

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

WRIT PETITION NO. 3127 OF 2009

IN THE MATTER OF

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

-AND-

IN THE MATTER OF:

Md. Enayet Hossain  
... Petitioner

-Versus-

Artha Rin Adalat, Narayangonj and  
others

... Respondents

Mr. Shah Muhammad Ezaz Rahman with  
Mr. Mohammad Ayub Ali, Advocates

.....For the petitioner

Mr. M. Sayeed Ahmed, Senior Advocate with  
Mr. Md. Tajul Islam, Advocate

..... For the respondents No. 3 and 4

Heard on 01.12.2022

Judgment on 04.12.2022

Present:  
Mr. Justice J.B.M. Hassan  
and  
Mr. Justice Razik-Al-Jalil

J.B.M. Hassan, J:

By filing an application under Article 102 of the Constitution,  
the petitioner obtained the Rule Nisi in the following terms:

“Let a Rule Nisi be issued calling upon the  
respondents to show cause as to why the Order No.  
15 dated 30.03.2005 and decree dated 30.03.2005  
passed by the respondent No. 1, Artha Rin Adalat,  
Narayangonj, in Artha Rin Suit No. 300 of 2004

(Annexure-B and B-1) and the proceeding of Artha Execution Case No. 348 of 2005 and the Order No. 25 dated 16.03.2009 passed therein by the respondent No. 1, Judge, Artha Rin Adalat, Narayangonj (Annexure-D), should not be declared to have been made 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.”

Subsequently, by order dated 01.11.2010 the petitioner also obtained a supplementary Rule Nisi calling upon the respondents to show cause as to why the order No. 29 dated 15.04.2009 passed by the Artharin Adalat, Narayangonj in Artha Execution Case No. 348 of 2005 rejecting an application under Order XXI Rule 89 of the Code of Civil Procedure should not be declared to have been passed without lawful authority and is of no legal effect.

Relevant facts leading to issuance of Rule Nisi and supplementary Rule Nisi are that the Manager, Agrani Bank Limited, Kanchan Branch, Rupgonj, Narayangonj (respondent-Bank) instituted Artha Rin Suit No. 300 of 2004 before the Artha Rin Adalat (Joint District Judge), Narayangonj for recovery of loan amounting to Tk.17,59,920.20 as on 31.03.2004 with up to date interest. Ultimately the suit was decreed exparte on 30.03.2005 (decree signed on 30.03.2005) for the aforementioned amount with interest till recovery. Thereafter the decree-holder Bank filed Artha Execution Case No. 348 of 2005 for recovery

of decretal dues. In the execution proceeding, the mortgaged property was put on auction and the respondents No. 3 and 4 jointly became highest bidders with their offer at Tk.8,60,000/-. The bid was accepted by the impugned order dated 16.03.2009. Thereafter, the judgment-debtor filed an application on 15.04.2009 under Order XXI Rule 89 of the Code of Civil Procedure (**“the Code”**) depositing Tk.7,94,000/-. The application was rejected by the impugned order (in supplementary Rule) dated 15.04.2009 on the ground that the petitioner did not deposit the required balance dues in accordance with Rule 89 of the Code. In this backdrop, challenging the decree dated 30.03.2005 and the order dated 16.03.2009 passed in the execution proceeding accepting the bid, the petitioner filed the writ petition and obtained the Rule Nisi. Thereafter, the petitioner obtained supplementary Rule Nisi challenging the order dated 15.4.2009 rejecting application under Order XXI Rule 89 of the Code.

Mr. Shah Muhammad Ezaz Rahman, learned Advocate for the petitioner submits as follows:

- (i) The principal amount was Tk.4,00,000/- while the suit was filed for Tk.17,59,920.20 and thereby, the claim being more than 200% interest on the principal amount, the suit was on the face of it illegal in accordance with section 47 of the Artha Rin Adalat Ain, 2003 (the Act, 2003).

- (ii) At the time of filing application for setting aside the sale under Order XXI Rule 89 of the Code, the petitioner deposited Tk.7,94,000/- towards compliance of the requirement (a) of Rule 89 and instantly the petitioner could not deposit in terms of sub-rule (b) of Rule 89. But ultimately petitioner repaid entire liabilities with the consent of the Bank and the mortgaged property was redeemed and thereby the execution case has been concluded setting aside the sale in accordance with Order XXI Rule 89 of the Code.
- (iii) At the time of issuance of the Rule Nisi, as per direction of this Court the petitioner paid Tk.2,00,000/- and subsequently, adjusted the entire liabilities negotiating with the Bank in accordance with section 45 of the Act, 2003.
- (iv) Bid money deposited by the respondents No. 3 and 4 (auction purchasers) are lying with the Court and the possession of the property has never been handed over to the auction-purchasers. Therefore, considering the stage of execution proceeding, there is scope, even after confirmation of sale, to compromise in accordance with section 45 of the Act, 2003.
- (v) The Adalat directed to publish auction notice in two newspapers but the respondent-decree-holder Bank did not comply with the said direction and so the property was sold at a very shockingly low price in an irregular manner.
- (vi) After confirmation of sale, considering all aspects the Appellate Division has done complete justice returning back the property to the judgment-debtor giving solatium to the auction purchaser and this authority can be exercised even by the High Court Division exercising section 57 of the Act, 2003.

