

Present:
Ms. Justice Nazmun Ara Sultana
and
Mr. Justice Md. Ruhul Quddus

Writ Petition No.4236 of 2009

Mirza Ahsan Habib

...Petitioner

-Versus-

The Judge, Artha Rin Adalat, Khulna and
another

.... Respondents

Mr. Abul Kalam Mainuddin, with Ms. Rehana
Akhtar, Advocates

.... for the Petitioner

Mr. Md. Mozibur Rahman Miah, Advocate

...for the Respondent

Judgment on 19.1. 2011

Md. Ruhul Quddus, J:

This Rule, at the instance of a judgment-debtor in a mortgage decree, was issued calling in question order dated 12.11.2007 passed by the Judge, Artha Rin Adalat, Khulna in Artha Rin Execution Case No.319 of 2006 (second execution case) rejecting the petitioner's application for rejection of the execution case as being barred by limitation under

section 28(3) of the Artha Rin Adalat Ain, 2003 (herein after referred to only 'the Ain').

Petitioner's case in short is that the Agrani Bank, Baikali Branch, Khulna (herein respondent No.2) as plaintiff instituted Artha Rin Suit No.55 of 2004 before the Artha Rin Adalat, Khulna for realization of loan amounting to Tk.10,43,454.18 (Taka ten lac forty-three thousand four hundred fifty-four and Paisa eighteen) only against the petitioner and three others. Ultimately the suit was decreed exparte on 26.5.2004 and the decree holder-bank put the decree in execution by filing Execution Case No.397 of 2004, which was finally disposed of on 4.8.2005 by issuing a certificate under section 33(5) of the Ain in favour of the decree holder-bank (vide annexe:D-1 to the writ petition). Thereafter the bank failed to dispose of the property and filed second execution case being Execution Case No.319 of 2006 on 1.11.2006 for selling the same property that was given under its possession and enjoyment earlier. In the said second execution case the learned Judge, on an application filed by the decree-holder bank, issued warrant of arrest on 27.8.2007 against the petitioner and two other judgment-debtors to put them in civil prison. At that stage the petitioner filed an application for rejection of the execution case as being barred by special limitation under section 28 (3) of the Ain (vide annexe-G to the writ petition). The learned Judge of the executing Court rejected the said application by his order dated 12.11.2007 without discussing even touching the issue of special limitation as raised by the petitioner.

Being aggrieved by the said order, the petitioner moved the High Court Division in Civil Revision No.444 of 2007, which was ultimately discharged by judgment and order dated 5.4.2009 being not maintainable (vide annexe-H to the writ petition). Thereafter the petitioner moved the instant writ petition challenging the said order dated 12.11.2007, obtained the Rule and an order of stay on 23.6.2009.

The decree holder-bank as respondent No.2 contests the Rule by filing an affidavit-in-opposition. In the said affidavit-in-opposition the bank has not controverted the material facts relating to special limitation for filing a second execution case under the Artha Rin Adalat Ain, 2003.

Mr. Abul Kalam Mainuddin, the learned Advocate for the petitioner submits that admittedly the first execution case was disposed of on 4.8.2005. Therefore the initiation of the second execution case on 1.11.2006 i.e. after expiry of one year as prescribed in section 28 (3) of the Artha Rin Adalat Ain, 2003 is hopelessly barred by the law of special limitation and as such it is liable to be rejected. The warrant of arrest issued against the petitioner, in an illegal execution proceeding, is also illegal.

On the other hand Mr. Md. Mozibur Rahman Miah, the learned Advocate for the respondent-bank submits that the petitioner did not surrender before the executing Court and as such he has become a fugitive and not entitled to any relief from this Court.

We have perused the writ petition with its annexes and the affidavit-in-opposition filed by the respondent-bank, and have also considered the submissions of the learned Advocates of both the sides. The question of limitation is a mixed question of law and facts. In the present case the fact i.e the date of disposal of the first execution case and that of filing the second execution case is admitted. These facts are relevant to resolve the issue of limitation in view of section 28 (3) of the Ain, which runs as follows:

“২৮। জারীর জন্য মামলা দাখিলের সময়সীমা।- (১) ...

(২) ...

“(৩) জারীর জন্য দ্বিতীয় বা পরবর্তী মামলা, প্রথম বা পূর্ববর্তী জারীর মামলা খারিজ বা নিষ্পত্তি হওয়ার পরবর্তী এক বৎসর সময় উত্তীর্ণ হওয়ার পরে দাখিল করা হইলে, উক্ত মামলা তামাদিতে বারিত হইবে; এবং তামাদিতে বারিত অনুরূপ মামলা আদালত কার্যার্থে গ্রহণ না করিয়া সরাসরি খারিজ করিবে।”

It appears from the record that the first execution case was disposed of on 4.8.2005 and the second execution case was filed on 1.11.2006 i.e clearly after expiry of one year from disposal of the first execution case. Section 28 (3) of the Ain provides a special limitation of one year for filing of the second execution case, and the limitation would start from the date of disposal of the first execution case. In view of the above quoted law of special limitation, the execution case in question is clearly barred by limitation. Since the execution case is illegal, the order passed therein issuing warrant of arrest against the petitioner is also illegal and as such the petitioner cannot be termed as a fugitive.

Moreover, the term 'fugitive' disqualifying a person to get any relief from the Court is applicable for criminal proceedings. But the Artha Rin Suit is a clear and simple suit of civil nature and in execution of the decree passed therein the present execution case is also a proceeding of civil nature. Therefore a judgment-debtor against whom an warrant of arrest is pending in a case of civil nature, cannot be termed as a fugitive and the door of justice is not closed for him. The submission of the learned Advocate for the respondent on this point bears no substance and we find substance in the Rule.

Accordingly the Rule is made absolute and the proceedings in Execution Case No.319 of 2006 (arising out of Artha Rin Suit No.55 of 2004) now pending in the Artha Rin Adalat, Khulna is declared to be without lawful authority. Consequently the order dated 27.8.2007 issuing warrant of arrest against the petitioner passed in the said execution case is also declared to be without lawful authority and is of no legal effect.

The mortgaged property that was given under disposal of the respondent-bank under section 33 (5) of the Ain will, however, remain with the bank and may also be disposed of in accordance with law.

Nazmun Ara Sultana, J:

I agree.