Present:

Mr. Justice Md. Salim

CIVIL REVISION NO. 6797 OF 2023.

Md. Sarwar Mirza and another

..... Defendant-Petitioners.

-VERSUS-

Sajedul Alam and Government of Bangladesh

..... Opposite parties.

Mr. Sherder Abul Hossain with
Mr. Shimonti Ahmed, Advocates
--------For the petitioners.

Mr. Md. Omar Farouq, Senior Advocate with
Ms. Fatema-Taz-Zahura, Advocate
..... For the opposite parties.

Heard on 30.06.2025, 01.07.2025, 21.07.2025, 23.07.2025, 27.07.2025, 28.07.2025.

Judgment on 06.08.2025.

By this Rule, the opposite parties were called upon to show cause as to why the impugned Judgment and decree dated 15.10.2023 passed by the learned Special District Judge, Noakhali in Title Appeal No.195 of 2022 allowing the appeal and reversing the Judgment and decree dated 19.10.2022 passed by the learned Joint District Judge, 1st Court, Noakhali in Title

Suit No.58 of 2021 rejecting the plaint under Order VII Rule 11 of the Code of Civil Procedure should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The facts in brief for the necessary disposal of the Rule are that the opposite party herein, as plaintiff, instituted Title Suit No. 58 of 2021 before the Joint District Judge, 1st Court, Noakhali, for specific performance of the contract, contending inter alia that the defendants entered into a registered agreement on 02. 10.2018 to sell 102 decimals of land at the rate of Tk.5,50,000.00/- per decimal; accordingly, an amount of Tk.100,00,000.00/- was paid as advance out of Tk5,61,00,000/- on the same date and in reciprocal the possession of the land was delivered to the plaintiff, the plaintiff expended Tk.1,04,50,000.00/- in various purposes including the purpose of development of the land and securing possession by erecting boundary wall in furtherance of converting the same in to a modern housing project. In the meantime, 6.65 decimals of land were sold to Sajeda Begum at the instant of the plaintiff, on 02.10.2018, for an amount of Tk. 49,87,500.00/-, the total of which was received by the defendants. On the same date, a new registered deed of agreement for sale for the rest of 95.60

decimals of land was executed by the parties on the previous conditions for a period of one year. In that agreement, it was agreed that the property would be sold to the plaintiff or to any person at the instance of the plaintiff. Accordingly, at the instance of the plaintiff, the defendants executed sale deeds in favour of several persons for several portions of land, being the last one dated 12.08.2021 in favour of Kamal Hossain and Sharmeen Sultana. By those deeds, they transferred a total of 28.40 decimals of land at the rate of Tk. 5,50,000.00/-. But the defendants received an excess amount of Tk. 80,18,000/- in total. Meanwhile, the defendant executed a power of attorney dated 25.07.2019 in favour of the plaintiff. So, the defendants agreed to execute another deed of sale for 14.72 decimals of land in favour of the plaintiff in exchange for the amount of Tk. 80,18,000/-, which they have already received. Accordingly, the plaintiff demanded a Kabala from the defendant on 01.10.2021. Rather, the defendants refused to execute the kabala deed as such, the instant suit.

The petitioners herein, as defendants, contested the suit by filing a joint written statement, denying all material allegations against them. They contended, inter alia, that the agreement between the parties had expired and the suit was

time-barred, and that the plaintiff had not deposited the remaining consideration money as stated in the plaint. So, the plaint is liable to be rejected.

During the pendency of the suit, the defendants filed an application under Order VII Rule 11 of the Code of Civil Procedure for rejecting the plaint. The plaintiff contested the same by filing a written objection and also filed an application under Order VII Rule 17 of the Code of Civil Procedure to amend the plaint.

Subsequently, the learned Joint District Judge, 1st Court, Noakhali, by the Judgment and decree dated 19.10.2022, rejected the plaint upon allowing the application under Order VII Rule 11 of the Code of Civil Procedure, as well as rejected the amendment application.

