

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION.
(Special Original Jurisdiction)

Writ Petition No. 9455 of 2012.

In the matter of:

An application under Article 102 of the
Constitution of the People's Republic
of Bangladesh.

And

In the matter of:

A.K.M. Fayekuzzaman

...Petitioner.

Vs.

Judge, Artharin Adalat No. 2, Dhaka and others.

...Respondents.

Mr. Md. Mamunur Rashid, Advocate

... For the Petitioner.

Mr. M.Moksadul Islam, Advocate

...For the Respondent No. 2.

Judgment on 19.02.2013

Present:

Mr. Justice Nozrul Islam Chowdhury

AND

Mr. Justice Mohammad Ullah.

Mohammad Ullah, J.

This Rule Nisi was issued on an application filed by the petitioner under Article 102 of the Constitution, calling upon the respondents to show cause as to why the impugned order dated 07.6.2012 passed by the Arthra Rin Adalat No. 2, Dhaka in Artha Rin Suit No. 237 of 2011 should not be declared to have been passed without lawful authority and is of no legal effect.

By the Rule issuing order dated 22.7.2012 further proceeding of the above suit was stayed till disposal of the Rule.

The facts leading to disposal of the Rule are briefly stated below:

The petitioner and others are the defendants in an Artha Rin Suit being No. 237 of 2011 brought by the respondent-Bank for realization of outstanding dues of Tk. 8,74,74,699.61/-.

The petitioner as the defendant No. 1 entered appearance in the said Artha Rin Suit and by filing a written statement denying most of the allegation made in the plaint stating inter-alia that the petitioner took loan over a sanction letter issued by the lending Bank. Further case of the petitioner is that he has paid Tk. 2,59,60,715.02 and claiming of Tk. 8,74,74,699.61 or any other amount from the petitioner is absolutely false, without any basis and the sweet will of the plaintiff-Bank.

After submitting written statement the petitioner filed an application before the respondent No. 1-Artha Rin Adalat, Dhaka praying for holding a settlement conference to settle the dispute between the parties in an alternative dispute resolution as contemplated under section 22 of the Artha Rin Adalat Ain, 2003 (**hereinafter referred to as the Ain, 2003**).

On the other hand the respondent-Bank upon filing an application expressed its unwillingness to go for settlement conference stating inter-alia therein. (copy was not produced)

Upon hearing of both the parties the respondent No. 1-Artha Rin Adalat, 2nd Court, Dhaka by its impugned order dated 7.6.2012 rejected the application filed by the petitioner seeking for holding mediation or settlement conference mainly on the ground that the plaintiff-Bank expressed its unwillingness to go for settlement conference to mediate the dispute between the parties and thereby fixed 26.6.2012 for framing issues. The defendant-

petitioner against the said order of the respondent No. 1 approached this Court and obtained the present Rule and order of stay as stated above.

Mr. Md. Mamunur Rashid, the learned Advocate appearing on behalf of the petitioner having placed the impugned order and other materials on record submits that there is no option for the plaintiff-Bank to raise any objection against mediation process to be referred by the court to the parties and as such non referring of the Artha Rin Suit to the mediator on the face of the objection made by the plaintiff-Bank is illegal, without lawful authority and is of no legal effect.

Mr. Mamunur Rashid, the learned Advocate upon referring the unamended provision and the amended provision of mediation process submits further that before amendment it was the discretion of the court either to send the pleadings for arbitration or not. But after amendment, the provision for holding settlement conference has been made mandatory for the court to refer the Artha Rin Suit to the parties for mediation and in such view of the matter the impugned order of the Artha Rin Adalat should be declared to have been passed without lawful authority and is of no legal effect.

Mr. Rashid, the learned Advocate submits further that language of section 22 is very clear wherein it has been provided that after submission of the written statement, the Adalat shall send the pleading to their engaged lawyers and if any lawyer has not been appointed the matter shall be sent to the parties for holding settlement conference and in sending the pleadings section 24 of the Ain, 2003 should also to be taken into consideration.

In support of his submission Mr. Mamunur Rashid, the learned Advocate placed reliance on the case of M/S Rana Apparel Limited and another vs. Government of Bangladesh and others reported in 15 BLT (2007), 104.

