

3 SCOB [2015] HCD 132**High Court Division
(Special Original Jurisdiction)**

Writ Petition No. 3709 of 2015.

Hazi Mohammad Ali

... Petitioner.

-Versus-

Judge, Artha Rin Adalat No.3,
Dhaka & others
... Respondents.Mr. A.K.M.Asiful Haque, Advocate with
Mr. Shaheen Akther

... For the petitioner.

Mr. M.Imtiaz Farooq

...For Respondent

Nos. 2 & 3.

Heard on the 4th August, 2015

&

Judgment on the 6th August, 2015.**Present:****Mr. Justice Zubayer Rahman Chowdhury****And****Mr. Justice Mahmudul Hoque****Code of Civil Procedure, 1908****Section 136:**

The Court below has power to order attachment of property situated beyond the local limit of the Court. But the Court passing the Order of attachment cannot directly attach property outside its own jurisdiction and it can only ask the Court in whose jurisdiction the property actually situated to carry out the order of attachment and complete the formalities of attachment. In the present case this Court finds that the Impugned Order passed by the Adalat was sent directly by the Court without sending the same to the District Court for compliance where the property situates. Therefore, the Impugned Order from the face of it is found to be palpably illegal and invalid in law as contained in Section 136 of the Code. ... (Para 11)

Order XXXVIII**Rule 5:**

Before issuing an Order of attachment before judgment the Court must be satisfied that the defendant has been trying to frustrate the effect of the decree that might be passed against him by disposing of the property or removing it from the jurisdiction of the Court. It means that the Court must be satisfied not only to the effect that the defendant trying to dispose of the property or remove the same from its jurisdiction but also this disposal or removal is with the object of obstructing or delaying the execution of the decree that may be passed in Suit. This satisfaction, however, is to be judicial satisfaction and it must be based on some visible materials which are to be found in the Affidavit filed by the party or otherwise. But in the Impugned Order such satisfaction of the Court is totally absent, even not a single word has been written by the Court concerned why the attachment of the property before pronouncement of the judgment is necessary. In the absence of such satisfaction of the Court necessitating or warranting order of attachment has made the order wholly illegal and ineffective. ... (Para 12)

Judgment

Mahmudul Hoque, J:

1. In this application under Article 102 of the Constitution of Bangladesh a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why Order No.22 dated 22.03.2015 as evidenced by Annexure-F, passed by Artha Rin Adalat No.3, Dhaka in respect of the application filed by the Plaintiff Bank (Respondent No.3) for attachment of property under Order XXXVIII Rule 5 of the Code of Civil Procedure in Artha Rin Suit No. 2059 of 2013, now pending in the Artha Rin Adalat No.3, Dhaka shall not be declared to have been passed 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. Facts relevant for disposal of this Rule, in short, are that on an application of the Respondent No.4, the Respondent No.3 Bank had sanctioned loan facilities in different form to the Respondent No.4. The Respondent No.4 Company availed and enjoyed the said loan facilities but failed to repay the same as per terms and conditions of the sanction letter. Resultantly, the Respondent No.3 Bank filed Artha Rin Suit No. 2059 of 2010 in the Court of Artha Rin Adalat No.3, Dhaka against the Petitioner and Respondent Nos. 4 and 5 for realization of Tk.22,71,91,645.34. In the said Artha Rin Suit the Petitioner as defendant filed written statement denying the claim of the Plaintiff-Bank. During pendency of the said Artha Rin Suit the Plaintiff Bank filed an application under Order XXXVIII Rule 5 of the Code of Civil Procedure (“Code”) praying for attachment before judgment of the certain property owned by the Petitioner (Defendant No.3 in Suit). The Artha Rin Adalat upon hearing the said application directed the Petitioner to deposit money equivalent to the claim in Suit and asked the Petitioner to show cause why the property mentioned in the schedule to the application shall not be attached in the event of failure of the Petitioner to deposit money in court by its Order No.19 dated 22.1.2015. The Petitioner, thereafter, filed show cause as directed by the Court denying the liability of the loan granted in favour of Respondent No.4 Company. Subsequently, the Artha Rin Adalat by the impugned order allowed the application under Order XXXVIII Rule 5 of the Code filed by the Respondent No.3 Bank and directed the Office to issue process of attachment fixing 5.5.2015 for return of the same. At this stage the Petitioner moved this Court by filing this application challenging the validity and propriety of the said Order and obtained the present Rule and Order of stay.

