

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Surendra Kumar Sinha, Chief Justice

Mr. Justice Syed Mahmud Hossain

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider

Mr. Justice Md. Nizamul Huq

CIVIL APPEAL NO.81 OF 2014.

(From the judgment and order dated 08.12.2010 passed by the High Court Division in Writ Petition No.3836 of 2010)

With

CIVIL APPEAL NO.82 OF 2014.

(From the judgment and decree dated 15.12.2005 passed by the High Court Division in First Appeal No.585 of 2001.)

With

CIVIL APPEAL NO.83 OF 2014.

(From the judgment and decree dated 15.12.2005 passed by the High Court Division in First Appeal No.585 of 2001.)

With

CIVIL REVIEW PETITION NO.120 OF 2014

(From the judgment and order dated 09.03.2014 passed by the Appellate Division in Civil Petition for leave to Appeal No.247 of 2011)

And

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.480 OF 2015.

(From the Judgment and order dated 23.06.2015 passed by the High Court Division in Criminal Revision No.42 of 2015.)

Chairman, Rajdhani Unnayan Kartipakkha
(RAJUK), Dhaka:

Appellant.
(In C.A.No.81 of 2014)

Government of Bangladesh represented by
the Deputy Commissioner, Dhaka:

Appellant.
(In C.A.No.82 of 2014)

Rajdhani Unnayan Kartipakkha (RAJUK)
represented by its Chairman:

Appellant.
(In C.A.No.83 of 2014)

Manzur Ahmed:

Petitioner
(In C.R.P.No.120/14)

Moudud Ahmed:

Petitioner
(In Cr1.P.No.480/15)

=Versus=

Manzur Ahmed @ Manzoor Ahmed and
others:

Respondent.
(In C.A.No.81-83 of 2014)

Rajdhani Unnayan Kartipakkha (RAJUK)
represented by its Chairman:

Respondent
(In C.R.P.No.120/14)

The State and another:	Respondent (In Crl. P. No.480/15)
For the Appellant: (In C.A.No.81/14)	Mr. Mahbubey Alam, Senior Advocate, instructed by Mrs. Sufia Khatun Advocate-on-Record.
For the Appellant: (In C.A.No.82/14)	Mr. Mahbubey Alam, Attorney General, (with Mr. Ekramul Haque, D.A.G.) instructed by Mrs. Madhumality Chowdhury Barua, Advocate-on-Record.
For the Appellant: (In C.A.No.83/14)	Mr. Mahbubey Alam, Senior Advocate, instructed by Mrs. Madhumality Chowdhury Barua, Advocate-on-Record.
For the petitioner: (In C.R.P.No.120/14)	Mr. Md. Taufique Hossain, Advocate- on-Record.
For the petitioner: (In Crl.P.No.480/15)	Mr. Md. Taufique Hossain, Advocate- on-Record.
For the Respondents: (In C.A.No.81-83/14)	Mr. Rokanuddin Mahmud, Senior Advocate (with Mr. Qumrul Haque Siddique, Senior Advocate) instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondents: (In C.R.P.No.120/14)	N.R.
For the Respondent No.2: (In Crl.P.No.480/15)	Mr. Khorshed Alam Khan, Advocate, instructed by Mrs. Sufia Khatun, Advocate-on-Record.
For the Respondent No.1: (In Crl.P.No.480/15)	N.R.

Date of hearing: 3rd, 4th and 10th May, 2016.

Date of Judgment: 2nd August, 2016.

J U D G M E N T

Surendra Kumar Sinha, CJ: The subject matter out of which these proceedings have cropped up are identical, and therefore, this judgment will regulate all these matters. It relates to a house at Gulshan appertaining to Plot No.6, Block No.NW(H) 159, Gulshan Avenue, Dhaka, area 1 bigha 13 katha 14

chataks with building standing thereon. Complicated questions of fact are involved in these matters and to address the questions of law short facts are relevant which are as under:

Mrs. Inge Flatz, an Austrian national was married to Muhammad Ehsan, a Pakistani citizen. They had their own respective businesses and Mrs. Inge Flatz had her own property and business in the then East Pakistan. After the marriage she retained her own name and nationality. On 14.09.1965 the Dhaka Improvement Trust now RAJUK allotted the said plot of land in favour of Mrs. Inge Flatz. She built a house on the plot with the prior approval of RAJUK. On 02.8.1973 Mrs. Inge Flatz executed a Power of Attorney in favour of Mr. Moudud Ahmed of the Law Consultants duly notarized and endorsed by an official of Bangladesh Embassy, Bonn, Germany and attested by the Ministry of Foreign Affairs, Dhaka, to enable him to act on her behalf. The Austrian government took up the matter when the government declared the property

as abandoned property for the release of the property. Three Austrian Ambassadors Dr. Erna Sailer (1972-74) , Dr. W. Schallenger (1975-78) and Dr. Georg Henning (1979-81) visited Dhaka several times and called on the government officials including the Secretaries and Ministers in successive years for the restoration of the property to Mrs. Inge Flatz.

Mrs. Inge Flatz rented the house to Mr. Moudud Ahmed by a lease agreement executed between her and Mr. Moudud Ahmed on 23.05.1981. Mr. Ahmed along with his family started residing in the house since June, 1981. It is claimed by the plaintiff, the brother of Mr. Moudud Ahmed, that this lease deed was further amended on 21.07.1982 with the provision to repair, renovate and recondition of the house for habitation since the 2-bed room small house was in shamble condition. Under the lease agreement signed in May 1981 provision was made for the lessee to do all these works at his own cost to be adjusted against the rent, to make the house worth living for which a

huge investment had been made costing more than two crore.

It is stated that Mrs. Inge Flatz on 25.06.1984 executed a new Power of Attorney in favour of one Mohsin Darbar son of late Dawodbhai Darbar, a member of Bohra Community as lawful attorney to do all such acts as embodied in the said instrument including the sale of the property. On 10.08.1985 an agreement for sale was executed acknowledging the part payment between Mrs. Inge Flatz through her attorney and the plaintiff and possession was handed over to him along with all the original documents relating to the title of the property. Manzur Ahmed, (the plaintiff) filed the suit for specific performance of contract on 23.1.1993 in the 1st Court of Subordinate Judge, Dhaka being Title Suit No.14 of 1993, renumbered as Title Suit No.179 of 1999.

The plaintiff stated that in the agreement for sale the price was fixed at 60,000 sterling pound and Mrs. Inge Flatz received an advance of 20,000

sterling pound and the plaintiff promised to pay the balance amount of the price at the time of registration of the sale deed, either in cash or through bank from income of the plaintiff originated in the United Kingdom. Since the vendor did not take steps for obtaining income tax clearance certificate and permission to sell the suit property which amounts to refusal to execute and register the sale deed, the plaintiff was compelled to file the suit.

Defendant No.3, RAJUK filed written statement stating that the plaintiff is not entitled to any decree on the following grounds:

- a) No notice under section 169 of the Town Improvement Act has been served upon RAJUK before institution of the suit.
- b) No permission from RAJUK has been obtained before entering into agreement for sale;
- c) The amount shown as consideration money is much below the rate fixed by RAJUK.

d) The alleged power of attorney has not been accepted by RAJUK. More so, the same is forged and collusive;

e) The claim is time barred.

Learned Subordinate Judge by his judgment and order dated 16.08.2001 dismissed the suit holding that Mohsin Darbar, is a fictitious person and the power of attorney has been created by using his name; that there is no acceptable evidence in support of payment of advance amount; that the defendant No.1 is a foreigner but no permission has been taken from the Bangladesh Bank under section 18 of the Foreign Exchange Regulation Act, 1947 before entering into the contract; that no account has been opened with the Bangladesh Bank as per Bangladesh Bank's direction and the court cannot pass any order for opening a non-resident foreigner's account with Bangladesh Bank for depositing the balance amount and that no transfer fees has been paid to RAJUK on the basis of the price of the land fixed by RAJUK.