Mr. M. Moksadul Islam, the learned Advocate appearing on behalf of the respondent No. 2-Bank supporting the impugned order on the other hand submits that the provision of mediation is not only for the defendant of the suit but also for both the parties, in such view of the matter when either of the parties like the plaintiff-Bank refuse to go for settlement conference at this stage, the whole purpose of the process of mediation would be fruitless and as such the order passed by the Artha Rin Adalat is not required to be interfered with.

We have heard the learned Advocate of both the parties, perused the writ petition, annexures and also gone through the decision referred to.

On the face of the submissions of both the parties we have to look into the intention of the legislature and in doing so we are to see both the unamended and the amended provision of mediation process which is provided in Chapter-5 of the Ain, 2003 under the heading “বিকল্প পদ্ধতিতে বিরোধ নিষ্পত্তি” which reads as follows:

“ ২২। মধ্যস্থতা।--(১) ধারা ২১ এর অধীনে মীমাংসা সভার মাধ্যমে বিরোধ নিষ্পত্তির লক্ষ্যে প্রয়াস গ্রহণের জন্য কোন আদেশ না করিয়া থাকিলে, বিবাদী কর্তৃক মামলায় লিখিত জবাব দাখিলের পর, আদালত, ধারা ২৪ এর বিধান সাপেক্ষে, পরবর্তী কার্যক্রম স্থগিত রাখিয়া, মধ্যস্থতার মাধ্যমে

বিরোধ নিষ্পত্তির লক্ষ্যে প্রয়াস গ্রহণের জন্য মামলাটি নিযুক্ত আইনজীবীগন, কিংবা আইনজীবী নিযুক্ত না হইয়া থাকিলে, পক্ষগনের নিকট প্রেরণ করিতে পারিবে।

তবে শর্ত থাকে যে, পক্ষগন যদি এই মর্মে আদালতের নিকট দরখাস্ত করিয়া আবেদন করেন যে, তাহারা মধ্যস্থতার মাধ্যমে মামলার নিষ্পত্তি করিতে আগ্রহী, তাহা হইলে এই ধারার অধীন মধ্যস্থতার মাধ্যমে নিষ্পত্তির চেষ্টার জন্য মামলা প্রেরণ করা আদালতের জন্য বাধ্যতামূলক হইবে।”

The law was amended in 2010 vide Act XVI of 2010 and the provision of section -22(1) as provided after the said amendment is as follows: “ধারা ২২। মধ্যস্থতা।-(১) চতুর্থ পরিচ্ছেদে বর্ণিত সাধারণ পদ্ধতিতে মামলার বিচার বা শুনানী সম্পর্কিত যে বিধানই থাকুক না কেন, এই আইনের অধীন দায়েরকৃত কোন মামলায় বিবাদী কর্তৃক লিখিত জবাব দাখিলের পর, আদালত, ধারা ২৪ এর বিধান সাপেক্ষে, মধ্যস্থতার মাধ্যমে বিরোধ নিষ্পত্তির লক্ষ্যে, মামলাটি, নিযুক্ত আইনজীবীগন কিংবা আইনজীবী নিযুক্ত না হইয়া থাকিলে পক্ষগনের নিকট প্রেরণ করিবে।”

The section 24 of the Ain, 2003 also should be taken into consideration for the purpose of materializing the mediation process under section 22 of the Ain, 2003 which reads as follows:

২৪। (১) এই আইনের অধীন মধ্যস্থতার মাধ্যমে বিকল্প পদ্ধতিতে মামলার নিষ্পত্তির উদ্দেশ্যকে কার্যকর করার লক্ষ্যে, আর্থিক প্রতিষ্ঠান উহার পরিচালক (আসতক্ষম ষপ ঙ্গতক্ষদৃক্ষক্ষ) বা অনুরূপ উপযুক্ত পর্যায়ে কতৃক, তদউদ্দেশ্যে রিজুলিউশন বা সিদ্ধান্ত গ্রহণপূর্বক, কেন্দ্রিয়, আঞ্চলিক ও স্থানীয় পর্যায়ে উপযুক্ত ব্যবস্থাপক বা কর্মকর্তাকে যথাযথ ক্ষমতা অর্পণ করিয়া আদেশ বা পরিপত্র জারী করিবে।

