

7 SCOB [2016] HCD 156**HIGH COURT DIVISION****(Civil Appellate Jurisdiction)**Mr. Mohammad Ali, Advocate
.....For the appellant

FIRST APPEAL No. 312 of 1996.

No one appears
.....For the respondent.**Sonali Bank, Islampur Brahch,
Jamalpur**

.....Appellant

Judgment: on 31.05.2015.

Versus

Md. Abu Baker Sarker

.....Respondent

Present:**Mr. Justice Muhammad Abdul Hafiz****And****Mr. Justice S.M. Mozibur Rahman****Artha Rin Adalat Ain, 2003****Section 50:**

The court has no power to exempt the defendant respondent from the liability of paying up interest however high rate it may be ... since the financial institution bank itself preserves the exclusive right to exempt any-body from payment of interest of loan they sanctioned. ... (Para 12)

Judgment**S.M. Mozibur Rahman, J:**

1. This Appeal is directed against the judgment and decree dated 29.02.1996 passed by the learned Judge of Artha Rin Adalat, Jamalpur in Mortgage Title Suit No. 4 of 1993.

2. The plaintiff's case, in short, is that the appellant Sonali Bank, Islampur Branch, Jamalpur instituted mortgage Title Suit No. 04 of 1993 before the Artha Rin Adalat Jamalpur praying for realization of Tk. 1,84,697/15 against the defendant respondent who was a Cloth Traders of Islampur Bazar, Jamalpur. For the purpose of smooth running of his business, defendant respondent took loan of Tk. 70,000/- (Seventy thousand) from the plaintiff appellant Sonali Bank Islampur Branch, Jamalpur at the rate of 20% interest up to the period of 20.07.1993. Since the defendant respondent did not pay up the loan money with interest at the specified rate plaintiff appellant instituted the original mortgage suit for realization of Tk. 1,84,697/15 up to the period of 20.07.1993.

3. The defendant contested the suit by filing a written statement and contended inter alia that the original suit is false, fabricated and barred by limitation. Generally denying the material allegations made in the content of the plaint the defendant stated as real facts that the manager of Sonali Bank, Islampur Branch, Jamalpur inspired him to take loan from his Bank

and being instigated with the advice of the Manager of the Bank, thinking the betterment of his running business defendant respondent took loan of Tk. 70,000/- by executing a deed of mortgage on condition that if the face amount is paid up along with interest thereof he will be free from all encumbrances incorporated in the deed of mortgage. Thereafter defendant paid-up the loan of Tk. 70,000/- along with interest thereof.

4. Subsequently, the then Bank manager, Sonali Bank, Islampur Branch allured the defendant respondent to take loan again and sanctioned Tk. 63,000/- as hypothecation loan in favour of the defendant in the year 1987. In this way while defendant was carrying out his cloth business smoothly next year in 1988 the whole area of the country was seriously affected by flood causing unlimited loss of lives and property over turning entire situation of the country in a vulnerable position. As a result, people over all the country suffered mount due to such terrible flood massively held in the year 1988 perishing wealth and properties of peoples of all sectors. Messrs Bilkis Cloth Store belonging to the defendant himself was also floated away due to the irresistible flow of flood water inundating different area of Jamalpur district in that year of 1988. A great number of people and properties perished in the flood of 1988 causing terrible havoc over all area of the country. So, the defendant respondent also became penniless losing everything of his cloth store and domestic house. Subsequently he brought the matter to the notice of the Bank authority who immediately one year before the flood of 1988, sanctioned hypothecated loan in his favour. Having come to learn about the loss of the defendant due to such natural calamity, the officers of the local bank inspected the affected area of the defendant and found his claim to be true and just. Yet without considering his financial inability they instituted a mortgage suit against the defendant for realization of Tk. 1,84,697/15 which is not possible to pay up by the defendant due to damage and misery which suddenly dwindled in to his life as a result of natural calamity like terrible flood of 1988. Accordingly, he prayed for exempting him from the liability of hypothecated loan sanctioned in his favour by the plaintiff appellant.

5. In view of the above pleadings the learned Trial Judge of Artha Rin Adalat framing the issues as usual concluded the trial of the suit and passed the impugned preliminary decree dated 29.02.1996 deducting from the face amount all interest payable by the defendant in case of the hypothecated loan.

6. Being aggrieved by and dissatisfied with the impugned preliminary decree dated 29.02.1996 passed by the learned Joint District Judge and Judge of the Artha Rin Adalat, Jamalpur, the plaintiff preferred this appeal amongst others on the main grounds that the learned Judge erred in law and facts in not giving any findings or observation for the payment of the interest which is the main source of income of the plaintiff appellant Bank who deals with the public deposit. The learned Judge of Artha Rin Adalat erred in law as well as in fact by discarding interest incurring pecuniary losses to the plaintiff-appellant for sum of Tk. 1,30,464/15 upto the period of 20.07.1993 and further interest @ 20% till realization of loan money which the plaintiff-appellant is entitled as per terms and condition of the sanctioned letter and other documents which were admittedly accepted by the defendant-respondent and hence the impugned preliminary decree is liable to be set aside. The learned Judge of Artha Rin Adalat most arbitrarily and without applying his judicial mind passed the judgment and decree for Tk. 54,233/- only instead of Tk. 1,84,697/15 and thus erred in law and fact and as such the judgment and the decree are liable to be set aside. The learned Judge of the Artha Rin Adalat below erred in law and facts in allowing most arbitrarily allowed 6(six) installments giving total period of 1(one) year time without ascertaining the actual insolvency of the defendant-respondent for payment of the decretal amount of Tk. 54233/- only

