

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice A.K.M. Zahirul Huq

First Appeal No. 383 of 2015

Md. Abdul Aziz and another appellants

-Versus –

Desh Bangla Bicolpo Poribahan Limited
represented by its Chairman Md. Motiur Rahman
and another respondents

Mr. Sarder Abul Hossain with

Mr. Muntasir Uddin Ahmed and

Mr. Ajit Shil, Advocates

..... for the appellants

Mr. Md. Abul Alim Miah Jewel with Mr. Md.
Shahadat Hossain, Mr. Sayem Md. Murad, Mr.
Momtaj Parveen, Mr. Rafayelur Rahman and Mr.
Amina Siddika, Advocates

..... for respondent 1

Judgment on: 28.08.2025.

Bhishmadev Chakrabortty, J:

This appeal at the instance of the defendants is directed against the judgment and decree of the Joint District Judge, Court 1, Dhaka passed on 14.09.2015 in Title Suit 129 of 2009 decreeing the suit for specific performance of contract.

In the plaint the plaintiff asserted the facts that defendants 1 and 2 had purchased .54 acres of land as described in the schedule to the plaint and became its owner and possessor. During their possession and enjoyment they offered the plaintiff to purchase the suit land. The plaintiff accepted the proposal at a consideration of Taka 21,27,000/-. He paid Taka 16,00,000/- to defendants 1 and 2 as earnest money and they executed and registered a deed of agreement (*bainapatra*) on

30.12.2007. The defendants handed over possession of the suit land to the plaintiff. In the *bainapatra* there was a condition that the plaintiff would pay the balance amount of consideration of Taka 5,27,000/- to the defendants within 4 months and the latter would execute and register the *kabala*. The plaintiff requested the defendants within the prescribed time to receive the balance amount of consideration and execute and register the *kabala* but the defendants did not do the same. The plaintiff then through his learned Advocate sent a legal notice to the defendants on 09.02.2009. The defendants received the said notice but did not execute and register the *kabala*. The plaintiff then deposited the balance amount of consideration money through a chalan of Bangladesh Bank and instituted this suit for specific performance of contract.

Defendants 1 and 2 contested the suit by filing written statement admitting the execution and registration of *bainapatra* and receiving Taka 16,00,000/- as earnest money. But they further stated that on urgent need of money to send the son of defendant 1 to abroad they agreed to sell the suit land at a consideration of Taka 21,27,000/-. They received Taka 16,00,000/- as earnest money and executed and registered a *bainapatra* on 30.12.2007 where a condition was stipulated that the plaintiff would pay the balance amount of consideration to the defendants within 4 months and the latter would execute and register the *kabala*. But the plaintiff did neither pay the balance amount nor offered it to the defendants. Consequently,

defendant 1 failed to send his son abroad and suffered a huge loss. The plaintiff disregarded the terms of agreement by not paying the balance amount of consideration but he sent a legal notice on 9.02.2009 to them on false statement. The defendants gave reply to the aforesaid notice on 19.02.2009. Since the plaintiff did not comply with the terms of agreement, the contract was automatically cancelled after expiry of 4 months of its execution and registration. The price of the land in the meantime increased and to take its advantage the plaintiff instituted the suit with ill motive and as such the suit would be dismissed.

On pleadings the trial Court framed the following issues- (i) whether the suit is maintainable in the present form and manner; (ii) whether there was any agreement for sell of the suit land; (iii) whether the plaintiff is entitled to get a decree of specific performance of contract. In the trial, the plaintiff examined 3 witnesses and produced their documents exhibits 1-8(Ka). On the other hand the defendants examined 2 witnesses and produced their documents exhibits Ka-Gha(1). However, the Joint District Judge decreed the suit deciding the material issues in favour of the plaintiff, giving rise to this appeal by the defendants.

Mr. Sarder Abul Hossain, learned Advocate for the appellants taking us through the materials on record submits that the agreement for sale which is the subject matter of this suit is in fact a concluded

contract. It has been stipulated in the agreement what has to be done by the parties to perform the contract and if the parties fail to perform their respective part as per the agreement what would be its consequence. He then submits that in the agreement 4 months time from the date of execution of the *bainapatra* was prescribed for performance of the next part of the contract. The plaintiff did not offer the balance amount of consideration to the defendants within the specified time to execute and register the *kabala*. The plaintiff's witnesses failed to prove that he offered the balance amount of consideration within the time prescribed in the *bainapatra*. He refers to the legal notices sent by the defendants to the plaintiff exhibits-Kha and Ga and submits that by those they informed the plaintiff that the agreement has already been ceased on expiry of 4 months time stipulated in the agreement. But even after receipt of those the plaintiff did not take any step to perform the contract. In this case the readiness and willingness of the plaintiff to perform his part to execute and register of the *kabala* is necessary. But he failed to prove it by evidence both oral and documentary. The framing of issues in the suit was faulty. No relevant or material issues were framed for effective disposal of the suit. The trial Court could have framed an issue that in whose negligence the contract could not be performed. He then refers to the judgment and submits that the trial Court mainly dismissed the suit on the ground that the defendants failed to prove that they took the money on urgent basis to send defendants 1's son to the

abroad which is not the material issue in disposing the suit. Mr. Hossain finally submits that since the plaintiff failed to prove that he offered the balance amount of consideration to the defendants to execute and register the *kabala*, the trial Court ought to have dismissed the suit. The judgment under appeal, therefore, would be set aside and the appeal be allowed.

