IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

CIVIL REVISION NO. 3098 OF 2014

In the matter of:
An application under Section 115(1) of the Code of Civil Procedure.

AND

In the matter of:

National Credit and Commerce Bank, Ltd

.... Petitioner

-Versus-

S.M. Shams and others

....Opposite-parties

Mr. Md. Saidul Alam Khan, Advocate with
Mr. Monjur Elahi Porag, Advocates

... For the petitioner

Mr. Mustafizur Rahman Khan, senior Advocate with

Ms. Mehreen Hassan, Advocates

....For the opposite party noy. 1-2

Heard on 05.02.2024 12.02.2024 18.02.2024

19.02.2024

and Judgment on 19.02.2024.

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J:

At the instance of the plaintiff in Artha Rin Suit No. 10 of 2011 and that of the appellant in Artha Rin Appeal No. 01 of 2013, this rule was

issued calling upon the opposite-parties to show cause as to why the judgment and decree dated 28.04.2014 passed by the learned Additional District Judge, Nilphamari in Artha Rin Appeal No. 01 of 2013 dismissing the appeal and thereby affirming the judgment and decree dated 05.02.2013 passed by the learned judge, Artha Rin adalat, Nilphamari in Artha Rin Suit No. 10 of 2011 decreing the suit in-part should not be set aside and/or such other or further order or orders be passed as to this court may seem fit and proper.

At the time of issuance of the rule, this court also stayed the operation of the impugned judgment and decree dated 05.02.2013 passed by the learned judge Artha Rin Adalat, Nilphamari in Artha Rin Suit No. 01 of 2011 till disposal of the rule.

The short facts leading to issuance of the rule are:

The present petitioner as plaintiff originally filed the said Artha Rin Suit claiming an amount of taka 1,37,37,671.00 against the present opposite parties stating inter alia that, that the opposite party no. 1 is the proprietor of a proprietorship concern namely “M/S Japan Electronics” and upon an application filed by the said opposite party on 02.02.2005 the petitioner-bank sanctioned a cash credit facilities (CC loan) for taka 10,00000/- vide sanction letter dated 23..02.2005. To secure the repayment of the said loan, the opposite party executed a deed of mortgage and power of attorney. Subsequently, on 14.05.2007 the opposite party made another request to the petitioner, bank for credit facilities and the petitioner bank then sanctioned a cash credit (hypo) facilities amounting to taka 15,00000/- and that of revolving loan for taka 75,00000/- vis-a-vis revolving LTR limit

for taka 10,00000/- vide sanction letter dated 17.06.2007. To secure the repayment of the said credit facilities, the opposite party no. 1 also executed various charge documents. Apart from that, the opposite party on 07.01.2008 also furnished under taking and promisory note to pay back the loan amount as per repayment reschedule provided in the sanction letter. Subsequently, the petitioner bank also sanctioned festival credit facilities (FSBL) for taka 5,00000/- to the opposite party vide sanction letter dated 21.09.2006 whereby the opposite party nos. 2 and 3 stood as guarantors by executing personal guarantee for securing repayment of the said loan. The opposite party no. 1 also availed credit card loan facilities from the petitioner bank. In pursuance of the application filed on 12.08.2007, 02.09.2007, 18.09.2007 and 01.02.2007, the petitioner, bank also granted PAD loan facilities no. 25 for taka 11,77,250/-. PAD loan facilities no. 30 for taka 15,60,375/-. PAD facilities no. 34 for taka 15,70,500/- and PAD facilities no. 40 for taka 34,85000/- respectively that came with interest at taka 1,00,11,815/- and the total claim amount then stood at taka 1,37,37,671/- as on 31.07.2011. Since the opposite party did not come forward to repay the said amount, the petitioner bank then requested him to liquidate the dues. Subsequently, the petitioner bank issued legal notice upon the opposite parties to pay the dues but the opposite party did not pay any heed to the said request compelling the petitioner to publish auction notice under section 12(3) of the Artha Rin Adalat Ain but since no bidder came forward to purchase the mortgaged property, the petitioner bank then filed the Artha Rin Suit.

