

**6 SCOB [2016] HCD 19****HIGH COURT DIVISION  
(Special Original Jurisdiction)**

Writ Petition No. 8542 of 2011

**M. A. Hashem**

..... Petitioner.

Versus

**The Artha Rin Adalat No.2, Dhaka and  
others**

... Respondents.

Mr. T. H. Khan, Senior Adv. with  
Mr. Rokanuddin Mahmud, Senior Adv.,  
Mr. Mostafizur Rahman Khan,  
Mr. Mohammad Ahasan  
Ms. Adita Afroz Hasan  
Ms. Nushrat Mafiz, Advocates  
... for the Petitioner.Mr. Mainul Hossein, Senior Adv. with  
Mr. Mizan Sayeed, Advocate and  
Mr. F.K.M. Ahsan Mahbub, Adv.  
..... for the Respondent Nos. 2,5-9.Dr. Rabia Bhuiyan, Senior Advocate  
..... for the Respondent No. 3.Heard on 04.09.2014, 14.09.2014,  
15.09.2014, 22.10.2014, 23.10.2014,  
13.11.2014, 16.11.2014, 17.11.2014,  
20.11.2014, 08.12.2014, 09.12.2014,  
11.12.2014, 14.12.2014, 25.06.2015.  
Judgment on: 13.8.2015.**Present:****Mr. Justice Syed Refaat Ahmed****And****Mr. Justice Mahmudul Hoque****Statutory privilege:**

**A statutory privilege is a nascent right reserved to an individual person but this privilege is lost once he/she himself infringes it or abandons it voluntarily. The Writ Petitioner in fact has abandoned the statutory privilege by willfully and deliberately refraining from depositing the balance amount of bid money within the prescribed period of limitation. By filing the application seeking permission to deposit the balance 75% bid money instead of depositing the amount directly, the auction purchaser relinquished his known statutory right as auction purchaser and waived all his rights to the property in question as well as the earnest money deposited by him. ... (Para 25)**

**The right of redemption of the mortgagor:**

**It is this Court's view that the distinction between legal and equitable rights and interest does not exist under the existing legal régime governed by the Transfer of Property Act, 1882. Thus, the right of redemption of the mortgagor is not an equitable right but a legal right conferred by statute. Therefore, a mortgagor under Bangladeshi law always**

retains a legal interest before and after the expiry of the date of payment. Therefore, the right of redemption is not an equitable form of relief to be given on such terms as the court considers equitable but a statutory right conferred and available only upon terms statutorily defined and stated. In view of the above, it is found that the Judgment-Debtors/Respondents being mortgagors of the property in question possessed an inalienable right to redeem their property at all material times. The right of the Respondents over the mortgaged property is, accordingly, found by this Court to have been created when the property was mortgaged. Such right remained inalienable and in fact even after expiry of the date of repayment. ... (Para 33)

Where there is equal equity the law shall prevail:

Under the rule of equity, the holder of a legal as well as an equitable interest shall be preferred on the basis of the principle that where there is equal equity the law shall prevail. In other words, a legal interest is superior as between two persons having equitable interest because equity follows the law. ... (Para 34)

**Arta Rin Adalat Ain, 2003**

**Section 33:**

As per section 33(2) of the Act, the Petitioner has forfeited all rights and privileges upon his failure to deposit the balance amount of bid money within the stipulated period of ten days time. Furthermore, there is no scope to interpret the law to give the Petitioner a technical or tactical advantage of a ninety-day extension in the name of Artha Rin Adalat (Amendment) Ordinance, 2007. This is because equity follows the appropriate rules of law and does not replace or violate the law. Therefore, the Writ Petitioner may not now be allowed to frustrate justice on the ground of mere technical interpretation of any aspect of law and equity. ... (Para 36)

**Arta Rin Adalat Ain, 2003**

**Section 38 and 45:**

Sections 38 and 45 of the Act contain the provisions of amicable settlement. Under the above provisions of law, the Judgment-Debtors and the Decree-Holder Bank could settle the dispute between them at any stage of the suit and even at the execution stage. Since the mortgaged property has been redeemed and the execution proceeding was withdrawn following an amicable settlement between the Judgment-Debtors and the Decree-Holder, the auction purchaser Petitioner is not found to be entitled to any relief as prayed for in the present case. ... (Para 41)

## **Judgment**

**SYED REFAAT AHMED, J:-**

1. In this Application under Article 102 of the Constitution a Rule Nisi has been issued at the instance of the Petitioner calling upon the Respondents to show cause as to why the Order No. 105 dated 29.09.2011 passed by the Respondent No.1, the learned Judge of the Artha Rin Adalat No. 2, Dhaka in Artha Jari Case No. 249 of 2011 cancelling/setting aside the auction held and accepted by Order No. 45 dated 01.12.2003 arising out of Title Suit No. 202 of 1999 of the Artha Rin Adalat No. 2, Dhaka (Annexure-M to the Writ Petition) 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 passed as to this Court may seem fit and proper.

2. Facts relevant for disposal of this Rule are that the Decree-Holder Bank as plaintiff (Respondent No. 3) instituted Title Suit No. 217 of 1993 for realization of outstanding loan amounting to Tk. 1,14,65,356/- against Rush International Ltd. and 7 others, namely, Mr. S.B. Zaman, Managing Director, (2) Mrs. Nusrat Ara Zaman, (3) Mrs. Ismatunnessa Khanam, (4) Mr. S.A. Rabbani, (5) Mr. S.M. Hossain, (6) Mrs. Amena Begum and (7) Ms. Soheli Pervin and other six Directors of the Rush International Limited. Since none of the defendants contested the suit, the suit was decreed ex parte on 26.08.1999 (decree signed on 05.09.1999) in preliminary form and later on the decree was made final on 11.07.2000 (decree signed on 17.07.2000) against all the defendants. The Decree-Holder Bank filed Title Execution Case No. 150 of 2000 on 23.11.2000 against all the Judgment-Debtors to execute the said decree for realization of Tk. 2,59,49,528/-.

