

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6400 OF 2018
IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

IN THE MATTER OF:

Mrs. Salma Khatun

.... Petitioner

-Versus-

Government of Bangladesh and others

.... Respondents

Mr. Uzzal Kumar Bhowmick, Advocate

.... For the Petitioner

Mr. Mukunda Chandra Debnath, Advocate with

Mr. Khan Mohammad Shameem Aziz, Advocate

.... For the Respondent No. 12

Judgment on 07th August, 2023

Present:

Mr. Justice Mahmudul Hoque

and

Mr. Justice Md. Mahmud Hassan Talukder

Mahmudul Hoque, J:

In this application under Article 102 of the Constitution Rule Nisi was issued calling upon the respondents to show cause as to why the impugned order dated 30.03.2017 passed by the respondent No. 2, learned Artha Rin Adalat No. 1, Dhaka, in Miscellaneous Case No. 05 of 2017 arising out of Artha Jari Case No. 115 of 2013 filed by the bank for execution of decree passed in Artha Rin Suit No. 89 of 2009, rejecting the Application of the petitioner filed under sections 32(1) and 57 of the Artha Rin Adalat Ain, 2003 read with Order 21 Rules 58 and 90 of the

Code of Civil Procedure (as contained in Annexure-J) should 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.

Fact of the case, in short are that, the present petitioner is owner in possession of 8.91 sataks or 5.40 kathas land by purchase from Eastern Housing Limited by a registered sale deed dated 30.06.1993. After purchase she got her name mutated in khatian and has been possessing the same and paid rents to the government upto 1425 B.S. The petitioner came to know from the alleged auction purchaser's representative that the property mentioned in schedule to the application sold in auction by the bank in execution of decree for realization of bank's loan. On coming to know the fact, she made a search with the Artha Rin Adalat, Dhaka on 08.04.2014 and got information about Artha Rin Suit No. 89 of 2009 and Artha Jari Case No. 115 Of 2013 and from the information supplied by the Artha Rin Adalat it appears that the respondent No. 3, Bank obtained a decree in Artha Rin Suit No. 89 of 2009 against the respondent Nos. 4-11 including the guarantor as defendant No. 9 showing her as mortgagor of the property and guarantor for the loan. Thereafter, the petitioner filed an application on 16.04.2014 before the execution court stating that the petitioner never executed any deed of mortgage and Power of Attorney mortgaging the schedule property to the respondent No. 3, Bank and never stood as guarantor of the loan, but from the plaint in suit it appears that this petitioner was shown as defendant No. 9 in the suit and

fraudulently, obtained the decree on the basis of forged and fabricated deed of mortgage and power of attorney showing her mortgagor. By practising fraud, one Salma Khatun, a fake person was shown as contested defendant in the suit and obtained the decree against her along with other defendants. The respondent No. 3, Bank put the decree in execution by filing Execution Case No. 115 of 2013 wherein the schedule property put in auction and the respondent No. 12 participated in the auction whose offer was accepted by the execution court without consent of the decree holder bank. Thereafter, on 19.11.2014 the petitioner filed an application under Order 21 Rules 58 and 90 of the Code of Civil Procedure (“Code”) read with section 32 and 57 of the Artha Rin Adalat Ain (“Ain”) praying for setting aside the sale and release of the property from execution.

The execution court by an order dated 19.11.2014 rejected the application summarily without assigning any reason. Thereafter the petitioner filed Writ Petition No. 3874 of 2014 against the order dated 19.11.2014 and obtained rule. Finally this Court by judgment and order dated 03.11.2016 made the rule absolute and directed the execution court to give a full fledged decision after considering the application dated 19.11.2014 of the petitioner within one month from the date of receipt of the judgment and order without fail.

The execution court, after receipt of the judgment and order of this Court registered the application as Miscellaneous Case No. 05 of 2017 and issued notice upon the opposite party. In course of hearing, the petitioner examined herself and her husband in support of her case and the

decree holder bank examined one of its Principal Officer in support of their claim. After hearing, the execution court by impugned judgment and order dated 30.03.2017 dismissed the case. By this time the petitioner filed a criminal proceeding before the learned Metropolitan Magistrate, Dhaka against the respondent Nos. 3-12 and others under Sections 467/468/471/109 of 2009 of the Penal Code. The allegation was investigated by CID who examined relevant signature of the petitioner with the signature contain on the mortgage deed, Power of Attorney and thumb impression and signature lying with the concerned Sub-Registry Office and submitted report and charge sheet finding that the signature of the present petitioner Salma Khatun is different from the signature contain on the mortgage deed and power of attorney, for prosecuting the accused in accordance with law.

