

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

First Appeal No. 114 of 2012

Md. Abdul Kader Khan

..... Plaintiff-Appellant.

-Versus-

Most. Kazi Lutfa Begum being dead her legal heirs

Most. Samiza Hossain Koli and others

.....Defendants- Respondents

Mr. Md. Khalilur Rahman, Advocate

... For the Appellant

Mr. Md. Saidul Alam Khan, Advocate

... For respondents

**Heard on: 18.01.2024, 22.01.2024, 29.01.2024 and
30.01.2024**

Judgment on: 04.02.2024.

Sashanka Shekhar Sarkar, J:

This appeal, at the instance of the plaintiff is directed against judgment and decree dated 28.02.2012 (decree signed on 04.03.2012) passed by learned Joint District Judge, 1st Court, Dhaka in Title Suit No. 826 of 2010 rejecting the plaint on an application under Order VII rule 11 of

the Code of Civil Procedure in a suit for Specific Performance of Contract.

The facts, relevant for disposal of the appeal, are that one Most. Kazi Lutfa Begum, [mother of respondent No. 1(a)-1(c)] and Md. Jebul Sikder being the owners and possessors of the land mentioned in the schedule of the plaint, came to an agreement with the plaintiff to sell out the scheduled land with a consideration of Tk. 28 lac and accordingly, on receiving the earnest money of Tk. 10 lac executed a registered bainapatra on 23.11.2009 with terms and conditions that the defendants within 1 (one) year from the date of execution and registration of bainapatra, would execute a registered kabala in favour of the plaintiff on receiving the rest balance amount of the consideration of the contract. The plaintiff within the time as mentioned in the terms, requested the defendants to execute and register a kabala receiving the remaining consideration but they on the plea of correcting wrong field survey delayed to do so and thereafter, when the field survey was corrected he again requested to get the kabala executed but he was denied and the defendants on the pretext of mentioning less consideration in bainapatra adopted dilatory tactics to execute the kabala. Then he requested to the local elites for conciliation but the defendants again demanded consideration TK. 40 lac imposing a condition to extend further one year to have the kabala executed. Accordingly, the plaintiff again paid Tk. 10 lac by two installments on 13.01.2010 and 12.03.2010. In the above way the plaintiff paid total Tk. 20 lac which was duly endorsed by the defendants. The defendants again took Tk. one lac and fifty thousand showing his urgency and one the very day handed over possession of the land to the plaintiff but lastly on 22.11.2010 in presence of the local

elites refused to execute a kabala and threatened that the land under bainapartra would be transferred to others. Therefore, the plaintiffs constrained to file the suit for Specific Performance of Contract.

Defendant Nos. 1 and 2 entered appearance in the suit and filed a joint written statements denying all material averments of the plaint and contended that they being absolute lawful owner and possessor of the suit land came to an agreement with the plaintiff to sell out the land on the consideration of Tk. 40 lac on urgent necessity of money for giving marriage of her daughter and to purchase land from else where. The plaintiff, as per terms and conditions of bainapatro, paid Tk. 10 lac on 23.11.2009 but he cleverly mentioned one year duration of payment of money in stead of three months in Bainapatra. Thereafter, the defendants received Tk. 5 lac on 13.01.2010 and 5 lac on 12.03.2010 respectively and requested to pay the rest amount but the plaintiff did not pay any heed to their request and had been delaying to pay the same. The defendants once again on 01.11.2010 requested the plaintiff to pay the rest amount of Tk. 20 lac and get the kabala executed but the plaintiff straight way informed the defendants that he would pay Tk. 8,00,000/= (eight lac) only and refused to pay the rest Tk. 10,00,000 (ten lacs). Thereafter, the defendants after collecting the certified copy of bainapartra came to know that the plaintiff in connivance with the deed writer and attested witnesses had written the consideration of the contract at Tk. 28 lac in place of 40 lac. The plaintiff, thereafter, on 22.11.2010 forcefully tried to enter into the house of the defendants and snatched away a gold chain following which a case was lodged with the concerned police station and thereafter, again filed a case under section 145 of the Code of Criminal Procedure against the plaintiff which is still pending. The defendants due to urgent necessity