3. During pendency of the Execution case on 12.04.2002 the Judgment-Debtor No. 2 Mr. S.B. Zaman died leaving behind as his heirs and successors (1) Mohammad Junayed Quader, (2) Ms. Badrunnessa, (3) Ms. Tabassum Rifat, (4) Ms. Bushra Rubayet, (5) Ms. Sumaiya Zaman, (6) Ms. Tasnuva Amrin Zaman who were substituted on 07.09.2003 in the said Title Execution Case No. 150 of 2000.

4. The Executing Court fixed 26.07.2003 for holding auction of the mortgaged property and accordingly notice of auction was published in the daily 'Manabzamin' and 'Dainik Bhorer Dak'. But on the date of auction due to prayer for withholding the auction sale made by the Decree-Holder Bank, the Court below fixed 09.09.2003 again for holding auction of the mortgaged property and directed to publish notice in the daily "Jonokontho". In the auction held on 09.09.2003, the highest price quoted was Tk. 2.97 crore. However, the quoted price being insufficient the auction sale was again postponed by the Court below at the prayer of the Decree-Holder Bank and fixed again on 17.09.2003 for holding auction of the mortgaged property. On 17.09.2003, the quoted price was found at Tk. 5.26 crore but on the selfsame ground of insufficiency the auction sale was again postponed.

5. At this stage, the said Title Execution Case No. 150 of 2000 got transferred to the Artha Rin Adalat No. 4, Dhaka and was renumbered as Title Execution Case No. 1210 of 2003. The transferee Court fixed 27.09.2003 for taking steps under Section 33(4) of the Artha Rin Adalat Ain, 2003 ("Act"). Thereafter, the Court by Order dated 11.10.2003 fixed 20.11.2003 for holding auction and directed to publish the auction notice in two dailies namely, 'Jonokontho' and the daily 'Ittefaq'. On the date the only price quoted was by one Mr. Aziz Al Kaiser for an amount of Tk. 6.03 crore but the Court again refused to accept the bid on the ground that there is likelihood of getting higher price and thereby fixed 29.11.2003 as the next date of auction.

6. On the date fixed the Writ Petitioner submitted the bid quoting the price at Tk. 6.06 crore but the Court again finding the quoted price inadequate fixed 01.12.2003 as the next date of auction. On 01.12.2003 the quoted price submitted by the Petitioner was finally accepted by the Court vide Order No. 45. Another Decree-Holder namely, A.B. Bank Ltd., also filed an application on that date to reject the bid but it was not allowed by the Court below. The Petitioner on that date deposited Tk.1,51,75,000/- vide Pay Order No. 168554/2003 dated 30.11.2003 equivalent to 25% of the bid money and, accordingly, the Court considering the bid as the highest accepted the same and directed him to deposit the

balance amount of 75% bid money through Treasury Challan in the Court within ten working days from the date vide Order No. 45 dated 01.12.2003.

7. The said Order No. 45 dated 01.12.2003 was challenged by the Judgment-Debtors by a Writ Petition being No. 7354 of 2003 before this Court in which besides issuing Rule this Court also granted Order of Stay vide Order dated 15.12.2003. Later on, upon hearing, the Rule was discharged vide Judgment and Order dated 01.04.2004.

8. The Judgment-Debtors filed a Civil Miscellaneous Petition for Leave to Appeal before the Appellate Division challenging the aforesaid Judgment on 03.11.2004. The Judge-in-Chamber of the Appellate Division was pleased to stay operation of the aforesaid Judgment vide Order dated 08.11.2004. Thereafter, the Appellate Division upon hearing the Civil Appeal No. 41 of 2005, was pleased to dismiss the same vide Judgment and Order dated 28.05.2009.

9. The Petitioner auction purchaser obtained the certified copy of the Judgment and Order dated 28.05.2009 passed in Civil Appeal No. 41 of 2005 on 11.06.2009 which was a Thursday. On the next opening day on 14.06.2009 the auction purchaser filed an application before the Artha Rin Adalat No. 4, Dhaka seeking permission to deposit the rest 75% of the bid money in the Title Execution Case No. 1210 of 2003. On the same date, the Judgment-Debtor, Mr. Junayed Quader filed two applications, one under Order 21, Rule 89 of the Code of Civil Procedure and another under Section 57 of the Act for cancellation of the auction held on 01.12.2003 and for permission to deposit the full decretal amount. The Petitioner filed two separate written objections against the aforesaid two applications. The Petitioner auction purchaser filed another application on 06.09.2009 with the prayer for depositing 75% balance bid money by way of Treasury Challan. After hearing all the pending applications as stated above, the Court passed the Impugned Order No. 105 dated 29.09.2011 cancelling the auction held on 01.12.2003. It is at this juncture that Petitioner preferred the instant Application under Article 102 of the Constitution and obtained the present Rule and Order of Stay.

10. The Respondent Nos. 2,3,5,6 to 9 contested the Rule by filing Affidavits-in-Opposition and Supplementary Affidavit-in-Opposition denying all material allegations made in the Application contending inter alia that the Artha Rin Adalat by Order No. 45 dated 01.12.2003 accepted the bid of the Petitioner and directed him in clear terms to deposit the balance 75% bid money within the stipulated period of ten working days from the date of acceptance of the bid as per provisions of Section 33(2) of the Act. But the Petitioner, after clear thirteen days had elapsed, filed an application before the Executing Court merely seeking permission to deposit the balance 75% bid money on 14.06.2009. The period of limitation as mentioned in Section 33(2) of the Act is mandatory. It is contended that since the Petitioner as auction purchaser failed to deposit the balance 75% of bid money within the statutory period, he forfeited all his rights and claims over the mortgaged property and his earnest money was also liable to be forfeited. That notwithstanding, the Court below was kind enough not to forfeit the said amount and allowed him to draw or collect the earnest money. Having realized the said fact of default and consequences thereof, the Petitioner filed a fresh application on 14.06.2004 seeking permission to deposit the balance bid money within ten days from the date of permission as apparent from the prayer in the said application.

11. The further case of the Respondents is that the Rule was obtained by concealing material facts. It is pointed out that the mortgaged property has already been redeemed and the money Execution Case has accordingly been withdrawn by the Bank upon full

satisfaction of its claim and, therefore, the Petitioner is not entitled to the reliefs as prayed for.

