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

First Appeal No. 118 of 2009
With
Civil Rule No. 339 (F) of 2009

IN THE MATTER OF:

Md. Delowar Hossain Khan and another
…. Appellants
Versus

Bengal Lands Limited, changed to BRAC Concord Lands Limited, and now Concord Lands Limited and others
…. Respondents

Mr. Muhammed Mustafizur Rahman Khan, Senior Advocate
….For the Appellant No. 1

Mr. Md. Asaduzzman, Senior Advocate with
Mr. Mintu Kumar Mondal, Advocate
….For the Appellant No. 2

Mr. Zainul Abedin, Senior Advocate with
Mr. M. Moksadul Islam, Senior Advocate and
Mr. Moloy Kumar Roy, Advocate
….For the Respondent No. 1

Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan
Judgment on 23.07.2025.

Md. Iqbal Kabir, J:

This appeal is directed at the instance of the defendant appellant against the judgment and decree dated 30.11.2008 (decree signed on 05.01.2009) passed in the Title Suit No. 350 of 2002, by the learned Joint District Judge, Court No. 2, Dhaka, thereby decreeing the suit.

The respondent No. 1, as plaintiff, filed Title Suit No. 350 of 2002 seeking specific performance of an agreement for sale in respect of 1.28 acres of land situated at Mouza Boro Ashulia, Savar, Dhaka. The predecessor of appellant No.1, being the owner of the said land, executed an

Agreement for Sale with Bengal Lands Ltd., which was subsequently renamed BRAC Concord Lands Limited and thereafter, Concord Lands Limited. Under the agreement the total consideration was fixed at Tk. 86,15,384/-, out of which Tk. 25,00,000/- was paid at the time of execution, another Tk. 25,00,000/- would be paid within the next five months i.e., within 17.12.2009, and the balance Tk. 36,15,384/- had to be paid at the time of registration of the sale deed. The registration would be executed within 31.03.2000. However, on 28.12.1999, the plaintiff paid Tk. 10,00,000/- in lieu of Tk. 25,00,000/-, which was duly acknowledged. However, it has been claimed that the defendant was repeatedly requested by the plaintiff to execute and register the sale deed upon receipt of the remaining Tk. 51,15,384/-, but the defendant failed to do so on various pretexts. It has been alleged that, as there was mutual trust, the plaintiff waited even beyond the stipulated time, but ultimately, by a legal notice dated 15.05.2002 demanded registration within 21 (twenty one) days. Though the defendant in reply dated 02.06.2002, categorically denied the same. In such a situation, the plaintiff again issued notice dated 20.06.2002 and 14.11.2002, thereby, demanding registration. By the above notices, the plaintiff expressed his willingness; he also published a public notice in the Daily Ittefaq on 01.11.2002, affirming the agreement. The defendant, in turn, asked for withdrawal of the publication and subsequently issued his own notice in the same newspaper denying the validity of the contract. Finding no alternative, the plaintiff instituted the instant suit for specific performance of the contract against the defendants-appellants and others.

On the contrary, defendant No. 1 contested the suit by filing a written statement denying all the material allegations so made in the plaint.

The learned Trial Court in order to dispose of the suit, framed as many as 07 (seven) issues and decided all the issues in favour of the plaintiff-respondent and against the defendants.

However, both parties tried and in order to prove their respective cases, the plaintiff examined three witnesses and adduced documentary evidence which were marked as Exhibits 1, 2, 3, 3KA, 4, 5, 5KA, 5KHA, 6, 6KA, 7, and 8. The defendant, in support of his defence, examined two witnesses and produced several documents which were marked as Exhibits 2KA, 3, 4, 5, 6, and 7.

Upon consideration of the materials and evidence on record, the trial Court, by its impugned judgment and decree dated 30.11.2008 (decree drawn on 05.01.2009), decreed the suit against defendant No. 1 (KA–JA) on contest and ex-parte against the others.