of money for giving marriage of her daughter and to purchase land from else where came to a contract with the plaintiff to sell out the property but as the plaintiff totally violated the terms of bainapatra, the defendants took a decision to sell the property anywhere else. Since the plaintiff in collusion with the deed writer and attesting witnesses had written the consideration of the contract at Tk. 28 lac in place of 40 lac, the said contract is liable to be cancelled and as the suit for Specific Performance of Contract has been filed without depositing the balance consideration of the contract, the suit is liable to be dismissed being barred by law.

During pendency of the suit the defendants filed an application under Order VII rule 11 of the Code of Civil Procedure for rejection of plaint on the ground of being barred by law stating that the plaintiff has filed the suit for Specific Performance of Contract without depositing the balance amount of consideration of the contract.

The said application was contested by the plaintiff by filing a written objection contending that the plaintiff filed the suit for Specific Performance of Contract after two days of starting limitation period i.e. on 25.11.2010 and as the plaintiff after filing the suit deposited the balance amount of the consideration of the contract within one year of limitation period, the suit is very much maintainable and not barred by law.

The learned Trial Judge in adjudicating of the application framed the following issues:

- 1) Whether the application for rejection of plaint is maintainable in its present form?

2) Whether the plaintiff had deposited the remaining balance consideration of the contract at the time of filing the suit as provided by law?

3) Whether the remaining consideration of Tk. 8,50000/= (eight lac fifty thousand) deposited by the plaintiff on 12.07.2011 could be accepted?

The Trial Court took all the issues together for disposal and on considering the facts, materials and relevant laws placed before it allowed the application under Order VII rule 11 of the Code of Civil Procedure and rejected the plaint vide judgment and decree dated 28.02.2012.

The plaintiff, now the appellant being aggrieved by and dissatisfied with the above judgment and decree filed the instant appeal.

Mr. Khalilur Rahman the learned Senior Counsel appearing for the appellant in support of the appeal, made his submissions on following points:

a) The suit was filed within 1 (one) year of the limitation period from the date of arising out of the cause of action as per Article 113 of the Limitation Act.

b) The plaintiff deposited the balance consideration of the contract within the limitation period for filing the suit for Specific Performance of the Contract.

c) The right of the plaintiff to file a suit had existed till the last day of the period of limitation. Accordingly, the deposition of remaining amount of consideration afterwards of filing the suit within one year was to be considered as proper compliance of section 21A(b) of the Specific Relief Act, 1877.

d) The learned Joint District Judge committed gross illegality in rejecting the plaint without giving any decision with regard to the earnest money admittedly paid to the defendants and also about the deposited balance amount paid through chalan and;

e) To deposit the balance amount within one year from starting point of limitation period will not however legally bar in a suit for Specific Performance of Contract, as earlier has not been agitated and settled the matter as an important point of law. The decisions cited by the respondent in support of rejection of plaint are all per-incuriam and sub-silentio.

On the other hand Mr. Md. Saidul Alam Khan the learned Counsel appearing for the defendant-respondents submits supporting the impugned judgment and decree of the Trial Court elaborating the following points:

- a) The plaintiff-appellant filed the suit for Specific Performance of Contract without depositing the balance consideration of the contract at the time of filing the suit.
- b) Deposition of balance amount at the time of filing the suit for Specific Performance of Contract is a condition precedent which should have been followed strictly.
- c) Though the computation of time for filing suit for Specific Performance of Contract is one year from the date of expiry of the contract period but on any day within one year if the suit is filed the time computation will be started there from and balance amount of the contract shall not be allowed to be deposited afterwards of filing the suit within one year of limitation period.

