Present:
Mr. Justice Faruque Ahmed
And
Mr. Justice Obaidul Hassan

F.A. No. 635 of 2000

IN THE MATTER OF

Manager, Rupali Bank Ltd.
..... Plaintiff-Appellant
Versus
M/S New Music Corner and another
.....Defendants-Respondents.
Mr. Md. Rezaul Haque, Advocate.
.....For the Plaintiff-Appellant.
Mr. Md. Haroon-Ar-Rashid, Advocate.
……For the Defendant-Respondents

Heard on : 08.05.2011 & 12.05.2011
And
Judgment on : 18.05.2011.

Obaidul Hassan, J.

This appeal is directed at the instance of the plaintiff-appellant against the judgment and decree dated 06.04.2000 (decree signed on 10.04.2000) passed by the Subordinate Judge, Artha Rin Adalat, Bogra, in Artha Rin Case No. 326 of 1994 dismissing the suit.

The plaintiff appellant instituted Artha Rin Case No. 326 of 1994 impleading the present respondents as defendants for realization of Tk. 17,07,996.30.

The plaintiff in his plaint stated *inter-alia* that the defendant No.1 being a businessman, used to deal with electronics goods. He filed an application to the plaintiff bank to renew his previous loan, thereafter, on 11.06.1988 vide sanction letters No. 45 and 46 the bank sanctioned loan for an amount of Tk. 2,00,000/- as cash credit hypothecation and Tk. 10,00,000/- as cash credit pledge, in all Tk. 12,00,000/- in favour of the plaintiff. The defendant No. 2 became the guarantor of the said loan and mortgaged his property mentioned in the schedule of the plaint with the bank by a registered deed. In the sanction letter it was stipulated that the defendant would repay the loan money with the specified time but since he failed to repay the loan amount till 30.09.1994, the cash credit hypothecation

amount stood at Tk.5,19,331/- and cash credit pledge amount stood at Tk. 11,88,665.30, in all the amount of loan stood at Tk. 17,07,996/-. The defendant No.1 did not take any advantage of exemption of loan as it was offered to him like other borrowers by the government. Since the loan amount could not be realized, the bank was bound to file this case against the defendant and prayed for a decree so that the plaintiff bank can realize the loan amount after selling the mortgaged property. It has also been stated in the plaint that on 11.08.1993 the legal adviser of the bank gave a final notice to repay the loan amount within 15 days, although the defendant No.1 and 2 received the same notice but they refused to pay the loan amount verbally and the defendant No.2 also did not agree to pay the loan obtained by the defendant No.1. Subsequently, the defendant by filing an application under Order VI, Rule-17 read with section 151 of the Code of Civil Procedure amended the plaint

with a prayer to pass an order to allow the plaintiff to sell the pledged goods to adjust the sell proceed with loan amount. The defendant No.1 contested the said suit by filing a written statement stating that he received Tk. 2,00,000/- as cash credit hypothecation loan and Tk. 6,00,000/- as pledge loan from the bank and, thereafter, on 03.03.1997 the defendant No.1 withdrew Tk. 2,00,000/- and, thereafter, on 21.03.1987 again he withdrew Tk. 2,00,000/- and, thereafter, as cash credit pledge loan he withdrew Tk. 4,00,000/- by a cheque. Thereafter, upon an application of the defendant the loan amount was increased from Tk.6,00,000/- to Tk. 10,00,000/- and the said loan was renewed. The defendant by the said money purchased goods and kept those in a showroom and in a godown under the supervision and control of the bank. Thereafter, on 30.05.1988 the defendant repaid the entire amount of loan under pledge with interest and on 05.06.1988 he

