

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION.
(Special Original Jurisdiction)

Writ Petition No. 1752 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:

Dr. S. M. Eunos Ali

Petitioner

(Defendant-Judgment Debtor)

Vs.

Artha Rin Adalat and others

... .. Respondents.

Mr. S. N. Goswami with

Ms. Afsana Begum, Advocates

.....For the Petitioner.

Ms. Hosneara Begum, Advocate

..... For the Respondent No.2

Hearing on 22.11.2012 and 27.11.2012

Judgment on 3rd December, 2012.

Present:

Mr. Justice Nozrul Islam Chowdhury

AND

Mr. Justice Mohammad Ullah.

Mohammad Ullah, J.

This Rule Nisi was issued on an application filed by the petitioner under Article 102 of the Constitution, calling upon the respondents to show cause as to why the order No. 33 dated 25.07.2004 and the order No. 37 dated 29.08.2004 passed by the 2nd Court of Artha Rin Adalat, Bagerhat in Artha Rin Suit No. 14 of 2003

should not be declared to have been passed without any 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.

By the Rule issuing order dated 22.3.2009 all further proceedings of Artha Jari Case No. 12 of 2005 was stayed for a period of 3 (three) months and subsequently it was extended till disposal of the Rule.

The facts leading to disposal of the Rule are briefly stated below:

According to the plaint, the petitioner is a borrower of a loan of Tk. 21,19,830/- sanctioned by the respondent No. 2, Rupali Bank, Mongla Port Branch in 3 phases and subsequently as the petitioner defaulted to pay the borrowed money as per terms and conditions of the sanction letter, the respondent bank on 29.4.2003 instituted Artha Rin Suit No. 14 of 2003 in the Artha Rin Adalat, 2nd Court, Bagerhat for realization of Tk. 47, 82,062/- against the petitioner and respondent No. 3. The petitioner entered appearance and upon filing a written statement contested the said suit.

Neither the petitioner nor the respondent bank produced copy of the said written statement and the judgment of Artha Rin Adalat to substantiate their respective claims. However the petitioner made a statement in the writ petition about his case which is as follows:

“Under small industrial loan BISIC on 18.5.94 by sanction letter No. 94/04 the defendant received Taka 3,92,500/- and the defendant petitioner having adjust the loan of Taka. 72,303/- but the plaintiff

Bank fraudulently created over draft loan(OD) of Taka 16,55,545/- and when it was detected , the plaintiff offered the petitioner a loan of Taka 30,00,000/-/(thirty lacs) on condition that the Over Draft of Taka 16,55,546/- was to be adjusted from the said loan and the rest amount will be given to the petitioner and the plaintiff obtained from the petitioner collateral security of Taka 33,50,000/- in their favour but the above plan did not materialize but the plaintiff, with ill motive ,kept the collateral security in their custody and suppressing the real facts filed the instant suit.”

The plaintiff bank examined one witness as P.W. 1 in support of its case and the defendants also produced one witness as D.W. 1 in support of his case. Besides, both the parties produced some relevant papers and documents which were duly marked as exhibits in the Artha Rin suit.

The Artha Rin Adalat upon consideration of the evidence on record passed the impugned order dated 25.7.2004 and thereby decreed the suit against the defendants to the following manner:

আদেশ নং-৩৩,তারিখ-২৫/৭/০৪

অদ্য মোকদ্দমাটি রায় প্রদানের জন্য ধার্য আছে। রায় ভিন্ন ৭(সাত) ফর্দে লিখিত হইয়াছে এবং নথী সামিল আছে। রায় প্রকাশ্য আদালতে প্রদান করা হইল। রায়ের হুকুম হয় যে,মামলাটি দোতরফা সুত্রে বাদী পক্ষের অনুকূলে খরচাসহ ডিক্রি হইল। বাদী পক্ষ ৩৯,৮৯,৪১২/- (উন চল্লিশ লক্ষ উন নব্বই হাজার চার শত বার) টাকা পাইতে হকদার মর্মে ঘোষণা করা হইল। এবং বত্রী ৮০০০০০/- (আট লক্ষ) টাকা বাবদ বাদীর বরাবর বন্দকী সম্পত্তির মালিকানা ৩৩(৭) ধারার বিধান অনুসারে বাদীর অনুকূলে বর্তাইল। বাদী পক্ষের প্রতি ৩৩(৭) ধারার সার্টিফিকেট ইস্যু করা হউক। বাদী পক্ষের প্রাপ্য টাকা এই রায় ঘোষণার ৪০ (চল্লিশ) দিনের মধ্যে বাদী পক্ষকে প্রদান করিবার জন্য বিবাদী

পক্ষকে নির্দেশ দেওয়া হইল। অন্যথায় বাদী পক্ষ উক্ত ডিক্রীকৃত টাকা আদালতের মাধ্যমে আদায় করিয়া লইতে পারিবে।

স্বাক্ষর- অস্পষ্ট
অর্থস্বান জজ, অর্থস্বান ২য় আদালত,
বাগেরহাট

The Artha Rin Adalat also issued certificate under sub section (7) of section 33 of the Artha Ain, 2003 (**hereinafter referred to as the Ain, 2003**) in favour of the plaintiff bank by its order dated 29.8.2004 by virtue of the judgment and decree dated 25.7.2004.

Thereafter the petitioner approached this Court upon impugning the said judgment dated 25.7.2004 along with order dated 29.8.2004 by which the Adalat issued certificate under section 33(7) of the Ain, 2003 in favour of the decree holder bank and the Rule was issued as stated above.