It is also alleged that the defendant Salma Khaun as shown in the plaint and Jdr. in execution case is a fake person whose date of birth and name of her mother is not same with the national ID of the present petitioner. The petitioner as owner of the property is holding all the papers and documents in her possession and custody. The borrower making a false Salma Khatun and collecting true copy of the title deed of the petitioner fraudulently created the mortgage with the bank placing the schedule property as security against loan. The borrower showing fake Salma Khatun filed Miscellaneous Case No. 02 of 2014 before the execution court wherein he filed an application for hand writing expert opinion which was rejected by the execution court. Thereafter, she filed

Writ Petition No. 10247 of 2014 and obtained rule which was ultimately discharged for non-prosecution at the time of delivery of judgment.

The executing court while dismissing the miscellaneous case most unfortunately failed to find that the bank decree holder could not satisfy the court how they created mortgage without obtaining all the title deeds of the petitioner in original in their custody. The executing court also failed to find that original title deed of the petitioner was destroyed by the concerned Sub-Registry Office because of not taking delivery of the same within time. As such, the bank ought to have obtained registration token in original from the mortgagor before obtaining mortgage deed, but the bank though could not produce the registration token in original, the executing court most unfortunately found that the token in original has come before the court from the custody of the bank decree holder beyond record. Curiously enough, the respondent no. 3 bank did not file affidavit-in-opposition and contested the Rule Nisi, however, the respondent No 12, auction purchaser, contested the rule by filing affidavit in opposition, supplementary affidavit, affidavit in reply stating that the bank obtained decree in Artha Rin Suit No. 89 of 2009. By virtue of decree the mortgage property was put in auction in Execution Case No. 115 of 2013. The respondent No. 12 participated in the auction and their offer was accepted by the court in respect of schedule-“G” land to the schedule to the decree. Thereafter, the respondent No. 12 made payment for the schedule- “G” land to the court and after depositing money the court issued sale certificate and registered the same with the concerned Registry Office. It

is also claimed that the petitioner Salma Khatun mortgaged the property in question who was made party in the suit, as defendant No. 9 as well as judgment debtor in the execution case. Said Salma Khatun contested the suit as well as contested the execution case by filing Miscellaneous Case No. 02 of 2001 under Order 21 Rule 58 of the Code of Civil Procedure which was rejected. After registration of sale certificate the court delivered possession of the property to the respondent No. 12 and as such, the petitioner has no locus standi as a judgment debtor to file any application under Order 21 Rules 58 and 90 of the Code of Civil Procedure. It is also stated that the miscellaneous case is hopelessly barred by limitation as the same has been filed after 07 (seven) months 17 (seventeen) days from the date of knowledge.

Mr. Uzzal Kumar Bhowmick, learned Advocate appearing for the petitioner submits that in Miscellaneous Case No. 05 of 2017 the petitioner filed an application before the executing court praying for sending the signature of the defendant No. 9, Salma Khatun contain on the mortgage deed and power of attorney along with other papers and the signature of the present petitioner to the hand writing expert for opinion but the executing court without disposing the application independently, disposed of the same with the miscellaneous case rejecting the applications and the miscellaneous case and as such, it has committed error of law and illegality in rejecting the same.

He further submits that where claim of the petitioner that the person named Salma Khatun who created mortgage of the petitioner's property

with bank is not the present Salma Khatun, the actual owner of the property, the court ought to have allowed the application of the petitioner for sending all those documents to the hand writing expert for opinion to determine whether the mortgage created by the defendant No. 9, Salma Khatun is forged and fabricated, but the executing court most unfortunately found that the petitioner herself and her husband could not say where the original token of the deed lying and also found that the true copy of the original deed obtained and filed by the petitioner was obtained in the year 2014 and also observed that if the present petitioner is owner and possessor of the property in question she could have produced true copy of the title deed obtained in the year 1993, registration token in original and mutation in her name in the year 1993, but she has filed all those documents obtained in the year 2014. In fact, the petitioner is holding the true copy of the deed of the year 1993 and original registration token of the deed and also got her name mutated in the year 2005, but inadvertently all those documents were not filed before the court at the time of hearing of the case as it was not advised by her learned Advocate, consequently, she has filed all those documents obtained in the year 1993 before this Court by a supplementary affidavit and submits that for that reason the case is not liable to be rejected at all.

