

IN THE SUPREME COURT OF BANGLADESH  
APPELLATE DIVISION

**PRESENT:**

***Mr. Justice Hasan Foez Siddique, C.J.***

***Mr. Justice Obaidul Hassan***

***Mr. Justice M. Enayetur Rahim***

**CIVIL APPEAL NO.470-471 OF 2017**

(Arising out of Civil Petition for Leave to Appeal No.1143 of 2016 heard analogous with  
Civil Petition for Leave to Appeal No.1418 of 2016)

(From the judgment and order dated 27<sup>th</sup> day of January, 2016 passed by the High Court Division in Writ Petition No. 2458 of 2013)

Syed Jobayer Hossain : . . . Appellant  
(In C.A. No.470 of 2017)

M/S Green Valley Tourists . . . Appellant  
Resort Ltd. (In C.A. No.471 of 2017)

-Versus-

Judge, Artha Rin Adalat No.1, Dhaka : . . . Respondent  
and others (In C.A. No.470 of 2017)

Syed Jobyer Hossain and others : . . . Respondent  
(In C.A. No.471 of 2017)

For the Appellant : Mr. Fida M. Kamal, Senior Advocate  
(In C.A. No.470 of 2017) with Mr. Probir Neogi, Senior  
Advocate instructed by Mr. Md.  
Taufique Hossain, Advocate-on-  
Record

For the Appellant : Mr. Kamal-ul-Alam, Senior Advocate  
(In C.A. No.471 of 2017) instructed by Mr. Zainul Abedin,  
Advocate-on-Record

For the Respondent No.2 : Mr. Kamal-ul-Alam, Senior Advocate  
(In C.A. No.470 of 2017) with Mr. A.M. Aminuddin, Senior  
Advocate instructed by Ms.  
Madhumalti Chy: Barua, Advocate-  
on-Record

For the Respondent No.5 : Mr. Habibul Islam Bhuiyan, Senior  
(In C.A. No.470 of 2017) Advocate with Mr. Ariful Islam,  
Advocate instructed by Ms.  
Madhumalti Chy: Barua, Advocate-  
on-Record

For the Respondent Nos.1,3-4 & 6-10 : Not represented  
(In C.A. No.470 of 2017)

For the Respondent No.1 : Mr. Fida M. Kamal, Senior Advocate  
(In C.A. No.471 of 2017) with Mr. Probir Neogi, Senior Advocate instructed by Mr. Md. Taufique Hossain, Advocate-on-Record

For the Respondent Nos.2-9 : Not represented  
(In C.A. No.471 of 2017)

**Date of Hearing** : **The 16<sup>th</sup>, 17<sup>th</sup>, 23<sup>rd</sup> day of August, 2022 and**  
**Date of Judgment** **The 30<sup>th</sup> day of August,2022**

## **JUDGMENT**

**M. Enayetur Rahim, J:** These 2 (two) appeals, by leave, are directed against the judgment and order dated 27<sup>th</sup> January, 2016 passed by the High Court Division in Writ Petition No.2458 of 2013 making the Rule absolute in part.

The facts relevant for disposal of these appeals are that the writ respondent No.5, Eastern Bank ltd. instituted Title suit No.357 of 1988 in the Court of Subordinate Judge and Commercial Court No.1, Dhaka for realization of loan for a sum of Tk.18,26,444.05/- impleading the writ respondent Nos.4 and 6-9. The said suit was subsequently transferred to the Artha Rin Adalat No.3, Dhaka (**hereinafter referred to as Adalat**) and renumbered as Title suit No.198 of 1990.

The Adalat, after hearing the parties, decreed the suit on 06.06.1992. The decree-holder bank filed Title Execution case No.07 of 1994 (later, renumbered as Artha Jari case No.71 of 2007) for executing the said decree.