Being aggrieved by and dissatisfied with the above Judgment and decree dated 19.10.2022, the plaintiff, as appellant, preferred Title Appeal No. 195 of 2022 before the learned District Judge, Noakhali. Eventually, the learned Special Judge, Noakhali, by the Judgment and decree dated 15.10.2023, allowed the appeal, setting aside the Judgment and decree of the trial Court, and restored the suit.

Being aggrieved by and dissatisfied with the above Judgment and decree dated 15.10.2023, the defendants, as petitioners, preferred this Civil Revision under Section 115 (1) of the Code of Civil Procedure before this court and obtained the instant Rule with an order of stay extended from time to time.

Mr. Sherder Abul Hossain, the learned Counsel appearing on behalf of the petitioners, submits that as per the plaint, the consideration value of the land has been fixed at Tk. 5,22,50,000/-, and the plaintiff paid Tk. 2,14,58,500/-, leaving a remaining balance consideration amount of Tk. 3,07,91,500/-. The plaintiff did not deposit the balance consideration money at the time of filing the suit, which is a condition precedent to filing a suit for specific performance of a contract; that the contract for sale was registered on 02.10.2018, stipulating the period of performance within 1(one) year, i.e., on or before 01.10.2020, as per provision of Section 54A of the Transfer of Property Act read with Article 113 of the Limitation Act but the present suit was filed on 21.10.2020 which is contrary to the aforesaid provision of law thus the appellate court below allowed the appeal, therefore, committed an error of law resulted error in the decision occasioning failure of justice. In

his contention, he referred to the case of Abul Kalam (Md) Vs. Md. Mohiuddin and others reported in 69 DLR (AD) 239.

Mr. Md. Omar Farouq, the learned Senior Advocate appearing on behalf of the plaintiff-opposite party, submits that the general principle of deposit of consideration money in full at the time of filing suit for specific performance of a contract is not applicable in the present suit because the plaintiff paid full of amount of TK. 5, 87,78, 000/-to the defendant against the total land price and extra amount of TK. 20,00,000/- has been paid to the defendant through the banking channel in continuation of the agreement moreover, the defendants admitted some transactions as per terms and condition of the agreement even after expiry of the period of agreement as stipulated in its which clearly saves the suit from being barred by limitation; that the plaintiff has brought the suit for part of the property schedule in the agreement because the rest of the land are not in a position to be registered due to record of that part is not up-to-date and some civil litigation are pending for that part of the land moreover, as per terms and condition of the agreement transfer deed may be executed for part of the schedule property.

I have anxiously considered the submissions advanced by both parties, perused the Judgment of the courts below, and oral and documentary evidence on the records.

It manifests from the record that the plaintiff instituted the instant suit for specific performance of the contract. The plaintiff assailed in the plaint is that the defendant entered into a registered sale agreement on 08.04.2014 to sell 102 decimals of land at TK. 5,50,000.00 per decimal, the plaintiff has already paid TK. 5,61,00,000.00 as an advance of sale proceeds through the banking channel. It is also claimed that the plaintiff expended TK. 1,04,50,000.00 for developing the land and securing possession by erecting a boundary wall in furtherance of converting the same into a modern housing project. The defendant executed several deeds in favour of various persons at the plaintiff's instance, transferred land, and, finally, on 12.08.2021, the defendant transferred the property according to the sale agreement. The defendant received TK. 80,18,500.00/- from the plaintiff, and an agreement was made to execute a deed for the sale of 14.72 decimals. However, on 01.10.2021, the defendant refused to comply with the agreement. The learned Joint District Judge, 1st Court Noakhali, rejected the plaint, by the Judgment and decree dated 19.10.2022,

considering the application filed by the defendant under Order 7, Rule 11 of the Code of Civil Procedure.

It is the settled provision of law that in deciding an application under Order VII Rule 11 of the Code of Civil Procedure, the court is not permitted to travel beyond the averment made in the plaint. In the instant case it appears from the sale agreement that there are some vital proviso were inserted in the agreement that- (i) the agreement is executed apparently for one year; (ii) that the executants i.e. defendants were under obligation of supplying necessary papers and documents; (iii) that the defendants undertook to execute sale deed in favour of the plaintiff or any other person as the instance of the plaintiff; (iv) that consideration money might be paid in part or full and accordingly the sale deed might also be for part or full of the schedule property as per ratio of the payment of consideration money.