Against the said judgment the plaintiff filed an appeal in the High Court Division. Defendant No.1, Mrs. Inge Flatz has been made respondent No.1 in the said appeal. While the said appeal was pending the Registrar made a note to the effect that the appeal had abated against the heirs of defendant respondent No.1. The plaintiff filed an application on 16.06.2003 for setting aside the said order and praying for a direction for service of notice upon the defendant respondent No.1 under order 5 Rule 20 of the Code of Civil Procedure. Subsequently the plaintiff filed another application on 30.6.2003 in the appeal for setting aside the order of the Registrar and for exempting the plaintiff from substituting the legal heirs of the defendant No.1. Mrs. Inge Flatz.

The High Court Division allowed the application dated 30.06.2003 holding that legal heirs and successors of the defendant No.1 Inge Flatz, if any, are not required to be brought on record by way of

substitution and that the plaintiff is exempted from substituting the legal heirs and successors of the defendant No.1. On 13.12.2005 the plaintiff filed two applications, one for amendment of the plaint and another for a direction upon the government of Bangladesh and RAJUK respectively to execute and register the sale deed in favour of the plaintiff stating that in the absence/non-existence of the defendant No.1, the government has entered into the shoes of defendant No.1 and that the suit property has vested in the government.

The High Court Division allowed both the applications and allowed the appeal holding that the power of attorney dated 25.06.1984 was actually executed by Mrs. Inge Flatz in favour of Mohsin Darbar to sell the suit property; that the deed of agreement for sale is genuine and on the basis of the same the plaintiff made part payment and got possession; that in view of death of Mrs. Inge Flatz the suit property has vested in the government and

thus the Foreign Exchange Regulation Act will not be attracted in the case. Accordingly it directed the government of Bangladesh to execute the sale deed in favour of the plaintiff on receiving the balance consideration money in Bangladesh. Two appeals have been filed one by the government and the other by RAJUK.

The property was also enlisted as abandoned property. Plaintiff filed Writ Petition No.3836 of 2010 against refusal to mutate the property in pursuance of the judgment of the High Court Division. The High Court Division by judgment and order dated 8.12.2010 declared the enlistment of the property as abandoned property illegal basing upon the decree passed in the suit for specific performance. Civil Review Petition No.120 of 2004 arose from judgment of this court in Civil Petition No.247 of 2001 on the ground that this matter was not heard in presence of the lawyers of the plaintiff.

Though leave was granted on various law points, in course of hearing the Counsel of both the parties confined their arguments on the question of abatement of the suit. Learned Attorney General argued that the High Court Division was not justified in decreeing the suit for specific performance despite the fact that the principal defendant Mrs. Inge Flatz died during the pendency of the suit, if not earlier, without substituting the heirs and successors of Mrs. Inge Flatz or in the alternative, without filing proper application to proceed with the suit even if it is assumed that Mrs. Inge Flatz died leaving no heirs and successors as claimed by the plaintiff. Secondly, it was urged that the High Court Division was not justified in decreeing the suit without reversing the findings of the trial court that Mohsin Darbar, the attorney of Mrs. Inge Flatz was a fictitious person who never came in the scene at any stage after the execution of the power of attorney, and finally it was argued that the agreement was

executed in violation of the provisions of the Foreign Exchange Regulation Act.

The suit was instituted on 23.01.1993 for specific performance for sale of the property allegedly executed on 10.8.1985. Defendant No.2 government of Bangladesh and the defendant No.3 RAJUK entered appearance and filed written statements. However, for non-service of summons upon the principal defendant Mrs. Inge Flatz the suit was adjourned from time to time for taking steps. On 02.01.1994 the court recorded an order to the effect that the summons upon the defendant No.1 returned unserved. Her address has been given at Seepark, Klausnuhle, 6900 Bregenz, Austria and her attorney Mohsin Darbar's address has been shown at 5, Bangabundhu Avenue, Dhaka. Accordingly, the plaintiff prayed time for taking steps on 05.02.1994, 19.03.1994 and 23.04.1996. By an application filed on 18.04.1996 the plaintiff stated that the suit was fixed for taking steps for substitution. It was

clearly stated that "কিন্তু উক্ত মোকদ্দমার মৃত এক নম্বর বিবাদীর ওয়ারিশের নাম ও ঠিকানা অদ্যাবধি সংগৃহীত করতে না পারায়" । Similar application was made on 11.06.1996. On 04.06.1996 the court recorded an order to the effect that the plaintiff filed an application to implead the government and to allow the plaintiff to proceed with the suit. No such application is available with the record and the government has already been made a defendant in the suit from the beginning and we find no reason why the plaintiff has filed such application.

On 25.09.1994 the plaintiff again prayed for time for filling application for substitution of the heirs of defendant No.1. In the order the court observed, 'বাদী পক্ষ ১নং বিবাদীর ওয়ারিশদের ব্যাপারে তদ্বির গ্রহণের জন্য সময়ের আবেদন করিয়াছে।' Thereafter, the suit was adjourned on 15.11.1994, 16.02.1995, 08.04.1995, 20.05.1995, 11.07.1995, 02.09.1995, 05.10.1995, 19.11.1995, 10.02.1996, 09.03.1996, 18.04.1996, 11.06.1996, 11.08.1996, 09.10.1996, 30.11.1996, 12.02.1997, 26.04.1997, 24.06.1997. On 02.09.1997 the court

recorded an order 'বাদী পক্ষ মৃত ১নং বিবাদীর বিষয়ে তদ্বির গ্রহণের জন্য সময়ের আবেদন করিয়াছে'। The prayer was allowed and then the suit was adjourned on 04.11.1997, 01.03.1998, 15.08.1998, 20.08.1998, 27.09.1998, 16.11.1998 and in this way the suit was adjourned from time to time for the substitution of the heirs, but no petition for substitution was made at all. On 28.09.2000 the court recorded an order that the plaintiff filed an application under Order 5 Rule 20 of the Code of Civil Procedure for service of summons upon the defendant No.1. The court allowed the prayer.

Almost on all dates the court recorded orders to the effect that the plaintiff took adjournments for substitution of the heirs of late defendant No.1 and the plaintiff also repeatedly filed an application admitting that the defendant No.1 died and that he could not collect the particulars of the heirs. On perusal of the record we noticed that some applications are missing from the record particularly the application dated 28.09.2000. We also noticed

that there are double marking of the serial number of pages with red ink, for example, page 8 has been marked as page 12 and this process continued upto page 79, the corresponding cross page is 90. This apparently shows that someone has removed some applications filed by the plaintiff from the record.

Learned Attorney General submitted that the application for substituted service upon Mrs. Inge Flatz made on 28.9.2000 was misconceived petition, inasmuch as, long before that date the plaintiff has admitted the death and therefore, the suit was prosecuted against a dead person. In this connection he has drawn our attention to the order sheet of the suit. He added that in fact the defendant No.1 Mrs. Inge Flatz died before the date of execution of the agreement for sale in question and the power of attorney in favour of Mohsin Darbar, and that the suit was filed against a dead person by creating the power of attorney by forging the signature of defendant No.1 Mrs. Inge Flatz. In support of his

contention the learned Attorney General has also drawn our attention to some documents filed by way of supplementary paper book.

On the other hand, Mr. Rokanuddin Mahmood submitted that the documents filed by the government are not admissible in law. According to him, the plaintiff having failed to collect the particulars of the heirs of Mrs. Inge Flatz despite endeavours made in that regard was compelled to file the application under Order 5 rule 20 of the Code of Civil Procedure and the Court allowed the prayer. He, however, disputed the date of death of Mrs. Inge Flatz. He submitted that since the trial court did not record any order of abatement of the suit and proceeded with the suit, the suit did not abate even if it is assumed that Mrs. Inge Flatz died during the pendency of the suit. He, however, makes an alternative submission that if this court finds that Mrs. Inge Flatz died leaving two heirs as submitted by the learned Attorney General, ends of justice demands

that the suit should be remanded to the trial court for enabling the plaintiff an opportunity to substitute the heirs of the defendant No.1 Mrs. Inge Flatz and for this reason, the plaintiff should not be non-suited.