He further submits that challenging validity of mortgage deed and power of attorney, the petitioner already filed Title Suit No. 180 of 2015 renumbered as Title Suit No 171 of 2017 on transfer, now pending before the Joint District Judge, 7th Court, Dhaka for disposal.

Mr. Mukunda Chandra Debnath, with Mr. Khan Mohammad Shameem Aziz, learned Advocates appearing for the respondent No. 12, auction purchaser submit that the respondent No. 12 is not supposed to know all those facts whether defendant No. 9, Salma Khatun is fake person or the mortgage created in favour of the bank by the defendant No. 9 is not genuine, but fact remains that the property in question was mortgaged with the bank as security against loan by Salma Khatun whose address as mentioned in the suit is same with the address of present petitioner as mentioned in her title deed and before execution and registration of mortgage and power of attorney, the bank obtained all the title deeds of the defendant No. 9, like true copy of the title deed, mutation in her name, rent receipts etc. Since the original title deed has been destroyed by the concerned registry office, because of not taking delivery of the same within time, the mortgagor defendant No. 9 could not deposit the title deed in original which is also admitted by the present petitioner in her deposition and is evident from the true copy filed by the the present petitioner in miscellaneous case.

He further submits that before the execution court the petitioner could not produce true copy of the title deed of the year 1993, registration token in original, mutation khatian of the year 1993, as such, the court had reason to believe that the petitioner obtained all those documents before filing of the miscellaneous case claiming her to be actual Salma Khatun only to create obstruction in execution of decree.

He submits that the property was put in auction and sold to the respondent No. 12 and the court issued sale certificate and registered the same with the Sub-Registrar Office and delivered possession and as such, there is no scope for the petitioner to come with an application under Order 21 Rules 58 and 90 of the Code of Civil Procedure, as the property in question was not attached in execution and seeking setting aside the sale and release of the property. Hence, the miscellaneous case is incompetent and hopelessly barred by limitation.

He finally submits that against the judgment and order passed by the executing court disallowing the application under Order 21 Rules 58 and 90 of the Code of Civil Procedure is appealable under Order 43 Rule (1) of the Code, hence, the instant writ is incompetent and not maintainable in law. It is also argued that since the present petitioner was a defendant in the suit and a judgment debtor, present application under Order 21 Rule 58 of the Code of Civil Procedure is not maintainable in law.

Heard the learned Advocates for the parties, have gone through the writ petition and the grounds set forth therein along with all the annexures, supplementary affidavit, affidavit-in-opposition and the impugned judgment and order passed by the executing court.

As admitted by both the parties, one Salma Khatun wife of Yeahea of village and Post-Chadla, Police Station-Brahmanpara, District-Cumilla is the owner of the property mentioned in the schedule (B) to the decree. Present petitioner claims that she is the actual owner in possession of the property and she never mortgaged the case property to the respondent No.

3 bank as security against loan granted to the borrower, but the borrower by showing a false women in the name of Salma Khatun created the mortgage deed and power of attorney in favour of the respondent No. 3 bank. In support of her case the petitioner filed true copy of the title deed, relevant khatian and mutation in the name of Salma Khatun and rent receipts showing payment of rents. For the first time on 01.04.2014 she came to know that the property was sold in auction by the bank in Money Execution Case No. 115 of 2013. Thereafter, obtaining information from the court she filed this application under Order 21 Rules 58 and 90 of the Code of Civil Procedure as third party praying for release of the property and setting aside the sale.

At the first instance the execution court without registering the application as miscellaneous case, summarily rejected the application. Then the petitioner moved this Court by filing Writ Petition No. 3874 of 2014 wherein the Rule Nisi was made absolute directing the court to hear the application in accordance with law on merit. Thereafter, the execution court registered the application as Miscellaneous Case No. 05 of 2017 which was contested by the respondent No. 12, auction purchaser, by filing written objection. After hearing, the executing court rejected the application finding that the present petitioner Salma Khatun could not prove that the defendant No. 9, Salma Khatun in suit was a fake person and she did not mortgage the property to the bank. While the court below rejected the application observed that the petitioner claimed that she purchased the property on 30.06.1993 by a sale deed No. 7814, but she

could not file the deed in original even true copy obtained in the year 1993 and from the note on the deed in question it appears that the original deed was destroyed by the concerned registry office as the same was not taken delivery in time. In that view of the matter original registry token must be held by the petitioner but they could not produce the original token in the court, rather the bank has filed the same before the court which proves that the present petitioner had mortgaged the property to the bank and deposited the title documents.