(২) আর্থিক প্রতিষ্ঠান, উপ-ধারা (১) এর অধীন জারীকৃত আদেশ বা পরিপত্রে, প্রদত্ত অনুমোদন ও অর্পিত ক্ষমতারসীমা এবং উক্ত ক্ষমতা প্রয়োগের পদ্ধতি ও নীতি, সুস্পষ্টভাবে উল্লেখ করিবে।

(৩) আর্থিক প্রতিষ্ঠান, উপ-ধারা (১) এর অধীন জারীকৃত আদেশ বা পরিপত্রের অনুলিপি সংশ্লিষ্ট এলাকার অর্থ ঋণ আদালতে প্রেরণ করিবে।

(৪) আদালতে, এই আইনের অধীন মধ্যস্থতার মাধ্যমে বিকল্প পদ্ধতিতে উপনীত আপোষ অনুযায়ী ডিক্রী বা আদেশ প্রদান করিবার পূর্বে নিশ্চিত হইবেন যে, উক্ত আপোষ উপ-ধারা (২) এর নির্ধারিত সীমার অধীনেই হইয়াছে এবং, ক্ষেত্রমত,

আর্থিক প্রতিষ্ঠানের ব্যবস্থাপনা পরিচালক বা প্রধান নির্বাহী কর্মকর্তা কর্তৃক উহা অনুমোদিত হইয়াছে।

This section 24 deals with the delegation of power for effective role in the arbitration or settlement conference as provided under section 22 of the Ain, 2003.

On a plain reading of those provisions of mediation or settlement conference it is seen in the unamended provision that it was mandatory upon the Artha Rin Adalat to place the dispute or the pleadings to the parties for the purpose of mediation when the parties of the suit by filing an application to the court want to settle the dispute by holding settlement conference at the intervention of the mediator.

But in the amended provision of section 22 of the Ain, 2003 (Act 16 of 2010) provides the court to send the pleadings or dispute to the engaged lawyer or the parties as the case may be after filing written statement by the defendant for settling the matter through mediation or by way of settlement conference without any application for such mediation. But the parties have no option to expresses their unwillingness to go for mediation process at this stage. So, we hold that the amended provision of the Ain, 2003 for holding mediation is mandatory one. Because subsection (11) of section 22 of the Ain, 2003 has been provided consequence if the parties have failed to mediate the dispute by arbitration which reads as follows:

“ধারা ২২(১১) মধ্যস্থতার মাধ্যমে বিরোধ নিষ্পত্তির প্রয়াস ব্যর্থ হইলে আদালত মধ্যস্থতার কার্যক্রমের পূর্ববর্তী অবস্থান হইতে মামলার গুনানীর কার্যক্রম আরম্ভ করিবে।”

The unamended provision for mediation under section 22 of the Ain, 2003 clearly said that if the parties by filing an application desire to go for

mediation for settling the matter by arbitration, then the court has no other choice but to send the pleadings for mediation/ arbitration. But in the amendment Act, 16 of 2010 the above provision of mediation was repealed by the legislature by incorporating new provision for mediation wherefrom we find the clear intention of the legislature that the power given to the court under amended Act is a mandatory power.

In such view of the matter there is no provision for any of the parties of the suit to express their unwillingness to go for mediation by filing an application to the court.

Moreover, if the parties to the suit failed to settle the dispute between them under section 22 of the Ain, 2003 they have another alternative provision/remedy in this chapter to settle the dispute invoking section 23 of the Ain, 2003 which provides as follows:-

২৩। (১) ধারা ২২ এর অধীন মধ্যস্থতার মাধ্যমে বিকল্প পদ্ধতিতে বিরোধ নিষ্পত্তি না হইলে ৪র্থ পরিচ্ছেদের বিধান অনুযায়ী আদালত কর্তৃক রায় বা আদেশ প্রদানের পূর্বে মামলার যে কোন পর্যায়ে উভয়পক্ষ আদালতের অনুমতিক্রমে ধারা ২২ এর উপ-ধারা (২), (৩) ও (৪) এ উল্লিখিত বিধান মোতাবেক বিকল্প পদ্ধতিতে মামলা নিষ্পত্তি করিতে পারিবে।