Before we decide the contentious point as regards the date of death of the defendant No.1 Mrs. Inge Flatz, the first points which are required to see is whether the plaintiff has legally prosecuted with the suit by taking recourse to the substituted service upon Inge Flatz even if it is assumed that she has died just immediate after the institution of the suit. Secondly, whether the High Court Division is justified in directing the government to execute the sale deed pursuant to the plaintiff's prayer for amendment of the plaint at the late stage of the hearing of the appeal even after noticing that Mrs. Inge Flatz died during the pendency of the suit. It is on record that admittedly Mrs. Inge Flatz died leaving her husband Mohammad Ehsan. There is nothing

on record that Mrs. Inge Flatz divorced her husband. Rather in the plaint and the memorandum of appeal it has been written 'Mrs. Inge Flatz, wife of Mr. Md.Ehsan.....'" So as soon as the plaintiff knew that the summons of the suit could not be served upon her, the plaintiff was required to substitute at least her husband Mohammad Ehsan as the surviving heir. Or in the alternative, he was required to file petition stating that Mrs. Inge Flatz divorced her husband before her death and that she died leaving no children. Instead, the plaintiff filed application under Order 5 Rule 20 of the Code of Civil Procedure for substituted service of sommons upon a dead person which was misconceived. The plaintiff admitted by filing applications about the death and the court also recorded orders that Mrs. Inge Flatz had died. On the death of a plaintiff or defendant, the plaintiff is required to file an application for substitution of the representatives of the deceased. The death of a plaintiff or defendant shall not cause

the suit to abate if the right to sue survives. So the plaintiff was required to state by positive terms that despite the death his right to sue survived. In this connection Order 22 rule 4 is relevant for our consideration which reads as follows:

"4(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) Notwithstanding anything contained in sub-rule (3), the plaintiff shall not be required to substitute and shall be exempt from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who having filed it, has failed to appear and contest the suit at the hearing; and judgment may in such a case be pronounced against the deceased defendant notwithstanding the death of such defendant and shall have the same force and effect as if it had been pronounced before the death took place."

The cause of action for filing the suit arose on the refusal of Mrs. Inge Flatz to execute and register a sale deed on receipt of the balance consideration as per contract. The meaning of the words 'right to sue' used in the rule is to be based upon the facts which go to make up what is called 'the cause of action.' So the words 'if right to sue

survives' used in rule 1 of Order 22 mean, if the cause of action survives or continues. It includes a 'right to appeal' and a right to prosecute the suit by law or to obtain relief by means of legal procedure. Reference in this connection is ILR 26 Bom 597, AIR 1927 Nag 343, ILR 38 Mad 1064.

If the plaintiff is to establish his personal right to an office which would entitle him to possession of the property in suit, on his death either during the pendency of the suit or during the pendency of appeal, the right to sue will not survive and the suit would abate. This means, in cases where the relief sought is ultimately connected with the individuality of the deceased, the right to sue will not survive against his legal representatives. To make the point more clear, there are certain types of wrongs which, though a remedy for them is available against the wrongdoer during his lifetime, does not permit of a remedy for them against his representatives after the death. Under the English

law an executor represents the debts and the property of his testator but not his person. It is in general true of the position of a legal representative in our country.

Generally, apart from cases of contract in which a remedy for a wrongful act can be perused against the estate of the deceased is one in which the wrong consists of the appropriation by the deceased of the property, or value of the property belonging to another. In a suit for specific performance which is also based on contract in view of section 23 of the Specific Relief Act which provides that the specific performance of a contract may be obtained by 'the representative in interest for the principal.....'

Representative in interest includes alienee, transferee or legal representatives after death. Each of them may sue or may be sued for specific performance of the contract provided that the contract is not dependent on the learning, skill, solvency or any personal quality of such contracting

party, or there is no terms in the contract that his interest shall not be assigned.

Under the above rule a suit ordinarily abates only against the deceased defendant, unless there are circumstances which would cause an abatement as against one to operate as an abatement against all. Order 22 rule 4(3) lays down in express terms that if no application is made the suit would abate in so far as the interest of the deceased is concerned. If the court can deal with the matter in controversy so far as regards the right and interest of the plaintiff or the defendant other than the deceased defendant, it shall proceed with the suit and decide it. The heirs of the deceased defendant who are not party to the suit, will not be bound by the decree and in that sense the decree will not be effective against the heirs. If an effective decree can be passed against the other defendants the whole suit cannot abate.

The question of abatement of whole suit depends on whether the defendant was such a necessary party

that his absence would result in the dismissal of the whole suit. However, if the deceased was a proper party the suit would not abate as a whole. It depends upon the facts of each case. Reference may be made in this connection are the cases reported in AIR 1928 Lah 572 (FB) and Nasir Mohammad V. Hamid Ali Chowdhury, Civil Petition No.227 of 1995 (unreported). In the above unreported case in a suit for specific performance, a person subsequently entered into contract with the vendor. Vendor died and his legal representatives were not brought on record and the suit abated against the heirs of the vendor and it resulted in abatement of the suit as whole as the suit was not maintainable against a person who had not acquired title from the vendor. The question whether the whole appeal abates or only a part of it because of appellant's failure to bring on record within the time the legal representatives of the deceased shall be decided in each case on facts of the case. If a decree can be passed and

given effect to in so far as the rights of the parties actually before the court are concerned without interfering with the rights of others, the appeal can continue, if not, it abates as a whole.

Where in a suit against several defendants, the claims are made against all of them and on the death of one of the defendants during the pendency of the suit, his legal representatives are not substituted, the entire suit will abate if the interest of the deceased defendant in the subject-matter of the suit is not shown to be separable from that of the others. So, the question as to whether in the absence of the legal representatives of the deceased defendant the entire suit would fail depends on the nature of the suit, the relief sought and whether an effective decree can be passed by the court against the remaining defendants in the absence of the legal representatives of the deceased defendant. A suit for possession or injunction or mesne profit or specific performance, if the legal representatives of the

deceased defendant are not brought on record, no effective decree can be passed against the remaining defendants. Where a joint claim against several defendants is made in a suit and during the pendency of appeal by the plaintiff some of the defendants died and no separate claim is made against any of the defendants in appeal, the failure of the plaintiff to bring on record their legal representatives results in abatement in appeal in toto. (Babu Sukhram Singh V. Ram Dular Singh, AIR 1973 S.C. 204).

Where the defendant died before the institution of the suit against him, the court has no jurisdiction to substitute the representatives and allow the suit to proceed against them because the suit against a dead defendant is a nullity. Under the old Code of Civil Procedure a specific order of abatement was necessary and such an order should not be passed without notice to the plaintiff, but under the present Code, the abatement takes place automatically and no separate order therefore is

necessary. (AIR 1966 All 353(FB), AIR 1953 Trav-co 545 (FB).

Now keeping the above position of law in mind let us consider as to whether an effective decree can be passed in the suit. In none of the applications the plaintiff made any prayer for substitution of the heirs or that he stated that Mrs. Inge Flatz died leaving no heir. His right to sue survived against the representatives of the deceased and not against the other two defendants. Unless and until the plaintiff filed an application that his right to sue survives even after the death of the defendant, the suit cannot proceed. Article 171 of the Limitation Act provides 60 days time as the period of limitation from the date of death of the plaintiff or the defendant, as the case may be, and the application for substitution is to be made within the period of 90 days, from the date of death without any prayer for setting aside abatement otherwise the suit will abate automatically. The object of providing sub-rule

(3) is clear that if no substitution of legal representatives of the deceased is made the suit or appeal will abate provided if the right to sue survives. If no application for substitution is filed within the time allowed by law as against the deceased defendant, the effect of such an abatement on the suit against the surviving defendant depends on other considerations but in the facts of the given case, we are not required to examine this point because of the fact that the other defendants are formal defendants against whom no relief has been sought by the plaintiff in the suit as framed. Order 22 rule 9 provides that on the abatement of the suit no fresh suit shall be brought on the same cause of action. Therefore, there will be finality of the suit if the sole plaintiff or sole defendant dies and no application for substitution is made.