- d) The plaintiff could have filed the suit on any day within one year after expiry of the tenure of the contract along with the balance amount of consideration of the contract but afterwards of filing the suit, the deposition of the balance amount was barred as on the day of filing the suit, the limitation period had exhausted.
- e) After expiry of the tenure of contract any time within one year the plaintiff could have withdrawn the suit and filed afresh by depositing balance amount of contract but without doing so tried to justify the deposition of balance amount as not barred by Section 21A(b) of Specific Relief Act.
- f) The plaintiff filed the suit for Specific Performance of Contract for having kabala executed and registered without praying any other consequential alternative reliefs and the trial court rightly rejected the plaint as completely barred by law without giving any decision regarding the earnest money paid to the defendants and also regarding the balance amount of consideration deposited after filing the suit through Chalan and in the absence of such prayer the plaintiff is not entitled to get back the same.

We have heard the learned Advocates of both the parties at length. Perused the plaint, written statements, application for rejection of plaint and written objection filed against the same.

We have also perused the relevant laws and decisions cited by both the parties in support of their respective cases.

Mr. Khalilur Rahman the learned Counsel for the appellant confined with his argument that since the law allows the parties to the contract to file suit for Specific Performance of Contract within one year

of expiry of the contract, on any day within one year of limitation period the plaintiff is entitled to file suit and on any day of the said limitation period is also entitled to deposit the balance amount of consideration of the contract.

Mr. Rahman argued that the bainapatra was executed on 23.11.2009 and the tenure was expired on 23.11.2010, the plaintiff was refused to get kabala on 14.11.2010 and the plaintiff filed the suit for Specific Performance of Contract on 25.11.2010 and the balance amount of consideration was deposited through Chalan on 12.07.2011 and before that on 09.06.2011 the defendant filed application for rejection of plaint on the ground of non-deposition of the balance amount of consideration at the time of filing of the suit.

Mr. Rahman narrating above calculated facts of the case tried to substantiate that since only two days after starting the period of limitation the plaintiff filed the suit, he had scope to wait up to 23.11.2011 to deposit the balance consideration as the law of limitation allows. Mr. Rahman tried to substantiate that the points he argues in regard to advantage of deposition of balance consideration within the period of limitation of filing suit, had not been earlier agitated and decided in any case. Referring the case of Most. Safia Khatun vs. Mrs. Mahabuba Rahman and others reported in 15 MLR (AD) 89 he submits that if any question of law is not earlier raised before the Court and is remained silent to settle an important question of law and if such judgment is passed against the law, such judgment shall not be precedent to be followed. He further argues that in a case, where the court would have settled an important question of law but remained silent is a judgment per-incuriam or judgment sub-silentio. Mr. Rahman argued and submitted that the decisions cited by the respondents

supporting their case in favour of rejection of the plaint are all judgment per-incuriam and judgment sub-silentio in respect of this case.

Mr. Saidul Alam Khan, the learned Counsel in support of his submissions as mentioned above cited so many decisions of our jurisdiction on the point of per-incuriam. Mr. Khan cited the case of Secretary, Post and Telecommunication Division and another-Vs-Sudhanshu Shekhar Bhadra and others reported in 74 DLR (AD) 222 where it was held that “when courts ignore law and proceed to pass judgment, the decisions falls under the spectrum of per-incuriam and does not necessarily need to be followed.” The Apex Court further held that “a decision can be said generally to be given per-incuriam when the court had acted in ignorance of previous decisions of its own or when the High Court Division had acted in ignorance of a decision of the Appellate Division. Nothing could be shown that the Appellate Division in deciding the said case had over looked any of its earlier decision on the point. So, it is not open to the High Court Division to describe it as one given “per-incuriam”. Even if it were so, it could not have been ignored by the High Court Division in view of Article 111 of the Constitution which embodies, as rule of law, the doctrine of precedent.” It was further held that, “in view of the judgment reported in 4 BLC (AD) 85 that if any judgment pronounced by the Appellate Division, as per provision of Article 111 of the Constitution, the High Court Division is not competent to say the judgment is per-incuriam . Primarily the High Court Division must follow the judgment in to to, however in such a situation the High Court Division may draw attention to the Honourable Chief Justice regarding the matter. On the other hand even if any judgment is pronounced by the High Court Division,

the subordinate court had no jurisdiction to raise any question regarding the legality of the judgment on the point of per-incuriam. Parties may get remedy on preferring appeal.”

