

11 SCOB [2019] HCD 98

**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 4297 OF 2013.

**Agrani Bank Limited, Head Office at 9/D, Dilkusha Commercial Area, Motijheel, Dhaka having its Branch amongst other as Ramna Corporate Branch , Dhaka represented by its Deputy General Manager, 18, Bangabandhu Avenue,Dhaka
....Petitioner.**

Vs.

**Government of the People’s Republic of Bangladesh, represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka and others
....Respondents.**

Mr. Shamim Khaled Ahmed with
Mr. Syed Hasan Zobair, Advocates
... For the Petitioner.

Mr. Md. Asaduzzaman with
Mr. Md. Abbas Uddin, Advocates
...For the Respondent Nos.2 & 3

Heard on the 11th , 13th , 19th & 24th
May,2015.

And

Judgment on the 14th September,2015

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Mahmudul Hoque

It is well settled that the executing court can not go beyond the decree nor can it question its legality or correctness, but there is one exception to this general Rule i.e. the executing court can adjust the amount with the decree paid by the Judgment Debtors during pendency of the execution proceeding if certified by the Decree Holder.

**In the present case admittedly the Judgment Debtors made payment of Tk.62,50,000/- to the Decree Holder during pendency of the Suit which has not been adjusted by the Decree Holder at the time of filing of the execution proceeding. In this situation the executing court is legally entitled to adjust the aforesaid amount with the decretal amount not the amount paid before filing of the suit.
It must take the decree according to its tenor but in the instant case the executing court travelled beyond the decree and as such the Impugned Order passed by the executing court is not in accordance with law. ... (Para 8)**

Judgment

Mahmudul Hoque, J.

1. In this application under Article 102(i)(a) of the Constitution of Bangladesh this Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the judgment and order No. 22 dated 13.3.2013 passed by the learned Judge of the Artha Rin Adalat No.3, Dhaka in Artha Jari Case No. 29 of 2011 (Annexure-‘K’ to the

Writ Petition) now pending before the Artha Rin Adalat No.3, Dhaka should not be declared to have been passed without lawful authority and is of no legal effect and/or such other or further order or orders as to this court may seem fit and proper.

2. Bare necessary facts for the disposal of this Rule is, in brief, are that the Petitioner, Agrani Bank Limited instituted Artha Rin Suit No. 652 of 2004 against the Respondent Nos. 3-6 as heirs of the borrower Mrs. Fatema Salam for recovery of the loan and the said suit was decreed on contest against the Defendants on 11.10.2009. Thereafter the Petitioner Bank as decree holder put the said decree in execution by filing Artha Execution Case No. 29 of 2011. The Judgment-Debtor Respondent Nos. 3-6 filed an application on 15.11.2012 praying for allowing the Judgment-Debtors to pay the decretal amount by four equal instalments within one year and to adjust the amount already paid to the Bank before filing of the suit. In the said application the Respondents Judgment-Debtor claimed that their predecessor obtained loan from the Bank amounting to Tk.2,73,00,000/-. As per Section 47 of the Artha Rin Adalat Ain (“Ain”) the Decree Holder Bank can not claim more than thrice of the principal amount and accordingly, the Artha Rin Adalat decreed the suit for an amount of Tk.8,19,00,000/- following the provisions of Section 47. But the Decree Holder Bank filed execution case claiming an amount of Tk.14,24,63,207.38 with upto date interest which is illegal and contrary to the provision of Section 47 of the Ain. The Judgment-Debtors also claimed that they already paid an amount of Tk.2,09,70,444/- to the Bank but the said amount has not been adjusted with the decretal amount at the time of filing of the execution case. As per calculation of the Judgment-Debtors, the Decree Holder Bank after adjustment of the said amount is entitled to get only Tk.6,09,29,556/- and the Respondents by filing an application sought permission of the Adalat to pay the said amount by four instalments to the Petitioner Bank within one year. The Petitioner Bank filed written objection against the said application of the Judgment-debtor. The Artha Rin Adalat heard the application and upon hearing allowed the same and deducted Tk.2,09,70,444/- from the decretal amount of Tk.8,19,00,000/- and directed the Judgment Debtors to pay Tk.6,09,29,556/- to the Decree Holder Bank by four equal instalments within one year by the Impugned Order dated 13.3.2013. At this stage the Decree Holder Bank has challenged the validity and propriety of the impugned order by filing this application and obtained the present Rule and Order of Stay.

3. The Respondent Nos. 3 and 4 contested the Rule by filing Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the Respondents predecessor Mrs. Fatema Salam and S.M.Badius Salam obtained loan from the Bank who during pendency of the Artha Rin Suit died and the Respondents were made party to the suit as heirs of the original loanee. The Artha Rin Adalat after contested hearing decreed the suit. The Respondents were always ready to pay the decretal amount to the Bank as per decree subject to adjustment of the money already paid but the decree Holder Bank without adjusting the money paid and allowing instalments to the Respondents filed execution case claiming the amount beyond the decree. The Judgment Debtor Respondents filed an application before the executing court for adjustment of the amount already paid and to allow the Judgment Debtors to make payment of the rest amount by four equal instalments within one year. The Adalat upon contested hearing allowed the application and there was no illegality. The Petitioner Bank filed this Writ Petition only to harass the Respondents. Further case of the Respondents are that their predecessor obtained the loan from the Bank amounting to Tk.2,73,00,000/-. The Bank is entitled to claim three times of the loan amount from the borrower as per Section 47 of the Ain and accordingly, the Artha Rin Adalat decreed the suit for Tk.8,19,00,000/- out of which the Respondents made payment of

Tk.2,09,70,444/- . After deduction of the said amount the claim of the Bank stands at Tk.6,09,29,556/-. The executing court allowed the Respondents to pay the aforesaid amount by four equal instalments within one year. Therefore, the executing court committed no illegality in passing the Impugned Order and as such the Rule is liable to be discharged .