Being aggrieved and dissatisfied with the judgment and decree dated 30.11.2008 (decree drawn on 05.01.2009) passed by the learned Joint District Judge, Court No. 2, Dhaka, the defendant, as appellant, has preferred the instant appeal.

Mr. Zainul Abedin, learned Senior Advocate, along with Mr. M. Moksadul Islam, learned Senior Advocate, and Mr. Moloy Kumar Roy, learned Advocate, appeared on behalf of the plaintiff-respondent No. 1; whereas Mr. Muhammad Mustafizur Rahman Khan, learned Senior Advocate, appeared for the appellant No. 1, and Mr. Md. Asaduzzaman, learned Senior Advocate with Mr. Mintu Kumar Mondal, learned Advocate, appeared for the added appellant No. 2.

Mr. Khan, upon placing the application, drew our attention to the impugned judgment and decree, the plaint, and the written statement, and at the very outset submitted that the Court below, under a misconception of law and fact and without appreciating the matter from its proper perspective, most illegally arrived at an erroneous finding in holding that the seller’s acceptance of the interim payment, and that too in part, made 10 (ten) days after the contractually stipulated period on 28.12.1999, had the effect of extending the last date of 31.03.2000 contractually fixed for full payment.

By way of submission, it is pointed out that the 1st installment was duly paid on the date of execution of the agreement, while the 2nd installment, which was contractually required to be paid within 5(five) months, was in fact paid ten days after the stipulated period. It is further submitted that the plaintiff not only failed to pay the 2nd installment within the scheduled time but also failed to pay the balance amount within the agreement period, i.e., by 31.03.2000. The plaintiff did not approach the defendants within the subsistence of the agreement, either tender the remaining consideration or have the sale deed executed and registered. On the contrary, the plaintiff-respondent first approached the defendants on 15.05.2002, after a lapse of 26 (twenty six) months from the expiry of the contractual period, by issuing a legal notice.

He submits that the purchaser had not even paid half of the contractually agreed amount. Admittedly, a substantial part of the contract remained unperformed as of the last date. There was no initiative or written communication to perform his part, which shows the plaintiff had no eagerness/willingness to get the property. According to him, verbal testimony proffered by the purchaser is vague and lacking in particulars, and as such, the plaintiff is not entitled to get a decree of specific performance of the contract. In that context, cited an authority, namely Chairman, RAJUK, and another vs. Khan Mohammad Amir and others, reported in 26 BLC (AD)-219.

He submits that the Court below erred in law and upon the facts in construing the acceptance of Tk. 10,00,000/-, being only part payment of the second installment as per clause 3 of the agreement for sale, on 28.12.1999, i.e., 10 (ten) days after it was due, as evidence of the defendant having given the plaintiff extension of time to perform the remaining obligations under the agreement for sale, and as such, the finding of the learned Court below being based on conjecture, surmise and on no material evidence whatsoever, the judgment and decree is liable to be set aside.

He submits that at one point in time, the seller took back the title deeds from the agreed intermediary, which signifies the intent to terminate the contract, knowing such plaintiff/purchaser waited 23 (twenty three) months before issuing notice, such act again shows lack of eagerness.

He submits that the specific performance of the contract is no longer capable, as by this time, part of the land has been acquired. Further, there was no registered baina, and hence, a bona fide purchaser for value has entered into the picture, defeating any equity in favour of the purchaser.

Mr. Zainul Abedin, learned Senior Advocate for the plaintiff/respondent, upon placing the impugned judgment and the connected documents, sought to impress upon the Court that the plaintiff was ready and willing to perform his part of the contract. He contended that the trial Court rightly decreed the suit for specific performance, as the contract in question was validly executed and the suit had been instituted within the prescribed period of limitation. In support of his submissions, he pointed out that against the 2nd installment/ Tk. 25,00,000/–, a part payment of Tk. 10,00,000/– was made and accepted by the appellant's predecessor. According to him, the defendant was thereafter requested to execute and register the sale deed upon receiving the balance consideration. Due to mutual trust and friendship between the parties, the plaintiff believed he would get registration, and the balance consideration would be accepted beyond the period stipulated in the agreement for sale.

