

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Mirza Hussain Haider
Ms. Justice Zinat Ara
Mr. Justice Abu Bakar Siddiquee
Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO.129 OF 2018.

(From the judgment and order dated 08.09.2016 passed by the High Court Division in Writ Petition No.878 of 2004.)

S.M . Masud Hasan @ Masud : Appellant.

=Versus=

Judge, Artha Rin Adalat Respondents.
No.3, Dhaka and others :

For the Appellant: Mr. Sheikh Rezaul Haque,
Advocate, instructed by Mr.
Md.Taufique Hossain,
Advocate-on-Record.

For the Respondent Mr. Golm Arshed, Advocate,
No.3: instructed by Mr. Md.
Ferozur Rahman, Advocate-on-
Record.

For the Respondent Mr. Mrinal Kanti Biswas,
No.2: Advocate, instructed by Mr.
Bivash Chandra Biswas,
Advocate-on-Record.

Respondent Nos.1,4-12: Not represented.

Date of hearing : 14-11-2018
Date of judgment : 20-11-2018

JUDGMENT

Hasan Foez Siddique, J: This appeal is directed against the judgment and order dated 08.09.2016 passed by the High Court Division in Writ Petition No.878 of 2004 discharging the Rule.

The appellant, impugning the orders dated 20.10.1996, 07.01.2004, 08.01.2004 and 15.02.2004 passed by the Artha Rin Adalat No.3, Dhaka in Title Execution Case No.46 of 1995, filed Writ Petition No.878 of 2004 in the High Court Division and obtained Rule. A Division Bench of the High Court Division heard the said Rule. Mir Hasmat Ali, J. discharged the Rule and Shamim Hasnain, J. made the Rule absolute. Then the writ petition was heard by A.K.M. Asaduzzaman, J. who discharged the Rule by the judgment and order dated 08.09.2016. Against which, the appellant has preferred this appeal getting leave.

Short facts, for the disposal of this appeal, are that the father of appellant got allotment of the land measuring an area of 11 kathas 10.50 chattaks appertaining to plot No.39 Block-A, Road No.25, Banani, Dhaka (in short, disputed property) from the then D.I.T., at present, RAJUK on 08.11.1968. On 24.01.1980, the appellant took loan of tk.2,50,000/- from Pubali Bank Ltd. by mortgaging the said land. According to him, he repaid the entire loan amount and Pubali Bank Ltd. issued no objection certificate in his favour. He decided to take loan second

time from Shilpa Bank. Thereafter, the Pubali Bank Ltd. filed Title Suit No.94 of 1992 against the father of the appellant and others for recovery of defaulted loan of a sum of tk.7,946/- and got decree on 17.09.1994 from the Artha Rin Adalat No.3, Dhaka. The bank put the said decree in execution in Title Execution Case No.46 of 1995 against the present appellant and others for realization of tk.20,358/-. Accordingly, the disputed property was attached and the Adalat fixed 28.08.1996 for holding auction. Four bidders participated in auction and highest offer was tk.22,05,000/-. The decree holder bank raised objection against the auction stating that the offer was shockingly low. The Adalat cancelled the auction. Thereafter, on 28.09.1996, that is, within one month from the date of cancellation of first auction, the said land was again put in auction and writ respondent No.3 Parveen Sultana offered tk.16,10,000/- which was accepted by the Adalat. She deposited 25% of the auction money. On 09.10.1996, auction purchaser Parveen Sultana filed an application before the Adalat for staying realization of balance auction money till disposal of the F.A. No.330 of 1994 pending

in the High Court Division against the aforesaid decree passed in Artha Rin Suit No.94 of 1992 inasmuch as the High Court Division did not stay the execution of the said decree. The Adalat, by an order dated 20.10.1996, suspended the process of realization of the balance auction amount. Thereafter, on 29.04.2001, the Adalat vacated the order of suspension of realization of the balance auction money and proceeded with the execution case. Meanwhile, the record of execution case was called for by the High Court Division in Civil Revision No.891 of 2001, which was finally discharged as not being pressed. On 10.11.2003, First Appeal No.330 of 1994 was dismissed by the High Court Division. On 08.01.2004, the auction purchaser deposited the balance auction amount along with poundage fees. The Adalat, accepting the balance money, confirmed the sale. Thereafter, the appellant, on 24.01.2004, filed application under section 57 of the Artha Rin Adalat Ain praying for cancellation of the auction sale on the grounds that the auction purchaser failed to deposit the balance auction money within 15 days from the date of auction as required under Order XXI Rule 85 of the Code of Civil Procedure and

that the auction was held fraudulently and at a shockingly low price. It was contended that at the relevant time, the price of the said land was more than tk.1,0000000/-(one crore). The Adalat, by its order dated 15.02.2004, rejected the said application of the appellant. Then, the appellant, filing the aforesaid writ petition, obtained Rule.

The High Court Division, by the impugned judgment and order, discharged the Rule. Thus, the appellant has preferred this appeal after getting leave .