12. It is also stated that until filing of the application seeking permission to deposit 75% bid money the Petitioner got thirteen clear working days and after filing of the said application he got another period of about twenty-six months till passing of the Impugned Order on 29.09.2011 when there was no restraining order from any court in effect and he could easily have deposited the balance bid money but evidently failed to do so. The auction sale in question, it is submitted, was cancelled due to default of the Petitioner to deposit the balance amount of 75% bid money within time fixed by the law. After cancellation of the auction sale by the Impugned Order the Respondents got the mortgaged property redeemed following an amicable settlement with the Decree-Holder Bank before issuance of the instant Rule and as such the Rule has automatically become infructuous.

13. Mr. Rokanuddin Mahmud, Senior Advocate with Mr. Mustafizur Rahman Khan, Advocate appearing on behalf of the Petitioner submit that the Respondent No. 1 by Order No. 45 dated 01.12.2003 accepted the bid submitted by the Petitioner and directed him to deposit the rest 75% of bid money within ten working days through Treasury Challan. But on and from 02.12.2003 the Civil Court went on annual vacation up to 31.12.2003. In the meantime, the Judgment-Debtor/Respondent No. 2 filed Writ Petition No. 7354 of 2003 in the High Court Division and obtained a Rule and Stay against the operation of the said Order dated 01.12.2003 passed in the Money Execution Case No. 1210 of 2003. The said Order of Stay dated 15.12.2003 continued till disposal of the said Writ Petition No. 7354 of 2003 by this Court vide Judgment and Order dated 01.11.2004. However, the same was also stayed by the Judge-in-Chamber of the Appellate Division vide Order dated 08.11.2011 passed in Civil Miscellaneous Petition for Leave to Appeal No. 678 of 2004 and the same continued till disposal of the Civil Appeal No. 41 of 2005 by the Appellate Division on 28.05.2009. The Writ Petitioner received the certified copy of the Judgment and Order dated 28.05.2009 on 11.06.2009. The next two days i.e. 12.06.2009 and 13.06.2009 were a Friday and Saturday respectively i.e., weekly holidays. By showing the aforesaid chronology of events and dates Mr. Mahmud submits that although the Court below directed to deposit the balance amount of 75% bid money within ten working days but it was not possible on the part of the Petitioner to do so because of the Stay Order passed in the said Writ Petition and subsequently at the appellate stage by the Appellate Division.

14. Mr. Mahmud consistently maintained that the period of limitation has not been exhausted in the facts and circumstances. As stated above, initially he argued that by virtue of the Order No. 49 dated 14.03.2004 the execution proceedings had been halted despite the non-existence of any restraining Order from the higher court on the ground that the said Order allegedly stayed the execution proceeding until receipt of further Order. Accordingly, Mr. Mahmud submits that the claim of the Respondents as to having only thirteen working days before filing of the application seeking permission to deposit the balance 75% of bid money is not sustainable in the eye of law. He also submits that although Section 33(2) of the Act (before promulgation of the Artha Rin Adalat (Amendment) Act, 2010) speaks about the limitation period of ten days, the position altered considerably after the amendments introduced to the said Act during the 2007 Caretaker-Emergency period. Amendments sought to be introduced under the Artha Rin Adalat (Amendment) Ordinance, 2007 (“Ordinance”) first extended the limitation period from ten days to ninety days. After repeal of the Ordinance, the Artha Rin Adalat (Amendment) Act, 2010 (“amending Act”) subsequently incorporated the provisions by inserting a “*saving clause*” therein. Mr. Mahmud made

detailed and elaborate submissions on this point of law stating that the Petitioner is entitled to get the benefit of the extended period of ninety days as amended by the Ordinance with the aid ultimately of the amending Act. It is also argued that as a general rule of construction, law is prima facie prospective in operation and it cannot have retrospective operation except in certain cases unless the intention of the legislature in favour of the retrospective operation is clearly evident from the express words or necessary implication. The aforesaid presumption against retrospective construction can be rebutted in case of enactments which affects only procedure as distinct from substantive rights accrued. Relying on this exception, it was argued by Mr. Mahmud that the said Act being a procedural law the presumption against retrospective operation will not be applicable in case of amending legislation. In support of his contention Mr. Mahmud relied on decisions from various jurisdictions, e.g. *Hitendra Thakur vs. Maharashtra* reported in AIR 1994 SC 2623, *Maharaja Chintamani vs. Bihar* reported in AIR 1999 SC 3609, *State vs. Muhammad Jamil* reported in 20 DLR (SC)315, *Adnan Afzal vs. Sher Afzal* reported in PLD 1969 SC 187, *Wright vs. Hale* reported in (1860) 39 L.J. Ex. 40, *Gardner vs. Lucas* reported in (1878) 3 App. Cas. 582, per Lord Blackburn at p.603 and *Boodle vs. Davis* reported in (1853) 8 Ex. 351. He has argued that even though the Ordinance ceased to exist by virtue of the operation of Article 93(2) of the Constitution, the incorporation of the “saving clause” in the amending Act [i.e. Section 18 in the Artha Rin Adalat (Amendment) Act, 2010] presumably allowing for the ninety-day to be saved has consequentially created an entitlement for the Petitioner to enjoy a limitation period of ninety days instead of just ten days.