He contends that the plaintiff consistently demonstrated a willingness and readiness to perform his obligations under the contract. In support, it has claimed that PW1, PW2, and PW3, along with other officials of the plaintiff company, visited the defendant's residence and requested the execution of the sale deed upon receipt of the balance consideration. Despite such efforts, the defendant failed to execute the deed. Finding no alternative, the plaintiff issued a legal notice dated 15.05.2002, requesting the registration of the sale deed upon payment of Tk. 51,15,384/-. Several subsequent notices reiterated

the same demand, which evidences the plaintiff's readiness and willingness. It is submitted that the defendant had no lawful excuse, and at no point before receiving the legal notice did he refuse or repudiate the agreement. It is thus the trial Court rightly decreed specific performance of the contract, as there existed no legal impediment to such relief.

By his submission, it was brought to our notice that the plaintiff's case was supported by the statement of the PWs. In cross-examination, PW deposed that Tk. 10 (ten) lac has been given after eleven days from the date fixed for payment, as the defendant came to the office. PW2 deposed that we went to register the sale deed, but the defendant did not come. PW3 deposed that they went to the house of the defendant with manager Abul Hossain and requested again and again to register the sale deed.

Mr. Md. Asaduzzaman, learned Senior Advocate, in his reply, reiterated the submissions made by Mr. Khan. He contended by referring to the depositions of PWs-2 and 3, as well as the plaint and other documents, that the plaintiff failed to approach the defendant within the stipulated contract period. According to him, the plaintiff or witness did not specify any particular date or time, nor the names of the persons who purportedly approached the defendant before serving the legal notice to make the registration. The plaintiff did not establish who actually attempted or offered to execute and register the sale deed. According to him, there is no direct evidence on the part of the plaintiff as it required under the law.

He further submits that the Court below erred both in law and on the facts by failing to appreciate the case of the defendant-appellant. The testimony of DW-1, Engineer Hasan Md. Unus (Panna), clearly corroborates that the vendor of the suit land fulfilled his obligations under the Agreement for Sale by handing over to DW-1 the original documents relating to the suit land on 18.07.1999, in accordance with Clause 5, as evidenced by the receipt dated 18.07.1999 signed by DW-1. Notwithstanding such performance by the defendant, the plaintiff-respondent failed to make or offer payment in

accordance with the terms of the contract, despite reminders from DW-1. Therefore, having failed to perform its obligations under the Agreement for Sale, the plaintiff-respondent was not entitled to seek an order for specific performance.

Mr. Abedin, however, relying upon a decision, namely Syed Shahidur Rahman vs. Bangladesh, reported in 10 BLC (2005) 361, submits in a suit for specific performance of a contract relating to immovable property that neither inadequacy of the consideration nor hardship of the defendant could be taken into consideration as a ground to refuse relief in a suit for specific performance of a contract. Further relying upon another decision, namely, Mst. Anwara Begum vs. Md. Karimul Haque and others, reported in 20 BLD (AD) (2000) 187 that in a suit for specific performance of a contract relating to immovable property, time is not the essence of the contract, nor is the hardship of the defendant a ground to refuse relief in a suit for specific performance of a contract.

In reply, it was argued that in the interim, a third party purchased the land without being aware of the prior agreement. It was contended that if any condition was found against the plaintiff, he would not be entitled to a decree for specific performance. According to the appellant, the duty of the Court in a suit for specific performance is to ascertain the existence of a valid agreement for sale and, upon identifying any breach of such agreement, to determine whether to grant or refuse specific performance. It was submitted that the judgment and decree are liable to be set aside because, in the instant case, the plaintiff himself breached the agreement.

Mr. Abedin acknowledges that part of the suit land has been acquired during the pendency of this appeal. Thus, it was argued that since the decree had already been passed in favor of Concord Lands Limited, the compensation for the acquired land should be paid to the decree-holder, reinforcing the validity and enforceability of the decree. As per the decree, the land has to be vested in the plaintiff, and thus, the plaintiff-respondent No. 1,

being a legal owner, is entitled to get compensation regarding the acquired portion, and the rest of the land will be registered in favour of the plaintiff as per the decree. There would be no frustration of contract as it has been decided in a case of Joydeb Agarwala vs. Baitulmal Karkhana Ltd., reported in 16 DLR (SC) (1964)-706.