The Adalat issued summons and also ordered to serve notices upon the judgment debtors by publication in widely circulated daily news papers. So many dates were fixed for holding auction of the scheduled property but auction was not held. After exhausting all legal process under sub-section (1) and (4) of section 33 of the Artha Rin Adalat Ain, 2003 (herein after referred as Ain) the Adalat issued certificate under section 33(5) of the Ain in favour of the decree holder bank. After obtaining certificate, the bank issued notice for holding auction of the mortgaged property. The appellant of civil appeal No.470 of 2017 (writ petition) and his sister (writ respondent No.10) participated in the said auction and being the highest bidder their offer was accepted by the decree-holder bank, and accordingly, a registered sale deed being No.26431 of 2008 was executed in their favour. Thereafter, the bank filed an application before Artha Rin Adalat No.2, Dhaka for issuing writ of delivery of possession and, on 23.11.2009, the bank got possession of the property through court and handed over possession to the auction purchasers. Eventually, (the writ respondent Nos. 2 and 3 appellants of Civil Appeal No.471 of 2017) filed an application under order XXI rules 100 and 101 of the Code of Civil Procedure read with section 32 of the Ain in Artha Jari Case which was registered as Miscellaneous Case No.07 of 2010. The Miscellaneous Case was subsequently transferred to the Artha Rin Adalat No.1, Dhaka and after hearing the parties, the Adalat allowed the Miscellaneous Case and thereby, cancelled the

certificate issued under section 33(5) of the Ain and the auction sale held under the authority of the said certificate was also set aside. Against which, the auction purchaser, appellant of C.A. No.470 of 2017 filed writ petition No.2458 of 2013 before the High Court Division.

The appellants of civil appeal No.471 of 2017 (writ respondent No.2 and 3) contested the Rule by filing affidavit-in-opposition contending, *inter alia*, that the decree holder bank filed Title suit No.357 of 1988 and got decree, and the said decree was put in execution. In execution case, auction notice for sale of the scheduled property was published in national dailies but no bidder was turned up. At this stage, the decree holder bank filed a petition praying for amendment of the schedule of property for inclusion of 2.80<sup>1/2</sup> acres instead of the scheduled 9.30 acres. Said application was allowed on 25.01.2005. Then the bank, obtaining certificate under section 33(5) of the Ain, sold the said land in auction and the appellants of C.A. No.470 of 2017 and his sister (writ respondent No.10) auction purchased the same. It was further contended that the writ respondent No.2 is the absolute owner and possessor of the land measuring 2.81 acres appertaining to C.S. Khatian No.135, S.A. 290, R.S. Khatian No.518, C.S. and S.A. Plot No.139, R.S. Plot No.327 by way of purchase. The writ respondent No.4, Rina Humayan transferred the said property along with other land to one Mohammad Mohsin by different registered sale deeds in the year 1986 and 1994. Mohammad Mohsin gifted

the said land to his wife respondent No.3 by a registered deed of gift No.6267 dated 15.04.1999 who mutated her name in Mutation Case No.7725/98-99. Subsequently, writ respondent No.3 transferred the said land to writ respondent No.2 by a registered deed No.6507 dated 20.04.2000. Respondent No.2 obtained loan of Tk. 2,28,00,000/- from Sonali Bank for establishing a tourist resort therein and mortgaged the said land to Sonali Bank by registered mortgage deed No.6509 dated 20.05.2000, and handed over all original deeds and other relevant papers to Sonali Bank. Respondent No.2 had been in possession of the said property till 30.11.2009 when writ respondent No.5 with the aid of police force and pursuant to the order of the Court took over possession of the same. Managing Director of writ respondent No.2 filed writ petition No.8354 of 2009 which was disposed of by the High Court Division by a judgment and order dated 09.12.2009 directing the writ respondent No.5 Bank not to transfer the said land to anybody till 5 January, 2010 observing that the remedy available to company was under section 32 of the Ain. The writ respondent No.2 Company is a bonafide purchaser for value and was not aware of the alleged mortgage. The Artha Rin Adalat No.1, Dhaka, on correct appreciation of facts and evidence, allowed the miscellaneous case in favour of writ respondent Nos. 2 and 3.

The High Court Division by the impugned judgment and order, made the Rule absolute in part declaring the impugned order No.212 dated 28.11.2012 passed in

Miscellaneous case No.07 of 2010 so far it relates to setting aside the certificate issued on 24.07.2007 under section 33(5) of the Ain and auction sale illegal and without lawful authority discharged the Rule in respect of restoration of possession.

Against the said judgment and order, the writ petitioner, auction purchaser Syed Jobayer Hossain filed civil petition for leave to appeal No.1143 of 2016 which has given rise C.A. No.470 of 2017 and writ respondent No.2 and 3 filed civil petition for leave to appeal No.1418 of 2016 which gave rise C.A. No.471 of 2017.