Mr. Khan by referring to the above decisions very strongly submits that the submission of the learned Advocate for the Appellant have no substance as already our Apex Court of law has decided the matter elaborately. Mr. Khan on this point very strongly submits that the point raised by the learned Advocate for the Appellant is mere a technicality and it has got no legal support to stand. The plaintiff is entitled to file a suit for Specific Performance of Contract as per law within one year from the date of expiry of the contract but on the filing of the suit, the advantage of limitation exhausts even if the suit is filed on the first day or last day of limitation period. The moment of filing the suit the limitation period will be exhausted if within the limitation the suit is not withdrawn and filed again and after exhausting the forum, the plea of more time remains to end the limitation for depositing balance amount of consideration does not however at all has any support of law. The law is very specific and clear. Section 21 A (b) of the Specific Relief Act is non obstante clause. It is obviously a condition precedent. So the plaintiff at least could have filed more than one suit within limitation period subject to withdrawal of the previous one and he could have filed the suit by depositing the balance amount on the very day or before the filing of suit, not after filing the suit. Mr. Khan, in support of his submissions, cited the case of Abdul Kalam-Vs-Mohiuddin and others reported in 69 DLR (AD) 239. He also submits that it is a mandatory requirement to deposit the balance amount of consideration as provided by law. In support of his submission he cited the case of Syed Anis Ali alias Faizul Islam -vs- Syed Asaddar Ali and

others reported in 21 BLC 835. Mr. Khan also submits that the language provided in Section 21 A (b) is so unambiguous that it does not require any interpretation to come to the conclusion that in case of failure of depositing the balance amount of consideration at the time of filing the suit for Specific Performance of Contract, the suit will not be maintained. He placed reliance in the case of Abdul Kalam-Vs- Mohiuddin reported in 13 ADC 309. In the case of Md. Mojibur Rahman Gazi-Vs- Abdul Latif Sardar and another reported in 19 MLR 98 . Their Lordships held that “Section 21 A(b) of the Specific Relief Act provides for depositing the balance consideration money is a condition precedent failing which it would not be possible to enforce the contract by filing a suit. In the view of the language used in Section 21 A(b) of the Specific Relief Act 1877 (as amended) with a non obstante clause the ouster of jurisdiction is manifestly clear in entertaining suit for Specific Performance of Contract filed after 01.07.2005 without depositing the balance consideration money in the court at the time of filing the suit. The very specific provision of Section 21 A (b) provides that the balance consideration money has to be deposited at the time of filing the suit is a condition precedent.

In view of the above, there is no scope for a vendee to make deposit the balance consideration money beyond the scope of Section 21A of the Specific Relief Act. Consequently the application for allowing the plaintiff to make deposit of the balance consideration money was rejected as being barred by law. The same view has expressed in the case of Anisul Hoque-Vs- Abdul Awal Patowari reported in 21 BLT (AD) 229. Mr. Khan on the point of forfeiting the earnest money placed reliance upon a decision of the case of James Finlay PLC-Vs- Mezbauddin Ahmed reported in 46 DLR 624. In the said case it has

settled that, "if the tender is frustrated due to non fulfillment of the terms and conditions of the contract by purchaser, the seller is entitled to forfeit the earnest money. In the case of Chirenjit Singh-Vs- Horsarup reported in AIR 1926(PC) 1 it was held that earnest money is a part of purchase price when the transaction goes forward. It can be forfeited when the transaction falls through by reasons of fault or fail of the vendee. The above principles was settled in the case of Mawla Box-Vs- Union India reported in AIR 1970 (SC) 1955 and in the case of Sree Honuman Cotton Mills-Vs- Tata Air craft Ltd. reported in AIR 1970 (SC) 1986.