Mr. Abdul Alim Miah Jewel, learned Advocate for respondent 1 on the other hand opposes the appeal and supports the judgment passed by the trial Court. He submits that time is not the essence of contract in such a suit where the suit has been filed in compliance with the provisions of section 21A of the Specific Relief Act, 1877 (SR Act) as amended in 2004. He then refers to the amended provision of the Registration Act 25 of 2004; the amended Specific Relief Act 27 of 2004; the amended Transfer of Property Act 26 of 04 and amended Limitation Act 28 of 04 and submits that all the above laws have been amend at the same time. The combined effect of those amended provisions confinds the requirements of filing a suit for specific performance of contract in time and in form. He refers to the provisions of sections 12, 21A and 22(III) of the SR Act and submits that the intension of the legislation by amending the law and inserting section 21A of the SR Act is that a Court may enforce the defendants to perform his part of contract, if the suit is filed in compliance with the provisions of section 21A of the SR Act. This section starts form ‘notwithstanding anything’ which is a *non obstante* clause and

contends the expression that this law shall prevail over any other law exists at the time. He then submits that the plaintiff paid earnest money of Taka 16,00,000/- to the defendants out of total consideration Taka 21,27000/- and they executed and registered the *bainapatra*. The plaintiff offered them the balance amount of consideration but they did not perform their part on taking the balance amount. The plaintiff then sent legal notice to them on 09.02.2009 exhibit-7 but even on receipt of the aforesaid notice they did not come forward to perform their part. Thereafter, the plaintiff instituted this suit depositing the balance amount within the time prescribed under Article 113 of the Limitation Act. Although, there was a time fixed in the *bainapatra* to perform the contract but it cannot prevail over the law prescribed in the SR Act and Limitation Act. A suit for specific performance of contract cannot be refused only on the ground that the time fixed in the *bainapatra* to perform the part of the vendee has been expired. He further submits that apart from the above fact, the possession of the land has been delivered to the plaintiff. The plaintiff proved it in oral evidence and documents submitted which he received from the defendants. He refers to the case of Md. Alauddin Bepary vs. Somala Khatoon and others, 29 BLD 452 and relied on the *ratio* laid therein. He then refers to the case Cemex Cement (Bangladesh) Ltd. and others vs. Human Rights Peace for Bangladesh 12 ADC 455 and New Ideal Engineering Works Ltd vs. Bangladesh Shilpa Bank and others 42 DLR (AD) 221 and the principles therein on point of

interpretation of *non obstante* clause. Mr. Miah finally submits that although the trial Court did not frame issues properly but the ultimate decision passed is found correct and based on materials on record. The appeal, therefore, would be dismissed.

We have considered the submissions of both the sides, gone through materials on record, the interpretation of statute and *ratio* of the cases cited by the respondent.

The parties to the suit admits that defendants 1 and 2 entered into the contract with the plaintiff to sell the land measuring .54 acre described in the schedule to the plaint. They admit the execution and registration of the *bainapatra* exhibit-8 dated 30.12.2007. The parties also admits that consideration of the suit land was Taka 21,27,000/- and the defendants received earnest money of Taka 16,00,000/- from the plaintiff on the date of execution and registration of the *bainapatra*. The plaintiff alleged that he offered the balance amount of consideration to the defendants as per the terms of the *bainapatra* but the defendants did not receive it and execute and register the *kabala*. But the defendants claimed that the plaintiff did not pay or offered the balance amount of consideration to them in time and consequently they failed to execute and register the *kabala*. After expiry of prescribed 4 months time the contract has been ceased.