Mr. Fida M. Kamal, learned Senior Advocate, appearing with Mr. Probir Neogi, learned Senior Advocate, submits for the appellant in Civil Appeal No.470 of 2017 that the High Court Division was ex facie wrong making the Rule absolute in part in respect of certificate issued under section 33(5) of the Artha Rin Adalat Ain and auction sale held by the bank by virtue of that certificate and discharging the Rule in respect of restoration of possession of the same land which was sold in auction by the bank inasmuch as maintaining the certificate and sale in one hand, and restoration of possession to the claimants dispossessing the auction purchaser from the same land purchased by him cannot be sustained together, so the impugned judgment and order so far it relates to discharging the Rule in respect of restoration of possession is liable to be set aside.

Mr. Kamal further submits that having regard to the letters of Rule 100 of Order XXI of the Code of Civil

Procedure, the claimant in the miscellaneous case being admittedly transferee from the judgment debtors, the application under order XXI, Rule 100 was not maintainable, the High Court Division erred in law in maintaining restoration of possession of the case property in favour of the claimants.

He also submits that as per provision of section 33(9) of the Artha Rin Ain 2003, the execution case was finally disposed of by operation of law on 24.07.2007, which was recorded by the executing court by order No.220 dated 24.07.2007 and as such, the execution proceeding being non-est, the application under order XXI, Rules 100 and 101 of the Code of Criminal Procedure of after 03(three) years in 2010 was not maintainable and that the bank having sold the case property on the strength of certificate granted under section 33(5) of the Artha Rin Adalat Ain and received the sale proceeds from the auction purchaser-appellant-writ petitioner and put him into possession, the High Court Division is erred in law in holding that it was not concerned with restoration of possession in favour of the claimant disposing the auction purchaser is ex-facie against law and equity.

Per contra, Mr. Kamal-ul-Alam, learned Senior Advocate, appearing for the appellant of Civil Appeal No.470 of 2017 (writ respondent No.2) submits that it is a established principle of law to the effect that a court of law has always inherent jurisdiction to set aside its order when it is obtained by practicing fraud and by abusing the process of court and the executing court set

aside the certificate and the auction sale of the mortgage property there under upon categorical finding to the effect that 9.30 acres of land was mortgaged property in other suit No.194 of 1990 but in the Memorandum of Deposit of Title deed the mortgaged property was shown as 2.80<sup>1/2</sup> acres by overwriting, consequently, the learned judges of the High Court Division were wrong in law in passing the impugned judgment and order is not passing the order for restoration of possession of the writ-respondent No.2.

Mr. Alam further submits that the principle of law to the effect that a property which is not mortgaged or attached in accordance with the provisions of law cannot be lawfully auction sold and having further regard to the categorical findings of the executing court to the effect that 2.81 acres of the disputed land as inserted in the schedule of mortgaged land by way of amendment of the plaint was never lawfully mortgaged and attached, and as such could not be auction sold, the High Court Division erred in law in not holding that the executing court has inherent jurisdiction to set aside the auction sale.

He lastly submits that the High Court Division having itself found that since the writ petitioner being an auction purchaser has alternative efficacious remedy under Order XXI Rule 103 of the Code of Civil Procedure, against the impugned order of the Executing court so far as it relates to the adjudication of prayer (A) of the miscellaneous case for restoration of possession, the writ petition is not maintainable, the High Court



Division erred in law in making the rule absolute in part declaring the impugned order of the Executing court so far as it relates to the adjudication of prayer 'B' of the miscellaneous case for setting aside the certificate issued on 24.07.2007 under section 33(5) of the Ain and the subsequent auction sale there under as without jurisdiction.

Mr. Habibul Islam Bhuiyan, learned Senior Advocate, appearing for the respondent Bank has made his submission in the line of the learned Advocate for the Appellant of C.A. No.470 of 2017.

We have considered the submissions of the learned Advocates for the respective parties, perused the impugned judgment and order passed by the High Court Division as well as the Adalat and the documents placed before us by the parties.

Let us decide the issue whether the Miscellaneous Case under rules 100 and 101 of order XXI of the Code of Civil Procedure filed by the appellant of Civil Appeal No.471 of 2017 was maintainable.