In support of his submissions, learned Advocate refers to the case of Md. Mitul Mollah Vs Abul Khayer Mollah and others reported in 28 BLT (AD) 278; the case of Abdul Malek (Md) Vs

Md. Asaduzzaman Belal and others reported in 67 DLR (AD) 146; the case of Habibur Rahman Miah Vs The learned Judge of the Artha Rin Adalat, Pabna and others reported in 28 BLT (HCD) 7 and the case of A.B. Mannaf Sheikh (Md) Vs. 1<sup>st</sup> Joint District Judge Court and Artha Rin Adalat and others reported in 19 BLC (HCD) 493.

On the other hand, learned Advocate for the respondents No. 3 and 4 (auction purchasers) by filing affidavit-in-opposition and supplementary affidavit contends as follows:

- (a) The suit was filed on 8.4.2004 while section 47 came into effect on 1.5.2004 and as such there was no illegality in filing the suit and passing the decree imposing interest more than 200%. Moreover, non application of section 47 of the Act, 2003 in the suit, cannot be raised in the writ petition except for an appeal in the appellate forum.
- (b) The sale was accepted on 16.3.2009 and it was made absolute by the order dated 15.4.2009. Long thereafter, by filing writ petition the petitioner obtained the Rule Nisi on 10.05.2009. Therefore, after making the sale absolute, the Artha Rin Adalat being functus officio can not set aside the auction sale.
- (c) The application was filed for setting aside the auction sale under Order XXI Rule 89 of the Code. But the requirement to deposit the entire liabilities as per sub-rule (a) and (b) of Rule 89 having not been complied with, the Adalat rightly rejected the application which does not call for any interference by this Court.
- (d) Before filing writ petition, the sale was confirmed and made absolute. But the petitioner did not disclose those facts at the time of filing the writ petition. Due to which the High Court Division at the time of issuance of the Rule directed to pay Tk.2,00,000/- and

so the petitioner deposited the money at his own risk suppressing the facts in filing the writ petition.

- (e) The auction purchasers paid full bid amount in the year, 2009. Thus, after confirming the sale, the respondents No. 3 and 4 took possession of the property and they are now possessing the property mutating their names relating to the purchased property.

In support of his submissions, learned Advocate refers to the case of Sonali Bank Vs Artha Rin Adalat and others reported in 62 DLR (AD) 231; the case of Sonali Bank, Sadarghat Corporate Branch, Dhaka Vs Mrs. Hazera Islam and others reported in VI ADC 975; the case of Sk. Mohiuddin Vs Joint District Judge and Artha Rin Adalat No. 3, Dhaka and others reported in 13 MLR (AD) 356 and the case of Feroza Begum Vs Artha Rin Adalat No.4, Dhaka and others reported in 36 BLD (AD) 31.

Although, the Bank (decree holder) appeared by filing affidavit-in-opposition but at the time of hearing of the Rule Nisi, no one appears on behalf of the Bank.

We have gone through the writ petition, affidavits-in-opposition separately filed by the Auction Purchasers (respondents 3/4) and the Bank. Supplementary affidavits filed by all the contending parties as well as the cited cases.

Three issues have been raised under this Rule Nisi. **Firstly**, Decree of the artharin suit has been questioned raising provision of section 47 of the Act, 2003. **Secondly**, propriety of

the order dated 16.03.2009 accepting highest bid has been questioned and **thirdly**, the order dated 15.04.2009 has also been impugned by which petitioner's application under Order XXI Rule 89 of the Code was rejected. Therefore, we are addressing those issues in the following manner:

To address the first issue we have gone through section 47 of the Act, 2003 which runs as follows:

