

19 SCOB [2024] HCD 126

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

Writ Petition No.3618 of 2022

**Mosarrof Hosen and another
..... Petitioners
-Versus-
Artha Rin Adalat No.1, Dhaka and
others Respondents**

Mr. A.B.M. Altaf Hossain with
Mr. Mohammad Jamal Hossain,
AdvocatesFor the petitioners

Mr. Shamim Khaled Ahmed with
Mr. Nikhil Kumar Biswas, Advocates
.....For respondent No.2

Heard on: 09.02.2023
Judgment on: The 3rd of April 2023

**Present:
Mr. Justice Abu Taher Md. Saifur Rahman
And
Mr. Justice A.K.M. Rabiul Hassan**

Editors' Note:

This writ petition was filed challenging the ex-parte judgment and decree passed by the Artha Rin Adalat on the ground that the trial court has violated the provision of section 10 of the Artha Rin Adalat Ain, 2003 by not giving opportunity to the petitioner to submit written statement. Another question was raised by the opposite party as to the maintainability of the writ petition. The Court found that as the petitioner appeared before the trial court to submit the written statement, he should have been given the opportunity as per the law. Moreover, the Court also held that alternative remedy would not be a bar in case of exercise of the jurisdiction under article 102 of the constitution by the High Court Division.

Key Words:

Section 10, 19, 41 of the Artha Rin Adalat Ain, 2003; Ex-parte Decree; Article 102 of the Constitution; Alternative remedy

On perusal of the aforesaid provision, it transpires that before passing an ex-parte judgment and decree the trial Court has to be satisfied at first, the following requirement has been fulfilled mainly that (a) the date was fixed for ex-parte hearing and (b) the defendant does not appear on that day or (3) the defendant is not found present after he was called.(Para-12)

In the instant case, we have noticed that the trial Court below for the first time fixed the date for an ex-parte hearing on 28.02.2022, and on that day the petitioner appeared before the trial Court along with an application prayed for time to submit the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day in presence of the petitioner as evident from Annexure – B to the writ petition. So it is crystal clear that in violation of the mandatory provision of section

19(1) of the Ain 2003, the ex-parte judgment and decree has been passed and, as such, it is a nullity in the eye of the law. ... (Para-13)

So far the contention as raised by the learned Advocate for the respondent No.2 regarding the maintainability of the writ petition is concerned, we are of the view that the presence of an alternative remedy is not debarred. The exercise of jurisdiction by the High Court Division under Article 102 of the Constituent, when the proceedings of the Trial Court are absolutely void or where the trial Court purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the trial Court conclusion is based on no evidence on record whatsoever or where the decision of the trial Court is vitiated by malafide or the trial Court has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principals or acted malice in law interval is called for. Our this also get support from the decision in the case of *Fariduddin Mahmud vs. Md Saidur Rahman and Others* as reported in 63 DLR (AD) page 93 para 20. ... (Para-15)

JUDGMENT

Abu Taher Md. Saifur Rahman, J

1. This Rule was issued on an application filed by the petitioner under Article 102 of the constitution, calling upon respondents to show cause as to why the ex-parte judgment and decree dated 28.02.2022 (decree signed on 02.03.2022) passed by Artha Rin Adalat No. 1, Dhaka in Artha Rin Suit No. 70 of 2021 shall not be declared to have been made without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.

2. For disposal of this Rule, the relevant facts may briefly be stated as follows:

3. That the respondent No. 2, Agrani Bank Limited as plaintiff filed an Artha Rin Suit No. 70 of 2021 against the petitioners and others on 29.11.2021 for the realization of the outstanding loan amounting to **Tk.47,73,19,585/-** (Taka Forty seven crore, Seventy three lac, Nineteen thousand and five hundred eighty five paisa) where in the date was fixed on 16.02.2022 for submitting the written statement. The petitioner neither appeared nor filed a written statement on that day. Thereafter, the trial Court fixed the next date on 28.02.2022 for an ex-parte hearing, and on that day the petitioner appeared before the trial Court and prayed for time for submitting the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day. Being aggrieved, the petitioner has preferred this application before this Court and obtained the instant Rule and stay.

4. At the time of issuance of the Rule, this Court was pleased to stay all further operation of the aforesaid ex-parte judgment and decree dated 28.02.2022 for a period of **3 (three)** months from the date, which was time to time extended by this Court.

5. Mr. A.B.M. Altaf Hossain, the learned Advocate for the petitioner mainly submits that in the instant case in violation of the mandatory provision of section 19(1) of the Artha Rin Adalat Ain, 2003, the trial Court passed the impugned ex-parte judgment and decree, which is absolutely illegal and not sustainable in law. In support of his contention, he pointed out that section 19(1) of the Artha Rin Adalat Ain, provides that where on the day fixed for hearing of a suit the defendant does not appear in the Court, or, after the suit is admitted for hearing, the defendant is not found present after he was called, the Court shall dispose of the suit ex-parte.

6. In the aforesaid Artha Rin Suit, the date was fixed for the ex-parte hearing on 28.02.2022. The petitioner appeared on that day before the trial Court along with an application for submitting the written statement, which was rejected, and in the presence of the petitioner the trial Court passed the impugned ex-parte judgment and the decree, which is a clear violation of the provision of section 19(1) of the Artha Rin Adalat Ain, 2003 and, as such, the impugned ex-parte judgment and decree is passed without lawful authority and has no legal effect.