The Respondent No.4, Rina Humayun in appeal No.470 of 2017 (defendant No.5 in the Original Suit) mortgaged her property as described in the schedule to the plaint to the decree holder bank to secure loan in favour of the writ Respondent Nos.6-9 (defendant Nos.1-4 in the original suit). The mortgaged deed was executed on 25.05.1982. The Respondent Rina Humayun contested in the original suit and it was her case that she never mortgaged the property in question to the bank to secure loan for the loanee

defendants. The said Rina Humayun also examined herself before the trial Court and adduced evidence. The Adalat after considering the evidence of the respective parties decreed the suit and has observed to the effect that:

“নেং বিবাদিনী আর্জির তফশীলি তাহার নামীয় জমি বন্ধক দান অস্বীকার করিলিও জেরায় তাহার সম্পাদিত ব্যক্তিগত গ্যারান্টিপত্র প্রদর্শনী (৯ খ) এবং memorandum of deposit of title deed এর স্বাক্ষর স্বীকার করিলি। বাদী ব্যাংক তাহার অন্য ব্যবসা থাকা ইত্যাদি বিষয়ি তিনি লিখিত জবাব দাখিল করিলি নাই। সুতরাং আইন অনুযায়ী উহা বিবিচ্য না হওয়ায় নাকচ করা হলি। নেং বিবাদিনীর স্বীকারোক্তির পরিপক্ষিত্ত এবং বাদী ব্যাংকের দাখিলকৃত কাগজাদির ভিত্তিতে আর্জির তফশীলি বর্ণিত ঋণের বিপরীত্ত দায়বদ্ধ হিসাব গ্রহন করা হলি।”

Respondent Rina Humayun did not challenge the said judgment and decree and the observations and findings made against her before the Higher Court and as such the above findings have remained as it is; though she took the same plea in Miscellaneous Case No.07 of 2010 filed by the appellant of Civil Appeal No.471 of 2017.

Thus, it is the admitted position that respondent Rina Humayun mortgaged the property in question by a mortgaged deed dated 25.05.1982 to the decree holder bank and the said mortgage was valid and legal one.

From the record, it reveals that after mortgaging the property in question in favour of the bank, said Rina Humayun allegedly transferred the property in question in favour of Mohammad Mohsin in the year 1986 by executing and registering different deeds and thereafter said Mohammad Mohsin transferred the property in question to his wife Ms. Samortha Khandakar by executing a registered

Heba Bil Ewag deed being No.6267 dated 15.04.1999. Thereafter, said Samortha Khandokar transferred the property in question to the appellant of C.A. No.471 of 2017 on 20.04.2000 by a registered deed. The Adalat categorically hold that property in question was mortgaged by Rina Humayun in favour of the bank in the year 1982. In view of the above, the subsequent transfer by Rina Humayun to Mohammad Mohsin, Mohammad Mohsin to Samantha Khandoker and Samantha Khandaker to the appellant of Civil Appeal No.471 of 2017 cannot be treated as valid and legal transfer and such transfer did not create any right, title and interest in favour of the appellant of Civil Appeal No.471 of 2017. After mortgaging the property in question to the bank, subsequent transfer of the same to others without the consent of mortgagee bank by the mortgagor without the view of repaying the loan is nothing, but a fraudulent act and it is by now well settled that fraud vitiates everything.

Rule 100 of order XXI of the Code of Civil Procedure runs as follows:

"100. (1) where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

And under 102 of the said order runs as follows:

102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person."

Having regard to the fact that in the instant case the appellant of Civil Appeal No.471 of 2017 has stepped into the shoes of judgment debtors/mortgagor.

Rule 101 requires of an executing court to investigate in order to be satisfied as to whether the applicant was in possession of the property as complained of and, secondly, if such claimant was in possession on his own account or on account of some person who was not the judgment-debtor.

In the instant case Respondent Rina Humayun, transferred the property in question on 18.01.1986 long after the property was changed/encumbered against the loan obtained on 06.05.1978 and on 24.04.1997 respectively, as such the claimant (appellant of C.A. No.471 of 2017) was not in possession of the property in question of his own account or on account of some persons other than the mortgagor/judgment-debtor.

We also constrain to hold that resistance or obstruction in execution of decree for possession of immovable property cannot be put by a transferee, because a transferee from judgment debtor is presumed to be aware of mortgage of the property and the pendency of the proceeding before a Court and he should be careful in purchasing a property which is the subject matter of the litigation or mortgage. If any unfair, inequitable or underserved protection is afforded to a transferee pendente lite, the decree holder will never be able to realize the fruits of the decree.

Having discussed and considered as above, we have no hesitation to hold that the Miscellaneous Case under order 21 Rule 100 of the Code of Civil Procedure filed by the appellant of Civil Appeal No.471 of 2017 was not maintainable as the said appellant has stepped into the shoes of the mortgagor/judgment-debtor and he was not in possession on his own account or other than the mortgagor.