made payment of cash credit hypothecation loan to the bank. Thereafter, on 11.06.1988 the defendant upon an application received Tk. 2,00,000/- as cash credit hypothecation and Tk. 10,00,000/- as cash credit pledge loan, in all Tk. 12,00,000/- vide two sanction letters being numbered 45 and 46. And by the said amount of money the defendant purchased goods and kept those in a godown under control and supervision of the bank. On different dates the defendant sold the goods from the godown with the permission of the bank and deposited the sale proceed with the bank. Thereafter, on 15.12.1988 the period of renewal of the loan expired, the plaintiff asked the defendant No.1 to renew the loan facility. Up to 09.04.1998 there was an outstanding dues of Tk. 7,68,729.80 against the defendant No.1 under cash credit pledge and Tk. 1,97,997/- under cash credit hypothecation. The defendant No.1 deposited Tk. 2,96,100/- to the bank but, subsequently without giving

any notice the plaintiff bank suddenly locked the shop of the defendant No.1. As a result the defendant No.1 could not run his business any more. It has been further stated in the written statements that the shop of the defendant No.1 was not mortgaged to the bank, the defendant time an again applied to the bank to open his shop but failed. Thereafter, on 28.07.1990 the defendant filed an application to the bank requesting him to transform his loan account to a block account at the advice of the Manager of the bank, but it also went in vain. On the date of shutting the shop and the godown that is on 13.04.1989 there were some goods in the godown which were valued at Tk. 4,49,799.80. Subsequently, when new Manager came to the bank the defendant filed another application requesting him to open his shop and allow the defendant to run his business. The defendant also requested him to transform the loan account to a block account and also requested

him to sell the goods kept in the godown under the supervision of the bank, and to adjust the same with the outstanding dues. The said application of the defendant was received by the bank on 29.07.1990 and, thereafter, on 31.10.1990 the defendant No.1 again sent a similar application but they did not pay any heed to it. Thereafter, in presence of the new Manager namely Mr. Md. Abdul Matin an audit took place regarding the goods kept in the godown. It was found that most of the goods were damaged. It has also been mentioned in the written statement that since the goods were kept under lock and key for quite a long time those were destroyed. Thereafter, time and again the defendant No.1 requested the plaintiff bank to transform the loan account to a block account, without interest, and prayed for allowing him to pay the loan by installments, but all his efforts went in vain. The defendant No.1 further stated in his written statement that on 13.04.1989 his shop and

godown were kept under lock and key by the defendant bank, as a result he had to incur a loss of taka 17 to 20 lacs. For this loss the bank was fully responsible. Since for the negligence of the plaintiff bank the defendant could not run his business, he could not repay the loan amount in time and he prays for dismissal of the case. Thereafter, the defendant No.1 filed an additional written statement by which he stated that as per bank statement till 09.04.1989 there was an outstanding dues of Tk. 4,50,799.80 against the defendant and at that time the defendant had some goods in the godown which was valued at Tk. 4,41,719.80. So if the loan account would have been transformed as block account there would not have any outstanding dues to the defendant. On 09.07.1989 the entire amount of loan would have been paid by the defendant. The defendant on 09.04.1989 in all paid Tk. 8,11,500/- in cash against Tk. 7,50,200.20. It appears that the defendant paid the principal amount

along with more then 18% interest. Inspite of that for the unlawful activity of the bank the defendant had to incur a loss of Tk. 36,14,000/- which the plaintiff was entitled to get back. Thereafter, on the basis of an application filed by the defendant on 21.04.1999 the learned Judge of the trial court issued a show cause notice to the plaintiff bank to show cause as to why the shop of the defendant should not be made open and on the basis of this show cause notice the plaintiff bank filed a report, in which it has been stated that since the defendant No.1 did not give any security to the godown, the plaintiff bank refused to open the shop. It has been further stated in the said report that, had the plaintiff No.1 give any security of the godown the plaintiff bank would not have kept the shop and godown under lock and key. In reply to the said report the defendant No.1 stated that inspite of giving adequate security by the defendant, the bank did not allow him to enter into the shop and

godown rather kept the shop and godown under lock and key.

Considering the pleadings of the parties, the Judge of the trial court framed as many as three issues.

The plaintiff No.1 and defendant No.1 examined themselves as P.W.1 and D.W.1. After considering evidence adduced by the witnesses and the pleadings of the parties, the learned Judge, Artha Rin Adalat, Bogra by its judgment and decree dated 06.4.2000 (decree signed on 10.4.2000) dismissed the suit.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree the plaintiff appellant has preferred this appeal.