It transpired from the record that the suit was filed on 21.102021, although the suit was required to be filed on or before 02.10.2020 as per the proviso so enumerated in Article 113 of the 1st Schedule of the Limitation Act. However, upon compassionate consideration of the plaint, it appears that the defendant executed several deeds in favour of various persons

at the plaintiff's instance, transferred a portion of the suit land, and, lastly, transferred a portion of the suit land by deed dated 12.08.2021, as per the sale agreement and at the instance of the plaintiff. Therefore, it transpired that the transaction was done after expiry of the sale agreement, as the sale agreement has a condition that the defendant undertook to execute the sale deed in favor of the plaintiff or third persons at the instance of the plaintiff. In this regard, the learned Judge of the appellate court below says that:-

> "On perusal of the documents filed on behalf of the plaintiff, it is apparently found that some deeds of sale were executed by the defendants for some portions of the land of the schedule of the agreement in favour of some third parties, in which the plaintiff is found to be a witness. These deeds, accompanied by the banking transactions between the parties as asserted in the plaint are good circumstantial evidence of proof that the plaintiff was activ player in those sales and transactions which also gives rise of a reasonable presumption that plaintiff arranged those sales and monetary transaction as per the condition of the agreement that the defendant

undertook to execute sale deed in favour of the plaintiff or any other person at the instance of the plaintiff. If the plaintiff may prove these facts as per his assertion in the plaint, that may give rise of another presumption that the parties of the agreement are acting in continuation of the agreement even after expiry of the period of the agreement. The plaintiff clearly claims in the plaintiff that he had the last transaction before filing of the suit on 12.08.2021. But the court below has come to a conclusion that those transactions were made with third party beyond the agreement. We should keep in mind that since the agreement has a condition that the defendant undertook to execute sale deed in favour of the plaintiff or any other third person at the instance of the plaintiff the plaintiff should be given chance to prove that the transation after expiry of agreement was done in pursuance of the agreement and that was reasonably suficient to give rise in the mind of the plaintiff that the agreement remains in continuation. Actually, all these assertions of the plaintiff-appellant are matter of fact

which can never be determined without adducing and producing evidence at the time of trial of the suit."

We have already noticed that the defendant executed a sale agreement with the plaintiff to sell 102 decimals of land and fix the price of each decimal for Tk.5,50,000.00/-, so the total cost of the land is Tk.5,61,00,000.00/-, out of which an amount of Tk.5,50,00,000.00 was paid for several deeds in favour of several persons for several portions of land at the instance of the plaintiff. It also manifests that the defendant filed a case in the Land Survey Tribunal for correction of the record for 14.53 decimals of the suit land, out of the total suit land; a good portion of the suit land under the agreement were not recorded in the name of the vendors in full. A portion of the property has not yet been mutated in the names of the defendants. Some portions are subject matter of the Land Survey Tribunal for the correction of the record of right. Further, it appears from the terms and conditions of the sale agreement that the consideration money may be paid in part or in full, and accordingly, the sale deed might also be for part or all of the scheduled property as per the ratio of the payment of consideration money. Therefore, the defendant is found liable

under the agreement, which stipulates that he should supply up-to-date documents to the plaintiff for all properties within the agreed-upon timeframe. Consequently, the plaintiff is seeking relief for part of the land and has filed the suit after the expiry of the time stipulated in the sale agreement. Therefore, the principle of depositing the entire consideration money at the time of filing the suit for a specific performance of the contract is not applicable in the present suit, on the contrary, the instant suit is a suitable case to follow the principle laid down in the proviso so enumerated in Illustration (a) of section 15 of the Specific Relief Act, 1987.