15. Learned Advocates, Mr. Mainul Hossein, Mrs. Rabia Bhuiyan, Mr. A. J. Mohammad Ali, Mr. Shamim Khaled Ahmed and Mr. Mizan Sayeed appearing on behalf of the various Respondents commonly submit that this Rule was obtained by suppressing material facts and by misleading the Court. They emphasize in this regard upon the auction sale being set aside on 29.09.2011 by the Artha Rin Adalat No. 2, Dhaka both the Decree-Holder Bank and the Judgment-Debtors reached an amicable settlement in consequence of which the Respondents got the mortgaged property redeemed vide registered Deed of Redemption dated 13.10.2011 and, accordingly, the Decree- Holder upon full satisfaction of the decretal amount withdrew the case on 16.10.2011. The Petitioner auction purchaser filed the Writ Petition on 16.10.2011 and obtained the Rule and Order of Stay on 17.10.2011 by concealing the above vital facts of redemption and the resultant non-existence of the execution proceedings. Such willful suppression of facts, it is submitted, proves that the Petitioner has not come before this Court with clean hands given that he has full knowledge of the compromise and subsequent developments which are manifested in the statements made in the Writ Petition. Therefore, the Respondents argue, the Petitioner is not entitled to the reliefs prayed for either in law or in equity. In support of their contentions they have variously relied on the decisions of the Appellate Division passed in *Social Investment Bank Ltd. vs. Doctor J.H. Gazi and another* reported in 31 BLD (AD) 124, and as reflected in an unreported Judgment dated 07.05.2014 passed by the Appellate Division in CPLA No. 2125 of 2010 in the case of *Md. Muklesur Rahman and another vs. Govt. of Bangladesh*.

16. The learned Advocate for the Respondent Nos. 2 and 5-9, Mr. Mizan Sayeed has, in particular, made extensive submissions responding to each fact of the Petitioner’s case in this Matter. Mr. Sayeed has argued that the Petitioner in his application dated 14.06.2009 prayed for permission to deposit the balance amount of 75% bid money within ten working days from the date of permission. Once permission was given by the Court, no further permission was required under the law. Since the Petitioner was given permission by Order No. 45 dated 01.12.2003 by the Artha Rin Adalat, Dhaka in Money Execution Case No. 1210 of 2003 to

deposit balance amount of the bid money, as such no further permission was required as alleged by the Petitioner. Nevertheless, the Petitioner sought permission to deposit the balance amount of bid money in violation of the provisions of Section 33(2) of said Act. As a consequence, the auction sale was automatically cancelled.

17. Mr. Sayeed has submitted that Order 49 dated 14.03.2004 staying the execution proceedings until receipt of further Order from the High Court does not save the limitation. It is argued that either when the High Court Division or the Appellate Division discharged the Rule or vacated the earlier Order of Stay respectively, it was incumbent upon the parties, in particular the winning side in Writ Petition No. 7354/2005 (i.e. the Petitioner) to communicate the said Orders to the Court below forthwith at least by issuance of lawyer's certificates. The Petitioner, a leading businessman, the Respondents stress, as the highest bidder was expected to exercise reasonable duty of care and attention to deposit the balance amount of 75% bid money at the earliest opportunity within ten working days in order for compliance of the mandatory provisions of law. But he utterly failed to do so. It was misconceived on his part to assume instead that the execution proceeding was in halt despite the non-existence of any restraining Order from the higher Court. The Order 49 dated 14.03.2004 is perceived by the Respondents as having no bearing in the eye of law to save the limitation period prescribed by law, especially when there was no subsisting restraining Order from the higher Courts. Mr. Sayeed submits that the Petitioner was at gross fault for not communicating the higher Courts' Orders forthwith at his best interest towards compliance of the mandatory provisions of law. Having not done so, he cannot now be allowed to take the advantage of his own wrong.

18. It is argued, therefore, the objective test that can aptly be applied in such a matter is the "reasonable man test" i.e. whether a reasonable man of ordinary prudence in the position of the Petitioner would have done the same thing. The Petitioner as a reasonable man of prudence and a leading businessmen who happened to have submitted the highest bid, accordingly, ought to have exercised reasonable duty of care and attention to comply with the mandatory period of limitation under Section 33(2) of the Act. He was, accordingly, under an obligation to communicate the Order of the higher Court then and there so that he could deposit the balance bid money at the earliest opportunity towards compliance of the requirements of Section 33(2) of the Act. But for reasons unknown the Petitioner refrained from doing so and, therefore, he is liable to suffer the consequence of such imprudence.

19. Mr. Mizan Sayeed submits that since the Petitioner as auction purchaser failed to deposit the balance 75% bid money within the statutory limitation period of ten days, all his rights and claims were forfeited over the mortgaged property as well as his earnest money under Section 33(2) of the Act because (a) the provisions of Section 33(2) of the said Act are mandatory attracting penalties for default by which the auction purchaser's right is circumscribed and can be irredeemably defeated, and (b) due to non-compliance of the mandatory provisions of a special law, the auction sale was in fact automatically cancelled and reduced to a complete nullity. Mr. Sayeed substantiates his arguments in this regard by reference to a catena of cases being *Peninsular Shipping Service limited vs. M/S. Faruque Paint and Varnish Manufacturing Company Limited* and another reported in 26 BLD (AD) 172, *Saiful Islam (Md) and others vs. Govt. of Bangladesh* reported in 17 BLC(HC) 558, *Ishaque (Md) and others vs. Govt. of Bangladesh* reported in 43 DLR(AD) 28, *Kaushalya Rani vs. Gopal Singh* reported in AIR 1964(SC) 260.

20. Mr. Sayeed continues that since the Act is a special law and Section 33(2) of the said Act prescribes the specific period of limitation and the consequences of failure to do so are also provided therein, hence, no difficulty arises to construe the provisions to be mandatory. In support of his submissions he has referred to the cases of *Gangabai Gopaldas Mohata vs. Fulchand and others* reported in *AIR 1997 (SC) 1812* as well as *10 SCC (1997) 386*, *Sardara Singh vs. Sardara Singh* reported in *4 SCC (1990) 90* and *Balaram Vs. Ilam Singh* reported in *AIR 1996 (SC) 278*.

21. It is further pointed out that in his application dated 14.06.2009, the Petitioner prayed for permission to deposit the balance amount of 75% bid money within ten working days from the date of permission. This the Respondents view as amounting to seeking extension. It is submitted that since the provisions of Section 33(2) of the Act are mandatory and as such the extension of time for depositing the balance amount of bid money is not permissible under law. Consequentially, the Court has no jurisdiction to extend such time.