3. Respondent Nos.2 and 3 Bank contested the Rule by filing Affidavit-in-Opposition denying all the material allegations made in the application contending, inter alia, that the Petitioner is a Director of the borrower Company and has furnished personal guarantee for the liability of the borrower company. Since the Petitioner was actively trying to dispose of the schedule property with the intent of obstructing recovery of the decretal amount that may be passed, the Bank filed application for attachment before judgment of the property owned by the Petitioner. It is also stated that the order of attachment has been passed by the Adalat upon contested hearing of the parties in suit and giving sufficient opportunities to the Petitioner and hence, the Court below rightly allowed the application for attachment and there is no illegality.

4. Mr. A.K.M.Asiful Haque with Ms. Shaheen Akther, the learned Advocates appearing for the Petitioner submit that, admittedly the property attached in the Artha Rin Suit is situated beyond the territorial jurisdiction of the Court. According to the learned Advocate for

the Petitioner the Court cannot attach properties situated beyond its local jurisdiction and as such the order of attachment passed by the Adalat is illegal and without lawful authority. It is also argued that there is no finding in the Impugned Order that the defendant was trying to dispose of the properties in question in order to obstruct or delay the execution of the decree that may be passed against the Petitioner nor there were any materials before the Adalat which might warrant such finding. Mr. Haque further submits that the Adalat in passing the Impugned Order of attachment utterly failed to note its satisfaction for attaching the property before delivery of judgment. It is also argued that the Impugned Order is a non-speaking Order as no reason has been given by the Adalat in attaching the property of the Petitioner. As such the Impugned Order is illegal and liable to be declared to have been passed without lawful authority. Mr. Haque in support of his submissions has drawn our attention to the provisions of Order XXXVIII rule 5 of the Code and referred to the Cases of Md. Shamsul Huda Vs. Mozammel Huq and others reported in 27 DLR 256, Islam steels Mills Ltd. Vs. Nirman International Ltd. reported in 50 DLR (AD) 21 and an unreported decision passed by this Division in Writ petition No. 10639 of 2011 in the case of R. M. Oil Refinery Ltd. Vs. Bangladesh, in which one of us was a party.

5. Mr. M. Imtiaz Farooq , the learned advocate appearing for the Respondent Nos. 2 and 3 submits that the Court to which an application for attachment is made before judgment in its discretion can make an order of attachment attaching the properties situated out side the local limit of the jurisdiction of that Court. Therefore, the court below has not committed any illegality and or error in law in attaching the property situated outside the local limit of the jurisdiction of the Court. Mr. Farooq also submits that before passing the Impugned Order attaching the property in question the Petitioner was asked to furnish sufficient security or to deposit the claim amount in the Court and was asked to show cause why the property in question shall not be attached before delivery of judgment in the event of failure to deposit the money in Court. But the Petitioner has failed to deposit the money as directed by the Court. Consequently, the Court upon affording sufficient opportunity to the Petitioner of being heard passed the Impugned Order attaching the property and there was no illegality in the order passed and by the Impugned Order the Petitioner is not in any way prejudiced or aggrieved. It is also argued that the Court has power to attach any property of the Defendant before Judgment as a whole or in part if it is in the opinion of the Court necessary for the interest of justice and to ensure smooth recovery of the money that may be decreed in favour of the Plaintiff in suit. In support of his submissions he has referred to the cases of Kanshi Ram Vs. Hindustan National Bank Ltd. reported in AIR 1928 Lahore, 376 and Firm Surajbali Ram Harakh Vs. Mohar Ali and others reported in AIR 1941 Allahabad, 212.

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

7. To appreciate the submissions made by the learned Advocates appearing for both the parties the provisions of Order XXXVIII Rule 5 of the Code may be looked into which runs thus:

8. *R.5. Where defendant may be called upon to furnish security for production of property. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,-*

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of

the jurisdiction of the Court,

the Court may direct the defendant, within the time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

9. On a close reading of the provisions as quoted above, it appears that the Court has power to attach the property before delivery of judgment, belonging to the Defendants if the Court is satisfied by Affidavit or otherwise that the Defendants, with intent to obstruct or delay the execution of any decree that might be passed against them is about to dispose of or remove the property belonging to him from the jurisdiction of the Court, may ask the Defendant either to furnish security of the claim amount or produce and place the property at the disposal of the Court. This power is no doubt very extensive and extraordinary, but it must be exercised sparingly and with utmost caution, otherwise it may become an instrument of oppression.