Order 5 rule 20 is applicable in a case where the court is satisfied that the defendant is keeping out of the way for the purpose of avoiding service or

for any other reasons the summons cannot be served upon the defendant in the ordinary way, the question of service of substituted service of summons will arise. The plaintiff takes the recourse of substituted service when ordinary modes of service of summons have been exhausted but if the plaintiff does not take proper steps for ordinary way of service the court cannot pass any order of substituted service.

In this connection Mr. Rokonuddin Mahmood, learned Counsel has drawn our attention to certain letters enclosed with the additional paper book dated 22.02.2014. A letter was written by the Embassy of Bangladesh, Bonn, Germany on 15.06.1993 intimating the Foreign Ministry that summons of the suit was sent to the address of Mrs. Inge Flatz wife of Mr. Muhammad Ehsan, Seepark, Bregenz, Austria and it was returned with remarks that "the addressee was already dead". In this letter the Embassy clearly mentioned Inge Flatz's husband is Muhammad Ehsan. In the plaint also the plaintiff has mentioned her husband's name

is Muhammad Ehsan. The Ministry of Foreign Affairs intimated the court by letter under memo dated 27.06.1993 that Mrs. Inge Flatz died as reported by German Embassy. So, these two letters of the plaintiff proved that Mrs. Inge Flatz died at least leaving her husband but the plaintiff did not file any application to substitute her husband, instead he prayed for substituted service of summons upon her who was dead which was totally perverse.

Mr. Rokaonuddin Mahmood also drew our attention to a letter written by late Mr. Mohammad Azizul Huq, Advocate to the Secretary Ministry of Foreign Affairs for requesting the Ambassador in Federal of Republic of Germany to enquire as to whether Mrs. Inge Flatz had left any heir or heirs. The Ministry of Foreign Affairs wrote a letter to the Austrian Embassy for furnishing particulars of the heirs of the deceased and in reply the Austrian Embassy sent a Note Verbal on 14.09.1994 to the Embassy of Bangladesh intimating that "the information about day and month of the

death of Mrs. Inge Flatz in Austria is subject to data protection, and therefore, cannot be informed". It is already known to the plaintiff that Mrs. Inge Flatz's husband is alive. So this letter does not help the plaintiff. Before that date the plaintiff admitted in his applications that she died but despite that the plaintiff did not take any step to substitute her husband. Mr. Rokonuddin Mahmood could not give any satisfactory reply on being queried by the Court in this regard.

As the appellant did not substitute the heirs of Mrs. Inge Flatz, the appeal appeared in the lowazima court of the Registrar. The Registrar by order dated 10.11.2002 noted that 'Let a note be made that the appeal abates as against the heirs of the deceased respondent No.1'. The appellant thereupon filed an application for setting aside the order stating that the appellant could not trace out the defendant No.1 or her heirs. This petition was misconceived and inconsistent one, because after the death of Mrs.

Inze Flatz how he would trace out her whereabouts. He did not claim that Mrs. Inge Flatz died leaving no heir or successor.

The High Court Division by order dated 01.07.2003 allowed the application observing that 'Legal heirs and representatives of the deceased-respondent no.1 if any are not required to be brought on record by way of substitution and plaintiff-appellant is exempted from the necessity of substituting the legal heirs and representatives of deceased-respondent No.1.' This order is also totally misconceived order for, if any party to the litigation dies, in the absence of substitution of the heirs of the deceased, the suit or appeal will abate by operation of law after expiry of 90 days. The court can pass such order if the heirs are already on record and in that case, the Court can pass an order to note down the succession of the heirs of the deceased. The High Court Division itself noticed that through inadvertence and mistake 'the

defendant No.1 was made respondent No.1 showing her alive.' This shows that the High Court Division was satisfied that Mrs. Inge Flatz died before the filing of the appeal and that the appeal was preferred in the name of a dead person. This observation is sufficient to declare the appeal as nullity.

It is irony to note that after the conclusion of hearing of the appeal on 13.12.2005, the High Court Division entertained two applications on behalf of the appellant, one for amendment of the plaint for addition of sub-paragraphs 19(a), 19(b) and 3 stating that 'Since the defendant No.1 is dead, in that event what would be fate of the appeal if the same is allowed in favour of the plaintiff appellant; question of execution and registration of the sale deed are to be done through.....' and also the prayer portion of the plaint seeking a direction upon the defendant Nos.2 and 3 to execute the sale deed. The other application is to direct the defendant Nos.2 and 3 to execute and register the sale deed

since the defendant No.1 is dead. Surprisingly, we noticed that the High Court Division allowed these petitions as well despite the admission of the plaintiff that the principal defendant had died long ago, and decreed the suit.

Therefore, the admitted facts proved that Mrs. Inge Flatz died before the filing of the suit, leaving behind her husband and son, but the plaintiff did not substitute them. Under such circumstances, the prosecution of the suit against the government and RAJUK pursuant to an application under Order 5 rule 20 of the Code of Civil Procedure was absolutely erroneous. There was natural death of the suit for non-substitution of the admitted heirs of the defendant No.1 against whom the plaintiff claimed substantive relief. There is another aspect which is also relevant for our consideration to resolve the said issue and if this fact is considered, there cannot be any doubt that the plaintiff has prosecuted the suit against a dead person, and therefore, the

decree passed by the High Court Division is a nullity.

Beside the above admitted fact, the Learned Attorney General submitted that as the government had positive information that Mrs. Inge Flatz died on 30.03.1985, he went to Austria for collecting necessary documents relating to her death and confirmed that she died on that day. In this connection he referred to a letter written by the Judge of the District Court of Bregenz dated 05.09.2012 addressing to him stating as under:

"Today I can inform you, that Inge Maria Flatz, born on the 3rd of June 1941, Austrian citizen, last address: Klausmuhle 1, 6900 Bregenz, died on the 30th of March, 1985. The file shows that Inge Maria Flatz was married with Muhammad (also: Mohamad/Mohammad) Ehsan, born on the 15th May of 1916, Pakistani citizen, last known address: Klausmuhle 1, 6900 Bregenz, and that she was

the mother of Karim Franz Solaiman, born on the 11th of October, 1963, Austrian citizen, who - according to the central population register - was last registered under an address in Vienna, Austria, until the 31st of August 2012 and moved to Pakistan then.

Notations in the file that were taken in presence of Muhamad Ehsan and Karim Solaiman say, that Inge Marla Flatz was owner of a property in Dacca (Dhaka)/Bangladesh, Holding No.159, Gulshan Anevue No.NW(H)-6, described as "all that piece a parcel of land measuring 1 Bigha, 13 Kathas and 14 chattaks", that the property had been illegally occupied during political riots and because of that the property is practically valueless (see attached copy).

Inge Marla Flatz died without leaving a last will and her husband denied being heir to her assets. Therefore the judicial

proceedings in the hereditary case were terminated on the 4th of October 1985 by the transfer of the title to Karim Franz Solaiman (see attached copy)."

This letter clearly shows that Mrs. Inge Flatz died on 30.03.1985 leaving behind her husband Muhammad Ehsan and son Karim Franz Solaiman; that her husband denied being heir of her asset and that she had left the Gulshan's property as well. As regards presence of husband, the plaintiff has admitted as mentioned above. This letter has been counter signed by the President of the court. This letter clearly revealed that a hereditary judicial proceeding was initiated over the death of Mrs. Inge Flatz and on her husband's denial her son inherited her property. Learned Attorney General has also produced some orders and the list of the properties left by the deceased in the said hereditary proceedings. He also drew our attention in the list of the properties in which the suit property was also included with an

endorsement that "the property is illegally occupied since political unrest". He has also drawn our attention to a notarial certificate in support of this list of properties and the payment of necessary court fee for supplying the copy dated 07.09.2012. He also drew our attention to the nomination of the successor of the deceased by the court of Vienna. He has also drawn our attention to the minutes of the treatise of the property of Mrs. Inge Flatz, that is to say, the final decision of the hereditary proceedings as under:

"1.The inheritance declaration in the petition to the district Court Bregenz dated 01.04.1985, Onr, I, submitted by the son Karim Franz Solaiman, is accepted by the court.