22. Mr. Mizan Sayeed has comprehensively analyzed the chronology of events and dates in two segments before us, namely, (1) from 01.12.2003 to 28.05.2009 and (2) from 11.06.2009 to 29.09.2011. Mr. Sayeed pointed out that in the first segment until filing of the application seeking permission to deposit the balance 75% of bid money on 14.06.2009, the Petitioner got thirteen working days, i.e, on 02.11.2004, 03.11.2004, 04.11.2004, 31.05.2009, 01.06.2009, 02.06.2009, 03.06.2009, 04.06.2009, 07.06.2009, 08.06.2009, 09.06.2009, 10.06.2009 and 11.06.2009 when there was no restraining order from any court and during the said period the Petitioner could deposit the balance amount forthwith but clearly failed to do so. Hence, this failure of the Petitioner rendered the auction sale void. It is also emphasized that even if for the sake of argument the limitation period is to be counted from 14.06.2009 onwards as per the claim of the Petitioner, still he cannot save the limitation inasmuch as the Petitioner failed to pay a single farthing let alone the payment of balance 75% of bid money as on the date of passing the Impugned Order on 29.09.2011.

23. In addition to the above, Mr. Sayeed further adds that the mortgaged property in question is the only residential property of the Respondent Nos. 2 and 5-9. In fact, after the death of their predecessor, S.B. Zaman, in 2002 they have been struggling earnestly to save this piece of property. Having managed with great difficulty to settle the outstanding claim of the Decree-Holder Bank, it would now be unjust and illegal for the property to be acquired by the Petitioner in the circumstances despite the fact that the Petitioner failed to comply with the mandatory provisions of law and forfeited all his rights purportedly accrued primarily upon acceptance of the bid as the highest bidder. It is argued that the Respondent Nos. 2 and 5-9 have, accordingly, acquired a vested as well as a fundamental right to redeem their mortgaged property and enjoy the same without any disturbance from any quarter. Mr. Sayeed further submits that if the Rule is made absolute this will make the said Respondents homeless and shall cause multifarious inconveniences not only to the Judgment-Debtors but also to the Decree-Holder Bank. More so, this will also violate the fundamental rights of the Respondents as guaranteed under Article 42 of the Constitution. In view of the above, he argues that the legal, vested and fundamental rights of the Respondents cannot be compared with the ostensible equitable right of the Petitioner on the mortgaged property in question. The Petitioner, Mr. Sayeed emphatically submits, is not entitled to get any equitable relief because equity will not grant relief to rescue him from his self-created hardship. This is because the present situation has arisen from the Petitioner's gross negligence and carelessness due to his failure to deposit the balance bid money within the time specified by law. The prayer is, accordingly, for this Rule to be discharged.

24. This Court has perused the Application and Affidavits filed by all parties and heard the learned Advocates extensively on matters of law and facts.

25. This Court notes at the outset that a statutory privilege is a nascent right reserved to an individual person but this privilege is lost once he/she himself infringes it or abandons it voluntarily. The Writ Petitioner in fact has abandoned the statutory privilege by willfully and deliberately refraining from depositing the balance amount of bid money within the prescribed period of limitation. By filing the application seeking permission to deposit the balance 75% bid money instead of depositing the amount directly, the auction purchaser relinquished his known statutory right as auction purchaser and waived all his rights to the property in question as well as the earnest money deposited by him.

26. Before discussing these issues in detail, it is deemed relevant at this juncture to quote the provisions of Section 18 of the amending Act which runs as follows:-

“১৮। হেফাজত সংক্রান্ত বিশেষ বিধান । (১) অর্থ ঋণ আদালত (সংশোধন) অধ্যাদেশ, ২০০৭ (২০০৭ সনের ৩৯ নং অধ্যাদেশ), অতঃপর উক্ত অধ্যাদেশ বলিয়া উল্লিখিত, দ্বারা সংশোধিত অর্থ ঋণ আদালত আইন, ২০০৩ (২০০৩ সনের ৮ নং আইন), অতঃপর উক্ত আইন বলিয়া উল্লিখিত, এর অধীন কৃত কাজকর্ম বা গৃহীত ব্যবস্থা এই আইন দ্বারা সংশোধিত উক্ত আইন এর অধীন কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে ।

(২) গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ৯৩ এর দফা (২) এর বিধান অনুসারে উক্ত অধ্যাদেশের কার্যকারিতা নোপ পাওয়া সত্ত্বেও অনুরূপ নোপ পাইবার পর উহার ধারাবাহিকতায় বা বিবেচিত ধারাবাহিকতায় কোন কাজকর্ম কৃত বা ব্যবস্থা গৃহীত হইয়া থাকিলে উহা এই আইন দ্বারা সংশোধিত উক্ত আইন এর অধীনেই কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।”

(Emphasis added).

27. Upon a detailed explanation and analysis of the provisions of Section 18 it has been satisfactorily established by the learned Advocates for the Respondents that the Petitioner has no scope to take the advantage of extended limitation period of ninety days as mentioned in the erstwhile Ordinance, firstly, because the alleged bid was accepted by the Artha Rin Adalat on 01.12.2003 i.e. long before the promulgation of the Ordinance to the extent later saved by the amending Act. Therefore, the alleged bid was submitted and accepted under the old Artha Rin Adalat Act, 2003 as it existed before its amendment by the Ordinance. So by no manner of application the alleged auction can be considered as an action taken during the subsistence of the Ordinance. Therefore, the special provisions as to savings under Section 18(1) of the amending Act will not be applicable in the present case. Secondly, by no stretch of imagination can the alleged auction be considered as ‘action’ taken in continuation after the Ordinance ceased to exist or as a ‘step’ taken in presumed continuation of the same.