The opposite party nos. 1 and 2 as defendant nos. 1 and 2 contested the suit by filing a joint written statement denying all the material averment so made in the plaint contending inter alia that, the charge documents so have been produced by the plaintiff-petitioner bank are all fictitious and manufactured one. It has also been alleged that, the claim so made by the petitioner bank producing statement of account before the court are also vague, imaginary and not true. It has also been alleged that, the claim so made by the petitioner bank in the suit has already been adjusted and the bank in turn issued no objection certificate in their favour and therefore the suit itself is not maintainable under Artha Rin Adalat Ain, 2003 and finally prayed for dismissal of the suit.

In order to dispose of the Suit, the learned judge of the Artha Rin Adalat framed as many as three different issues where the plaintiff and defendant examined one witness each. The learned judge of the Artha Rin Adalat then upon considering the materials and evidence on record decreed the suit in-part decreeing taka 21,74,192/- and directed the defendant to pay the said amount within 45 days.

Feeling aggrieved by the said judgment and decree the plaintiff as appellant then preferred an appeal before the learned District Judge, Nilphamari which was on transfer heard by the learned Additional District Judge, Nilphamari. The learned Judge then after hearing the parties to the appeal and considering the material on record dismissed the same and upheld the judgment an decree passed by the trial court. It is at that stage the plaintiff bank as petitioner came before this court and obtained the instant rule and order of stay.

Mr. Md. Saidul Alam Khan along with Mr. Monjur Elahi Porag, the learned counsels appearing for the petitioner upon taking us to the impugned judgment and decree at the very outset submits that, the learned judge of the appellate court below without taking into consideration of the materials on record especially the application so filed under Order 41 Rule 23 of the Code of Civil Procedure passed the impugned judgment and decree which cannot be sustained in law. The learned counsel by taking us to the operative portion of the judgment also contends that, the learned judge also arrived at a finding that, the suit is barred under section 46 and 41 of the Artha Rin Adalat Ain but it has already been decided by this court that on the point of limitation as enshrined in section 46 of the Ain no Artha Rin Suit can be barred.

The learned counsel further adds that, since the appeal has to be preferred on the basis of the amount decreed not for claim amount, so on that point as well, the learned judge of the appellate court below came to a wrong finding which cannot be sustained in law.

The learned counsel further contends that, since relevant documents were produced before the appellate court below and those were entertained but in the four corner of the impugned judgment since court has not discussed on that application, so it would be wise if the suit is sent back to the learned judge of the Artha Rin Adalat for reconsideration of the documents so annexed with the application filed under Order 41 Rule 23 of the Code of Civil Procedure. On those counts, the learned counsel finally prays making the rule absolute by setting aside the impugned judgment and decree passed by the learned judges of the courts below.

On the contrary, Mr. Mustafizur Rahman Khan, the learned senior counsel appearing for the opposite party nos. 1 and 2 very robustly opposes the contention so taken by the learned counsel for the petitioner and contends that, since the learned judges on the point of festival loan as well as PAD loan made observation which are based on factual aspect so if the suit is sent back on remand those very proven facts cannot be dislodged and therefore he prays for discarging the rule without sending back the case on remand. The learned counsel by taking us to the impugned judgment passed by the appellate court below also contends that, since the learned judge found the signature so appeared in the loan application for festival loan and the signature of the opposite party dated 02.02.2005 and 14.05.2007 are not similar so the application for festival loan amounting to taka 5,00000/- was totally false and frivolous. Insofar as regards to the PAD loan, the learned counsel further submits that, the learned judge of the trial court has also perfectly found that, there had been no application for the loan ever sought by the opposite party to the bank and the bank could not produce any application for that loan nor it made any endeavor to prove the correctness of the application seeking that loan and has rightly been disbelieved PAD loan for taka 1,11,00 815/-. The learned counsel concludes that, since those very observation based on materials on record so there would have no improvement if the suit is sent back on remand basing on the documents produced with the application filed under Order 41 rule 23 of the Code of Civil Procedure and prayed for discharging the rule.