2. The inheritance right is proved by the law and the statement of the appeared persons.

3. The minutes of the treatise dated 26.09.1985 are permitted by the court.

4. The renouncement of inheritance of the widower Muhamad Ehsan, mentioned in the petition to the court dated 01.04.1985 Onr. I, is taken to notice.

5. Because of renouncement of inheritance of the widower Muhamad Ehsan, the whole property left will be handed over to the son Karim Franz Solaiman."

The Learned Attorney General also drew our attention to the notarial certificate which authenticated the proceedings of the District Court, Bregenz and also the death certificate issued by the District Court of Bregenz as under:

Certificate.

"The property left by Inge Flatz (3.6.1941), married to Ehsan residing in the past in Bregenz, Klausmühle I, who died on 30.03.1985 without leaving behind any will,

will be handed over to the son Karim Franz Solaiman (11.10.1963), student of medical science, address: Bregenz, Klausmühle, because he has submitted the inheritance declaration, which has been accepted by the court, and because of renouncement of inheritance of the widower Muhammad Ehsan."

He also drew our attention to the notarial certificates of the said document, the birth and death certificates of Mrs. Inge Flatz. In birth and death certificates the date of birth was clearly mentioned in English as '03.06.1941' and the date of death as '30.03.1985'. In the original death certificate also it was written in German, English, French and some other languages. In that certificate the deceased's parents names and all particulars have been mentioned. This certificate was also duly authenticated by a notary public.

Mr. Rokonuddin Mahmood submitted that these documents could not be admitted in evidence. The

translated version is not legally admissible as per provisions of Order VII rules 2-4 of the Appellate Division Rules, 1988. Rule 2 of order 7 provides that no document in a language other than Bengali or English shall be exhibited or used for the purpose of any proceedings before the court unless the same has been translated in accordance with the rules. The procedure has been provided in the succeeding rules. Now the question is whether in view of this provision these documents can be admissible in evidence or not, or even if it cannot be taken in evidence, this court can take judicial notice of them. Learned Attorney General submits that most of the documents are the certified copies of the judicial proceedings of Bregenz, which were duly issued by the District Court and countersigned by the President of the court and authenticated by a notary public and in view of section 78 of the Evidence Act, these documents are admissible in evidence.

Section 78 prescribes special modes of proving the contents of various kinds of official documents, public acts, proceedings of the legislature etc. Clause (6) relates to the proof of documents of any other class in a foreign country 'by the original, or by a copy certified by the legal keeper thereof, with a certified under the seal of a notary public, or of a Bangladesh Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country."

This clause requires three conditions to be fulfilled for reception of public documents in a foreign country. A public document in a foreign country should be certified by the legal keeper of the original documents, or of a Consul General and there shall be proof of the character of the document according to the law of the foreign country. These copies were duly certified by the keeper of the

documents with certificates under the seal of a notary public. This clause lays down three conditions for admitting public documents of the nature but the admission of judicial record is not a condition precedent for drawing the requisite presumption under section 86 of the Evidence Act. Except the birth and death certificates, other documents are from the judicial record. In the hereditary proceedings the date of death of Inge Flatz had been mentioned as '30.03.1985' and this date corroborates the date mentioned in the death certificate which is also a public document. Therefore conditions laid down in clause (6) of section 78 have been fulfilled and there is no legal bar to admit them in evidence.

When a document whether private or public has been filed for admitting in evidence, which are mentioned in section 79 to 90 of the Evidence Act, the court may draw an inference from certain facts in supersession of any other mode of proof. That inference may be one which the court is bound to take

as proved until contrary is proved by the opponent. Mr. Rokanuddin Mahmud raised one objection on the question of admissibility of the document in view of the endorsement made by the official of the Embassy of Bangladesh, Berlin to the effect that 'The Embassy does not assume any responsibility for the contents of the document' and submitted that since the Embassy did not take the responsibility about the contents of the document, clause (6) of section 78 has not been fulfilled. We find fallacy in the submission of the learned Counsel.

In *Badat & C. V. East India Trading Co.*, AIR 1964 S.C.538, an objection as to the enforcement of foreign awards or foreign judgment based upon those awards was raised. The award was made in New York and confirmed by New York Supreme Court. The question was whether ext. X-9 can be taken in evidence. That record contains the certificate issued by the Consul-General in the similar manner as under:

"The Consulate General of India assumes no responsibility for the contents of this document.

Sd/- M. Gopalcharan
CONSUL GENERAL
Seal of CONSULATE
GENERAL OF INDIA,
New York, N.Y.

Dated:
New York N.Y.
June 18, 1957. "

After quoting clause (6) of Section 78 and section 86 of the Evidence Act, Subba Rao, J. observed:

"It is not disputed that the copy of the judgment is certified by the legal keeper of the original within the meaning of S.78(6) of the Evidence Act; nor is it contended that there is no certificate under the seal of an Indian Consul certifying that the copy is certified by the officer having the legal custody of the original. But what is contended is that under S.78(6) of the Evidence Act three conditions must be complied with before the judgment can be admitted in evidence and the third

condition, namely, proof of character of the document according to the law of the foreign country, is not forthcoming in this case. A perusal of S. 78(6) of the Evidence Act makes it clear that apart from the two certificates - one by the legal keeper of the original documents and the other by the Consul General - there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. It is a condition precedent. The short question, therefore, is whether there is such proof in this case. Proof can be by direct or circumstantial evidence. Proof can also be given by placing before the Court facts giving rise to presumptions, rebuttable or irrebuttable. Section 86 of the Evidence Act lays down that a Court may presume the genuineness and accuracy of any document purporting to be a

certified copy of any judicial record of any foreign country, if such a copy is duly certified in the manner and according to the rules in use in the country for certification of copies of judicial records. To give rise to this presumption it is not necessary that the judgment of the foreign country should have already been admitted in evidence. While S. 78(6) of the Evidence Act lays down three conditions for admitting the judgment in evidence, the admission of the judicial record is not a condition precedent for drawing the requisite presumption under S.86 of the Evidence Act. The presumption may be drawn before the said record is admitted. The ascertaining whether there is the requisite certificate, viz., a certificate issued by any representative of the Central Government in the concerned country to the effect that the said document

was certified in the manner commonly in use in that country for the certification of copies of judicial record. If the distinction between the certificate and the judgment is borne in mind, the fallacy of the argument becomes apparent. The requisite certificate makes the document admissible and not vice versa. If there was such a certificate forthcoming - in this case there is such a certificate - the document may be presumed to be genuine and accurate. If it is presumed to be genuine and accurate, it shows its character, viz., that it is a genuine judgment made by the Supreme Court of New York. This is a fit case for raising the said presumption and with the aid of this presumption the third condition is also complied with i.e., it is a judgment of the Supreme Court of the State of New York made in accordance with law. As

the three conditions laid down in S.78(6) of the Evidence Act are fulfilled, the document can legitimately be admitted in evidence, and if it is admitted, the document, by its own force establishes that the aforesaid three conditions for the enforceability of the awards have been fulfilled."

A foreign public document may be proved by the original or a certified copy but in case of a certified copy it should be certified by the legal keeper of the document with a certificate by a notary public or of a diplomatic officer of Bangladesh to the effect that the copy is certified by the legal keeper of the original, and upon proof of the character of the document. So the condition is not of the contents but that the copy is certified by the keeper of the original. The first two conditions have been fulfilled. It has not been disputed that the keeper has not certified the copies. There are notarial certificates to the effect that the copies

were issued by the keeper. A diplomatic officer has authenticated them. Therefore the documents are presumed to be genuine and accurate. On fulfillment of these conditions there is no doubt about the character of the same. The mode of proof of public documents mentioned in section 78 is permissive, and therefore, the court is not precluded from having the other modes of proof. A public document may be proved by production of the original or by a certified copy under section 77 or in the manner prescribed in section 78. A foreign judicial record is a public document and may be proved by a copy certified in the manner prescribed by sections 78(6) and 86 of the Evidence Act. Reference in this connection is *Haranund Chetlangia V. Ram Gopal Chetlangia*, 27 IA 1 (PC) and AIR 1964 SC 538.