4. Mr. Shamim Khaled Ahmed with Mr. Syed Hasan Zobair, the learned Advocates appearing for the Petitioner Bank submit that the executing court can not go beyond the decree but in the instant case the executing court acted as a court of appeal sitting over the decree passed by the trial court. It is also argued that the executing court by the Impugned Order in fact revisited the judgment and decree passed by the trial court affecting the rights of the parties already settled under the decree. Mr. Zobair further submits that once under the decree the trial court had adjudicated the issue relating to entitlement of the plaintiff, the grievance, if any, on the part of the Defendant Judgment Debtor as aggrieved party is available in the form of an appeal and the executing court being not entitled to go beyond the decree certainly can not reduce any amount from the decree. But the executing court by allowing Judgment Debtors application reduced the decretal amount as prayed for and as such the Impugned Order is illegal and liable to be set aside.

5. Mr. Asaduzzaman with Mr. Md. Abbas Uddin, the learned Advocates appearing for the Respondent Nos. 3 and 4 submit that the executing court is entitled to deduct any amount paid by the Judgment Debtors during the pendency of the suit or before filing of the execution case. According to them it is not disputed that the Judgment Debtors made payment of Tk.2,09,70,444/- to the Petitioner Bank before and after filing of the suit. The trial court considering and keeping in mind the provision of Section 47 of the Ain decreed the suit for an amount three times of the principal amount of loan. As per provision of law the amount already paid by the Defendant Judgment Debtors ought to have been adjusted with the decretal amount but the trial court at the time of passing decree did not adjust the amount already paid. It is also argued that the executing court is competent enough under Order XXI Rule I of the Code of Civil Procedure to adjust the amount already paid to the Decree Holder Bank duly certified by them. In the instant case the executing court in fact exercised that power and as such the executing court by adjusting the said amount with the decretal amount committed no illegality and for that reason the order passed by the executing court is not liable to be interfered with.

6. In reply to the submission of the Respondents Counsel Mr. Zobair submits that the executing court, no doubt, can adjust the amount paid by the Judgment Debtors after filing and during pendency of the execution proceedings. But the executing court can not adjust again the amount paid by the Judgment Debtors which was already adjusted before filing of the suit. It is strongly argued that the Judgment Debtors during pendency of the suit made payment of Tk.62,50,000/- only which was not adjusted with the claim through inadvertence, that amount may be adjusted with the claim of the Decree Holder Bank but the executing court in place of adjusting Tk.62,50,000/- most illegally adjusted Tk.2,09,70,444/- as prayed for by the Judgment Debtors travelling beyond the decree and as such the Impugned Order is illegal and liable to be set aside.

7. Heard the learned Advocates for the parties, perused the Application, Affidavit-in-Opposition, Supplementary Affidavit and the Annexures annexed thereto.

8. In the instant, Rule the only point to be considered whether the executing court can go beyond the decree and it can adjust any amount with the decree paid before filing of the suit.

It is well settled that the executing court can not go beyond the decree nor can it question its legality or correctness, but there is one exception to this general Rule i.e. the executing court can adjust the amount with the decree paid by the Judgment Debtors during pendency of the execution proceeding if certified by the Decree Holder. In the present case admittedly the Judgment Debtors made payment of Tk.62,50,000/- to the Decree Holder during pendency of the Suit which has not been adjusted by the Decree Holder at the time of filing of the execution proceeding. In this situation the executing court is legally entitled to adjust the aforesaid amount with the decretal amount not the amount paid before filing of the suit but the executing court adjusted and deducted the amount paid before filing of the suit along with the amount paid during pendency of the suit which the executing court cannot do. It must take the decree according to its tenor but in the instant case the executing court travelled beyond the decree and as such the Impugned Order passed by the executing court is not in accordance with law. Had the executing court adjusted the amount of Tk. 62,50,000/- with the decretal amount it would have been just and proper exercise of power vested in it but in deducting the amount as prayed for, the executing court in fact sat over the decree as an appellate court and acted in affecting the rights of the parties already settled by the decree and as such this court finds that the Impugned Order passed by the Artha Rin Adalat amending the decree is illegal. Accordingly, the Impugned Order No.22 dated 13.03.2013 is hereby set aside.

9. Now in the above facts and circumstances this court is inclined to direct the executing court to adjust the actual amount paid by the Judgment Debtors after filing of the suit and during pendency of the execution proceedings with the decretal amount duly certified and admitted by the Decree Holder Bank and after adjustment of the amount actually paid by the judgment Debtor to proceed with the execution case in accordance with law and the decree passed by the trial court. However, the Judgment Debtors and the Decree Holder Bank shall be at liberty to settle the claim under the decree amicably out of court taking recourse to the provisions contained in Sections 38, 45 and 57 of the Artha Rin Adalat Ain and in that event nothing of this judgment shall debar the parties to the litigation to have the claim settled amicably.

10. With the above observations, the Rule is disposed of. However, without any order as to costs.

11. The order of stay granted at the time of issuance of the Rule, is hereby recalled and stand vacated.

12. Communicate a copy of this judgment to the court concerned at once.