Apart from this, the court held that any application Order 21 Rules 58 and 90 of the Code of Civil Procedure must be filed within 01 (one) month from the date of knowledge and the date of auction, but the case was filed after 07(seven) months 17 days from the date of knowledge which is barred by limitation. It is also observed that the petitioner earlier filed Miscellaneous Case No. 02 of 2014 which was dismissed, then the petitioner filed Writ Petition No. 10247 of 2014 and obtained rule which was discharged for non-prosecution at the time of delivery of judgment. As such, there is no earthly reason for filing the instant Miscellaneous Case No. 05 of 2017 again by suppressing the fact of filing earlier Miscellaneous Case No. 02 of 2014 and Writ Petition No. 10247 of 2014. On the other hand the petitioner claims that earlier Miscellaneous Case No. 02 of 2014 was filed by the fake Salma Khatun that is defendant No. 9 in suit who also filed Writ Petition No. 10247 of 2014, but the executing court wrongly found that earlier Miscellaneous Case No. 02 of 2014 and Writ Petition No. 10247 of 2014 were filed by the present petitioner. The

petitioner also claimed that admittedly, original title deed of the petitioner destroyed by the concerned registry office as the same was not taken delivery in time, but the true copy of the title deed was obtained after registration of the deed on 22.07.1993, all the receipts showing payment of consideration money to the Eastern Housing Limited, original registration token, relevant khatian in the name of Ms. Salma Khatun and mutation of her name and six storied building construction plan are in possession and custody of the petitioner. Had the petitioner created mortgage of the property with the bank as security against loan she would have deposited all the documents to the bank and the bank could have filed all those documents before the court, but they could not. Since, the title documents are coming out from the custody of the petitioner, it proves that the mortgage and power of attorney executed by a false Salma Khatun.

It is also claimed that though all the documents of the year 1993 lying with the petitioner she could not produce the same before the court as the conducting lawyer did not advise the petitioner, but at the time of hearing of the rule, the petitioner submitted all documents of the year 1993 as annexures "Y-Y9" by a supplementary affidavit showing the same are lying with her. As argued by the learned Advocate for the petitioner, had the execution court allowed the petitioner to get the signature examined by hand writing expert and could have filed all her documents at the time of hearing before the execution court, result of the case would have been otherwise, but because of ignorance of the

petitioner she could not file those documents and got the same exhibited, resultantly, the executing court adversely found that the petitioner has failed to prove the claim.

From perusal of annexures “Y” series filed by supplementary affidavit it appears that the petitioner obtained true copy of the title deed No. 7814 on 22.07.1993, mutated her name in the year 2005, obtained building construction plan from Rajuk on 21.06.2007, Registration Token of the Deed in original and money receipts showing payment of consideration to the Eastern Housing by instalments are lying with her. All the facts and documents supports the claim of the petitioner. In the absence of any contrary evidence on the part of respondent No. 3, bank, the executing court wrongly observed and found that the original registration token of the title deed lying with the bank and committed an illegality in disposing the application filed by the petitioner for sending the signature to the hand writing expert alongwith the miscellaneous case instead of disposing the application before disposal of the case.

Now the question has come whether the application under order 21 rules 58 and 90 of the Code is maintainable in law.

Rule 58 of order 21 of the Code provides that;

58(1) where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit;

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Ingredients for filing application under sub-rule (1) are; any property attached in execution of a decree on the ground that such property is not liable to such attachment and under sub-rule (2), the property to which the claim or objection applies has been advertised for sale. In the instant case the property in question has not been attached in execution and advertised for sale on the date of filing application. Property mortgaged with the bank are not required to be attached in execution of a decree and the property already sold in auction, issued sale certificate and registered the same with sub-registrar before filing of the application, as such, rule 58 of order 21 of the code is not attracted in the instant case.

Rule 90 of order 2 of the Code provides that;

90(1) Where any immovable property has been sold in execution of decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it;

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Circumstances must be present for filing an application under rule 90 (1) are; where any immovable property has been sold in execution of a

decree any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. From plain reading of the application we find nothing what material irregularity or fraud committed in publishing or conducting sale. In the absence of definite allegations on the part of the petitioner disclosing such irregularity in the application and leading evidence to that effect, the instant application under rule 90(1) of order 21 of the Code also fails. Apart from this, in the decree one Salma Khatun wife of Yahyea having same address has been shown as judgment debtor though the petitioner claims that said Salma Khatun is a fake person which is required to be proved and challenging identity of said Salma Khatun and execution of mortgage deed and power of attorney by her to be forged and fabricated, the petitioner already filed Title Suit No. 180 of 2015. Because of presence of one Salma Khatun as judgment debtor, the petitioner is not a third party on the face of it until it is proved in Title Suit No. 180 of 2015. Therefore, for the absence of ingredients as mentioned in rules 58 and 90 of order 21 present application is not maintainable in law.

