

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

Present:

Mr. Justice Md. Badruzzaman.

And

Mr. Justice Sashanka Shekhar Sarkar

CIVIL REVISION No. 4670 OF 2009.

Pubali Bank Limited

...Petitioner.

-Versus-

Mrs. Ferdousi Begum and others .

....Opposite parties.

Mr. A.F Hasan Arrif, Senior Advocate with

Mr. Md. Nazmul Alam with

Ms. Aditi Tamanna, Advocates

... For the petitioner.

None appears,

... For the opposite parties.

**Heard on: 16.01.2024, 22.01.2024,29.01.2024
and 29.02.2024.**

Judgment on: 28.04.2024,

Md. Badruzzaman, J:

Upon an application under section 42(1) of Artha Rin Adalat Ain, 2003 read with section 115(1) of the Code of Civil Procedure this Rule was issued calling upon the opposite parties to show cause as to why judgment and order dated 26.07.2009 passed by learned Additional District Judge, 2nd Court, Dhaka in Miscellaneous Appeal No. 88 of 2006 dismissing the appeal and affirming judgment and order dated 05.01.2006 passed by learned Judge, Artha Rin Adalat No. 3, Dhaka in Artha Jari Miscellaneous Case No. 17 of 2004 allowing the case filed under Order XXI of rule 58 of the Code of Civil Procedure read with section 32(2) of the Artha Rin Adalat Ain, 2003 releasing the suit property from attachment.

Facts relevant, for the purpose of disposal of this Rule, are that the petitioner Pubali Bank Limited as plaintiff filed Money Suit No. 29 of 1997 before the Court of Artha Rin Adalat No. 3, Dhaka for realization of TK. 28,21,090.11 as on 12.03.1992 against opposite party Nos. 2-4 and others. Opposite party Nos. 2-3, as defendants, filed joint written statements to contest the suit and the suit was decreed on contest against opposite party Nos. 2-4 and *ex-parte* against the rest vide judgment and decree dated 29.10.1997 decreeing the suit as per prayer of the plaintiff with an interest at the rate of Taka 20 % interest per annum with effect from 13.03.1992. Thereafter, the decree-holder-Bank put the decree in execution by filing Money Execution Case No. 20 of 1998 on 14.05.1998 for recovery of an amount of Tk. 92,99,111.11 as on 15.03.1998. The Bank included the suit property in schedule of execution case which was allowed by the Execution Court on 20.09.1999 and as per prayer of the decree-holder, the Execution Court made an order of attachment of the schedule property on 20.9.1999 and the attachment order was served on 29.09.1999 through process-server of the Court by hanging the attachment order on the door of the attached property and thereafter, the property in question was put to auction sale but it could not be sold.

During pendency of the execution case opposite party No. 1 as a Third-party-claimant filed an application in the execution case under Order XXI rule 58 of the Code of Civil Procedure read with section 32(2) of the Artha Rin Adalat Ain, 2003 upon depositing 25% of the decrial amount for releasing the attached property and the application was registered as Miscellaneous Case No. 17 of 2004. The case of the Claimant is that the attached property was owned and possessed by her mother Ojibunnessa and while she was owning and possessing the

same transferred it to her by way of oral gift dated 22.11.1985 and her Mother did not mortgage the property to the Bank or did not give any personal guarantee against the loan obtained by judgment debtors (opposite party Nos. 2-3 herein) and the decree-holder-bank in collusion with her brother (opposite party No. 3) obtained the decree against her mother Ojibunnesa. Her further case is that while she was owning and possessing the property in question, her other brothers and sisters denied her title in the property for which she instituted Title Suit No. 65 of 1999 before 1st Court of Sub-ordinate Judge, Barishal and obtained compromise decree on 08.11.2000 and the compromise petition was signed by her brother Mizan Khasru and sister Showkat Ara and she was owning and possessing the property in question by inducting tenant therein and paid rent to the Government after mutating her name by Mutation Case No. 54 of 2000-2001. Since the Claimant was the lawful owner in possession of the attached property before the attachment order was passed, the same should be released from attachment.

The decree-holder-bank filed written objection to contest the case contending, *inter alia*, that a proprietorship Firm namely M/S Desh Trading Corporation took credit facilities through L.C from the decree-holder-bank through it's the then proprietor Obaidur Rahman and immediate after obtaining the credit facilities, Obaidur Rahman died and thereafter, his brother Mostafizur Rahman, father A.N.M Habibur Rahman, mother Ojibunnesa, wife Shahinur, son Sumon Rahman and daughter Pinki Rahman took the liabilities of the loan of the Firm by an agreement with the bank and they also gave authorization to Mostafizur Rahman to continue with the business of M/S Desh Trading Corporation and to execute charge document against

the loan. Being authorized by Ojibunnesa and others opposite party No. 2 Mostafizur Rahman took the liabilities of the loan upon signing various charge documents and thereafter, defaulted to pay the outstanding dues of the bank for which the bank filed money suit and obtained the decree. Since Ojibunnesa was one of the judgment-debtors and there was no other properties of the judgment debtors, the bank attached the property of Ojibunnesa. The Claimant by practicing fraud upon the Court obtained compromise decree behind of the back of the decree-holder-bank in respect of the attached property after attachment was made by the Artha Rin Adalat. The bank was not a party to the suit filed by the Claimant Ferdousi Begum and as such, the compromise decree passed therein is not binding upon the decree-holder-bank and as such, the claim was case liable to be dismissed.