“৪৭। দাবী আরোপে সীমাবদ্ধতাঃ (১) বর্তমানে প্রচলিত অন্য কোন আইন বা পক্ষগণের মধ্যে সম্পাদিত সংশ্লিষ্ট চুক্তিতে যাহাই থাকুক না কেন, এই আইনের অধীন মামলা দায়েরের ক্ষেত্রে, কোন আর্থিক প্রতিষ্ঠান কোন ঋণ গ্রহীতাকে প্রদত্ত আসল ঋণের উপর দায় এমনভাবে আরোপ করিয়া আদালতে মামলা দায়ের করিবে না, যাহাতে আদালতে উত্থাপিত উক্ত সমুদয় দাবী আসল ঋণ অপেক্ষা ২০০% (১০০+২০০=৩০০ টাকা) এর অধিক হয়।

(২) উপ-ধারা (১) এ বর্ণিত মতে আসল ঋণ অপেক্ষা ২০০% এর অধিক অনুরূপ দাবী আদালত কর্তৃক গ্রহণযোগ্য হইবে না।

(৩) এই ধারার বিধানটি এই আইন বলবৎ হইবার এক বৎসর পর কার্যকর হইবে:

তবে শর্ত থাকে যে, কোন আর্থিক প্রতিষ্ঠান, ইচ্ছা করিলে, এই ধারা কার্যকর হইবার পূর্বেই, এই ধারার বিধান অনুসরণ করিতে পারিবে-”

Sub section (1) and (2) of section 47 debar the plaintiff to claim in the suit more than 200% interest on the principal amount. But sub-section (3) of the said provision provides that section 47 will take effect one year after the Act came into effect. The Act, 2003 came into effect on 01.05.2003 and so, the effect of section 47 was scheduled to have come into effect on 01.05.2004. But the present artharin suit was filed on 8.4.2004. Although there is a proviso giving discretion to the creditor-bank for waiving interest as per section 47 within that one year but

non exercise of such discretion shall not make the suit illegal. Therefore, we do not find any illegality in claiming interest beyond 200% in the suit inasmuch as the loan was disbursed long back in 1991. Moreover, it is not the forum to raise this issue.

To consider the 2<sup>nd</sup> and 3<sup>rd</sup> issues as pointed above, we have gone through both the impugned orders dated 16.03.2009 and 15.04.2009. By the order 16.03.2009 the highest bid of respondents No. 3 and 4 (auction purchasers) was accepted. Although, the decree holder bank objected the highest offer claiming low price but the Adalat giving cogent reason rejected the objection and accepted the bid inasmuch as objection was not filed by any Bank's representative in accordance with law and that the highest offer was above the Bank's proposed value. However, the Bank has not challenged the said order before any higher forum.

Furhter, the judgment debtor (petitioner) also did not challenge the said bid or auction by filing miscellaneous case under Order XXI Rule 90 of the Code of Civil Procedure (CPC) alleging low price or irregularity or fraud in conducting auction. Rather, the judgment debtor (petitioner) filed application under Order XXI Rule 89 of the Code to set aside auction sale by depositing entire liability and compensation, which being

rejected by the impugned order dated 15.04.2009 has been challenged, which is 3<sup>rd</sup> issue under this Rule Nisi. Moreover, application under Order XXI Rule 89 of the Code having been opted and filed, at the same breath, the petitioner can not file application under Order XXI Rule 90 of the Code in view of Order XXI Rule 89 (2) of the Code.

To appreciate the submissions of the learned Advocates for determining the propriety of the impugned order dated 15.04.2009 rejecting the application under Order XXI Rule 89 of the Code, let us first read the relevant provisions of Order XXI Rule 89 of the Code which run as follows:

“89. Application to set aside sale on deposit (1) Where immovable property has been sold in execution of a decree, any person, either owing such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court-

- (a) for payment to the purchaser, a sum equal to five percent of the purchase-money, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”

Pursuant to aforesaid provisions to file an application, the judgment-debtor is required to deposit 5% of the proclamation amount as compensation for the auction purchaser and also to deposit entire liabilities as mentioned in the sale proclamation. The said amount has to be deposited within one month from the date of sale in accordance with Rule 92 (2) of the Order XXI of the Code. Admittedly, the petitioner did not deposit the required amount in compliance to the said provision considering which the Adalat rejected the application by the impugned order dated 15.04.2009. Therefore, we do not find any illegality in passing the impugned order dated 15.04.2009 by the Adalat rejecting the application under Order XXI Rule 89 of the Code.

This view of ours finds support from the case of Mohammad Golam Azam Vs The Government of Bangladesh represented by the Secretary, Ministry of law, Justice and Parliamentary Affairs and others reported in X ADC (2013) page 417 wherein the Apex Court held as under:

“14. The High Court Division came to a finding that there was no scope for setting aside the auction sale without payment of decretal amount and that admittedly the petitioner deposited only 5% of the price of the auction sale and that the petitioner did not pay the decretal amount as mentioned in the proclamation of sale according to law.