The documents regarding the death of Mrs. Inge Flatz are relating to the judicial proceedings except the birth and death certificates but all those documents have been issued by the keeper thereof duly

authenticated by the notary public and attested by the Embassy of Bangladesh. As regards the birth and death certificates these are clearly written in English and public documents. As mentioned above, the date of death of Inge Falatz has also been mentioned in the hereditary proceedings. Besides, the letter issued by the District Court of Bregenz was also in English. In this letter the Judge of the District Court of Bregenz clearly mentioned that Mrs. Inge Flatz died on 30.03.1985 leaving a son and husband. This English letter was also duly countersigned by the President of the court and also attested by the Embassy. From this letter which is in English we clearly find the date of death of Mrs. Inge Flatz. This date tally with the date mentioned in the death certificate which is also in English and in the original death certificate it was also written in different languages including English.

Mr. Attorney General submits that as regards the German language used at the bottom of the

certificates and in some other documents the objection is not tenable in law, inasmuch as, in the plaintiff's documents particularly in the power of attorneys at the bottom German language has been used. The first power of attorney executed by Mrs. Inge Flatz in favour of Mr. Moudud Ahmed dated 2nd May, 1973, page 97 of the paper book in Civil Appeal No.81 of 2014, it has been authenticated by an officer of German Embassy in German language. In the second power of attorney said to have been executed in favour of Mohsin Darbar by Mrs. Inge Flatz, exhibit 4, at the bottom there was similar endorsement in German language.

As observed above, the dispute in these matters is relating to the date of death of Mrs. Inge Flatz. Both the parties admitted that Mrs. Inge Flatz had died, but the plaintiff did not disclose the date, the defendants have mentioned the date and produced documents, which are public documents. Since the plaintiff has admitted the death of Mrs. Inge Flatz,

the date of death as revealed from the documents cannot be disbelieved. The onus is on the plaintiff to prove the date of death and he has deliberately kept silent regarding the date despite knowing the fact of death since 15.06.1993. Even after the filing of the documents by the government in this court in late 2012, the plaintiff did not controvert the claim of the government or collected any document from Austria to show that the date mentioned in the government's documents is not correct. In the absence of contrary documentary evidence this court has left with no option other than to take presumption in favour of the government's claim. The fundamental error committed by the High Court Division is that even after noticing the death of Mrs. Inge Flatz, it has presumed that the property vested in the government without deciding as to whether the appeal was maintainable without substituting the heirs in the absence of any material that Mrs. Inge Flatz dies leaving no heir.

Besides, we noticed both German and English languages have been used in some documents. The office of this court downloaded a copy of 'Federal Act concerning the Protection of Personnel Data', a copy of which was also produced on behalf of the plaintiff at the time of hearing leave petitions. This Act has been printed both in German and English languages in the similar manner of our constitution where both the Bengali and English versions have been printed with the variation that in the said Act two columns have been used and both the versions have been printed side by side. Therefore, there is doubt in assuming that in Austria or in German both languages are legally in vogue from which it can be inferred that the English version of some papers cannot be doubted. This disposes the main issue about the date of death of Mrs. Inge Flatz and the presence of her heirs and successors after the death.

Now turning to the merit of the case, in view of our decision that Mrs. Inge Flatz died prior to the

date of the execution the agreement for sale, these two deeds which are the sheet anchor of the suit are apparently forged documents created for the purpose of grabbing the suit property. The documents about the death of Mr. Inge Flatz were not before the trial court, the trial court on comparison of the power of attorney, exhibit 4, and the deed of agreement for sale, exhibit 5 rightly held that these documents were forged documents. In arriving at such conclusion the trial court took into consideration the oral evidence along with these documents and receipt acknowledging the payment of 20,000 sterling pound as advance. It observed that in the agreement for sale Mohsin Darbar's full signature was absent, instead his initial had been used and the plaintiff had also put his initial, which fact had been admitted by P.W.2 in course of cross-examination. The trial Court further observed that P.W.1 could not say the date of execution of the agreement for sale and also the boundaries of the suit property; that P.W.2 could not

say whether Mohsin Darbar was a Bangalee or a non-Bengali; that in the plaint the plaintiff has admitted that the whereabouts of Mohsin Darbar could not have been traced out; that this fact conclusively proved that the Mohsin Darbar is a fictitious person and that the deed of agreement has been created by using his name. The High Court Division observed that those findings of the trial court has no basis at all, inasmuch as, on the application of "Mohsin Darbar RAJUK recognized Mohsin Darbar authorizing him to act and execute all relevant things contained in the power of attorney and thus Mohsin Darbar was accepted as the proper person to deal with the property and thus the conclusion drawn by the learned subordinate Judge has no leg to stand and it is thus not sustainable in law" The High Court Division without repelling the findings of the trial court based its decision relying upon a disputed fact in failing to notice that his recognition by RAJUK on superficial consideration of the power of attorney.

More so, the High Court Division erred in law in assuming the existence of a person under the name 'Mahsin Darbar' by giving precedence to an order of RAJUK over the findings of a court of law made on the basis of sifting the evidence on record. Further more, the High Court Division ought to have applied its judicial mind on the totality of the transaction when the contesting defendants have disputed the existence of 'Mahsin Darbar' and the determination of the said issue is very important in the suit as framed.

There is no dispute that the suit property is situated at a posh area of Dhaka city and it is a very valuable property. According to the plaintiff, he paid only 20,000 pound sterling to Mohsin Darbar as advance and the balance amount of 40,000 sterling pound would be paid at the time of registration of the deed. It sounds mysterious to believe the story that this Mohsin Darbar was untraceable after receiving 20,000 sterling pound leaving two third portion of the consideration amount. In this

connection the trial court rightly held that “অতপর উক্ত মহসীন দরবার নাঃ সম্পত্তির মূল মালিককে আর দৃশ্যপটে পাওয়া যাচ্ছে না। প্রদর্শনী-৮ এবং আরজির শেষোক্ত প্যারা থেকে তা বুঝা যায়। এক্ষেত্রে আদালতের অভিমত হলো যে, এত মূল্যবান সম্পত্তি সংক্রান্ত কোনরূপ খোজ খবর না নিয়ে ১নং বিবাদীর অস্তিত্বহীন হওয়ার বিষয়টি বোধগম্য নয়।” The substance of the finding is that without completing the transaction particularly without receiving the balance consideration money non-availability of Mohsin Darbar sounds mystery. Mohsin Darbar is untraceable is evident from a letter written by Mr. Azizul Huq on 02.03.1991. In the said letter the plaintiff’s lawyer wrote to Mrs. Inge Flatz stating that ‘since we cannot locate Mr. Mohsin Darbar kindly advise....’ This statement clearly corroborated the trial court’s finding that this Mohsin Darbar was set up by the plaintiff who was a fictitious person.

The trial court also disbelieved the entire transaction between the plaintiff and the defendant about the execution of the deed of agreement for sale particularly the receipt of showing payment of 20,000/- (twenty thousand) sterling pound observing

that this receipt was typed on a plain paper and Mohsin Darbar put his initial but no witness has been cited in the said receipt; that P.W.2 in his cross-examination admitted that no payment of money was made in his presence; that though RAJUK accepted Mohsin Darbar as the attorney of Mrs. Inge Flatz to act on her behalf on 20.07.1989, Mohsin Darbar's presence could not have been traced out at any point of time. The High Court Division presumed that Mohsin Darbar is a genuine person and then proceeded to decide the appeal as if Mrs. Inge Flatz appointed Mosin Darbar as her attorney to complete the transaction. The High Court Division believed the agreement and the power of attorney on comparison of the signature on the reasoning that the court is competent to compare the signatures. The basic fundamental mistake committed by the High Court Division in this regard is that where the existence of the person who has negotiated the transaction and executed the deeds is doubted, the comparison of the

signature in the absence of admitted signature of Mahsin Darbar is totally misconceived.