In deciding the merit of the Rule the High Court Division has observed that:

"Inquiry contemplated under rules 100 and 101 is restricted to the question of possession only and the question of title or question regarding construction of the decree cannot be gone into. CPC provides specific provisions to challenge the Certificate issued under section 33(5) of the Ain and the auction sale held thereunder. In the Miscellaneous Case, those provisions were not invoked. Rules 100 and 101 as well as section 32 of the Ain do not confer any jurisdiction upon the court below to set aside the certificate issued under section 33(5) of the Ain, 2003 and the subsequent auction sale held thereunder. Adjudication of the Miscellaneous Case, so far as it relates to this issue, is without jurisdiction. Jurisdiction of a Court goes to the very root of a matter brought before it and if the court got no jurisdiction, everything shall fall through. The court, which got no jurisdiction over a matter shall not go into the merit of the matter (Managing Director, Rupali Bank Ltd. and others vs. Tafazal Hossain and others, 44 DLR (AD0 260))."

However, the High Court Division discharged the Rule so far as it relates to the order of restoration of

possession as passed by the Adalat in favour of the Appellant (C.A. No.471 of 2017). When the application under order XXI rule 100 is not maintainable, then the other consequential relief(s) granted by the Court/Adalat on the said application is non-est in the eye of law and thus, the High Court Division committed error of law in discharging the Rule in not declaring the same illegal and without lawful authority.

Mr. Kamalul Alam, learned Advocate, for the appellant of Civil Appeal No.471 of 2017 has tried to convince us that after amendment of the schedule of the execution case the property in question was not lawfully mortgaged and attached and as such the auction sale as well as the transfer of the property to the decree holder bank under section 33(5) of the Artha Rin Adalat Ain is absolutely illegal.

It transpires from the record that the bank after institution of the title suit on 03.02.1991 filed an application before the Adalat under order 6 Rule 17 read with section 151 of the Code of Civil Procedure for amendment of the plaint including the schedule of the plaint and accordingly the Adalat upon hearing the respective parties by its order dated 10.03.1991 allowed the application holding inter-alia that:

“ বিবাদীর আপত্তি না থাকায় মঞ্জুর করা হলো। আর্জি ও রেজিস্ট্রার সংশোধন করা হোক।

২৭/০৩/১৯৯১ ইং চূড়ান্ত শুনানী। ইতিমধ্যে বিবাদী ও জবাব দাখিল করিত্ত পারি। ”

In view of the above, it is abundantly clear that the schedule of the plaint in respect of the land was amended without any objection of the defendants and

eventually in the execution case the correction was made to that effect. From the record it also transpires that the bank on 12.06.1989 filed an application for attachment of the property in question and the defendants contested the said application by filing written objection and the learned Sub-ordinate judge by its order dated 22.10.1990 passed an ad-interim order of attachment and thereafter, hearing the parties by an order dated 29.08.1990 attached the property in question till disposal of the suit. None of the defendants including defendant No.5, Rina Humayun, the mortgagor did take any step before the Higher forum against such attachment of the property in question.

Thus, we do not find any force in the submission of Mr. Alam that the property in question was never mortgaged or attached before putting the same in auction. We have already noticed that before adducing the evidence of respective parties, the plaint including the schedule of the plaint was amended and that was accepted by the defendants. As such, the property in question which was duly mortgaged and attached by the Adalat concerned. In the execution process the said property was transferred to the decree holder bank as per provision of section 33(5) of the Artha Rin Adalat, which was subsequently purchased by the appellant (Civil Appeal No.470 of 2017) through auction.

As we have already held that the Miscellaneous case under order XXI rule 100 filed by the appellant of Civil Appeal No.471 of 2017 was not maintainable; thus, we do



not find any necessity to decide the issue whether the appellant of Civil Appeal No.470 of 2017 has got other remedy or not.

Having considered and discussed above, we find merit in Civil Appeal No.470 of 2017 and do not find any merit in Civil Appeal No.471 of 2017.

Accordingly, Civil Appeal No.470 of 2017 is allowed and Civil Appeal No.471 of 2017 is hereby dismissed. The judgment and order dated 28.11.2012 passed by the Artha Rin Adalat in Miscellaneous Case No.07 of 2010 under order 21 Rule 100 is hereby set aside.

C.J.

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