Mr. Asaduzzaman relying upon a decision namely Nayeb Ali (Md) vs. Md. Abdus Salam Khan and others, reported in 26 BLC (AD) 174 submits that the duty of the court in a suit for specific performance of a contract is to see whether there is an agreement for sale and if there is any such breach of such agreement, then to order or reject specific performance of the contract. In the instant case, the plaintiff breached the agreement. In this context, it has been argued that the judgment and decree are liable to be set aside.

He submits that, under the settled principle of law, the burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. Similarly, he cannot, on failure to do so, take advantage of the weakness of his adversary's case; he must succeed by the strength of his own right and the clarity of his own proof. According to him, under section 60 of the Evidence Act, oral evidence must be direct. Abul Hossain and others vs. Habibullah Mia and others, reported in 11 BLC-209, Chayya Bithi Co-operative Housing Samity Ltd. vs. Jore Pukur Par Islamia Hafizia Madrasha and others, reported in 76 DLR 483, Durnity Daman Commission vs. Md. Tarique Rahman and the State, reported in 68 DLR-500.

Again, it was contended that the unperformed portion of the contract significantly exceeded the portion already performed. The total contract value was Tk. 86,15,393.20/-, of which the plaintiff-respondent had paid only Tk. 35,00,000/-, leaving an outstanding balance of Tk. 51,15,384/-. According to him, the plaintiff-respondent was not willing to perform the remaining part of the contract within the stipulated period, and as a result, it remained unperformed.

We have considered the submissions of the learned counsel for appellants and that of the respondent at length, perused the memorandum of appeal, including the impugned judgment and decree, and all other connected documents appended in the paper book.

It is at this juncture that this Court seeks to identify any specific date, time, or the names of persons mentioned in the plaint by which the plaintiff allegedly approached the defendant to pay the balance amount and seek registration. In examining the plaint and other documents, no such positive details were brought into the light. There is no direct evidence; therefore, it cannot be said that the plaintiff approached the defendant for registration. The available documents, however, clearly indicate that the plaintiff did not make any attempt to approach the defendant for registration within the contract period.

> "In the above context, it has brought notice to the Court that the plaintiff-respondent stated in the plaint that "১নং বিবাদীকে সাফ কবলা দলিল সম্পাদন করিয়া রেজিস্ট্রি করাইয়া দেওয়ার জন্য অনুরোধ ও তাগিদ তাগাদা দিয়া আসিতেছিল, কিন্তু ১ নং বিবাদী বিভিন্ন তাল বাহানার আশ্রয় গ্রহণ করিয়া দেই দিচ্ছি বলিয়া বায়নাকৃত নালিশী তপসিলে বর্ণিত ভূমি বাদীর বরাবরে সাফ কবালা দলিল সম্পাদন করিয়া রেজিস্ট্রি করাইয়া দেন নাই।". The claim is vague; no specific date, time, or names of his officers disclosed who, when, or how they approached and denied.
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> Similarly, the PW-2, Md. Abul Hossain in his deposition stated that "বিবাদী রেজিস্ট্রির জন্য আমি যাই। আমি কোম্পানীর পক্ষ থেকে বর্ণিত বিবাদীদের বাড়ীতে যাই। বিবাদী রেজিস্ট্রির জন্য আসে নাই। কোম্পানীর আইন বিভাগ লিগ্যাল নোটিশ দেয়। আমি ছাড়াও অফিস থেকে মনির হোসেন যায়। লিগ্যাল নোটিশ এর পর পত্রিকায় বিজ্ঞপ্তি দেয়। তারপরও বিবাদী আগাইয়া আসে নাই। ও রেজিস্ট্রি করে দেন নাই। আমরা বাকী টাকা দিয়ে রেজিস্ট্রির জন্য প্রস্তাব দেই।"
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> The PW-3, Md. Monir Hossain in his deposition stated that "তার ওয়ারিশদেরকে একজনকে চিনি। নালিশী জমি নিয়ে ১৮/৭/১৯৯৯ ইং সালে বায়না হয়। মোট মূল্য ছিল ৮৬,১৫,৩৯৩.২০ টাকা ছিল তা মনে নাই। বায়নার দিন ২৫ লক্ষ টাকা দেন। চেকের মাধ্যমে পরিশোধ হয়। বিবাদী বায়নার সম্পাদন করে। আমার উপস্থিত ছিলাম। ২৮/১২/৯৯ ইং তারিখে আরও কি পর টাকা দেওয়া হয়। আমরা বিবাদীর বাদীর কাছে যাই। ম্যানেজার আবুল হোসেন সহ বিবাদীর বাসায় যাই। বার বার বিবাদীর বাসায় যাই। বাদী কোম্পানীর আইন বিভাগকে বুঝিয়ে দেন। নালিশী শুনেছি লিগ্যাল নোটিশ দেয়। পত্রিকায় বিজ্ঞপ্তি দেয় মর্মে আইন অফিস বলে।"