More so, the High Court Division failed to notice that section 73 empowers the court to compare the signature of a person but it is not at all safe for a court to adopt such procedure particularly when someone puts his signature by giving initial or thumb impression. Section 73 does not specifically state by whom the comparison may be made, though the second paragraph dealing with a related subject expressly provides by way of contract that in that particular connection the court may make comparison. This comparison is not safe because a comparison without the aid of microscopic enlargements is at all times as a mode of proof hazardous and inconclusive and especially when it is made by one not conversant with the subject. That is why is an English case Blackburn, J. in R.V. Harvey, 11 Cox. CC 546 refused to allow comparison without the held of expert. The judicial committee of the Privy Council in Kessarbai

V. Jethabai Jivan, AIR 1928 P.C. 277 has observed that it is not always safe to take a decision on the correct determination of the genuineness of a signature by mere comparison with admitted signatures. The language of section 73 is wide enough that the comparison can be made either by witness acquainted with the hand writing or by expert witness skilled in deciphering hand writing or without intervention of any witness by the court itself but the second clause limits the power of the court to directing a person present in court to write any words only if it is of the view that it is necessary for its own purposes to take such writing in order to compare what is written with what is alleged to have been written by such person. True, the court is competent to compare the disputed writing with writing admittedly to be that of the person concerned. But it is not bound to do so and it is always advisable to take assistance of expert and use his comparison as an aid for comparison of the evidence. However, in the absence

of the admitted signature of Mahsin Darbar the High Court Division was fundamentally wrong in comparing the signatures and believed the receipt of advance money.

After analyzing of the entire evidence the trial court concluded its finding holding that admittedly the defendant Inge Fltz being a foreigner the agreement was required to be executed with prior permission of Bangladesh Bank, but the plaintiff did not obtain permission and thus, the agreement was hit by section 18 of the Foreign Exchange Regulation Act; that Bangladesh Bank attached some conditions for transfer of the suit property particularly by attaching a condition of opening a non-resident block account, but neither the plaintiff nor the defendant followed the said direction. Accordingly, it held that it remains obscure as to whether the court can give any direction to deposit the amount in which account; that plaintiff has admitted in the plaint that RAJUK directed to deposit the transfer fee on

the ground that the price fixed by the plaintiff was undervalued but the plaintiff did not take any prior permission of the RAJUK and that the agreement was unlawful and the same was not enforceable in law. The High Court Division overlooked those findings and decreed the suit mainly on the reasoning that since the signature appearing in the agreement for sale and receipt are identical, the plaintiff has been able to prove the execution of agreement.

Mr. Rokanuddin Mahmood submits that the trial court erred in law in holding that the agreement for sale is hit by section 18 of the Foreign Exchange Regulation Act. Section 18 prohibits any resident in Bangladesh to act on behalf of a company which is controlled by persons resident in Bangladesh without prior permission of the Bangladesh Bank or that no person resident in Bangladesh can lend money or security to any company which is controlled by persons resident outside Bangladesh. We find substance in his contention, but if the Foreign

Exchange Regulation Act is read as a whole, there is no doubt in assuming that a foreigner who owns any immoveable property in Bangladesh cannot sell his/her property to another foreigner without prior permission of the Bangladesh Bank because of the fact that such transaction which involves sale of any property of a resident in Bangladesh involves taking the sale proceeds of the property in foreign currency. Suppose, a foreigner came to Bangladesh for business purposes with the prior permission of the government and purchased a property out of the income of such business. After the completion of the period/tenure he left the country and sold the property and received consideration money abroad. The transaction would be void. This will be evident if the provisions of the Foreign Exchange Regulation Act is read as a whole. The preamble of the Act clearly provides 'An Act to regulate certain payments, dealings in foreign exchange and securities and the import and export of currency and bullion.'

Section 3 prohibits dealings with any foreign exchange without prior permission of Bangladesh Bank. Clause (ii) of section 3(2) prohibits 'transactions of all descriptions in foreign currencies' other than authorization of the Bangladesh Bank. Again section 4 restricts the dealing of the foreign currency by any person other than an authorized dealer in Bangladesh and no person resident in Bangladesh other than authorized dealer or outside Bangladesh, buy or borrow from, or sell or lend to, or exchange with, any person not being an authorized dealer, any foreign exchange. Sub-section (2) of section 4 prohibits any transaction which requires conversion of Bangladesh currency into foreign currency or foreign currency into Bangladesh currency at rates of exchange other than the rates for the time being authorized by the Bangladesh Bank. Section 5 restricts the making of payment of foreign currency. It provides that no person in, or resident in Bangladesh shall-

“(a) make any payment to or for the credit of any person resident outside Bangladesh”

“(e) make any payment to or for the credit of any person as consideration for or in association with-

- (i) the receipt by any person of a payment or the acquisition by any person of property outside Bangladesh;
- (ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside Bangladesh.”

Section 20 is a supplemental provision and clause (a) of sub-section (1) is relevant for our consideration which is as under:

“until the Bangladesh Bank by general or special order otherwise directs, any person who has at any time after the commencement of this Act been resident in Bangladesh shall be treated as still being resident in

Bangladesh and if such direction is given in relation to any such person the Bangladesh Bank may be the same or a subsequent direction, declare the territory in which he shall be treated as being resident."

A plain reading of these provisions clearly show that any person who has been a resident in Bangladesh, that is to say, Mrs. Inge Flatz, cannot make any payment or receive foreign currency whether it is consideration or otherwise to any person outside Bangladesh in respect of any property in Bangladesh. Both the plaintiff and Mrs. Inge Flatz were residents in Bangladesh. Section 20 states that any person who has been in Bangladesh shall be treated as still being in Bangladesh and therefore, both these persons cannot deal with a transaction in foreign currency in respect of a property in Bangladesh, shall be treated as still being resident in Bangladesh, because they and therefore, Mrs. Inge Flatz cannot sell her immovable property in

Bangladesh to a foreigner who is also a resident of Bangladesh without prior permission of the Bangladesh Bank. Besides, Section 21 prohibits contracts in evasion of the provisions of the Foreign Exchange Regulation Act. Sub-section (1) provides that "No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder".

In this sub-section (1) the words "in any way the operation of any provision" have been used and the language is wide enough to infer that no resident in Bangladesh can deal with any transaction in respect of any property in Bangladesh which involves payment of foreign currency with any other person resident in Bangladesh without prior permission of Bangladesh Bank because of the simple reason that if such transaction is allowed anybody can siphon the foreign currency to any foreign country by selling his immovable property in

Bangladesh and in that case, the government will be deprived of the foreign currency. The object for promulgating this law is to restrict, regulate payments, dealings with foreign exchange and other related matters. If any such transaction which involves foreign currency by a resident in Bangladesh is made without prior permission of the Bangladesh Bank, the economic and financial interest of the country will be affected. Even if it is assumed that the plaintiff has entered into the agreement for sale with Mrs. Inge Flatz, the mode of payment in respect of the property having been made in foreign currency and the alleged part payment having been made in England without prior permission of Bangladesh Bank, the transaction be treated in violation of the provisions of the Foreign Exchange Regulation Act and therefore, the same be treated as has been undertaken against the public interest.

The plaintiff has also impliedly admitted that without prior permission of the Bangladesh Bank the

transaction could not be materialized and accordingly in reply to a letter written on his behalf by M/S Moudud Ahmed and Associate's on 20.04.1987, the Bangladesh Bank by letter dated 09.08.1987 directed him to open a non-resident account in the name of Mr. Inge Flatz to meet all expenses to be incurred towards the maintenance of the house. It was also directed that if there was any shortage of money, the same to be sent by Mrs. Inge Flatz, and if any balance amount remains, it should be deposited in the account. It was also directed that on each count the permission of the Bangladesh Bank was necessary; that for the implementation of the transaction for sale, all expenses relating to registration, stamp, transfer fee, capital gain tax, income tax etc. should be brought in foreign currency and that before the execution of the sale deed prior permission of the Bangladesh Bank must be obtained. It also advised to open another non-resident foreign currency

accounts in the name of the plaintiff. The plaintiff did not comply with the directions.