10. It appears that the property sought to be attached is not situated within the jurisdiction of the Court. Ordinarily the property sought to be removed must be within the jurisdiction of the Court but there is no clear provision in the law that the Court which passed the order attaching the property cannot attach the property situated beyond its local jurisdiction. In the Case reported in AIR 1941 and AIR 1928 it has been held that:

“the Court can attach before judgment property situated beyond the local limit and in that case the order of attachment made by the Court has to be sent to the District Court where the property is situated and the District Court on receipt of the order is to cause the attachment to be made by its own Office or by a Court subordinate to the District Judge and after making the attachment the District Court has to inform the Court which had ordered the attachment of its compliance. It is not open to the Court which should order the attachment of property outside its jurisdiction to send its order for compliance directly to any other Court except the District Court and without the intervention of the District Court would be unauthorized and invalid.”

11. This Court is in full agreement with the above quoted findings and observations and accordingly this Court holds that the Court below has power to order attachment of property situated beyond the local limit of the Court. But the Court passing the Order of attachment cannot directly attach property outside its own jurisdiction and it can only ask the Court in whose jurisdiction the property actually situated to carry out the order of attachment and complete the formalities of attachment. In the present case this Court finds that the Impugned Order passed by the Adalat was sent directly by the Court without sending the same to the District Court for compliance where the property situated. Therefore, the Impugned Order from the face of it is found to be palpably illegal and invalid in law as contained in Section 136 of the Code.

12. From a perusal of the application filed under Order XXXVIII Rule 5 of the Code by the Respondent Bank, this Court finds that the statements made in the application are

completely vague and in general. In the said statement there was no reference to any complete facts from which it could be said that the Defendant was trying to dispose of his properties to defeat the claim of the Plaintiff which may be decreed. It is in this court's view that before issuing an Order of attachment before judgment the Court must be satisfied that the Defendant has been trying to frustrate the effect of the decree that might be passed against him by disposing of the property or removing it from the jurisdiction of the Court. It means that the Court must be satisfied not only to the effect that the defendant trying to dispose of the property or remove the same from its jurisdiction but also this disposal or removal is with the object of obstructing or delaying the execution of the decree that may be passed in Suit. This satisfaction, however, is to be judicial satisfaction and it must be based on some visible materials which are to be found in the Affidavit filed by the party or otherwise. But in the Impugned Order such satisfaction of the Court is totally absent, even not a single word has been written by the Court concerned why the attachment of the property before pronouncement of the judgment is necessary. In the absence of such satisfaction of the Court necessitating or warranting order of attachment has made the order wholly illegal and ineffective. For easy understanding of the facts noted above and the observations made, the Impugned Order passed by the Adalat may be looked into which runs thus:

“ ২২। ২৩/০৩/২০১৫ - অদ্য আদেশের জন্য দিন ধার্য আছে। উভয়পক্ষ হাজিরা দিয়াছে। নথি পেশ করা হইল। শুনলাম। ৩নং বিবাদীর ১৮/০২/২০১৫ তারিখের আবেদন নামঞ্জুর। বাদীপক্ষের দাখিলী ক্রোকের আবেদন মঞ্জুর। ক্রোকী পরয়ানা দাখিল সাপেক্ষে ইস্যু করা ইউক। আগামী ৫/৫/২০১৫ তারিখ ক্রোকী পরয়ানা ফেরত (ভিওপি)।”

13. From the face of the Impugned Order quoted above, it appears that it is a non speaking order and passed in a slipshod manner without recording any satisfaction of the Court.

14. Taking into consideration as above, this Court finds that the Impugned Order is to be seriously wanting legal insufficiency, devoid of any judicial satisfaction and thereby to be shorn of all validity and legal effect. Accordingly, this Court finds merit in the submissions of the learned Advocate for the Petitioner and in the Rule Nisi issued calling for interference by this Court.

15. In the result the Rule is made absolute. However, without any order as to costs.

16. The impugned Order No.22 dated 22.03.2015 as evidenced by Annexure-F, passed by Artha Rin Adalat No.3, Dhaka in respect of the application filed by the Plaintiff Bank (Respondent No.3) for attachment of property under Order XXXVIII Rule 5 of the Code of Civil Procedure in Artha Rin Suit No. 2059 of 2013, now pending in the Artha Rin Adalat No.3, Dhaka is hereby declared illegal and without lawful authority and thereby set aside.

17. The Order of stay granted at the time of issuance of the Rule is hereby recalled and stand vacated.

18. Communicate a copy of this Judgment to the Court concerned at once.