without adding any interest over face amount. The learned Judge of Artha Rin Adalat erred in law and facts in not giving importance in the prayer portion of the plaint of the plaintiff-appellant and for which the appellant has been deprived from substantial amount of interest for the period of pendentelite without making any findings and hence the impugned judgment and decree being bad in law is liable to be set aside. The learned Judge of Artha Rin Adalat below erred in law in not believing the statement of accounts produced from the custody of the Bank as per section 4 of the Banker's Books of Evidence Act. The learned Judge of Artha Rin Adalat by not giving any findings about the interest as lawfully claimed by the appellant as per terms and conditions of the sanctioned letter and the documents of the plaintiff bank thereby committed error in law and fact and hence the impugned judgment and decree are liable to be set aside.

7. In view of the above situations the only point needs to be decided in this civil appeal is whether the impugned judgment and preliminary decree of the original suit is tenable in law or not.

8. We have heard the learned lawyers for both sides. Mr. Mohammad Ali, the learned Advocate appearing on behalf of the plaintiff-appellant supporting the grounds of the memorandum of appeal submits that the learned Judge of Artha Rin Adalat erred in law as well as in fact to evaluate the effects of the documents submitted as Exhibits No. 1 to 10 at the time of deposition of the plaintiff's Bank which were admittedly executed by the defendant. He further submits that learned Judge of Artha Rin Adalat erred in law in wrongly interpreting the relevant section of the Banker's Books evidence Act (Act No. XVIII of 1891 not Act No. XXIII of 1891) in as much as the defendant-respondent admittedly prayed for renewal of loan on 02.03.1987 by Exhibit.4 and executed the letter of continuity dated 03.09.1987 by Exhibit. 1, Demand Promissory Note and Delivery Letter Exhibit 1(Ka), Revival Letters dated 02.09.1990 and 30.12.1992 Exhibit. 2 and 2 (Ka) and as such the impugned Judgment and order is liable to be set aside. He further submits that the deed of Mortgage has since been not redeemed by the defendant-respondent there was no illegality in the eye of law for renewal of the loan by executing a deed of continuity dated 03.09.1987 (Ext 10) which is the usual and normal practice for allowing and availing the loan when the stipulated period expires and hence the learned Judge thereby erred in law and fact and as such the impugned judgment and decree are liable to be set aside. The learned Judge of Artha Rin Adalat erred in law as well as in fact discarding all sorts of interest like previous, pendentelite and after decree till realization of loan money by giving importance to the deposition of the D/W-2 who is a bargader of the defendant-respondent and in the absence of any neutral or neighbouring witnesses presuming the washing away of shop's materials of the defendant respondent by flood of 1988 and hence the impugned judgment and preliminary decree are liable to be set aside. The learned court below erred in fact and in law in believing the alleged damages of the clothes of the defendant-respondent's business shop during flood of 1988 without ascertaining necessary report from the authority concerned though the flood affected major part of the country in the month of September, 1988 that is well after 15.08.1988 which was last date of adjustment and also by wrongly emphasizing Money Lender Act, 1933 and the reported case in 27 DLR page 1, 42 DLR page 107, 43 DLR page 27 and BCR 1985 page 376 in which cases interest were exempted considering extraordinary and special circumstances and not colourable circumstances and hence the impugned judgment and decree are liable to be set aside.

9. No one appears for the respondent.

10. In the light of the above arguments agitated by the learned Advocate for the appellant we have examined the impugned judgment and preliminary decree passed by the learned Judge of the Artha Rin Adalat, Jamalpur and found that the original suit was decreed in preliminary form for the amount of Tk. 54,233/- only deducting Tk. 8767/- deposited by the defendant from the face amount of Tk. 63,000/- excluding the total interest claimed by the plaintiff. It has been submitted by the learned Advocate for the appellant that as per provision of the Artha Rin Adalat Ain, 2003 learned Judge has no power to exempt anybody from paying up interest of loan taken by any person from any bank or financial institution. In this regard he referred section 50 of the Artha Rin Adalat Ain, 2003 which runs as follows:-