The trial court rightly pointed out in this connection that even if the plaintiff's claim is taken to be true that he has paid 20,000/- (twenty thousand) sterling pound to the defendant Mrs. Inge Flatz, how he will deposit the balance 40,000/- (forty thousand) sterling pound and who will receive the said amount. The plaintiff, it is observed, is required to give an explanation as to whom and how the court will direct the plaintiff to deposit the balance consideration money for execution and registration of the deed in the absence of any foreign currency accounts opened with Bangladesh Bank because the alleged transaction was in foreign currency. The High Court Division has totally ignored with the findings and observed that the plaintiff is not a resident in Bangladesh and that the plaintiff has performed his part of agreement.

These facts conclusively proved that the plaintiff created the deed of agreement for sale of the disputed property by using the name of Mohsin Darbar as the attorney of Mrs. Inge Flatz and that Mahsin Darbar is a fake person set up by the plaintiff to grab in property by deceitful meanse. The documents produced by the government conclusively proved that Mrs. Inge Flatz died before the execution of the agreement. These documents were not produced before the trial court but these documents conclusively proved that the trial court was justified in its findings. The High Court Division has totally ignored those findings. Now the question is whether the suit should be remanded to the trial court for filing proper application for substitution as prayed for.

We are of the view that no fruitful purpose will be served if the suit is remanded to the trial court for affording the appellant an opportunity to substitute the heirs. Firstly, we held that Mrs. Inze

Flatz died before the execution of the agreement and that her attorney Mohsin Darbar is a fake person. Admittedly, the whereabouts of Mahsin Darbar is not known despite the fact that the two third portion of the consideration amount has not been paid in respect of the suit property which is situated at Gulshan. Secondly, even if the agreement for sale is taken to be true, and if the plaintiff's claim is also taken to be true, Mrs. Inge Flatz died at least leaving behind her husband Mohammad Ehsan, but the plaintiff did not substitute him. Lastly, the death of Mrs. Inge Flatz is known to the plaintiff and he has admitted this fact in the trial court and in the High Court Division. So the right to sue though survived on the death of Mrs. Inge Flatz, the suit abated about 23 years ago for non-substitution of the admitted heir. Thirdly, even after filing the documents relating to the death of Mrs. Inge Flatz in 2012, the plaintiff had the opportunity to discard those documents by bringing documents from Austria

had Mrs. Inge Flatz not died on 30.03.1985, but the plaintiff did nothing in this regard and sat over his right even after knowing that the government produced documents showing the date of death. This conduct of the plaintiff proves that he has admitted the date of death of Mrs. Inge Flatz. Under such circumstances, the court cannot give any relief in favour of the plaintiff in the absence of conclusive documents in support of the status of Mrs. Inge Flatz.

A relief for specific performance being discretionary, the court is not bound to pass a decree even if the plaintiff proves the execution of the agreement for sale and payment of consideration unless and until the plaintiff comes in court with clean hands. Since from the very execution of the power of attorney is doubtful, and from the admission of the plaintiff that the defendant died at least at the initial stage of the suit, and if this admission is taken into consideration with the documents filed by the government, there is no doubt that Mrs. Inge

Flatz died long before the execution of the agreement for sale. Therefore, the plaintiff is not entitled to any decree for a specific performance on the strength of forged deeds. The High Court Division erred, therefore, in decreeing the suit for specific performance.

As regards Criminal Petition No.480 of 2015 this proceeding has been initiated on 17.12.2013 over an occurrence allegedly committed from 1973 to the date of lodging of the FIR, that is, within a space of 43 years. The allegations against the petitioner Moudud Ahmed are that the petitioner obtained a Power of Attorney on 02.08.1973 and had shown him as the tenant of Mrs. Inge Maria Flatz. There is no proof that Mrs. Inge Maria Flatz ever came into Bangladesh after the liberation. Moudud Ahmed became Minister in 1978 and 1979. He became a Member of Parliament in 1979 as well as the Deputy Prime Minister while he made all his efforts to remove the house from the abandoned property list. In course of time, being in

the Ministry he arranged to sell the property to Mrs. Inge Maria Flatz at Tk.100/-. Accordingly, the said house was registered in favour of Mrs. Inge Maria Flatz by a deed dated 21.06.1980. It is further alleged that Mrs. Inge Maria Flatz executed a Power of Attorney on 25.03.1984 in favour of one Mohsin Darbar. Mrs. Inge Maria Flatz died on 30.03.1985 but by using the said power of attorney, an agreement for sale was executed to transfer the house along with the land in the name of his brother, Manjur Ahmed. The petitioner by using his official power secured an order of sale of the property in favour of his brother and thereby has committed an offence under section 5(2) of Act II of 1947 read with section 109 of the Penal Code.

The allegations made in the FIR and the materials collected in course of investigation are the reproduction of the facts leveled in the suit and the writ petition, and the case was instituted during the pendency of the appeal before this court. Whether

or not the petitioner by influencing his official power arranged an order of sale of the property in favour of Mrs. Inge Flatz is an issue in this suit and the writ petition, and when the matter is sub-judice before this court, the Durnity Daman Commission should not have instituted the case. More so, the period of occurrence as shown in the FIR is hit by section 234 of the Code of Criminal Procedure. Since the document allegedly created by Moudud Ahmed has been filed in the suit and the writ petition, those are subject matter of the appeals and the documents have been used by the respondent Monjur Ahmed in judicial proceeding. Therefore, the initiation of the proceeding is also barred under section 195(1)(c) of the Code of Criminal Procedure.

Apart from this, if these allegations are taken to be true that the petitioner Moudud Ahmed has secured the order of permission for his pecuniary gain, the deed of sale was admittedly executed in favour of Mrs. Inge Flatz by the government who was

the original lessee under the RAJUK. She had no relationship with Moudud Ahmed except that during the relevant time Moudud Ahmed was tenant under Mrs. Inge Flatz. Mrs. Inge Flatz did not transfer the property either in favour of Moudud Ahmed or in favour of his wife or his children. Mrs. Inge Flatz executed an agreement for sale of the property in favour of Monjur Ahmed, brother of Moudud Ahmed, who is a citizen of England and has been residing in a separate mess.

A criminal misconduct is said to have been committed by a public servant, if he accepts or obtains or agrees to obtain or attempts to obtain for himself or for any other person in gratification. This clause is not applicable to this case. There is no allegation of gratification against him. The other clause is that if a public servant accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration or for a consideration, which he knows to be inadequate from any person who he knows to have been, or to be likely to be concerned in any

proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned. The other clause is that if he dishonestly or fraudulently misappropriates or otherwise converts for his own use, any property entrusted to him or under his control as a public servant or allows any other person, or if the public servant by corrupt or illegal means or by otherwise abusing his position as public servant, obtains or attempts to obtain for himself or for other person any valuable thing or pecuniary benefit.

None of the clauses mentioned in clause (a), (b), (c) and (d) of sub-section (1) of Section 5 is applicable to this case. Admittedly, the deed was executed in favour of Mrs. Inge Flatz by the government, and therefore, clause (b) cannot be applicable to this case. Clauses (c) and (d) have no manner of application, inasmuch as, Moudud Ahmed has not converted the property for his own use. The alleged agreement for sale was executed in favour of

Monjur Ahmed, who is a distinct person and not a member of his family. The High Court Division has totally ignored that aspect of the matter. Though the petitioner has challenged the order of taking cognizance of the offence, we noticed that the initiation of the proceeding itself is an abuse of the process of the court and no fruitful purpose will be served if we allow the criminal case to proceed with. The proceeding, is therefore, liable to be quashed.

Thus there is merit in the appeals. The criminal proceeding is quashed. The appeals are, therefore, allowed without any order as to costs. The criminal petition is disposed of.

C.J.

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The 2nd August, 2016
Md. Mahub Hossain.