The *bainapatra* exhibit-8 shows that the parties agreed to perform the remaining part of contract for sale within 4 months of the

registration of the *bainapatra*. The term of the *bainapatra*, giving rise to the suit is reproduced below-

“অদ্য হইতে আগামি চার মাস মেয়াদের মধ্যে দেশ বাংলা বিকল্প পরিবহন লিমিটেডের চেয়ারম্যান সাহেবের নিকট হইতে বায়নাবাদে মূল্যের অবশিষ্ট পাঁচলক্ষ সাতাশ হাজার টাকা বুঝিয়া নিয়া দেশবাংলা বিকল্প পরিবহনের নিকট বরাবরে অথবা উহার চেয়ারম্যান সাহেবের মনোনিত যেকোন ব্যক্তির বরাবরে এক বা একাধিক সাফ কবলা দলিল সম্পাদন রেজিস্ট্রি করিয়া দিবো বা দিতে বাধ্য হইলাম।”----- “আর যদি অত্র দলিল গ্রহিতা দেশ বাংলা বিকল্প পরিবহন লিমিটেডের চেয়ারম্যান সাহেব উক্ত মেয়াদের মধ্যে বায়নাবাদে মূল্যের বক্রির টাকা বুঝাইয়া দিতে অপারাগ হন তাহা হইলে অত্র বায়নানামা দলিল বাতিল বলিয়া গণ্য হইবে।”

The deed of *kabala* in respect of the suit land could not be executed and registered. The plaintiff alleged that he offered the balance amount to the defendants in time and requested them to execute and register the *kabala* but the defendant did not do so. On the contrary the defendants alleged reverse to the above. Let us examine whether the plaintiff has been able to prove that he offered the balance amount of consideration to the defendants within the prescribed time.

The plaintiff stated in paragraph 10 of the plaint- “বাদীপক্ষ বায়না দলিল সম্পাদনের পর হইতে মূল্যের অবশিষ্ট টাকা সংগ্রহ করিয়া বায়নার মেয়াদের মধ্যে অবশিষ্ট টাকা বুঝিয়া পাইয়া ও নিয়া তফসিল বর্ণিত সম্পত্তি বাদীর বরাবরে রেজিস্ট্রি করিয়া দেওয়ার জন্য বিবাদীকে অনুরোধ করেন”। The defendants specifically denied the aforesaid statements made in the plaint in paragraph 8 of the written statement.

The defendants stated therein- “আরজির দশ নম্বর দফায় বর্ণিত যে বায়নাপত্র সম্পাদিত হওয়ার পরে বাদী মূল্যের অবশিষ্ট টাকা সংগ্রহ করিয়া বায়নার মেয়াদের মধ্যে অবশিষ্ট

টাকা বুঝিয়া পাইয়া নিয়া তফসিল বর্ণিত সম্পত্তি বাদীর বরাবরে রেজিস্ট্রি করিয়া দেওয়ার জন্য বিবাদীকে অনুরোধ করেন। উক্তরূপ উক্তিটি সম্পূর্ণ মিথ্যা, বানোয়াট, মনগড়া হওয়ায় অত্র বিবাদীগণের অস্বীকৃত বটে। In evidence PW 1 Md. Saidur Rahman did not state anything that the plaintiff offered the balance amount of consideration to the defendants within the time prescribed or any specific date he offered to. He stated, “বাদী বিবাদীকে বহুবার তাগিদ দেওয়া স্বত্ত্বেও জমি রেজিস্ট্রি করিয়া দেয় নাই”। PW 2 Md. Humayun Kabir in evidence stated nothing about offer of balance amount of consideration to the defendants. Although in cross examination he stated, “মেয়াদ ছিলো ৪ মাস। ৪ মাসের মধ্যে রেজিস্ট্রি করিয়া নেয় নাই দলিল হবে কিভাবে? অবশিষ্ট টাকা বিবাদীকে বাদী সাধিয়াছে। তারিখ মনে নাই”। PW 3 Md. Rafiqul Haque Chowchury in evidence stated, “বহুবার ঐ বাদী টাকা সাধিছে কিন্তু বিবাদীপক্ষ টাকা নেয় নাই। রেজিস্ট্রি করিয়া দেয় নাই”। In cross examination he stated, “টাকা সাধার সময় আমি ছিলাম। তারিখ আমার জানা নাই”। DW 1 Abdul Aziz stated in evidence “চার মাসের মধ্যে পরিশোধ করিয়া জমি রেজিস্ট্রি করিয়া নেয় নাই। আমি অনেকবার তাদেরকে টাকা দিয়া জমি রেজিস্ট্রি করিয়া নিতে বলি”। DW2 stated in evidence “এই চারমাসের মধ্যে বাদীরা টাকা দেয় নাই রেজিস্ট্রি করে নাই। আমি বহুবার তাদের বাড়ীতে গিয়েছি, দেনদরবার করেছি”।

On scanning the evidence of witnesses as quoted above, we find that none of the plaintiff’s witnesses stated any date of offer of the balance amount to the defendants. Even they did not state that they offered the amount within the time prescribed in the agreement. The plaintiff thus failed to prove that he offered the balance amount of consideration money to the defendants within the stipulated time in the *bainapatra*.

But the defendants proved that they requested the plaintiff to get the *kabala* executed and registered on payment of balance amount.