To prove the miscellaneous case, the opposite-party-claimant adduced 3 oral witnesses as well as produced documentary evidence and on the other hand, the bank adduced 1 witness to prove its case. The Execution Court, upon considering the materials and evidence on record, by order dated 05.01.2006, allowed the miscellaneous case and released the attached property which was affirmed by the appellate Court in Miscellaneous Appeal No. 88 of 2006 filed by the bank against which the bank has preferred this application and obtained the instant Rule.

None appears to contest the Rule.

Mr. A.F Hasan Arrif, learned Senior Advocate appearing with Mr. Md. Nazmul Alam, learned Advocate for the petitioner submits that in an application under Order XXI rule 58 of the Code of Civil Procedure the Executing Court is authorized to investigate the ownership and possession of the claimant but in the instant case the execution Court

as well as Court of appeal upon misconception of law and fact came to wrong finding that the claimant became owner of the attached property by oral gift followed by compromise decree without considering that the Claimant did not add the bank as party to the suit filed by her and the compromise decree was passed keeping the property under attachment. Learned Advocate further submits that to frustrate the decree the Claimant introduced the story of oral gift though the oral gift was not proved by evidence and as such, the miscellaneous case should have been dismissed by the courts below. In support of his contention learned Advocate has referred to the cases of Amanat Ullah Howlader (Md) and another vs. Abu Hanif Howlader and others 21 BLC 307, Sultan Ahmed vs. Md. Waziullah and others 39 DLR 329 and Nitu Poddar vs. Eastern Bank Limited and another 9 BLC 209.

We have heard the learned Advocates for the petitioner, perused the revisional application and the grounds stated therein, the impugned judgment and that of passed by the Execution Court and other materials available on record.

It is not denial of the fact that opposite party No. 2, M/S Desh Trading Corporation obtained credit facilities through L.C represented by it's the then proprietor Mr. A.B.M Obaidur Rahman and after his death, his heirs i.e opposite party No. 3, Mostafizur Rahman along with his mother Ojibunnesa and others entered into an agreement with the bank by taking the responsibilities of the loan liabilities and they also executed Power of Attorney in favour of Mostafizur Rahman (judgment debtor) to continue with their family business and execute charge documents and being authorized by Ojibunnesa and others by power of attorney, he executed charge documents in favour of the bank against the loan liabilities obtained by the Farm and thereafter, defaulted in

payment of outstanding dues and the bank obtained money decree on contest against opposite party Nos. 2 and 3 and *ex-parte* against the rest including Ojibunnesa (judgment-debtor No. 4). During her lifetime, Ojibunnesa did not challenge the money decree passed by the Artha Rin Adalat against her. It appears that the decree holder-bank included the property of Ojibunnesa in the schedule of the execution case by application dated 20.09.1999 and the execution Court attached the property of Ojibunnesa by order dated 20.09.1999 and the writ of attachment was served through process server of the Court by hanging it on the door of the attached property on 29.9.1999. It also appears that the Claimant obtained the compromise decree in respect of the attached property on 8.11.2000. Her claim was that she got the property from one of the judgment-debtors namely Ojibunnesa through an oral gift purported to be made on 22.11.1985. In support of the oral gift she adduced oral evidence only. It appears that the attached property is a two-storied building and it is situated within the Barishal Municipality area. After the so called oral gift dated 22.11.1985, the Claimant did not mutate her name in the concerned municipality, revenue office or other authorities of the Government and she did not do any activities on the strength of the so-called oral gift before the order of attachment. Accordingly, the so-called oral gift was not acted upon. Rather, it appears that opposite party No. 1 invented the story of oral gift in the plaint of her title suit after attachment order was passed and she obtained a compromise decree on 08.11.2000 against her brother and sister without impleading the decree holder bank as party in her suit and keeping the property under attachment and thereafter, in 2001, got her name mutated in the Government Revenue Office.

Though the Claimant pleaded that she did not aware of the attachment order but from the LCR it appears that the order of attachment was passed on 20.09.1999 and the writ of attachment was served by hanging on the door of the attached property by the process server of the Court on 29.09.1999 from which it appears that the order of attachment was properly served upon the judgment debtors upon fulfilling all formalities as required under law. The Third-party-claimant is claiming the attached property through her Mother, who is one of the judgment debtors. Accordingly, it is to be presumed that the Claimant was well aware of the order of attachment.

It clearly reveals that the Third-party-claimant obtained the so-called compromise decree behind the back of the decree-holder-bank and after the order of attachment was passed. Accordingly, it can be safely concluded that to frustrate the decree, the Claimant invented the story of oral gift and compromise decree. Since the Claimant obtained the compromise decree keeping the property in question under attachment, her claim is subject to the order of attachment passed by the Execution Court and accordingly, the attached property cannot be released unless the decree obtained by the bank is fully satisfied through the execution process. It appears that the execution Court as well as the Court of appeal without addressing such factual aspect and vital important question of law, illegally released the property in question from attachment and as such, the impugned judgments passed by the Courts below are not tenable under law.

In that view of the matter, we find merit in this Rule.

In the result, the Rule is made absolute however, without any order as to costs.

The impugned judgment and order dated 26.07.2009 passed by learned Additional District Judge, 2nd Court, Dhaka in Miscellaneous Appeal No. 88 of 2006 and those of dated 05.01.2006 passed by learned Judge, Artha Rin Adalat No. 3, Dhaka in Artha Jari Miscellaneous Case No. 17 of 2004 are set aside. Resultantly, Miscellaneous Case No. 17 of 2004 be dismissed.

Send down the L.C.R along with a copy of this judgment to the Courts below at once.

(Justice Md. Badruzzaman)

I agree.

(Mr. Justice Sashanka Shekhar Sarkar)