Mr. Sheikh Rezaul Haque, learned Counsel appearing on behalf of the appellant, submits that in view of the fact that the auction was held on 28.09.1996 and the auction purchaser deposited 25% of the auction money on the same day but without depositing the rest amount within the time as per provisions of Order XXI rules 85 and 86 of the Code of Civil Procedure on 09.10.1996 she filed application before the Adalat for suspension of realization of balance auction money which was allowed and, finally, the rest auction amount was deposited on 24.01.2004, that is, long after the statutory period, the High Court Division erred in law in

discharging the Rule. He submits that the auction purchaser was legally bound to deposit auction amount within 15 days from 28.9.1996, that is, within 13.10.1996, the Adalat erred in law in accepting the rest of auction money long after expiry of stipulated time as provided under Order XXI Rule 85 of the Code of Civil Procedure, the High Court Division erred in law in not making the Rule absolute.

Mr. Golam Arhsed, learned Counsel on behalf of the auction purchaser respondent, submits that First Appeal was pending in the High Court Division against decree of the Adalat when auction was held and, knowing about the pendency of the First Appeal, she filed an application for suspension of the execution proceeding and, accordingly, the execution proceeding was stayed, the Adalat rightly allowed the auction purchaser to deposit the rest auction money after disposal of the proceedings arising out of Artha Rin Adalat suit. Mr. Golam Arshed further submits that the provisions under Order XXI rules 85 and 86 of the Code of Civil Procedure are not at all attracted in a

proceeding initiated under the provision of Artha Rin Adalat Ain which is a special law.

It appears from the materials on record that the instant auction was held on 28.09.1996 and the auction purchaser deposited the ¼th of the auction money on the same day. It further appears from the materials on record that Adalat, considering the application filed by the auction purchaser, stayed the further proceeding of the Execution case on 20.10.1996 stating that against the original decree, First Appeal No.550 of 1994 was pending in the High Court Division. Lastly, after completion of the different proceedings arising out of said suit and Execution case, the auction purchaser deposited the rest amount on 08.01.2004.

The provision of Order XXI Rule 85 of the Code of Civil Procedure provides 15 days time for depositing the balance auction amount from the date of holding auction. Since law provides that the balance amount of auction money should be deposited within 15 days from the date of holding auction, it was the statutory obligation of the auction purchaser respondent to deposit the same in time. Order XXI rule 86 of the Code provides the consequence of non depositing

the balance auction amount within 15 days, which is, in such circumstances the Executing Court shall proceed for holding auction afresh. Since the aforesaid provision is mandatory in nature, the Adalat was not authorise to extend the time of depositing the balance auction money. The Adalat failed to construe the true spirit of the provisions of Order XXI rules 85 and 86 of the Code of Civil Procedure, thereby, accepted the auction money long after expiry of 15 days.

In this regard, Mr. Rezaul relied on the case of Manilal Mohanlal Vs. Syed Ahmed reported in AIR 1954 SC 349. In the cited case it was observed,

"The provision regarding deposit of 25 percent by the purchaser other than the decree -holder is mandatory as the language of the rule suggests. That full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree holder is entitled to the advantage of a set off. The provision of payment is, however, mandatory (Rule 85). If the payment is not made within the period of fifteen days the court has the discretion to forfeit the deposit and there the discretion

ends but the obligation of the court to re-sell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property --- (Rule 86)."

Mr. Rezaul's second citation is the case of Balaram Vs. Ilan Singh reported in AIR 1996 SC 2781. In that case it was observed,

"It is to be noted that the argument that it is only a material irregularity in the sale to attract Rule 90 instead of Rule 85 being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the executing Court to proceed under Rule 86 and property has to be resold unless the judgment-debtor satisfies the decree by making the payment before the resale."

Similar views have been expressed in the case of Nand Lal Vs. Mt. Siddiquan and others reported in AIR 1957 All page 558. In that case fact was that on 04.11.1953 it was ordered that sale should take place on 23.12.1953 of the property in dispute. On 23.12.1953, sale of the property was held and it was purchased by the auction purchaser applicant. On that day, he

deposited 25 percent of the purchase money under Order XXI rule 84 . The balance of the purchase money he had to deposit within fifteen days from the date of the sale, i.e. the deposit should have been made by 07.01.1954 at the latest, as required by rule 85 of Order XXI. On 06.1.1954, instead of depositing the money, the auction purchaser prayed for extension of time to deposit the money till 23.1.1954. The court extended the time only by ten days. On 15.01.1954, the remaining amount was deposited. On 23.01.1954, the sale was confirmed and the sale certificate was issued. On 29.01.1954, i.e. after the confirmation of the sale, an application was moved stating that since the money had not been deposited within the statutory period of fifteen days, as required under Order XXI rule 85 the sale should be set aside, and it was the application which gave rise to the application in revision. The executing court held that the sale was a nullity as 75 percent had not been deposited in time and, therefore, it set aside the sale and ordered resale of the property. Against that order, the auction purchaser went to Allahabad High Court. Allahabad High Court observed that

"in a case where an auction purchaser fails to deposit the money within fifteen days, there is an imperative duty cast upon the executing court itself to set aside that sale and to order resale of the property". Order XXI, rule 85 of the Code requires that the full amount of the purchase-money shall be paid by the auction purchaser into Court before the Court close on the 15th day from the sale of the property. Rule 86 also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit after defraying the expenditure, be forfeited to the Government and the property shall be resold. When the default is made in depositing the balance of the amount as required by Rule 81, the Court ought to order the re-sale of the property.