In the above context, it can be observed that no representative of the plaintiff approached the defendant within the time stipulated in the agreement to tender the balance amount and, upon its acceptance, to execute and

register the sale deed. Indeed, there is no positive evidence on record indicating that any such offer regarding the balance amount was made. The plaintiff/respondent may claim that the defendant/appellant refused to execute the deed upon receiving an offer to pay the balance; however, the plaintiff has failed to prove that any such demand was ever made to the defendant for the execution of the deed. In view of the foregoing, we believe that the trial Court erred in concluding that the defendant/appellant was at fault in performing his obligations under the terms of the agreement.

Indeed, it is admitted that the contract amount was Tk. 86,15,393.20/-, and out of which the 1st installment of Tk. 25,00000/- was paid on the day when the agreement was executed. Under the agreement, the 2nd installment was supposed to be paid within the next 05 months, but it was paid after ten days from the scheduled date. Thereafter, by serving notice plaintiff asking for registration and making an offer to accept the remaining amount. By such transaction and offer, it is evident that the 2nd installment was not paid within the scheduled time, and also failed to pay the rest of the amount within the agreement period, i.e., by 31.03.2000. In the above context, it is evident that the unperformed part of the contract was larger than the performed part. The plaintiff-respondent first approached the defendant on 15.05.2002, i.e., after 26 (twenty six) months of expiry of the contract, by sending a legal notice. The plaintiff-respondent did not take any initiative to pay the remaining amount within the stipulated time, i.e., 31.03.2000, which shows there was no eagerness and or willingness to perform his part of the contract within the stipulated time. Therefore, the claim of the plaintiff-respondent that they made an offer to accept the balance amount is not legally tenable. In the context above, he brought to our notice the decision reported in 26 BLC (AD) 219, wherein it was held that:

> “A decree for specific performance of the contract is discretionary. Even if the plaintiff is able to prove the execution of the agreement and payment of advance money towards the consideration, the court is not bound to pass a decree. Court is required to look into other factors, such as, the bonafide of the

> plaintiff and his eagerness in performing his part of obligation; the hardship of the defendants, if a third party purchases the property in the meantime without notice to the previous contract. If any of the said conditions is found against the plaintiff, he will not get any decree for specific performance."

On scrutiny of the evidence on record together with other documents, it appears that the appellant, for urgent need of cash, agreed with the plaintiff/respondent to sell his land. However, the evidence on record does not show that the plaintiff/respondent on any particular date/time made any demand to the defendant to execute the deed by offering the balance amount to the defendant in the presence of any witness, or that the defendant refused to execute the deed.