Mr. Khan lastly citing the case of Amena Khatun and others-Vs- Hazi Abdul Jabbar being dead his heirs Most. Maleka Banu and others reported in 14 BLD (AD) 267 submits that though the plaintiff in the suit has not specifically prayed consequential/alternative relief regarding refund of earnest and balance money, over and above, the court has discretionary power to direct the vendor to refund the said money.

In the above case the plaint was presented with the prayer (Ka) for Specific Performance of Contract in respect of the suit house and prayer (Ga) for refunding of earnest money if the decree of Specific Performance of Contract is refused by the court. So, essentially the first prayer was for Specific Performance of Contract and the prayer No. (Ga) was an alternative prayer if the decree for Specific Performance of Contract is refused. Such prayer is ordinarily made, as in the relevant of refusal of Specific Performance of Contract, the plaintiff can get back of the earnest money. Even without such prayer if the suit for Specific Performance of Contract is dismissed then the plaintiff is entitled to get back the earnest money.

We have heard the learned Counsels of both the parties patiently and their arguments and counter arguments in support of their respective cases. It transpires that the defendant came to an agreement with the plaintiff to sell the scheduled lands by executing a bainapatra dated 23.11.2009. The plaintiffs grievances are that on the date of bainapatra paid Tk. 10,00000/= lac and subsequently in two installments also paid Tk. 10,00000/= lac and again on the request of the defendants for urgent necessity of money he paid Tk. 1,50000/=. In this way the plaintiff has already made payment of Tk. 21,50,000/= to the defendants. The defendants were requested several times by the plaintiff to execute the deed of kabala in his favour but the defendants did not pay any heed to the request of the plaintiff rather, were trying to sell out the property to others and very openly declared that they would not execute the deed in favour of the plaintiff and then, the plaintiff was constrained to file the suit for Specific Performance of Contract on 25.11.2010.

It transpires that the suit was filed on 25.11.2010 i.e. only two days after starting point of the limitation period. It appears that the defendant appeared in the suit and submitted written statements denying all material averments made in the plaint. It also transpires that the defendants filed application on 09.06.2011 for rejection of plaint under Order VII rule 11 of the Code of Civil Procedure and thereafter, the plaintiff deposited the balance amount of the consideration on 12.07.2011 from which it is crystal clear that when the defendants raised objection against the plaint then the plaintiff, to fill up the lacuna deposited the balance amount of consideration i.e. one month three days after filing the application for rejection of plaint. As per Section 21 A (b) it is a precondition to deposit the balance amount

of consideration at the time of filing the suit for Specific Performance of Contract. We find that the plaintiff within the limitation period filed the suit for Specific Performance of Contract on 25.11.2010 but at the time of filing the suit he did not deposit the balance amount of consideration of the contract. For ready reference Section 21 A (b) of the Specific Relief Act is quoted below:

“ **Section 21 A:** Unregistered contract for sale not specifically enforceable- Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, no contract for sale of any immovable property can be specifically enforced unless-

- (a) the contract is in writing and registered under the Registration Act, 1908, whether or not the transferee has taken possession of the property or any part thereof; and
- (b) 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.”

We, on going through the plaint, written statements, the application for rejection of plaint filed under Order VII rule 11 of the Code of Civil Procedure and the written objection against the same by the plaintiff and last of all the impugned judgment and decree passed by the Trial Court, found that the trial Court in disposing of the application for rejection of plaint framed as many as three issues which have already been quoted above. The issue No. 1 was that whether the application for rejection of plaint is maintainable in its present form? The trial Court in adjudicating the said application found that the contract for sell of property was executed on 23.11.2009 and on the very day of execution of registered bainapatra Tk. 10,00000/= (Ten lac) was paid is admitted. Subsequently, by two installments another Tk.