Having examined the language of the relevant provisions and the decisions upon the subject, we are of the view that the provisions of the rules requiring the deposit of 25% of the purchase money immediate, on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these

provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25% of the purchase money in the first instance and the balance within 15 days. Non payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The court is bound to re-sell the property in the event of a default shows that the previous proceedings for sale are completely wiped out as if they do not exist in the eye of law.

Mr. Golam Arshed, submits that the provisions of Order XXI Rule 85 and 86 of the Code of Civil Procedure are not applicable in this case since Artha Rin Adalat Ain is a special law which provides special provisions for execution of the decree passed under the Ain. In this case, the Artha Rin Suit and Artha Rin Execution case were started under Artha Rin Adalat Ain, 1990. Section 5(4) and (5) of the Artha Rin Adalat Ain, 1990 provides that the Adalat shall follow the provisions of the Code of Civil Procedure subject to the provision of the Ain. Contents of section 5(4) and (5) run as follows:

“৫(৪) অর্থ ঋণ আদালত একটি দেওয়ানী আদালত (Civil Court) বলিয়া গণ্য হইবে এবং Code of Civil Procedure, 1908 (Act V of 1908) এ দেওয়ানী আদালতের যে সমস্ত ক্ষমতা ও এখতিয়ার আছে সেই সমস্ত ক্ষমতা ও এখতিয়ার, এই আইনের বিধান সাপেক্ষে, অর্থ ঋণ আদালতের ও থাকিবে।

(৫) এই আইনের ভিন্নরূপ কিছু না থাকিলে, অর্থঋণ আদালত উহার কার্যক্রম পরিচালনার ব্যাপারে Code of Civil Procedure, 1908 (Act V of 1908) এ দেওয়ানী আদালতের কার্যক্রম পরিচালনা সম্পর্কে যে বিধান করা হইয়াছে উহা অনুসরণ করিবে।”

In Artha Rin Adalt Ain, 1990 there was no such specific provision in the Ain for execution of decree. Section 6(ক) of the Ain, 1990, under which the instant suit was decreed and execution case was started, provides,

“৬ক। ডিক্রী বাস্তবায়ন। Code of Civil Procedure, 1908 (Act V of 1908) এ যাহা কিছুই থাকুক না কেন, কোন অর্থ ঋণ আদালতের সিদ্ধান্ত উক্ত আদালত কর্তৃক জারী ও বাস্তবায়ন করা হইবে।”

In the case of Sultana Jute Mills Ltd. and others Vs. Agrani Bank Ltd. and others reported in 14 BLD(AD) 197 this Division observed that the Artha Rin Adalat Ain is a special legislation providing for special measures to realise loans given by financial institutions. Section 5(4) of the Act gives Artha Rin Adalat the powers and jurisdiction of a Civil Court, but subject to the provisions of the Act itself. Section 5(5) of the Act makes the Code of Civil Procedure applicable to the proceedings

of the Artha Rin Adalat but only if the Ain does not contain anything different. Identical view has been expressed by this Division in the Case of Islami Bank Bangladesh Ltd. Vs. Alhaj Md. Shafiuddin Howlader and another reported in 20 BLD (AD) 162 stating that according to sub-section (4) of Section (5) of the Ain the Artha Rin Adalat is a Civil Court having all the powers and jurisdiction under Civil Procedure Code, 1908, subject to the provision of the Ain. Sub- Section (5) of Section 5 thereof makes the provisions of the said Code applicable, notwithstanding anything to the contrary, to the conduct of proceedings in an Artha Rin Adalat. In the case of M/S. Antibiotic Stores and others Vs. Subordinate Judge and Artha Rin Adalat reported in 8 MLR(AD) page 4 this Division again observed that under Section 5(4) of the Artha Rin Adalat Ain, 1990, the Artha Rin Adalat is a Civil Court and subject to the provisions of the Ain, the Artha Rin Adalat have all the powers and jurisdictions under the Code of Civil Procedure, 1908.

Since the instant auction was held under Artha Rin Adalat Ain, 1990 which did not provide specific procedure to be followed for

holding auction and as to time limit for payment of auction money, the Adalat followed the provision of the Code of Civil Procedure rightly. Consequently, we do not find any force in the submissions of Mr. Golam Arshed .

Accordingly, we find substance in the appeal.

Thus, the appeal is allowed. Judgment and order of the High Court Division is set aside. The impugned orders of the Adalat are hereby declared to have been passed without lawful authority and are of no legal effect. The Adalat shall proceed with the Execution Case in accordance with law.

J.

J.

J.

J.

J.

J.

The 20th November, 2018

halim/words-28862 /