It is the settled proposition of law that a specific time is fixed for payment or for convenance, and it does not usually make the essence. This view gets support from the case of Amir Hossain Sowdagar vs. Md. Harunur Rashid and others reported in 65 DLR (AD) 130, wherein their Lordship of the Appellate Division observed that:-

> "On a plain reading of this deed, there is no gain saying that there is obligation on the part of the defendant to comply with the above conditions other than the last one, which shall be complied by the plaintiff. Though there is stipulation for completion

of the transaction within a period of 6(six) months, this time limit for payment was circumscribed by the fulfillment of the obligations by the defendant, who was not given unconditional power to rescind the agreement for non-payment of the balance consideration within six months. The defendant is under obligation to handover the vacant possession of the house except the shop and to deliver collateral documents of title and then to arrange for the execution of the tripartite deed with HBFC and the plaintiff. After fulfillment of these conditions, the question of by the payment of the balance consideration after adjustment of HBFC loan and advance would arise at the time of execution of the sale deed. He is also required to resolve the dispute regarding the shop, which appears from the recitals of the agreement that it is in the possession of the tenant, even though there is no such positive statement, other-wise the parties would not have used the expression 'settlement' of the same. Assuming that the plaintiff is required to pay the HBFC's outstanding loan but how he would pay

unless the defendant arranged with HBFC that the plaintiff would adjust the outstanding amount of loan on his behalf, and this could only be done if the tripartite deed was executed as per agreement, otherwise there was no need from providing such clause. It would be necessary for the purpose of adjustment of the outstanding loan to negotiate first with HBFC for the execution of tripartite deed so that the plaintiff would be able to adjust the balance amount of loan."

In the case reported in 65 DLR (AD) 130, their Lordship further held that:-

"Section 55 of the Contract Act lays down the effect of failure to perform at fixed time in contracts in which time (a) is essential, or (b) is not essential, acceptance or performance at time other than that agreed upon. In Jamshed Khodaram Irani vs. Burjoriji Dhunjibhai, AIR 1915 PC 83, it was provided in the agreement that the deed was to be prepared and received within two months from the date of execution; the balance consideration should be paid on the signing of the deed and, in default of payment within the stipulated time, the earnest money

would be forfeited and the vendor would have the right to sell the land. In the facts of the given case, their Lordship were of the opinion that section 55 of the Contract Act does not lay down any principle, as regards contracts to sell land, different from those which obtain under the common law of England. Under that law, equity, which governs the rights of the parties in cases of specific performance of contracts to sell land, looks not at the letter but at the substance of the contract in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Specific performance of contract of that nature will be granted, although there has been a failure to keep the dates assigned by it, if justice can be cone between the parties, and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. It was observed "But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time

limits prescribed in a fashion which is unmistakable.....But equity will; not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable nothing that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction."

In the case reported in 65 DLR (AD) 130, their Lordship also held that:-

"In contracts for the sale of immovable property, the fact that a specific time is fixed for payment or for conveyance does not normally make time of the essence. Failure to pay at a fixed time is not, per se, sufficient to terminate the seller's duty to convey; and failure to convey on the exact date does not per se discharge the buyer. In such agreements, usually time is not the essence of the contract, the reason being that the law of equity, which governs rights of the parties in cases of specific performance of

> contracts of sale of immovable property, looks not at the letter but at the substance of the agreement. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract for sale of real estate, stipulation as to time is not the essence of the contract."

In view of the above, it is clear that, in determining the parties intention the court is required to consider the agreement at or before the date of execution, not afterwards. If the time is not made originally of the essence of the contract, one of the parties is not entitled afterwards to make it of the essence. Therefore, these subsequent fixations of time by one party could not be considered as the basis to infer the time of essence of the contract. In this regard, in the case of Green vs. Sevin (1879), the House of Lords held that:-

> “When time is not originally made of the essence of a contract for sale of land, one of the parties is not entitled afterwards by notice to make it of the essence, unless there has been some default or unreasonable delay by the other party.”

Notably, the instant case is founded purely on a finding of the mixed question of facts and law based on the correct evaluation of the facts and law therefore, in deciding the application for the rejection of the plaint, the court is not permitted to travel beyond the averments made in the plaint, and to determine the truth of the mixed question of law and fact, evidence is necessary, and this can be available only in the course of the trial of the suit.