7. He further contended that after appearance before the trial, the defendant–petitioner is entitled to get total 60 (sixty) days time to submit the written statement as per the provision of section 10 of the Artha Rin Adalat Ain, 2003. In the instant case, the petitioner appeared before the trial Court on 28.02.2023 along with an application to submit the written statement, but the trial Court below without giving any opportunity to submit the written statement passed the ex-parte judgment and decree which is also a clear violation of the provision of section 10 of the Artha Rin Adalat Ain, 2003 and, as such, the impugned judgment and decree is liable to be set aside.

8. As against this, Mr. Shamim Khaled Ahmed, the learned Senior Advocate mainly submits that as against the ex-parte judgment and decree, the petitioner could have preferred an application under section 19(2) of the Artha Rin Adalat Ain, 2003 or may prefer an appeal under section 41 of the Artha Rin Adalat Ain, 2003, but the petitioner without invoking the aforesaid provisions of law filed the instant Writ petition, which is not maintainable. In support of his contention, he relied upon the decisions as reported in 59 DLR (AD) page 6, 23 BLT (AD) page 196, and 16 MLR (AD) page 151.

9. Heard the submissions of the learned Advocates of both sides and perused the instant writ petition along with other materials on record thoroughly.

10. The only issue for determination of this Rule is to see whether the impugned ex-parte judgment and decree passed in Artha Rin Suit No.17 of 2021 is without lawful jurisdiction or not.

11. We have to keep in mind that Artha Rin Adalat Ain, 2003 is a special law with an overriding provision over other laws and has prescribed a special procedure which is mandatory in nature. In order to appreciate the contention of the learned Advocate of the petitioner it is necessary to examine the relevant provision of section 19(1) of the Artha Rin Adalat Ain, 2003, which reads as follows:

“19. Provisions for ex-parte decree – (1) Where on the day fixed for hearing of a suit the defendant does not appear in the Court, or, after the suit is admitted for hearing, the defendant is not found present after he was called, the Court shall dispose of the suit ex-parte.”

12. On perusal of the aforesaid provision, it transpires that before passing an ex-parte judgment and decree the trial Court has to be satisfied at first, the following requirement has been fulfilled mainly that (a) the date was fixed for ex-parte hearing and (b) the defendant does not appear on that day or (3) the defendant is not found present after he was called.

13. **In the instant case, we have noticed that the trial Court below for the first time fixed the date for an ex-parte hearing on 28.02.2022, and on that day the petitioner appeared before the trial Court along with an application prayed for time to submit the written statement, which was rejected and thereby passed the ex-parte judgment and decree on the same day in presence of the petitioner as evident from Annexure – B to the writ petition.** So it is crystal clear that in violation of the mandatory provision of section

19(1) of the Ain 2003, the ex-parte judgment and decree has been passed and, as such, it is a nullity in the eye of the law. For proper adjudication of this matter, section 10 of the Ain 2003 also needs to be read out, which reads as follows:

“10 – Time for submission of written statement – (1) subject of the provisions of sub-section (2), the Artha Rin Adalat shall not accept any written statement filed by the defendant after the expiry of 40 (forty) days after he has appeared in the Court, and in such a case the Court shall immediately decide the suit ex-parte.

(2) Notwithstanding the provisions of sub-section (1), subject to the condition of payment of Taka not less than Taka 2,000 (two thousand) and not more than Taka 5,000 (five thousand) as cost, the Court may extend the said period by a further period of 20 (twenty) days.”

14. In the instant case, we have noticed that the petitioner appeared before the trial Court below on 28.02.2022. In view of the aforesaid provision section 10 of the Ain 2003, the petitioner is entitled to get total 60 (sixty) days time to submit the written statement, but herein the trial Court below without allowing any single day to the petitioner passed the ex-parte judgment and decree, which is unbelievable and unlawful. We have examined the entire order sheet of the trial Court (Annexure – B) wherein we find that after filing the aforesaid Artha Rin Suit, the trial Court without giving any opportunity to the petitioner to contest the suit and thereby passed the ex-parte judgment and decree vide order No.6 dated 28.02.2022, which is also unbelievable.

15. So far the contention as raised by the learned Advocate for the respondent No.2 regarding the maintainability of the writ petition is concerned, we are of the view that the presence of an alternative remedy is not debarred. The exercise of jurisdiction by the High Court Division under Article 102 of the Constituent, when the proceedings of the Trial Court are absolutely void or where the trial Court purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the trial Court conclusion is based on no evidence on record whatsoever or where the decision of the trial Court is vitiated by malafide or the trial Court has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principals or acted malice in law interval is called for. Our this also get support from the decision in the case of *Fariduddin Mahmud vs. Md Saidur Rahman and Others* as reported in 63 DLR (AD) page 93 para 20.

16. In the instant case on the face of the record, it transpires that the trial Court below passed the ex-parte judgment and decree in violation of the mandatory procedure as laid down under sections 19(1) and 10 of the Artha Rin Adalat Ain, 003, which is absolutely nullity in the eye of law. So the contention as raised by the respondent No.2 is not acceptable. We have also gone through the decisions as cited by the learned Advocate for the respondent No.2. In the facts and circumstances of this case which are not applicable.

17. Under the aforesaid reasons and observation, we find substance in this Rule.

18. As a result, the Rule is made absolute.

19. The impugned ex-parte judgment and decree dated 28.02.2022 (decree signed on 02.03.2022) passed in the Artha Rin Suit No.17 of 2021 is hereby declared illegal and passed without lawful authority and has no legal effect.

20. The trial Court is hereby directed to hear the matter afresh and dispose of the aforesaid Artha Rin Suit No.17 of 2021 in accordance with law.

21. Communicate this judgment and order at once.