We have considered the submission so advanced by the learned counsel for the plaintiff-appellant-petitioner and that of the defendant respondent opposite party nos. 1 and 2. We have also gone through the application filed under Order 41 Rule 23 of the Code of Civil Procedure which has been annexed as of Annexure-'E' to the revisional application. Aside from that, we have also examined the observation so have been made by the trial court in regard to FSBL (festival loan) as well as PAD loan against LC on which no decree was passed in favour of the plaintiff-petitioner, bank. We have also perused the discussion taking in to notice by the learned judge of the appellate court below in regard to the application filed by the plaintiff-petitioner under Order 41 Rule 23 of the Code of Civil Procedure appeared at page no. 82 to the application that runs as under:

> *'' উক্ত রায় ও আংশিক ডিক্রির অসম্মতিতে বাদি ব্যাংক বিভিন্ন হেতুবাদে আপীল মোকদ্দমা দাখিল করেন এবং মোকদ্দমার শুনানির প্রাক্কালে ২৫.০৯.২০১৩ তারিখে পূনরায় স্বাক্ষ্য প্রাদানের সুযোগ দানের জন্য এলসি ডকুমেন্ট এবং উৎসব ঋণের কাগজপত্র প্রমান চিহ্নিত করার জন্য দরখাস্তের বর্ণনা মোতাবেক পৃণঃ বিচারে আবেদন করেন।''*

Having said that, the learned judge of the appellate court below vide order no. 8 dated 25.09.2023 entertained the said application and fixed next date on 30.10.2013 for haring the same but on the subsequent occasions we don't find that the learned judge has ever taken step to get the said application heard rather proceeded with to dispose of the appeal. However, on going through the application filed under Order 41 Rule 23 of the Code of Civil Procedure we find that, several documents have been annexed with the application to prove the sanction and disbursement of the

festival loan as well as the PAD loan in favour of the opposite party and it was the bounden duty of the appellate court below either to dispose of the application or to made observation on that application while adjudicating the appeal but nothing short of this has been found in the judgment of the appellate court below leaving that application undisposed. Furthermore, while disbeling PAD loan, the learned judge of the trial court came to a finding that, there has been no application for PAD loan by the opposite party but on the next breath, the learned judge made an observation that, the bank has not taken any step to prove the application against the PAD loans which is self-contradictory. Then again, while disbelieving festival loan (FSBL) amounting to taka 5,00000/- the learned judge on his own volition came to a finding that there has been no similarity of the signature of the opposite party in the application filed on 21.09.2006 with the applications subsequently filed by the opposite party dated 14.05.2007 and 02.02.2005. But we are of the view that, whether the opposite party ever filed any application for the festival loan could have been examined by the trial court itself by taking signature of the defendant opposite parties or comprising his signature with other sanction letters of cash credit loan and CC (hypo) loan. But fact remains, though the plaintiff-petitioner submitted the documents in support of sanctioning PAD loan as well as festival loan but the appellate court below did not touch upon the said application supporting the sanction of two different sorts loan. Though the learned senior counsel for the opposite parties make submission on that point but we don’t find any substance to the said submission because our aforesaid observation proves that, the learned judge of the appellate court below

should have taken into consideration of those documents. Insofar as regards to two legal points taken into consideration by the learned judge of the appellate court below with regard to the point of limitation as well as the pecuniary jurisdiction so provided in section 46 and 41 of the Artha Rin Adalat Ain respectively, we find no substance therein Because section 46 is not any mandatory provision of law and that proposition has already been settled by this couirt in the decision reported in 14 BLC 111 and 64 DLR 487.

Regard being had to the above facts and circumstances we don't find any substance in the impugned judgment passed by the trial court as well as the appellate court below and it would be justified if the suit is sent back on remand to the Artha Rin Adalat for taking into consideration of the documents filed before the appellate court below under Order 41 Rule 23 of the Code of Civil Procedure since witness is required to be adduced to prove those documents .

Accordingly, the rule is made absolute however without any order as to cost.

The impugned judgment and decree so passed by the learned Additional District Judge, Nilphamari in Artha Rin Appeal No. 01 of 2013 dated 28.04.2014 affirming the judgment passed by the Artha Rin Adalat, Nilphamari dated 05.02.2013 in Artha Rin Suit No. 10 of 2011 is hereby set- aside.

Taking into account of the aforesaid observation, the learned judge of the Artha Rin Adalat is hereby directed to dispose of the suit as expeditiously as possible preferably within a period of 03(three) months

from the date of receipt of the copy of this order by intimating the judgment to the learned Advocates for both the parties.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this judgment and order along with the lower court records be communicated to the court of Artha Rin Adalat, Nilphamari forthwith.

Mohi Uddin Shamim, J:

I agree.

Kawsar /A.B.O