15. The findings arrived at and the decision made by the High Court Division having been made on proper appreciation of law and fact do not call for interference.”

Mr. Shah Muhammad Ezaz Rahman, learned Advocate submits that although the requirement of deposit of entire liabilities in accordance with Order XXI Rule 89 of the Code was to be made within 30 days from sale but the present Rule Nisi being pending before the High Court Division regarding the same issue, the petitioner had the scope to deposit money during pendency of the Rule and that during that period the petitioner has adjusted the liabilities and thereby compliance have been made as per requirement of Order XXI Rule 89 of the Code.

To appreciate the submission, we have examined Rule 92 of Order XXI of the Code which runs as follows:

“92. (2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.”

Rule 92(2) requires deposit under rule 89 within 30 days from the sale. Non compliance of such requirement the application was disallowed, sale was confirmed and thereupon it became absolute in accordance with Rule 92(1) of the Code.

We find that the auction bid was accepted on 16.3.2009 and thereafter the petitioner filed the application for setting aside auction

sale resorting to Order XXI Rule 89 of the Code but he did not comply with the condition precedent depositing entire liabilities and after 30 days from the sale, as per law the Court made the sale absolute. The sale was confirmed on 15.04.2009 and sale certificate was issued and registered.

Thus, while the transaction became closed, the petitioner came before this Court by filing writ petition and obtained the Rule Nisi on 10.5.2009. Therefore, at this stage, it cannot be said that the petitioner got scope to adjust the liabilities availing the provisions of Rule 89 of the Code. Although at the time of issuance of the Rule Nisi this Court directed the petitioner to deposit Tk.2,00,000/- but in the four corners of the writ petition, we do not find that the petitioner ever stated that before moving the writ petition, the sale was made absolute and thus non-disclosing the real facts, the petitioner obtained the order to deposit the money and that being so, it was deposited at his own risk.

Now at the fag end of hearing, learned Advocate for the petitioner submits that the auction notice was published in one newspaper instead of two newspapers as directed by the Adalat and the price was shockingly low. But it is not the petitioner's case before us or before the Artha Rin Adalat, because there was no such application filed before the Artha Rin Adalat under Order XXI Rule 90 of the Code alleging fraud or irregularity or shockingly low price of the auction sold property. Further, filing of application under Rule

89 being opted, the application under Rule 90 can not be filed in view of Rule 89(2). So much so, from the order sheet we find that auction sale was confirmed and made absolute in accordance with Order XXI Rule 92 of the Code. Thereafter, the Adalat issued sale certificate which was ultimately registered before the concerned Sub-Registrar.

There are series of decisions of our Appellate Division that after confirming the sale and issuance of sale certificate, the Artha Rin Adalat becomes *functus officio* and it has no scope to interfere with the sale. We find the cited cases reported in VI ADC 97; 62 DLR (AD) 231; 36 BLD (AD) 31; 13 MLR (AD) 356. In all those cases, the Apex Court held that after making the sale confirmed/absolute there is no scope to interfere with the auction sale.

Mr. Rahman again submits that the petitioner has not yet handed over possession to the auction purchasers and the auction money is still lying with the Court. In the circumstances, the Adalat can interfere with the sale considering the payment of entire decretal dues. The respondents No. 3 and 4 (auction purchasers) claim that they have got the possession of the property without court's interference.

Yet, relying upon the case reported in 36 BLD (AD) 31 the High Court Division in the case of Bank Asia Limited Vs Judge, Artharin Adalat, Chattogram and others case reported in 71 DLR

(HCD) 338 held that non delivery of possession to the auction purchaser, is not material in making the sale absolute and closed in the execution case. If the auction purchaser needs possession through Court in that case he can file proper application before the Artha Rin Adalat under section 33(7ka) of the Act, 2003 and in that case the Adalat can pass appropriate order directing the judgment-debtor or possessor or the owner to hand over possession to the auction purchaser. But this position as to non-delivery of possession will no way help the petitioner to question the auction sale as well as to set aside the auction sale when a right to property was accrued in favour of bonafide purchaser for value long back in 2009.

Finally, Mr. Rahman submits that since the liability has been adjusted with the Bank and the Bank in the meantime executed a deed of redemption and that auction money are lying with the Court. At this stage, this Court can consider the whole matter within the ambit of complete justice as the Appellate Division held in the cases reported in 28 BLT (HCD) 7; 28 BLT (AD) 278; 67 DLR (AD) 146 and 19 BLC (HCD) 493.

