

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique,

Chief Justice

Mr. Justice M. Enayetur Rahim

Mr. Justice Jahangir Hossain

CIVIL APPEAL NO. 39 OF 2017.

(From the judgment and order dated 09.08.2015 passed by the High Court Division in Writ Petition No.8202 of 2014.)

Feroz Alom being dead his heirs: Appellants.

1(a) Faridul Alam and others

=Versus=

Syed Akhlaque Hossain and others: Respondents.

For the Appellants : Mr. Kamal-ul Alam, Senior Advocate (with Mr. Yousuf Khan Rajib, Advocate) instructed by Mr. Haridas Paul, Advocate-on-Record.

For the Respondent Nos.1-4: Mr. A.J. Mohammad Ali, Senior Advocate, instructed by Mr. Md. Zahurul Islam, Advocate-on-Record.

Respondent Nos.5-9: Not represented.

Date of hearing and judgment: 03-01-2023

JUDGMENT

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 09.08.2015 passed by the High Court Division in Writ Petition No.8202 of 2014 disposing of the Rule with observations.

The relevant facts, for the disposal of this petition, in short, are that the respondent Nos.1-4 filed aforesaid writ petition, stating,

inter alia, that respondent No.1 and Syed Mozammel Hossain, predecessor in interest of respondent Nos.1-4 were the owners and possessors of the land measuring 400 (four hundred) square yards along with two storied building surrounded by boundary wall of Plot No.197, Mohakhali DOHS, Dhaka. Upon an application for credit facilities dated 05.02.2004, the Premier Bank Ltd. (the bank), writ respondent No.3 sanctioned the following credit facilities to the proforma writ respondent No.6 Aexim Pharmaceuticals Ltd. (hereinafter referred to as company) :

- 1.Cash Credit (Hypo) Limit for Tk.250.00 lac
- 2.Term Loan Tk.30.00 Lac
- 3.L.C. Limit Tk.150.00 Lac and
- 4.LTR Limit Tk.100.00 Lac,

The company availed the credit facilities in part and paid substantial amount against those credit facilities till the middle of 2009. At one stage, it failed to pay installments. On 27.12.2009, the company through its Managing Director applied to the bank to get renewal of the said credit facilities and for allowing the company to regularize its account for smooth running of the business of the company, but the bank did not pay any heed. The bank, all of a

sudden, published an auction notice on 31.05.2010 in "the Daily Prothom Alo" under Section 12(3) of the Artha Rin Adalat Ain, 2003 (the Ain) for holding auction of the mortgaged properties by fixing a date of holding auction on 13.06.2010 for realization of tk.5,23,75,500/- with interest as on 19.03.2010. After publication of the said auction notice, the writ petitioner No.1, by a letter dated 05.06.2010, informed the bank that they had deposited tk.13.00 lacs on 05.06.2010 and would deposit Tk.30.00 lacs within 7(seven) days and prayed for cancellation of auction notice. But the bank did not pay any heed. Then the company and the writ petitioner No.1 jointly filed Writ Petition No.4890 of 2010 in the High Court Division challenging the auction notice dated 31.05.2010 which was disposed of with a direction to rescind and revoke the auction notice with an observation that the writ respondents may publish auction notice afresh. Thereafter, the company deposited tk.17.00 lac on 09.06.2010. The bank again published auction notice on 22.06.2010 for realization of outstanding amount of tk.5,08,48,104/88 with interest as on 19.06.2010 by fixing auction dated 08.07.2010 in "The Daily

Prothom Alo". Then the company and writ petitioner No.1 filed Writ Petition No.5221 of 2010 in the High Court Division challenging the publication of the second auction notice dated 22.06.2010 and the same was rejected as being not pressed. The writ petitioners, thereafter, on 07.07.2010, filed a Title Suit No.475 of 2010 in the 1st Court of Joint District Judge, Dhaka for declaration that auction notice dated 22.06.2010 published in "The Daily Prothom Alo" was illegal and prayed for injunction under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure. The Court issued show cause notice upon the defendant Nos.1 and 2 of the said suit. Thereafter, they filed Civil Revision No.2814 of 2010 in the High Court Division and a Division Bench issued Rule on 28.07.2010 and also passed an order of status-quo in respect of position and possession of the properties described in the schedule to the plaint. On an application for vacating the order of status-quo, the High Court Division directed the plaintiffs writ petitioners to pay the entire outstanding amount by 2(two) installments, but they failed to deposit the installments. In another Division Bench of the High Court Division, the plaintiffs applied for a direction

