of section 21A(b) of the Act. Therefore, the plaint was liable to be rejected under Order VII, rule 11 of the Code of Civil Procedure. We find no error with the view taken by the High Court Division in view of the language used in section 21A(b) of the Act.”

It is now well settled that if the balance consideration is not deposited in Court at the time of filing of a suit for specific performance of the contract, the plaint must be rejected. Thus contention of Mr. Neogi that a plaint cannot be rejected on the ground of non-deposition of balance consideration at the time of filing of the suit has no leg to stand.

It appears that the plaintiff paid total of Taka 3.5 Crore (Taka three crore and fifty lac) to defendant No. 1-petitioner against the total consideration as per the contract. Since, the suit is barred under the provisions of sections 15 and 21A(b) of the Specific Relief Act, the trial Court should have rejected the plaint under Order VII rule 11 of the Code of Civil Procedure and being failed to do so, committed an error of law resulting in an error in the decision occasioning failure of justice.

It appears that the learned Judge of the trial Court upon misconception of law and misinterpretation of the law settled by our Apex Court in the case of *Abul Kalam (Md) vs. Md Mohi Uddin and others 69 DLR (AD) 239*, came to a perverse finding that the law settled by the Appellate Division in that case is not applicable in the instant case and refused to reject the plaint. When the Appellate Division in expressed terms declared a law and settled an issue, no inferior Court can deviate there from. Accordingly, the learned Judges of the subordinate courts should be more careful in explaining the law declared by our Apex Court.

In view of the above, we find merit in this Rule.

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

The impugned order dated 05.06.2023 is set aside and the application filed by defendant No. 1 under Order VII, rule 11 of the Code of Civil Procedure is allowed. The plaint of Other Class Suit No. 233 of 2022 is hereby rejected.

We are also of the view that the plaintiff is entitled to get back Taka 3.50 crore from defendant No. 1 which he received from the plaintiff against the agreement and Taka 6,08,16,814.16 deposited by the plaintiff through Treasury Challan before the trial Court. Since defendant No. 1-petitioner is ready to refund said amount of Taka 3.5 crore to the plaintiff and prays for three months time for making the payment, we are inclined to allow the time.

Accordingly, defendant-petitioner is directed to refund Tk. 3.5 crore (Taka three crore and fifty lac) to the plaintiff within 3 (three) months from date in default, the plaintiff would be at liberty to realize Taka 3.5 crore with interest @ 10% per annum with effect from the date of respective payments through execution process. The trial Court is also directed to pass necessary order for refund of Taka 6,08,16,814.16 without any delay.

It is to be mentioned that admittedly, the plaintiff did not deposit the balance consideration money at the time of filing of the suit for specific performance of contract on 12.10.2022. Though the trial Court registered the suit but it fixed the next date on 20.10.2022 for admission hearing of the suit and withheld service of summons upon the defendants. This type of practice in original jurisdiction is unknown to law. Since balance consideration was not deposited at the time of filing of the suit, the trial Court should have refused to register the suit for noncompliance of the provisions under section

21A(b) of the Specific Relief Act and returned the plaint to the plaintiff.

It is to be further noted that there are so many instances before us where some of the subordinate courts are being registering suits for specific performance of contract and fixing dates for admission hearing of the suit without considering whether the balance consideration was deposited during filing of the suit in compliance of the provisions under section 21A(b) of the Specific Relief Act and the settled principle of law that ‘the balance consideration is to be deposited in Court at the time of filing of a suit for specific performance of the contract failing which the plaint must be rejected’. For such type of unwarranted mistakes on the part of some of the sub-ordinate courts, the innocent litigants are suffering for no fault of their own. The Sub-ordinate Courts should strictly follow the expressed provisions of the statute as well as the law settled and declared by our Apex Court. Our considered view is that justice would be best served if the subordinate courts having original jurisdiction refuse to register the suit and return the plaint to the plaintiff when he fails to deposit balance consideration at the time of filing of a suit for specific performance of contract. We are also of the view that a **General Notification** is required to be circulated by the learned Registrar General of the Supreme Court among the learned Judges of the subordinate courts in this regard.

Accordingly, the learned **Registrar General of the Supreme Court of Bangladesh** is directed to circulate through a **General Notification** among the learned Judges of the sub-ordinate courts that “the Sub-ordinate Civil Courts having original jurisdiction should strictly follow the provisions of section 21A(b) of the Specific Relief

Act and the law declared by the hon'ble Appellate Division in *Abul Kalam (Md) vs. Md Mohi Uddin and others, 69 DLR (AD) 239* and if the plaintiff fails to deposit balance consideration at the time of filing of a suit for specific performance of the contract, the Court must refuse to register the suit and return the plaint to the plaintiff".

Communicate a copy of this judgment to:

1. The learned Registrar General, Supreme Court of Bangladesh.
2. Mr. Sohag Ranjan Paul, the then learned Joint District Judge, 1st Court, Kishoregonj.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)