P.W. 1 Md. Jalaluddin in his deposition stated that on the basis of an application filed by the defendant No. 1 on 11.06.1988 the plaintiff bank vide sanction letter No. 45 and 46 sanctioned loan of Tk 2,00,000/- as cash credit hypothecation and Tk. 10,00,000/- as cash credit pledge,

in all Tk. 12,00,000/- in favour of the defendant No. 1. After observing all formalities the defendant obtained the loan and started his business. Up to 30.9.1994 there were outstanding dues against the defendant for an amount of Tk. 5,19,331/- under cash credit hypothecation, and Tk. 11,88,665.30 under cash credit pledge, in all there was an outstanding dues against the defendant for an amount of was Tk. 17,07,996.30. For realization of this amount of money the plaintiff through their Legal Advisor sent a legal notice to the defendant No. 1. As per Government policy the defendant No. 1 filed an application for exemption of interest. But interest was not exempted. He further stated that he filed the necessary papers. He denied the suggestion that due to non co-operation of the bank the defendant failed to pay the loan in due time. He further stated that the defendant could repay the loan at a time and he had the ability to repay the loan amount at a time. In cross-

examination P.W. 1 stated that on 16.10.1988 the defendant withdrew Tk. 2,60,000/-. After 16.4.1988 the defendant on different dates deposited Tk. 8,11,300/-. He further stated that the pledge godown was under their control and the shop was made open as per the order of the Court. He further stated that he could not see whether any permission was obtained from the Court or from the head office of the bank to close the showroom and the godown of the defendant. He further stated that he did not know whether on 16.10.1990 the shop was audited. He further stated that in the audit report it was mentioned that there were some goods in the godown which were valued at Tk. 4,31,250/-. He further stated that on 31.7.1990 and 01.01.1990 the defendant field two applications to open the shop. He further stated that he did not know whether the shop was opened or not. He further stated that he did not know whether the defendant applied for transforming

his loan account as block account. He further stated that on 28.7.1990, 19.5.1991, 02.6.1991 and 05.6.1991 the defendant filed applications to transform his account to a block account and on the basis of these applications permission was given from the regional office for transforming the loan account as block account. But till this date the account was not transformed as block account. He further stated that had the applications of the defendants been considered there would not be any interest. He denied the suggestion that inspite of permission made by the higher authority, with an ill motive, the applications of the defendant to transform his account as block account was not considered. He further stated that from 13.4.1989 to July, 1999 the shop of the defendant No. 1 was closed for 10 years. But he did not know whether he (defendant No.1) could run his business. He further stated that there were goods in the godown. Subsequently he stated that he did not know

whether there were any goods in the godown. He further stated that he did not know whether the defendant incurred a loss of Tk. 24,00,000/- for not doing his business for last 10 years. He further stated that up to 09.4.1989 there were some goods under pledge which were valued at Tk. 4,41,719.80, at that time there were outstanding dues against the defendant No. 1 for an amount of Tk. 6,49,750. He denied the suggestion that if the shop and godown were kept open the defendant would not have incurred any loss and the bank would not have filed any Suit for realization of money.

D.W. 1 Md. Tariqul Islam in his deposition stated that up to 09.4.1989 he deposited Tk. 8,11,500/ and, thereafter, he deposited Tk. 22,700/- more to the bank. He further stated that repeatedly he applied to the bank to allow him to continue his business by opening the shop and he also applied to transform his loan account

as block account, but the bank did not pay any heed to it. On 16.10.1990 an inspection was held in the godown. The bank gave an inspection report in which this witness put his signature. In the said statement it was mentioned that there were goods value of which were approximately equal to the outstanding dues of the bank against the defendant. After inspection this defendant time and again filed applications to the bank to open his shop which was recommended by the regional Manager, but ultimately no application was considered. The bank filed this case after 6/7 years from the date of locking the godown and shop. He further stated that if the shop was kept open he could have earned more than 20 lacs taka during last 10 years. He further stated that for not keeping the shop open he lost at least Tk. 24 lacs for last 10 years. In cross- examination this D.W. denied the suggestion that he violated the terms and conditions of the sanction letter. He further denied the suggestion that

since he used to lead indiscipline life and used to go to club and spent lot of money there in gambling by selling pledged goods, the bank was bound to keep the shop under lock and key.