In the present case, the DW-1 was designated by the parties as the person who would retain the documents of the suit land, as he was a person who was trusted by both parties. He was an independent, neutral, and reliable witness, but the Court below, without any cogent reason, disbelieved his deposition in decreeing the suit, and rather placed reliance on the evidence of the PWs, all of whom were admittedly connected with the plaintiff-respondent, and as such, the impugned judgment and decree is liable to be set aside.

It is pertinent to note that, after the expiry of the scheduled date, the defendant received Tk. 10,00,000/- as part payment of the second installment i.e., before the date fixed for execution of the sale deed upon receipt of the balance amount. The date fixed for the second installment was 18.12.1999, and the part payment was received on 28.12.1999, which falls within the period stipulated under the agreement. Under the terms of the agreement, the final payment was to be made on or before 31.03.2000, upon which the sale deed was to be executed. The part payment of the second installment was made within the contractual period; therefore, such acceptance cannot be construed as an extension of the agreement period. In view of the foregoing, the finding of the court below is erroneous and unsustainable in law.

Indeed, we find fault with the reasoning of the trial Court. The facts, circumstances of the case, and the materials on record demonstrate that the plaintiff/respondent had lack of willingness and, without offering the balance amount, attempted to portray that he had made an offer to complete the registration in accordance with the terms of the agreement. At this juncture, judging the conduct of the parties, it is pertinent to note that the plaintiff/respondent did not establish his eagerness and willingness to offer his obligation within the time stipulated in the contract.

In light of the above, it is apparent that the contract has been defeated as the plaintiff was not ready and willing to perform his part of the contract within the time mentioned in the contract; therefore, specific performance of the contract should not be allowed.

It is pertinent to note that, as of now, 89.04 acres of the suit property out of a total of 1.125 acres have been acquired for the Dhaka-Ashulia Elevated Expressway. Therefore, it was argued that the contract is no longer capable of specific performance, as a portion of the land has already been taken over. Further, the plaintiff was not holding possession of the property, though there was an agreement. Third-party purchaser for value has entered into the picture as the rightful owner, and keeping possession, thereby defeating any equity in favour of the original purchaser.

However, it appears that under the agreement, the plaintiff had made certain payments long ago, which were accepted by the appellant. In the meantime, a period of about 25 (twenty-five) years have elapsed since the execution of the agreement. In such circumstances, it has occurred to this Court that it may be appropriate to consider awarding compensation, and that the plaintiff/respondent may reasonably expect such relief from this Court. Accordingly, the Court sought the opinion of the parties as to whether the plaintiff would be willing to accept a solatium, charge, or compensation in lieu of further prolonging the dispute. Mr. Asaduzzaman, learned Advocate for the appellant, concurred with the point raised by this Court and submitted that, if

the Court pass any such order, the appellants would duly comply with it. In response, Mr. M. Moksadul Islam, learned counsel for the respondent, stated that the plaintiff is not willing to accept any amount; however, if the Court deems it appropriate, it may pass an order to that effect.

In the premises noted above, this Court is of the view that justice could be served by awarding solatium/charge/compensation to the plaintiff, which would also help to prevent multiplicity of proceedings concerning the property. Accordingly, this Court assessed the consideration amount (Tk. 86,15,384 x 2=1,72,30,768/-) as solatium/charge/compensation to be paid by the appellants to the plaintiff. However, such an amount has to be paid within 4 (four) months from the date of receipt of the judgment, along with the amount which has already been received under the agreement.

In light of the above observation, the First Appeal is allowed, without any order as to costs, and the connected Civil Rule being No. 339 (F) of 2009 is disposed of.

The impugned judgment and decree dated 30.11.2008 (decree signed on 05.01.2009), passed in Title Suit No. 350 of 2002 by the learned Joint District Judge, Court No. 2, Dhaka, decreeing the suit, is hereby set aside.

However, the respondents/plaintiffs have liberty to withdraw the money which he deposited and the Court below is directed to take appropriate initiative if respondents/plaintiffs filed such an application to withdraw the alleged amount.

Let a copy of this judgment, along with the lower Court records, be transmitted to the Court concerned forthwith.

Md. Riaz Uddin Khan, J:

I agree.