We have anxiously considered the case of Abul Kalam (Md) {Supra} wherein their Lordships of the Appellate Division held that:-

> "We have considered the provision of section 21 A(b) of the Act. The language of the section is so unambiguous that it does not require any interpretation to come to conclusion that in case of failure of depositing the balance amount at the time of filing the suit for specific performance of the contract, the suit cannot be maintained. Even then, from the impugned Judgment and order, it appears that the High Court Division considered various decisions of this court and of the Indian jurisdiction and came to the finding that the deposit of the

> balance consideration of the contract before filing a suit for specific performance of the contract is a condition precedent and that having not been done in the instant case, that suit was barred under the provision of section 21A(b) of the Act. Therefore, the plaint was liable to be rejected under Order VII, Rule 11 of the Code of Civil Procedure. We find no error with the view taken by the High Court Division in view of the language used in section 21A(b) of the Act."

We are in full agreement with the decision of the above-cited case. However, its case depends upon its own facts and circumstances. In the instant case, we have already noticed that the defendant executed a sale agreement with the plaintiff to sell 102 decimals of land and fix the price of each decimal for Tk.5,50,000.00/-, so the total cost of the land is Tk.5,61,00,000.00/-, out of which an amount of Tk.5,50,00,000.00/- was paid. Moreover, the defendant filed a case in the Land Survey Tribunal for correction of the record for 14.53 decimals of land, out of the total land; a good portion of the suit lands under the agreement were not recorded in the name of the vendors in full. A portion of the property has not

yet been mutated in the names of the defendants. Some portions are subject matter of the Land Survey Tribunal for the correction of the record of right. Further, the terms and conditions of the sale agreement stipulate that the consideration money may be paid in part or in whole. Therefore, the principle of depositing the entire consideration money at the time of filing the suit for a specific performance of the contract is not applicable in the present suit.

We have also perused the application filed by the plaintiff under Order VI Rule 17 of the Code of Civil Procedure. It is a well-established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. If the error or mistake is not fraudulent or is not intended to overreach, the court ought to correct it if it cannot do injustice to the other side. The court does not exist for the sake of discipline but to decide matters in controversy. We do not regard such an amendment as a matter of favor or grace. It seems that the amendment will help determine the fundamental controversy. It is as much a matter of right for the plaintiffs to have the plaint corrected by this amendment.

Considering the above facts and circumstances, it appears that the learned Judge of the appellate court below rightly says that the trial court is found confined in the literal averment of the sale agreement regarding its period, which affects the order to be misconceived in selecting the decision of the higher court. However, the specific performance of the contract is an equitable relief. Many alternative remedies may be awarded in a suit for specific performance of the contract. Since the last transaction between the parties before the suit was filed is claimed to have occurred on 12.08.2021, that should be proved in the trial, as it is a matter of fact. So, under the facts and circumstances explained in the plaint as well as in the application for amendment of the plaint at this stage, the suit cannot be said to be barred by any law. It should be left for trial. Therefore, the relief sought by way of amendment of the plaint and the prayer to have permission to deposit the remaining consideration money should be allowed for the ends of justice under the law and the principle of equity. On the contrary, the trial court below misdirected and misconstrued the facts and circumstances of the case, and rejected the plaint; as such, it committed an error of law, resulting in an error in the decision and occasioning a failure of justice.

Considering the above facts, circumstances of the case, and discussions made herein above, we are of the firm view that the court of appeal below, considering all the material aspects of the matter, significantly and judiciously restored the suit in allowing the appeal and reversing the Judgment and decree of the trial court below. Consequently, it appears to me that the impugned Judgment and decree do not suffer from any legal infirmity, so the impugned Judgment is well-founded in accordance with law and based on the materials on record, which cannot be interfered with by this court exercising revisional power under Section 115 (1) of the Code of Civil Procedure.

Resultantly, the Rule is discharged.

The impugned Judgment and decree dated 15.10.2023, passed by the learned Special Judge, Noakhali, in Title Appeal No. 195 of 2022, restored the suit in allowing the appeal and reversing the Judgment and decree dated 19.10.2022 passed by the learned Joint District Judge, 1st Court, Noakhali.

The order of status quo passed at the time of issuance of the Rule stands vacated.

Communicate the Judgment and send down the Lower Court Records at once.

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(Md. Salim, J).

Kabir/BO