Mr. Abdullah Al Manun learned Advocate appearing on behalf of the appellants submits that the learned Judge Artha Rin Adalat, Bogra could not appreciate the pleadings and the evidence adduced by the witnesses particularly P.W.1 to its proper perspective. He further submits that it appears from the evidence of P.W. 1 that on 09.4.1989 there was an outstanding dues against the defendant No. 1 for an amount of Tk. 6,49,750/- where as up to that date there were some goods in the godown which were valued at Tk. 4,41,719.80. Had it been so there was an outstanding dues for an amount of more that Tk. 2,00,800/-. The learned Judge, Artha Rin Adalat Bogra failed to consider the amount which was an outstanding dues to the

defendant and without considering this aspect of the case he dismissed the suit. The bank statement was not properly appreciated by the learned Judge, Artha Rin Adalat, Bogra. In the statement it appears that on 09.4.1989 there were an outstanding dues of Tk. 4,41,719.80 under cash credit pledge and an outstanding dues of Tk. 2,18,191 under the cash credit hypothecation to the defendant. But the learned Judge, Artha Rin Adalat could not also appreciate this aspect of the case and, as such, the judgment and decree passed by the learned Judge, Artha Rin Adalat, Bogra is liable to be set-aside.

Mr. Md. Harun-Ar-Rashid learned Advocate appearing on behalf of the respondent at the very outset submits that the suit is not maintainable as per section 12 of the Artha Rin Adalat Ain, because as per section 12 of the said Ain it has been stated that if there is any property mortgaged to the bank or any property is kept

under lien or pledge, the bank is under obligation to sell the property first and to adjust the same to the loan amount, but in this case the bank without selling and without taking any attempt to sell the pledge goods has filed this case and, as such, as per section 12 (1) and (2) of the Artha Rin Adalat Ain the suit is not maintainable.

He further submits that on 13.4.1989 when the godown was kept under lock and key by the bank, there were goods in the godown which were valued at Tk. 4,41,719.80. The plaintiff bank without adjusting this amount with the loan amount filed the case which is not at all maintainable and, as such, the Suit is liable to be dismissed.

We have gone through the pleadings of the parties, evidence adduced by the P.W.1 and D.W.1, the bank statements kept in the record and other materials on the records and we have also considered the provisions of

law. Now let us see what does law say. The section 12 (1) and (2) of the Artha Rin Adalat Ain run as follows :

> আর্থিক প্রতিষ্ঠান কর্তৃক কতিপয় জামানত বিক্রয়।-(১) উপ-ধারা (২)-এর বিধান সাপেক্ষে, কোন আর্থিক প্রতিষ্ঠান, উহার নিজ দখল বা নিয়ন্ত্রণে থাকা বিবাদীর কোন সম্পত্তি যাহা পণ বা বন্ধক (Lien or pledge) রাখিয়া ঋণ প্রদান করা হইয়াছে, এবং যাহা বিক্রয় করিবার আইনগত অধিকার বাদীর রহিয়াছে বা বাদীকে সমন্বয় না করিয়া, অর্থ ঋণ আদালতে কোন মামলা দায়ের করিবে না।
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> (২) উপ-ধারা (১)-এর বিধান সত্ত্বেও, কোন আর্থিক প্রতিষ্ঠান নিজ দখল বা নিয়ন্ত্রণে থাকা পণ বা বন্ধকী সম্পত্তি বিক্রয় না করিয়া মামলা দায়ের করিলে অনতিবিলম্বে উক্ত সম্পত্তি পূর্ব-বর্ণিত মতে বিক্রয় করিয়া বিক্রয়লব্ধ অর্থ ঋণের সহিত সমন্বয় করিবে এবং বিষয়টি আাদালতকে লিখিতভাবে অবহিত করিবে।

It appears that in sub-section 1 of section 12 of the Ain it has been stated that without selling the pledge goods the bank can not file any case against the debtor. In sub-section 2 of section 12 it has also been mentioned that if any bank files any case without selling the goods or property as the case may be, after filing the suit they will sell the goods and it would be adjusted with the loan amount.