(২) উপ-ধারা (১) এর অধীন প্রদত্ত মধ্যস্থতার মাধ্যমে মামলা নিষ্পত্তির সুযোগ এই আইনের ধারা ১৭ তে উল্লিখিত মামলা নিষ্পত্তি সময়সীমার ব্যত্যয় ঘটাইতে পারিবে না।

The legislature has incorporated these provisions of mediation or settlement conference or in other words alternative dispute resolution to mediate the dispute or to realize the outstanding dues from the defaulted borrower without unnecessary spending time, energy and money in litigations. In this respect if we look into the preamble of the Ain we will see that the whole purpose of Ain is to realize the unpaid loan given by the financial

institution to the borrower for different purposes of their business. The preamble of the Ain reads as follow:

“যেহেতু আর্থিক প্রতিষ্ঠান কর্তৃক প্রদত্ত ঋণ অদায়ের জন্য প্রচলিত আইনের অধিকতর সংশোধন ও সহতকরন প্রয়োজনীয়, সেহেতু এতদ্বারা নিম্নরূপ আইন করা হইল”

So, the legislature while incorporating the Ain has given prime consideration for realization of the unpaid loan. Since the whole purpose of enacting the law is for recovery of loan and as such the Artha Rin Adalat Ain, 2003 has been incorporated upon consolidating the existing law of 1990 and since under the existing law it appeared that by filing suits or execution cases money could be recovered but not in a short span of time and thus the legislature has incorporated the provision of chapter 5 in the new Ain, 2003 for easy recovery of money within a short time and as such alternative dispute resolution has been incorporated in the new Ain for the purpose of realizing money without spending much time and money in litigations.

As such chapter 5 has been incorporated in the present Ain, 2003 allowing the parties to ask for amicable settlement under section 22 of the Ain, 2003 and lastly by Act No. 16 of 2010 this mediation process has been amended and make it mandatory for the parties of the suit to go for mediation at a certain stage of the proceeding to decide the dispute between the parties at the intervention of the mediator.

Adalat is under a statutory obligation of the provision of law that it should send the pleadings to the parties of the suit or their engaged lawyer as soon as filing the written statement by the defendant without any prayer either of the parties of the suit.

Moreover, when the defendant borrower wants to settle the dispute with the intervention of the mediator in an alternative dispute resolution. In such a situation the plaintiff-Bank should have extended its hand to materialize the intention of the legislature and also for early recovery of its dues from the defaulted borrower without spending much time or money in litigation.

Be that as it may we find that the parties of the suit have many options, if they want to settle the dispute in an alternative manner. It is necessary to mention here that in all purposes of mediation or settlement conference or alternative dispute resolution (ADR) Adalat should have taken a vital role to materialize the dispute of the contending parties out of court without expending time and energy unnecessarily.

The decision as referred to by the learned Advocate for the petitioner is applicable in the present facts and circumstances of the instant case in our hand.

For the reasons and discussions made herein above and also the relevant law we are of the view that the Rule has merit and thus the Rule is made absolute, however without any order as to costs.

The judgment and order dated 7.6.2012 passed by the Artha Rin Adalat, 2nd Court, Dhaka in Artha Rin Suit No. 237 of 2011 is hereby declared illegal and is of no legal effect.

The trial court concerned is hereby directed to send the pleadings of the suit to the parties or their engaged lawyers for holding mediation within

15 (fifteen) working days of receipt of this judgment. In doing so, the parties of the suit are also directed to take positive steps for holding mediation keeping in view of the provision of subsection (5) of section 22 of the Ain, 2003. The concerned Artha Rin Adalat is also directed to proceed with the suit in accordance with law, if the parties of the suit failed to mediate the dispute within 90 (Ninety) days from receipt of the pleadings of the suit as provided under section 22(5) of the Ain, 2003.

Send copy of this judgment to the 2nd Court of Artha Rin Adalat, Dhaka at once.

Nozrul Islam Chowdhury, J.

I agree.