10,00000/= (Ten lac) was paid to the defendants and lastly on the request of the vendor paid Tk. 1,50,000/= (one lac fifty thousand) i.e. in total the plaintiff paid Tk. 21,50000/=(Twenty one lac fifty thousand) to the defendants but due to non execution of deed of kabala, the suit was filed by the plaintiff without depositing the balance amount of consideration at the time of filing of the suit. The said balance amount was deposited on 12.07.2011 i.e, after 229 days of filing suit on 25.11.2010 and after one month three days of filing the application for rejection of plaint which is completely beyond the scope of the provisions under section 21 A (b) of the Specific Relief Act.

We have very meticulously perused the impugned judgment and decree of the Trial Court and other relevant papers available before us. It appears that the plaintiff filed the suit for Specific Performance of Contract within the limitation period but he did not deposit the balance amount of consideration of the contract at the time of filing of the suit which is mandatory provision and condition precedent for filing such suit to be strictly followed.

We have discussed so many decisions on this particular point and found that the plaintiff in a suit for Specific Performance of Contract must deposit the balance amount of the consideration of the contract at the time of filing the suit. The arguments so submitted before us by the learned Advocate for the plaintiff-appellant that since the plaintiff was entitled to file suit within one year from the date of expiry of the tenure of contract, he has also right to deposit the balance amount within said period of one year time and since this particular important point of law was not raised and settled earlier in any judicial proceedings and that being a new phenomenon, this court may settle

this particular point considering the cited case decisions are per-incuriam and sub-silentio in respect of this case.

We have meticulously perused the decisions cited by the learned Advocates of both the sides and considered submissions of the learned Advocate for the appellant on this particular point but found no support of any authority of the law rather, those are death against the settled principles of law and statute.

Moreover, the decision in the case of Secretary, Post and Telecommunication Divisio –Vs- Shudhanshu Shekhar Bhadra reported in 74 DLR (AD) 222 made our hands highly tied to in respect of interfering the settled matter and its principles.

Lastly it came to our notice with regard to the question of consequential relief as reported in a case of Amena Khatuna and others-Vs- Hazi Abdul Jabbar being dead his heirs Most. Maleka Banu and others reported in 14 BLD (AD) 267 where at their Lordships held that, “from the prayer in the plaint it appears that the plaintiff at prayer “Ka” prayed for Specific Performance of Contract in respect of the suit house of the defendant in pursuance of the agreement for sell dated 24.03.1973 and prayer “Ga” the plaintiff prayed for refund of earnest money if the decree of Specific Performance of Contract is refused by the court. So essentially the first prayer is for Specific Performance of Contract and the prayer at “Ga” as mentioned above is an alternative prayer. Such prayer is ordinarily made, as in the event of refusal of Specific Performance of Contract, the plaintiff can get refund of the earnest money. Even without this prayer if a suit for Specific Performance of Contract is dismissed, then the plaintiff is entitled to refund the earnest money.”

We have perused the plaint of the suit and found the following prayers; “ সেমতে বিনীত প্রার্থনা এই যে, আদালত দয়াপরবশে (ক) বাদীগণের অনুকূলে এবং ১ ও ২নং বিবাদীগণের প্রতিকূলে নালিশীর তফসিল ভুক্ত সম্পত্তি বিক্রয়ের চুক্তি প্রবলক্রমে রেজিস্ট্রি বায়না চুক্তি

পত্র রেজিস্ট্রিকৃত দলিল নাম্বার ১৪১২ এর বায়না চুক্তির শর্ত মোতাবেক যথারীতি সম্পাদন ও রেজিস্ট্রি করার জন্য এক ডিক্রী প্রদান করিতে আজ্ঞা হয়।