upon the bank for accepting pay order of tk.2.00 crore. Said application was heard on 03.01.2011 and status-quo granted earlier was extended till disposal of the Rule. Against which, the Bank moved a Civil Petition in the Appellate Division and obtained an order of stay from the learned Judge-in-Chamber. In the meantime, the trial Court allowed the prayer for temporary injunction in said Title Suit No.475 of 2010. The bank preferred First Miscellaneous Appeal No.77 of 2011 in the High Court Division which was allowed. Finally, said Civil Petition was dismissed. Thereafter, the writ petitioners requested the writ respondent No.2 Governor, Bangladesh Bank stating all necessary facts and prayed for holding enquiry of the matter but, on receipt of the same, the Bangladesh bank did not take any step. Finding no other alternative efficacious remedy, the writ petitioners have filed the writ petition and obtained Rule Nisi.

The bank contested the Rule by filing affidavit-in-opposition.

The case of the bank, in short, was that, the company received credit facility from the Bank by mortgaging the property executing registered mortgage deed dated 21.07.2005, but the writ

petitioners failed to repay the outstanding loan amount of Tk.5,44,88,318/-. The Bank published auction notice for sale of the mortgaged property on 31.05.2010 under section 12 of the Ain, for realizing the outstanding dues. Against the auction notice dated 31.05.2010, the writ petitioners filed Writ Petition No.4890 of 2010 and the High Court Division, directed the Bank to cancel the auction notice dated 31.05.2010 upon giving the bank an option to publish a fresh auction notice and accordingly, the bank published a fresh notice in the two daily newspapers on 22.06.2010. On the basis of which auction of the scheduled property was held on 08.07.2010. The writ respondent No.5 of the instant writ petition, being the highest bidder, purchased the mortgaged property on payment of consideration of Tk.6,21,00,000/- (six crore twenty one lac) and the said money was finally accepted and the writ respondent No.5 paid all the amount and the Bank, after adjustment of the outstanding dues against the loan, kept the surplus money deposit in the account of the borrower (the writ petitioners). Challenging the auction notice dated 22.06.2010, the writ petitioner filed Writ Petition No.5221 of 2010 in

the High Court Division which was ultimately rejected on 04.08.2010 as being not pressed. Then the writ petitioners filed Title Suit No.475 of 2010 in the Court of Joint District Judge, First Court, Dhaka praying for declaration that the auction notice dated 22.06.2010 was illegal. In that suit, they filed an application for temporary injunction. The trial Court, issued a show cause notice. They filed Civil Revision No.2814 of 2014 against the order dated 12.07.2010 in the High Court Division, and obtained Rule and got an order of status-quo. Thereafter, they filed an application seeking time to make payment of loan amount. After hearing the said application, the High Court Division, by an order dated 26.10.2010, directed the writ petitioners to pay Tk.2 crore to the bank within 10.11.2010 and to submit compliance by 11.11.2010. The writ petitioners were also directed to pay balance amount of the outstanding dues on or before 07.12.2010 and to submit compliance within 08.12.2010. It was also ordered that if the writ petitioners fails to pay the first installment within 10.11.2010, the order of allowing installment to make payment shall stand vacated but as per direction of the High Court

Division, the writ petitioners could not even pay the first installment within 10.11.2010. After expiry of that date, the writ petitioners again filed an application in Civil Revision No.2814 of 2010 to accept a pay order of Tk.2 crore. The High Court Division extended the order of status-quo till disposal of the Rule. Against which, the Bank filed a Civil Petition No.203 of 2011 and obtained order of stay from the learned Judge in Chamber. Meanwhile, the trial Court, after hearing, allowed the prayer for temporary injunction in Title Suit No.475 of 2010. Against which, the bank filed First Miscellaneous Appeal No.77 of 2011 in the High Court Division which was allowed on 05.03.2012. The writ petitioners filed Civil Petition No.925 of 2012 in the Appellate Division and the same was dismissed by an order dated 04.09.2014.

The writ petitioners applied to the Governor of Bangladesh Bank, writ respondent No.2 for a direction upon the Bank, for re-scheduling the outstanding loan amount of the writ petitioners but the Bangladesh Bank did not pass any order. As such the Bank, in due course of business, published the fresh notice for auction.