Secondly, whether the writ petition is maintainable in law. To appreciate the question raised, provisions in section 32 (1) &(2) of the Artha Rin Ain may be looked into which run thus;

৩২। জারীর বিরুদ্ধে আপত্তি-(১) অর্থ ঋণ আদালতের ডিক্রী বা আদেশ হইতে উদ্ধৃত জারী মামলায় কোন তৃতীয় পক্ষ দেওয়ানী কার্যবিধির আইনের বিধানমতে দাবী পেশ করিলে, আদালত প্রাথমিক বিবেচনায় উক্ত দাবী সরাসরি খারিজ না করিলে, ডিক্রীর অনূর্ধ্ব ৩০ (ত্রিশ) দিবসের মধ্যে উহার বিরুদ্ধে লিখিত আপত্তি দায়ের করিয়া শুনানী দাবী করিতে পারিবেন।

(২) উপরোক্ত মতে দাবী পেশ করিবার ক্ষেত্রে, দরখাস্তকারী, ডিক্রীকৃত অর্থের, অথবা ডিক্রীকৃত অর্থের আংশিক ইতিমধ্যে আদায় হইয়া থাকিলে অনাদায় অংশের, ১০% এর সমপরিমাণ জামানত বা বন্ড দাখিল করিবে, এবং অনুরূপ জামানত বা বন্ড দাখিল না করিলে উক্ত দাবী অগ্রাহ্য হইবে।

As per section 32 (1) any third party can file application in an execution case under the provisions of Code of Civil Procedure i.e. under Order 21 rule 58 and in that case he is to deposit 10% of the decretal amount or a bond to the court. When an application is filed under order 21 rule 58, the executing court adjudicates the same registering as Miscellaneous case. If the claim is allowed and released the property from attachment under rule 60 and if disallowed the claim under rule 61 and an application under order 21 rule 90 is disallowed under rule 92, in both the situations the order passed by the executing court is appealable under order 43 rule-1 of the code as the order passed by the Executing court is under the provisions of Code of Civil Procedure, not under any provisions of Artha Rin Ain and the said order is not an interlocutory order as mentioned in section 44 of the Artha Rin Ain.

Apart from this, since the order passed by the executing court attaches finality and not an interlocutory order under section 44 is appealable under section 41(1) of the Ain which run thus;

৪১(১) আপীল দায়ের ও নিষ্পত্তি সম্পর্কিত বিশেষ বিধান।-(১) মামলার কোন পক্ষ কোন অর্থ ঋণ আদালতের আদেশ বা ডিক্রী দ্বারা সংক্ষুদ্ধ হইলে, যদি ডিক্রীকৃত টাকার পরিমাণ ৫০ (পঞ্চাশ) লক্ষ টাকা অপেক্ষা অধিক হয়, তাহা হইলে উপ-ধারা (২) এর বিধান সাপেক্ষে, পরবর্তী ৬০ (ষাট) দিবসের মধ্যে হাইকোর্ট বিভাগে, এবং যদি ডিক্রীকৃত টাকার পরিমাণ ৫০ (পঞ্চাশ) লক্ষ টাকা অথবা তদাপেক্ষা কম হয়, তাহা হইলে পরবর্তী ৩০ (ত্রিশ) দিবসের মধ্যে জেলা জজ আদালতে আপীল করিতে পারিবেন।

“মামলার কোন পক্ষ কোন অর্থ ঋণ আদালতের আদেশ বা ডিক্রী দ্বারা সংক্ষুদ্ধ হইলে”

occurs in this section means any party to the suit or case. In Miscellaneous

Case No. 05 of 2017 the petitioner is a party, moreover, rightly or wrongly she was made defendant No. 9 in suit. Apart from this, when an application under order 21 rule 58 CPC is entertained, the court proceeded to investigate the claim in all aspects, as if he was a party to the suit. In that view of the matter the petitioner is a party to the suit and as such, the order is appealable under section 41(1) of the Ain, not amenable in writ jurisdiction as held in the case of Md. Mokaddas Ali and others vs. Artha Rin Adalat and others reported in 4 ADC 562.