28. The Petitioner has emphasized that he will get the advantage of the extended period of ninety days under the Ordinance. This is on the ground that even though the Ordinance ceased to exist, by virtue of the incorporation of the “*saving clause*” in Section 18 in the amending Act the ninety day limitation is, however, to be treated as saved. With a detailed explanation and analysis of the provisions of Section 18 in the Supplementary Affidavit submitted by the Respondent Nos. 2 and 5-9 on 17.04.2014 it has been satisfactorily controverted thus by these Respondents that the Petitioner has no scope to take advantage of an extended limitation period of ninety days as mentioned in the said erstwhile Ordinance of 2007 which met with its natural death on 25.02.2009 by operation of the provisions of Article 93(2) of the Constitution:

- (a) the Ordinance was promulgated on 23.12.2007 (i.e. after about four years of acceptance of the Petitioner's bid). Subsequently, when the first session of Parliament took place on 28.01.2009, the Ordinance was not laid before Parliament at its first meeting on 28.01.2009 for necessary approval as per the requirement of Article 93(2) of the Constitution. As a consequence, the Ordinance met with its natural death on 25.02.2009 upon the expiration of thirty days computed from 28.01.2009. It is important to note that admittedly from the date of promulgation (i.e. 23.12.2007) of the Ordinance up to the date of its natural death (on 25.02.2009), the clock of limitation was at a halt. Hence, clearly there remains no scope whatsoever for the Petitioner to take the advantage of any amendments under the said Ordinance; and
- (b) the amending Act was subsequently promulgated by the 9<sup>th</sup> Parliament in 2010 by incorporating a "*saving clause*" therein vide Section 18 to which the Hon'ble President of Bangladesh gave assent on 30.03.2010 and the same was published in the Official Gazette on 31.03.2010. Again, the Petitioner cannot take any advantage from the provisions of Section 18 of the amending legislation. Firstly, because the alleged auction in question was accepted by the Artha Rin Adalat on 01.12.2003 i.e. long before promulgation of the Ordinance read with the amending Act. Therefore the alleged auction was submitted and accepted under the unaltered Artha Rin Adalat Act, 2003 as it existed before its abortive amendment by the Ordinance. So by no manner of application the alleged auction can be considered as an action taken during the subsistence of the Ordinance. Therefore, the special provisions as to savings under Section 18(1) of the amending Act will not be applicable in the present case. Further, by no stretch of imagination the alleged auction can be considered as an "*action*" taken in continuation after the Ordinance ceased to exist or a "*step*" taken in presumed continuation of the same, because the auction was submitted and accepted on 01.12.2003 i.e. long before the promulgation of the said Ordinance in 2007.

29. There is always a legal presumption against retrospective operation of any statute seeking to impair any existing right or obligation unless from express words or by necessary implication the legislature is clearly seen to have given retrospective operation to the statute. But the aforesaid presumption can be rebutted in case of enactments which affects only the procedure. Relying on this, the Petitioner has argued that he is ostensibly entitled to take advantage of an extended period of ninety days under the amending Ordinance of 2007 to the extent saved by the amending Act. This Court finds the above arguments of the Petitioner to be misconceived, misleading and not sustainable in the eye of law for the following reasons:

- (a) the arguments of the Petitioner that presumption against retrospective operation can be rebutted in case of procedural law is not a disputed position of law. But the fact remains that the Ordinance (by which the limitation period of ten days as specified in the old 2003 Act was increased to ninety days by amendment of then existing Section 33(2) of the Act) had its natural death on 25.02.2009 by virtue of the operation of Article 93(2) of the Constitution. Thereafter by incorporating a "*saving clause*" as Section 18 in the amending Act the legislature itself has saved specified rights and privileges of the Ordinance by giving retrospective effect to the "*actions*" or "*steps*" taken during the subsistence of the said Ordinance. Hence, there is found neither any

scope nor any necessity of the rebuttal of presumption against retrospective operation of the Ordinance in the present case;

- (c) the scope of rebuttal is possible in the absence of “*saving clause*” or any intention of the legislature to the contrary. A legal presumption is just that i.e. a mere presumption and no more. It is neither absolute nor to be likened to an unqualified privilege. Rather any such legal presumption is subject to the language or dominant intention of the legislature reflected in the amending legislation. So neither presumption nor the rebuttal of the presumption in appropriate case can override or overstep the act of Parliament;
- (d) when the legislative intention is reflected in the amending legislation by inserting a “*saving clause*” therein, therefore the question of rebuttal of presumption against the retrospective operation is unnecessary;
- (e) since legislative intention is clearly manifested in the “*saving clause*” of the amending Act as Section 18 to give retroactive operation to the said Ordinance to the extent mentioned therein, hence, the Court shall look into the words or terms of the “*saving clause*” while ascertaining the intent of the legislature. In this regard it has to be borne in mind that such clauses are introduced into statutes to safeguard rights which, but for such saving, would be lost; and
- (f) evidently, when a “*saving clause*” is provided in any enactment, it becomes a special law of interpretation in respect of matters it deals with and circumscribes, accordingly, the applicability of the general law of interpretation with regard to repeal of an enactment under the General Clauses Act.

30. Therefore, it is clear that as per the terms of the “*saving clause*”, only the action or steps taken during the subsistence of the Ordinance shall come within the purview of such clause. Since the bid submitted by the Writ Petitioner was accepted on 01.12.2003 i.e. long before the promulgation of the Ordinance on 23.12.2007, as such the dispute arising out of the said bid is liable to be regulated under the Act only as it existed. Accordingly, this Court has to confine the ambit and operation of the “*saving clause*” in Section 18 of the amending Act to only action taken during the subsistence of the Ordinance for accrual of any entitlement to any advantage or benefit under the Ordinance.

31. By categorical reference to specified dates in the applicable calendar years it has been argued and explained in detail by the Respondents that even if for the sake of argument the Petitioner is allowed to take the advantage of ninety days he still cannot save the limitation. Because even if the limitation period is counted from 14.06.2009 (as per the argument of the Petitioner) in the meantime more than twenty-six months (i.e. about more than seven hundred and eighty days) had elapsed. According to the Respondents, the Petitioner got three days from 02.11.2004 to 04.11.2004 and subsequently again got ten days from 31.05.2009 to 11.06.2009 but failed to deposit the balance bid money. Interestingly, the Petitioner argued that taking the advantage of ninety days he submitted the application for approving the *Challan* on 06.09.2009 i.e. allegedly on the eighty-fourth day. But as usual, the Petitioner refrained from making an actual payment. If the above mentioned thirteen days are added with eighty-four days the alleged application, this Court finds, was in fact submitted out of date on the ninety-seventh day. Furthermore, this Court accepts the Respondents’ argument that such application without actual payment in the prescribed form bears no significance for the purpose of the law of limitation. It is found thus that by no manner of application can the Petitioner be found to have saved the limitation. Thus, since the Petitioner failed to pay a single farthing before the learned Court below as on the date of pronouncement of the

impugned Order dated 29.09.2011. It is found that the requirements of Section 33(2) were not complied with and the alleged auction became automatically null and void.