Now the question comes, where the suit has been filed within the prescribed period of limitation under Article 113 of the Limitation Act and in compliance with the provisions of section 21A of the SR Act, is the plaintiff entitled to get a decree as prayed for. Where specific time is stipulated in an agreement for sale, there time limit is made the essence of contract. When time is made the essence of contract under which parties thereto agree mutually to undertake certain obligations, it would be necessary to find in whose failure to carry out his obligations within the time mentioned in the contract the same could not be performed. It is necessary to find whose unwillingness to perform his part of the obligation under the contract eventually led to the non performance of the contract. In a suit for specific performance of contract which makes time the essence of the contract, the plaintiff must succeed if his readiness and willingness to perform the obligations undertaken by him are proved. [reliance placed on Ram Chandra Das and others vs. Khalilur Rahman and another, 37 DLR(AD) 21]. Here, the plaintiff had to perform his part first. He had to offer the balance amount of consideration within the prescribed time in the *bainapatra* to execute and register the *kabala*. But we have already observed that the plaintiff in evidence failed to prove it.

The interpretation of law with regard to *non obstante* clause particularly in section 21A of the SR Act and the cases referred to by learned Advocate for the appellant is found correct. We do agree with Mr. Miah about the interpretation of law of *non obstante* clause and find no dispute about it. But when a provision contains the expression “notwithstanding anything contained in any other law” it cannot mean that the provision containing the *non obstante* clause shall prevail over other provisions of the Act in the case of conflict; it will simply mean that the provision containing the *non obstante* clause shall prevail when it comes in conflict with any provision of any other law. Section 21A of SR Act provides prerequisite for filing a suit for specific performance of the contract. The prerequisites of filing a suit with above relief is that the agreement must be registered and balance amount of consideration money is to be deposited at the time of filing the suit. If a suit is filed in compliance with the aforesaid provisions of law, the suit would be found in form and maintainable. A suit for specific performance of contract cannot be filed without complying with the aforesaid provisions of law. If a suit is filed and registered without complying as above, the plaint shall be rejected outright. But it does not mean that if a suit is filed in compliance with the aforesaid provisions of law, the plaintiff is entitled to get a decree in it, even he fails to prove his case. The provisions of section 54A of the Transfer of Property Act as amended in 2004 provides that whether possession of the land under agreement for sale is handed over to the vendee is

immaterial in dealing with a case for specific performance of contract. The *ratio* laid in the case reported in 29 BLD 452 as referred to by Mr. Miah shall not apply here because the fact of that case and principle laid therein is quite distinguishable.

It is further found that just before expiry of period of limitation of one year for filing the suit prescribed under Article 113 of the Limitation Act the plaintiff sent a notice upon the defendants on 09.02.2009. It also proves that, if the plaintiff was willing to perform his part of contract he could have served the above notice earlier. On the other hand it is found that defendants sent notices upon the plaintiff on 27.05.2008 and 13.07.2008 exhibits 'Kha' and 'Ga' which were much earlier than that of the plaintiff. Despite that the plaintiff did not take any step but sent a notice to the defendants just before filing of the suit to save limitation. A relief sought in a suit for specific performance of contract is an equitable relief. It is well settled principle that he who seeks equity must do equity. On going through the evidence and materials on record, it is found that the plaintiff did not perform his part of contract and come to the Court with clean hands and as such he is not entitled to get a relief in the suit. The defendants by evidence of witnesses further proved that on urgent necessity of money to send plaintiff 1's son abroad they entered into the agreement with the plaintiff to sell the suit land but defendant 1 failed to send his son abroad for non-cooperation of the plaintiff in paying the balance amount of consideration within the fixed time. The

findings of the trial Court in this regard is perverse because the oral evidence of 2 DWs and cross-examination on PW1 by the defendants is enough to hold the aforesaid fact as claimed by the defendants.

In view of the aforesaid premises, we find that the trial Court erred in law in decreeing the suit. Accordingly, the appeal having merit is allowed. No order as to costs. The Judgment and decree passed by the trial Court is hereby set aside and the suit is dismissed.

But it is found in the agreement that nothing has been stated therein as to forfeiture of earnest money if the plaintiff fails to perform his part of contract and the *bainapatra* is cancelled. Therefore, we find that the defendants would refund the earnest money to the plaintiff and since in the meantime 15 years have passed the defendants have to pay an additional amount of Taka 8,00,000/- with the earnest money. Therefore, the defendants would pay a total amount of Taka $(16,00,000 + 8,00,000) = 24,00,000/-$ to the plaintiff through a pay order within 6 (six) months failing which this judgment shall stand recalled. If the plaintiff refuses to accept the pay order, the defendants would submit it to the concerned trial Court.

Communicate this judgment and send down the lower Court records.

A.K.M. Zahirul Huq, J:

I agree.