Learned Advocate for the petitioner submits that in our jurisdiction it has been decided by another Division Bench in Writ Petition No. 16127 of 2018 and Writ Petition No. 11446 of 2021 holding that the writ is maintainable, as the order is an interlocutory order under section 44 of the Ain. We have gone through the judgment referred and here, we find that the execution court disposed of the Miscellaneous Case No. 05 of 2017 after recording evidence of both the sides and by giving complete judgment disallowing claim of the petitioner under rule 61 and as such, the impugned order is not an interlocutory order under section 44 of the Ain passed by the court in a pending proceeding, therefore, is appealable under order 43(1) of the Code. Learned Advocate for the petitioner referred another case *Md. Humayun Kabir vs. Sonali Bank Limited and others* reported in 9 ADC 335. We have closely gone through the judgment passed by the Appellate Division. In that case, one Md. Humayun Kabir claiming him as third party filed an application under Order 21 Rule 58 of the Code of Civil Procedure praying for release of the

property. But the petitioner at the time of filing of the application did not deposit 10% of the decretal amount under section 32(2) of the Ain. Because of non-deposit of 10% of decretal amount the execution court at the first instance rejected the application summarily for want of deposit under section 32 (2) of the Artha Rin Ain. Then the petitioner filed revision against the order. It was held that the order being passed by the executing court is under section 32(2) of the Artha Rin Adalat Ain, the revision is incompetent. No observations made as to whether the order is an interlocutory order under section 44 of the Ain and amenable in writ jurisdiction, as such, under the facts and circumstances that principle is not applicable in the present case. Another Division Bench of this court while passing those judgments in W.P No. 11146 of 2021 and W.P. No. 16127 of 2018 also did not notice the decisions reported in 4 ADC 568, 25 BLD (HCD) 135, 17 BLC (HCD) 476 and as such, those judgments passed in per incurium.

Present petitioner filed Title Suit No. 180 of 2015 for declaration of title as well as challenging the mortgage and power of attorney allegedly executed by a fake Salma Khatun to be forged and fabricated which is now pending for disposal. The petitioner has ample scope to agitate the matter in the title suit by adducing evidence and producing all those relevant documents i.e. the true copy of the title deed obtained in the year 1993, registration token in original in her custody, relevant khatians, rent receipts and building construction plan and can prove that the said Salma Khatun is a fake person and the deed executed by said Salma Khatun is

forged and fabricated. In the event of finding the mortgage deed and power of attorney forged and executed by a false person after obtaining opinion from hand writing expert, the sale held in auction will be invalid. Therefore, we find that the executing court when rejecting the miscellaneous case finding the petitioner as one of the judgment debtor instead of finding the judgment debtor Salma Khatun is a fake person, the petitioner has remedy in the title suit already filed seeking relief against the mortgage deed and power of attorney as well as declaration of title.

Taking into consideration the above, we find that the impugned judgment and order is appealable and not amenable in writ jurisdiction.

Since the claim as framed by the petitioner in the instant case can be decided in Title suit which is now pending before the civil court, the petitioner can seek an order of injunction in respect of her possession till disposal of Title Suit No. $\frac{171 \text{ of } 2017}{180 \text{ of } 2015}$ and accordingly, she has filed an application for injunction. The trial court can pass an order granting injunction to secure ends of justice and to prevent multiplicity of the proceedings since a vital question of identity of present petitioner Salma Khatun and defendant No. 9 in Artha Rin Suit Salma Khatun has been challenged and in the event of succeeding the petitioner in proving that the mortgage and power of attorney executed by a fake person in her name then the suit will succeed. In that view of the matter we find a prima facie case in favour of the present petitioner.

With the above findings and observations we find that the writ is not maintainable and the executing court committed no illegality in passing the impugned judgment and order.

In the result, the Rule Nisi is discharged, however, without any order as to costs.

The order of stay granted at the time of issuance of the Rule Nisi stand vacated. The order of status quo shall continue till hearing and disposal of the injunction application filed in Title Suit No. $\frac{171 \text{ of } 2017}{180 \text{ of } 2015}$.

The trial court is hereby directed to dispose of the Title Suit No. 171 of 2017 within shortest possible time giving top most priority and considering urgency of the matter in dispute.

Communicate a copy of this judgment to the parties concerned.

Md. Mahmud Hassan Talukder, J:

I agree.