32. Subsequently, Mr. Mahmud, came up with another argument regarding the Petitioner's entitlement to equitable relief on priority basis as opposed to the equitable right of the Judgment- Debtors/Respondents, because the equitable right of the Writ Petitioner was created first in time. Referring to Order No. 45 dated 01.12.2003, it was further argued that the bid of the Petitioner was accepted on 01.12.2003 but on the other hand, the Judgment-Debtors/Respondents deposited the proclamation money and 5% of the bid money only on 01.10.2009 (vide Order No. 75 dated 01.10.2009) which means much later to the acceptance of the bid. Mr. Mahmud stressed that the Judgment-Debtors/Respondents also did not offer to deposit the decretal amount or any amount whatsoever at the time of acceptance of the Petitioner's bid on 01.12.2003 (which incidentally was accepted at the fifth attempt). Mr. Mahmud further submits that the Judgment- Debtors/Respondents also did not pay anything during the pendency of this Writ Petition or during the pendency of the Appeal before the Appellate Division. Given, therefore, that the Judgment- Debtors/Respondents did not deposit any amount whatsoever towards adjustment of the entire decretal dues until 01.10.2009, Mr. Mahmud argues that it is the Petitioner's equity which is following the law and that the equity of the Judgment- Debtors/Respondents are swimming against the law. It is submitted, therefore, that even if for the sake of argument the equity of both the Judgment-Debtors/Respondents and the Petitioner are considered to be equal, nevertheless, due to the reason that the equity of the Petitioner was created first in time such equity will take precedence over the equity of the Judgment-Debtors/Respondents.

33. It is this Court's view that the distinction between legal and equitable rights and interest does not exist under the existing legal régime governed by the Transfer of Property Act, 1882. Thus, the right of redemption of the mortgagor is not an equitable right but a legal right conferred by statute. Therefore, a mortgagor under Bangladeshi law always retains a legal interest before and after the expiry of the date of payment. Therefore, the right of redemption is not an equitable form of relief to be given on such terms as the court considers equitable but a statutory right conferred and available only upon terms statutorily defined and stated. In view of the above, it is found that the Judgment- Debtors/Respondents being mortgagors of the property in question possessed an inalienable right to redeem their property at all material times. The right of the Respondents over the mortgaged property is, accordingly, found by this Court to have been created when the property was mortgaged. Such right remained inalienable and in fact even after expiry of the date of repayment. Resultantly, there is found no scope to argue that the Petitioner's right was first created in terms of time.

34. Accordingly, since the Respondents have already adjusted the outstanding dues of the Decree-Holder Bank in full following a compromise between them in accordance with the law and after cancellation of the bid vide the impugned Order dated 29.09.2011, they are found by this Court to have acquired a vested legal right to redeem their only residential property. Even if for the sake of argument, the Writ Petitioner has allegedly acquired an equitable right, the legal and vested right that has already been acquired by the Respondents is much more superior to that of the Writ Petitioner. The Respondents are in fact, not only the holders of legal, vested and fundamental rights, they also have acquired the equitable right to recover their property from the custody of the Bank. As a consequence, under the rule of equity, the holder of a legal as well as an equitable interest shall be preferred on the basis of the principle that where there is equal equity the law shall prevail. In other words, a legal

interest is superior as between two persons having equitable interest because equity follows the law.

35. In the present case, the Petitioner did not take any action whatsoever since the clock of limitation started ticking as of the date of the impugned Order, i.e. on 29.09.2011. As a consequence, since his legal claim is barred by the limitation as mentioned in a special law he will not be entitled to any equitable relief as well. It may further be mentioned here that equitable claims may also be barred not only by limitation law but also by unreasonable delay or laches. The Petitioner is found to be a defaulter on both counts. In view of the above, the law of equity should not come in aid of the Petitioner as he was not vigilant and has been found slumbering and sleeping on his rights. The Petitioner's claim must fail for following specific reasons resultantly:

- i) The Petitioner failed to deposit the balance amount of 75% bid money as per Order No. 45 dated 01.12.2003 passed by Artha Rin Adalat within ten working days firstly, when the Rule issued in Writ Petition No. 7354 of 2003 was discharged on 01.11.2004 and secondly, when the appeal filed by the Respondents was dismissed by the Appellate Division vide Judgment and Order dated 28.05.2009, in both cases it was incumbent upon the Petitioner to communicate the said Orders to the Court below forthwith at least by Lawyer Certificates. But this the Petitioner failed to do so despite the fact that before 14.06.2009 he got as many as thirteen working days to deposit the balance bid money; and
- ii) the Petitioner was supposed to deposit the balance amount of 75% bid money through Challan directly to the concerned court as soon as there was no restraining order from any court of law, but instead he filed an unnecessary application on 14.06.2009 seeking permission to deposit the same within ten days from the date of permission.

36. These are all found by this Court to be glaring examples of negligence or carelessness on the part of the Petitioner. Hence, as per the established principles of law he should not now be allowed to take any advantage of his own wrong. This Court finds against the Petitioner, accordingly, It is found, therefore, that as per section 33(2) of the Act, the Petitioner has forfeited all rights and privileges upon his failure to deposit the balance amount of bid money within the stipulated period of ten days time. Furthermore, there is no scope to interpret the law to give the Petitioner a technical or tactical advantage of a ninety-day extension in the name of Artha Rin Adalat (Amendment) Ordinance, 2007. This is because equity follows the appropriate rules of law and does not replace or violate the law. Therefore, the Writ Petitioner may not now be allowed to frustrate justice on the ground of mere technical interpretation of any aspect of law and equity.