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- (1) ধারা ৪৭ এর বিধান সাপেক্ষে, এই আইনের অধীন কোন আদালত, ঋণ প্রদানের দিবস হইতে মামলা দায়েরের দিবস পর্যন্ত সময়কালে কোন ঋণের উপর আর্থিক প্রতিষ্ঠান কর্তৃক আইনানুগভাবে ধার্যকৃত সুদ, বা ক্ষেত্রমত, মুনাফা বা ভাড়া ভ্রাস, মারফ বা নামঞ্জুর করিতে পারিবে না।
- (২) অর্থ ঋণ আদালত কর্তৃক প্রদত্ত ডিক্রীর বিরুদ্ধে বিবাদী-দায়িক পক্ষ কোন আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোনরূপ দরখাস্ত কোন উচ্চতর আদালতে দায়ের না করিলে, মামলা দায়েরের দিবস হইতে ডিক্রীর টাকা আদায় হইবার দিবস পর্যন্ত সময়ের জন্য ডিক্রীকৃত টাকার উপর ৮% (আট শতাংশ) বার্ষিক সরল হারে, কোন আপীল, রিভিশন বা অন্য কোন দরখাস্ত কোন উচ্চতর আদালতে দায়ের করিলে পূর্বোক্ত সময়কালের জন্য ১২% (বারো শতাংশ) বার্ষিক সরল হারে এবং আপীল বা উচ্চতর আদালতের ডিক্রী বা আদেশের বিরুদ্ধে আপীল বিভাগে আপীল করিলে, পূর্বোক্ত সময়কালের জন্য ১৮% (আঠার শতাংশ) বার্ষিক সরল হারে, উপ-d|j
- (৩) এর বিধান সাপেক্ষে, সুদ, বা, ক্ষেত্রমত, মুনাফা আরোপিত হইবে।
- (3) Ef-ধারা (২) এর বিধান সত্ত্বেও উচ্চতর আদালত আপীল, রিভিশন, আপীল বিভাগে আপীল বা অন্য কোন দরখাস্তে আপীলকৃত বা বিতর্কিত ডিক্রি বা আদেশের গুণগত পরিবর্তন করিয়া কোন আদেশ বা ডিক্রী প্রদান করিলে, উক্ত আদালত, উপরি-উল্লিখিত সংশ্লিষ্ট বর্ধিত সুদ বা মুনাফার হার আপীল বা দরখাস্ত কারীর ক্ষেত্রে প্রযোজ্য হইবে না মর্মে আদেশ প্রদান করিতে পারিবে।

11. So, we find substance in the argument of the learned Advocate for the appellant that learned Judge of the Artha Rin Adalat without applying his judicial mind passed the impugned Judgment and preliminary decree for Tk. 55,233/- only instead of Tk. 1,84,697/15 exempting stipulated rate of interest causing financial loss to the plaintiff appellant for sum of Tk. 1,29464/15 up to the period of 20.07.1993.

12. On perusal of the documents which were admitted in to evidence and marked as Exhibit No. 1-10 and the deposition of D.W. 1 Md. Abu Bakker, it appears that he took loan of Tk. 63,000/- from the appellant bank in the year of 1987 which has been increased up to Taka 1,84697/15 due to the inclusion of prescribed rate of interest per annum. This large quantity of amount is too high to pay up for him as he has become very much insolvent having been seriously affected by massive natural calamity like unprecedented flood situation happened over all the country in the year 1988. So it is seen that the defendant respondent is not denying the face amount of loan money he took from the appellant bank authority but having been seriously affected by the natural calamity like the terrible flood of 1988, he has lost his capacity to refund the loan money including the highest rate of interest fixed by the bank authority. He has stated in his deposition as D.W. 1 that if he is given a chance of paying up only the face amount he would try to return back the amount due to him. As a result it is clearly seen that owing to the high rate of interest over the face amount of Tk. 63000/- the total figure of loan money has been stood at Tk. 1,84,697/15. However since the court has no power to exempt the defendant respondent from the liability of paying up interest however high rate it may be and since the financial institution bank itself preserves the exclusive right to exempt any-body from payment of interest of loan they sanctioned, we think it would be just and proper if we leave it to the bank authority for the purpose of mitigating the matter by taking lenient view in respect of exempting their rate of interest

incurred upon the defendant considering the defendant's insolvency as victim of natural calamity like unprecedented flood of 1988 when a great number of people's wealth and properties were demolished causing terrible havoc over all area of the country.

13. In view of the discussion made above we are of the view that the impugned judgment and preliminary decree passed by the learned Judge of the Artha Rin Adalat is liable to be set-aside.

14. In the result, the appeal is allowed without any order as to cost. The impugned judgment and preliminary decree dated 29.02.1996 passed by the learned Judge of Artha Rin Adalat, Jamalpur in Mortgage Suit No. 4 of 1993 is hereby set-aside. The original Mortgage Suit be decreed in preliminary form. The plaintiff appellant is entitled to recover an amount of Tk. 1,84,697/15 up to the period of 20.07.1993 from the defendant respondent No. 1. The defendant respondent is directed to pay up the decretal amount as early as possible if he fails to persuade the bank authority about exemption from interest wholly or in part as per observation made in the body of this judgment. Otherwise the appellant plaintiff Bank will take appropriate step to realize the loan money payable by the defendant respondent by initiating execution case as per law.

15. Send down the L. C. Record along with a copy of this Judgment to the Court concerned at once for information and necessary steps.