(খ) ১ ও ২ নং বিবাদী পক্ষ যদি ডিক্রীর আদেশ মোতাবেক আদালত কর্তৃক নির্ধারিত সময় সীমার মধ্যে নালিশী সম্পত্তির কবলা দলিল সমূহ বাদীর বরাবরে অথবা বাদীর লিখিত মনোনীত ব্যক্তির বরাবরে সম্পাদন ও রেজিস্ট্রি করিয়া না দেয় তা হইলে বাদীর নিকট হইতে মোসাবিদা দলিল গ্রহণ পূর্বক আদালত কর্তৃক বাদীর বা বাদীর মনোনীত ব্যক্তির বরাবরে নালিশী সম্পত্তি কবলা দলিল বা দলিল সমূহ যথারীতি সম্পাদন ও রেজিস্ট্রি করিয়া দিতে মর্জি হয়।

(গ) বাদী বরাবরে অথবা লিখিত ভাবে মনোনীত ব্যক্তির বরাবরে নালিশী সম্পত্তি আদালত কর্তৃক কবলা সম্পাদন ও রেজিস্ট্রি করিয়া দিয়া আদালত মাধ্যমে সমস্ত বাধা বিপত্তি অপসারিত করিয়া নালিশী সম্পত্তির খাস দখল বাদীর বরাবরে বুঝাইয়া দেওয়ার আদেশ দানে মর্জি হয়।

(ঘ) আদালত ন্যায় বিচারের স্বার্থে আরও যে সকল প্রতিকার পাইতে পারে তাহার বিহীন বিধানে ডিক্রী দিতে মর্জি হয়।

From the above prayer it appears that the plaintiff did not specifically pray for refund the earnest money if as in the event of refusal of decree for Specific Performance of Contract. The above decision settled that if even there is no such specific prayer to have the earnest money refund but, inspite of that, the court itself by exercising its jurisdiction can direct to refund the earnest money to the plaintiff.

On considering the facts, circumstances, relevant laws and arguments, counter arguments and the decisions cited by both the sides we are of the view that the plaintiff though came to a contract to purchase the property in question by way of bainapatra and for enforcement of which filed the suit in time without depositing the balance amount of consideration of the contract at the time of filing the suit which was mandatorily required to as condition precedent having not complied with, the trial Court rightly rejected the plaint.

The case record shows that the plaintiff did not pray for an alternative relief for getting back the earnest money. However, on considering legal and factual aspect, we are inclined to direct to the defendants to refund the earnest money to the plaintiff.

The trial Court at the time of adjudicating the application under Order 7 rule 11 of the Code of Civil Procedure totally remained silent in respect of the balance amount of the consideration deposited afterwards of filing the suit. So the plaintiff is entitled to withdraw the money as he deposited through Chalan to the court on 12.07.2011.

Accordingly, we find no merit in the appeal.

In the result, the appeal is dismissed. The impugned judgment and decree dated 28.02.2012 (decree signed on 04.03.2012) passed by the learned Joint District Judge, 1st Court Dhaka in Title Suit No. 826 of 2010 is affirmed.

The defendants-respondents are directed to refund the admitted earnest money of Tk. 2,000000/= (Twenty lac) to the Plaintiff-Appellant within 06 (six) months from the date of receipt of the copy of the judgment and the trial Court is directed to refund the balance amount of money to the plaintiff deposited before it without any delay.

If the defendant fails to refund the earnest money to the plaintiff as per above direction, the plaintiff would be at liberty to realise the same through execution process with prevailing Bank interest with effect from the date of respective payments made by the plaintiff to the defendants.

However, there shall be no order as to costs.

Send down the Lower Courts Records at once along with a copy of this judgment.

(Mr. Justice Sashanka Shekhar Sarkar)

I agree.

(Justice Md. Badruzzaman)

A.B. Sutar
B.O.