37. Mr. Rokanuddin Mahmud also drew this Court's attention to two more new legal issues. *Firstly*, with reference to Rules 653, 654, 656 and 657 of the Civil Rules and Orders ("CRO"), he contends that because of the refusal of the Chief Ministerial Officer to sign on the *Challan* Form the Petitioner could not deposit the balance amount of bid money. *Secondly*, he contends that the Respondent No. 1, Artha Rin Adalat No. 2, Dhaka failed to specify the detailed reason as to why and how the Petitioner failed to deposit the balance amount of bid money within the limitation period. In other words, the Court below failed to show how the auction was time-barred under the relevant provisions of law. As a result, the

Impugned Order dated 29.09.2011 passed by the Respondent No. 1 is submitted to suffer from an error of jurisdiction.

38. The argument above as to refusal of the Chief Ministerial Officer to sign the *Challan* Form is found to play no role in saving the limitation. Rules 640, 642, 653, 658 of the CRO lay down the procedure when the *Challan* will be required and how the same shall be deposited and to whom etc. But by no stretch of application or interpretation may the said procedural provisions be read to prescribe any way to the Petitioner to save the limitation period set by a special law i.e. the Act. Further, this Court finds that the Impugned Order is not one devoid wholly of any reasoning or indeed a non-speaking Order. Upon a careful reading of the Order rather it is apparent to this Court that the Impugned Order contains a satisfactory analysis of facts, description of evidence and materials on record and adequate reasoning on the issues raised before it. Evidently, the Artha Rin Adalat appreciated the relevant provisions of law (i.e. the implication of Section 33(2) of the Act) in their correct perspective and applied the same to the facts and circumstances of the case to arrive at a correct judicial finding. As such in the absence of any specific statutory requirement to give reasons to a particular extent or detail or because of paucity of reasoning on a particular issue, the validity *per se* of the impugned decision cannot be called in question unless the same is found invalid or illegal for some other reasons or to have caused injustice to any party in the proceedings. In the present case, clearly reasons have been recorded in the Impugned Order regarding limitation period, albeit, not in an exhaustive manner. Hence, the same cannot be considered as a fatal defect that goes to the root of the Order or the Court's jurisdiction nor can be argued to reflect an error apparent on the face of the record. This Court is of the view that in the absence of any prescribed form or rules of procedure the reasons recorded by a court need not necessarily be exhaustively detailed or elaborate and the requirement of recording reasons will be satisfied if only the relevant reasons are recorded in an Order. By that reason, this Court remains disinclined to interfere with an Order passed by the Court below merely on the ground that the reasons recorded therein are to an extent inadequate or to a degree insufficient.

39. Finally, Mr. Mahmud submits that the Impugned Order was passed by the subordinate Court in excess of jurisdiction and that, accordingly, ought to be sent on remand to the Court below for retrial. In reply to the said argument, Mr. Sayeed, contends that neither any omission to put emphasis on nor to highlight a particular point of law in a greater detail, nor even a mere failure to give exhaustive reasoning will *ipso facto* destroy a court's jurisdiction. As far as the present case is concerned, it is clearly apparent to this Court that the Artha Rin Adalat No. 2, Dhaka had appropriate power or jurisdiction to decide or determine the matters in issue. That Court does not seem to us to have misinterpreted any statutory provisions of law nor misdirected itself as to the weight of any documentary evidence nor has committed any error of law in deciding an issue. Therefore, it is totally misconceived and misleading to argue that while deciding the issue of limitation, failure to give detailed reasoning will *ipso facto* destroy the jurisdiction of the Court below going to the root of the matter. By no manner of application the same will be considered as acts beyond jurisdiction. It is this Court's finding, therefore, that the Court below seems to have committed no error on the face of the Order. Rather it has correctly found that the Writ Petitioner as auction purchaser failed to comply with the statutory period of limitation of ten days. Indeed, the Respondent No. 1, Court does not seem to have further exercised any arbitrary power for collateral purpose. It is resultantly this Court's view that any and every error of law does not call for interference. It must be a mistake which must have influenced the ultimate decision and that but for such mistake the decision of the Court below would have been otherwise. In the present case,

clearly the Court below in giving its finding that the Petitioner as auction purchaser failed to deposit the outstanding 75% bid money within the stipulated period of time as prescribed in the special law has not committed any mistake or error of law and fact. There is detected no mistake which has influenced the ultimate decision and but for which mistake the said Court would have decided otherwise.

40. In view of the above facts and circumstances, this Court finds nothing to interfere with in the Impugned Order in *Certiorari* and finds no necessity to remand the case for retrial to the Court below given that the Artha Rin proceedings have been finally disposed of satisfactorily before issuance of the instant Rule and Order of Stay.

41. Finally, this Court notes that Sections 38 and 45 of the Act contain the provisions of amicable settlement. Under the above provisions of law, the Judgment-Debtors and the Decree-Holder Bank could settle the dispute between them at any stage of the suit and even at the execution stage. Since the mortgaged property has been redeemed and the execution proceeding was withdrawn following an amicable settlement between the Judgment-Debtors and the Decree-Holder, the auction purchaser Petitioner is not found to be entitled to any relief as prayed for in the present case. In this regard an unreported judgment of the Appellate Division in CPLA No. 2125 of 2010 (per Mr. Justice Md. Abdul Wahhab Miah) in the case of *Moklesur Rahman and another vs. Government of Bangladesh* is taken note of. In that case the Appellate Division has reiterated its persistent stance in favour of the judgment-debtors/mortgagors when the question of redemption following an amicable settlement with a bank crops up. In the said case, the mortgaged property was sold in auction and the auction purchasers deposited the entire bid money. Nevertheless, the Appellate Division allowed the judgment-debtors to pay the decretal dues to the decree-holder bank with a direction to such bank to accept the money and thus ultimately the mortgaged property was allowed to be redeemed and the decree was satisfied.

42. In the present case, this Court holds in summation that the Petitioner has not acquired any substantive right rather he is a defaulter in making payment of the balance amount of 75% bid money. Consequentially, the Respondents lawfully exercised their right of redemption by settling to the fullest their outstanding dues to the creditor bank immediately after auction being set aside.

43. In light of the above, this Court remains wholly disinclined to favourably dispose of this Application.

44. In the result, the Rule is discharged. The Order of Stay as initially granted is, hereby, recalled and vacated.

45. There is no Order as to costs.

46. Communicate this Judgment and Order to the Respondent No. 1, Artha Rin Adalat No. 2, Dhaka forthwith.