Learned Advocates in this regard also referred sub-section 6 of section 12 of the Ain. Sub-section 6 of section 12 of Artha Rin Adalat Ain runs which as follows :

> (৬) কোন আর্থিক প্রতিষ্ঠান উপ-ধারা (২) ও (৩)- এর বিধান পালন না করিলে, আদালত স্ব-উদ্যোগে অথবা দায়িকের লিখিত আবেদনক্রমে, ডিক্রী প্রদান করিবার সময় উক্ত আর্থিক প্রতিষ্ঠান কর্তৃক উক্ত সম্পত্তির প্রদর্শিত মূল্যায়নের, যদি থাকে, সমপরিমাণ অর্থ মামলার দাবী হইতে বাদ দিয়া ডিক্রী প্রদান করিবে এবং প্রদর্শিত মূল্য না থাকিলে, আদালত, সম্পত্তির স্থানীয় অধিক্ষেত্রের সাব-রেজিষ্ট্রারের প্রতিবেদন গ্রহণ করিয়া, মূল্য নির্ধারণ করিবে এবং নির্ধারিত উক্ত মূল্যের সমপরিমাণ অর্থ মামলার দাবী হইতে বাদ দিয়া ডিক্রী প্রদান করিবে।

From sub-section 6 of the section 12 of the Ain, it appears that before passing the judgment and decree the Court has the power to order to sell the pledge goods or property mortgaged as the case may be and adjust the same with the outstanding loan. It appears to us that section 12 does not create any bar to file any suit or case against the debtor and, as such, it can not be said that the suit/case filed by the plaintiff bank was not maintainable.

We are of the opinion that as per section 12 of the Artha Rin Adalat Ain a suit can be filed without selling the pledge goods, but as per sub-section 6 of the section 12 of the Ain it is clear that before pronouncement of the judgment the court should have sold the pledged goods and after depositing the sell proceed to the bank the Court should have proceeded with the case. But the learned Judge, Artha Rin Adalat, Bogra without complying with the provisions of section 12 in toto has passed the judgment and decree and, as such, we are of the view that it is not a proper judgment and decree in the eye of law, which is liable to be set-aside.

Since from the evidence it appears that on 09.04.1989 there was an outstanding dues against the defendants. The value of pledge goods valued at Tk. 4,41,719.80 (as per inventory list prepared by the inspection team in presence of the defendant No. 1,) should have been deducted from the outstanding dues

of Tk. 6,49,750/- and after deduction of the said amount the outstanding dues should have been fixed against the defendant.

In the circumstances we are of the view that justice would be met if we send the case back on remand to the trial Court to calculate the actual dues receivable by the bank from the defendant No. 1 keeping in the mind that the plaintiff bank did not convert the account of the defendant No.1 to a block account ignoring the recommendation of the higher authority. The shop and the godown of the defendant was illegally kept under lock and key for 10/12 years as a result the defendant had to incur a huge financial loss. The plaintiff bank is liable for such losses of the defendant, which should be assessed and deducted from the total amount to be decreed. The trial court is also directed to consider that the suit was filed after a long laps of 4(four) years.

In the result the appeal is allowed.

For the aforesaid discussions and reasons the judgment and decree dated 06.04.2000 (decree signed on 10.04.2000) passed by the Subordinate Judge, Artha Rin Adalat, Bogra passed in Artha Rin Case No. 326 of 1994 dismissing the case is hereby set-aside and the case is sent back on remand to the learned trial court for fresh disposal in the light of observations as made above. The learned court is directed to dispose of the case as soon as possible preferably within 6(six) months form the date of receipt of the lower court record.

Send down the lower court records along with a copy of this judgment immediately to the court concerned.

Faruque Ahmed, J:

I agree.

Bilkis