Referring to the case of 19 BLC (HCD) 493 he submits that exercising the inherent power of the Court under section 57 of the Act, 2003 the High Court Division can give such relief setting aside the auction sale giving appropriate solatium to the auction purchaser.

Before addressing on this point let us first examine the section 5(4) of the Act, 2003 which runs as follows:

“8। The Transfer of Property Act, 1882 অথবা বর্তমানে প্রচলিত অন্য কোন আইনে বিপরীত যাহা কিছুই থাকুক না কেন, উপ-ধারা (৩) এর অধীন বন্ধকী মামলা ব্যতিরেকে, এই আইনের অধীন দায়েরকৃত কোন মামলায়, আদালত কর্তৃক প্রদত্ত ডিক্রী বাদী আর্থিক প্রতিষ্ঠানের পক্ষে নিষ্ক্রিয় সমাপ্তির (Foreclosure) প্রাথমিক ডিক্রী হিসাবে গণ্য হইবে; এবং ঋণের বিপরীতে বাদীর অনুকূলে বন্ধকী স্থাবর সম্পত্তি ডিক্রীর ধারাবাহিকতায় নিলাম বিক্রয় হওয়া মাত্রই উক্ত প্রাথমিক ডিক্রী চূড়ান্ত ডিক্রী হিসাবে গণ্য হইবে, এবং বিক্রয় চূড়ান্ত ও ক্রয় বৈধ গণ্য হইবে এবং অতঃপর উক্ত সম্পত্তি পুনরুদ্ধার করিবার কোনরূপ অধিকার (Right to redeem) বিবাদী-দায়িকের থাকিবে না।”

(Underlined)

We find that the property was sold in auction and the sale was made absolute and thereafter the sale certificate having been registered through Court and the purchasers mutated their names. All these events took place in the year, 2009. Thus, the property has been vested absolutely with the auction purchasers with their title. We are surprised, in such circumstances, how the Bank can execute the deed of redemption in favour of the mortgagor when the auction sale has not yet been set aside. We are of the view that execution of deed of redemption on 29.03.2015 is absolutely a nullity and void ab initio. Because long before the said execution of deed of redemption, the property was sold to the auction-purchasers making the sale absolute and there was no interference at that moment by the higher Court. Moreover, after auction sale of mortgaged property, leaving the

auction purchaser the Bank can not make any compromise under section 45 of the Act, 2003.

Further, section 57 of the Act, 2003 is an inherent power of the Adalat to be exercised for passing necessary order in the absence of any statutory remedy under the Act, 2003 or the Code. But there are multiple provisions both in the Act, 2003 and under Order XXI of the Code for setting aside auction sale on different stage and eventually, when the sale was confirmed and made absolute under the statutory provision i.e section 5(4) of the Act, 2003, that can not be interfered exercising inherent power under section 57 of the Act. Moreover, in a series of cases, our Appellate Division consistently laid down ratio that after making the sale absolute there is no scope to set aside the sale, at this stage, we do not have the scope to do any complete justice in aid of section 57 of the Act contradicting the settled ratio of the Appellate Division. We are of the view that complete justice can only be done by the Appellate Division in accordance with article 104 of the Constitution. Therefore, the submissions made by the learned Advocate for the petitioner is not tenable in the eye of law. To come to this view we have relied upon the case of Sonali Bank, Sadarghat Corporate Branch, Dhaka Vs Mrs. Hazera Ialam and others reported in VI ADC (2009) page 975 wherein the Apex Court held as under:

“7. It appears that the decree of foreclosure in favour of the plaintiff attained its finality and the judgment debtor shall have no right to redeem the said mortgage

property. Moreover after issuance of the certificate under Section 33(5) of the Artha Rin Adalat Ain the same court of Artha Rin Adalat Ain had no power to entertain the application of the appellant invoking Section 57 of the Artha Rin Adalat Ain as such power under section 57 is only available when the other provisions of the Ain are not exhaustive. In this case after the certificate issued under Section 33(5) of the Ain the decree-holder has already sold the suit property in favour of the respondent No. 8, Md. Rafique by registered sale deed and therefore there is no scope to interfere with the bonafide purchase for value.”

In view of above discussions, we do not find any merit in the Rule Nisi.

**In the result, the Rule Nisi is discharged. There is no order as to costs.**

The Deed of Redemption bearing No. 2912/2015 executed by the respondent Bank (Agrani Bank Ltd) on 29.03.2015 in favour of the mortgagors registered with the Sub-Registrar, Rupgonj East, Narayangonj is hereby declared as void ab initio and as such, is of no legal effect.

Communicate a copy of the judgment and order to the respondents at once.

Razik-Al-Jalil, J:

I agree.