The High Court Division, by the impugned judgment and order, disposed of the Rule with the observations that since the possession of the property has not yet been delivered to the bank, the dispute may be settled by the bank with the consent of the auction purchaser taking care of the purchaser's interest by way of execution of a deed of re-conveyance by the purchaser if the writ petitioners come forward to make payment of entire outstanding dues along with interest, cost of stamp, registration and other expenses incidental thereto and compensation to the purchaser, failing which, in the alternative, the borrower writ petitioners may file a properly constituted suit for compensation against the bank for holding the auction unfairly and illegally, if so advised. Against which, the appellants have preferred this appeal upon getting leave.

Mr. Kamal-ul Alam, learned Senior Counsel appearing for the appellants, submits that Syed Mozammel Hossain and the writ petitioner No.1 being the directors of the loanee company and also the owners of the case property in possession cannot be treated as third party mortgagor, thus, the judgment and order passed by

the High Court Division treating the writ petitioners as third party is erroneous. He further submits that the auction, in question, having been held fairly and legally observing all legal formalities finding of the High Court Division that the auction was held unfairly and illegally is not tenable and said finding having been arrived at without considering the materials on record, the same is liable to be set aside. He, lastly, submits that the High Court Division failed to consider that the petitioner is bonafide purchaser of the case property and there was no fault of his part in participating the auction and he deposited the auction money, the order passed by the High Court Division is liable to be set aside.

Mr. A.J. Mohammad Ali, learned Senior Counsel appearing for the respondent Nos.1-4, submits that the High Court Division upon proper appreciation of the materials on record, rightly held that since the possession of the property has not yet been delivered to the auction purchaser, the dispute may be settled by the bank with the consent of the auction purchaser, taking care of the purchaser's interest by way of execution of the deed of re-conveyance . He

submits that the High Court Division, in fact, taking into consideration of the interest of all the parties of the dispute directed to settle the matter by the Bank and there is no illegally or irregularity in the judgment and order of the High Court Division.

In the writ petition, Bangladesh Bank and Governor were impleaded as respondent No.1 and 2 and respondent No.3 and 4 were the Premier Bank Ltd. and its executive. It further appears from the materials on record that, the High Court Division issued Rule calling upon the writ respondent Nos. 1 to 4 to show cause as to why the inaction of the writ respondent No.1 and 2 (Bangladesh Bank and Governor, Bangladesh Bank) to set aside the auction notice published 'in the Daily Prothom Alo' in its issue dated 22nd June, 2010 under the signature of the writ respondent No.4 at the instance of the respondent No.3, bank under Section 12(3) of the Ain so far the same relates to the writ petitioner's property as described in tender notice (Annexure-D to the writ petition) should not be declared illegal.

The whole object of the instance writ petition was to set aside the auction notice published at the instant of a private bank. Earlier the writ

petitioners filed Writ Petition No.5221 of 2010 against notification published on 22nd June, 2010 in "the Daily Prothom Alo" at the instance of respondent bank for holding auction of the scheduled property. On 04.08.2010, the said writ petition was dismissed as not being pressed. Writ petitioners obtained Rule challenging the said auction notice again as it appears from the judgment and order of the High Court Division itself. It further appears from the said judgment and order that the High Court Division has mentioned the fact of filing of the aforesaid Writ Petition No.5221 of 2010. In view of aforesaid facts and circumstances stated above, this writ petition is not at all maintainable. In fact, the writ petitioners filed instant writ petition challenging the auction notice issued by a private bank, against which, the writ petition is not maintainable.

It further appears from the materials on record that Syed Mojammel Hossain, predecessor-in-interest of the writ petitioner Nos.1-4 and writ petitioner No.1 himself were the directors of the loanee company and they are the owners of the disputed property in respect of which, mortgaged deed was executed and registered in

favour of the Bank and that they, being the owners of the case property, cannot be treated as third party mortgagor, the High Court Division has committed an error treating the writ petitioners as third party mortgagor.

From the Affidavit-in-Opposition filed by the auction purchaser in the High Court Division, it appears that the auction was held on 08.07.2010 and the auction purchaser writ respondent No.5 was the highest bidder and he offered a sum of taka 6,21,00,000/- which was the highest offer and the same was accepted on 12.07.2010. The writ petitioners filed the instant writ petition on 07.09.2014 but they did not challenge the auction though same was held at about 3(three) years before filing of the instant writ petition.

In view of the discussion made above, we find substance in the submissions made by Mr. Kamal-ul Alam.

Accordingly, the appeal is allowed. The judgment and order dated 09.08.2015 passed by the High Court Division in Writ Petition No.8202 of 2014 is hereby set aside.

C.J.

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