Mr. S. N. Goswami, the learned Advocate appearing with Ms. Afsana Begum Advocate on behalf of the petitioner submits that the Artha Rin Adalat without applying its judicial mind issued certificate under section 33(7) of the Ain, 2003 at the time of passing the impugned judgment in favour of plaintiff bank and thereby adjusted the value of the mortgaged property of the borrower with the decretal amount which should be declared illegal, without jurisdiction, without lawful authority and is of no legal effect.

Mr. Goswami, the learned Advocate submits further that the Artha Rin Adalat issued certificate under section 33(7) of the Ain, 2003 in favour of the decree holder bank without putting the decree in

execution as per Chapter VI of the Ain, 2003. The plaintiff bank did not even file any application for deduction of the value of the mortgaged property. In such situation issuing certificate under section 33(7) of the Ain, 2003 in favour of the plaintiff bank should be declared illegal, without jurisdiction and is of no legal effect.

Mr. Goswami, the learned Advocate further submits that the plaintiff bank filed the Artha Rin suit violating the mandatory provision of section 47 of the Ain, 2003. The bank was barred from filing any suit for recovery of its principal loan amount plus more than 200% interest accrued thereon and in such view of the matter the impugned orders should be declared illegal and without jurisdiction.

Mr. Goswami, the learned Advocate finally submits that the suit was filed on 29.4.2003 prior to enactment of Artha Rin Ain, 2003 and as such the suit ought to have been proceeded in view of the provision of Artha Rin Ain, 1990 (**the Ain, 1990**) and that there was no provision in the said Ain, 1990 to adjust the value of mortgaged property with the decretal amount, and to claim the penal interest and on those counts the judgment of the Adalat should be struck down.

In support of his submission Mr. Goswami, the learned Advocate placed reliance on the cases of (1) M/S. United Leather International vs. Artha Rin Adalat and others reported in 17 BLT (AD) 204, (2) Md. Joinaul Abedin Mintu vs. Joint District Judge, 3rd Court Tangail and others reported in 18 BLT 277, and (3) Humayun Hossain Khan vs.

Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance & others reported in 61 DLR (AD) 92.

On the other hand, in reply Ms. Hosneara Begum, the learned Advocate appearing on behalf of the respondent bank submits that a judgment debtor is not competent to challenge the judgment and decree of the Artha Rin Adalat and in such view of the matter there is nothing to interfere with the judgment and decree of Artha Rin Adalat invoking writ jurisdiction.

Ms. Hosenara, the learned Advocate submits further that the judgment debtor is required to file appeal in compliance with the provision of Ain, 2003 and on that count the impugned judgment and decree passed by the Artha Rin Adalat should not be knocked down invoking writ jurisdiction.

Ms. Hosenara, the learned Advocate finally submits that the Artha Rin Adalat passed the impugned judgment and thereby decreed the suit against the defendants and the Adalat also exercised its jurisdiction as contemplated in sub section (6) and (7) of section 12 of the Ain, 2003 and adjusted the value of the mortgaged property with the decretal amount and then issued certificate under section 33(7) of the Ain, 2003 in favour of the plaintiff bank and as such there remains nothing to interfere with the judgment and decree of the Artha Rin Adalat and consequently the Rule should be discharged.

Ms. Hosenara, the learned Advocate in support of her submission referred to the case of Mir Motiur Rahman Zehadi Vs. Artha Rin Adalat, Tangail and another reported in 15 BLT(AD) 267.

We have heard the learned Advocates of both the parties, perused the writ petition, impugned orders, annexures and gone through the decisions referred to, wherefrom it transpires that virtually the petitioner has challenged the judgment and decree of Artha Rin Adalat and an order of issuing certificate under section 33(7) of the Ain, 2003 in favour of the plaintiff bank.

The Artha Rin Adalat at the time of passing the judgment and decree has exercised its jurisdiction as contemplated under subsection (6) and (7) of section 12 of the Ain, 2003 and issued certificate under section 33(7) of the Ain, 2003 in favour of the plaintiff bank. So, we have to look into the provisions of subsection (6) and (7) of section 12 of the Ain, 2003 which reads as follows:-

12. (১)
- (২)
- (৩)
- (৪)
- (৫)

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

রেজিস্ট্রারের প্রতিবেদন গ্রহণ করিয়া, মূল্য নির্ধারণ করিবে এবং নির্ধারিত উক্ত মূল্যের সমপরিমাণ অর্থ মামলার দাবী হইতে বাদ দিয়া ডিক্রি প্রদান করিবে।

(৭) উপ-ধারা (৬) এর অধীন যে সম্পত্তির মূল্য মামলার দাবী হইতে বাদ দিয়া ডিক্রি প্রদান করা হইবে, উক্ত সম্পত্তির মালিকানা ধারা ৩৩ এর উপ-ধারা (৭) এর বিধানের অনুরূপ পদ্ধতিতে আর্থিক প্রতিষ্ঠানের অনুকূলে ন্যস্ত হইবে।

On a plain reading of those above statutory provisions of sub section (6) and (7) of section 12 of the Ain, 2003 it appears that the Adalat upon its own initiative and without any application of the borrower can deduct the value of the mortgaged property of the borrower from the decretal amount at the time of passing the decree in the suit.

So far the submission of the learned Advocate for the petitioner that the suit was filed prior to enactment of the Artha Rin Adalat Ain, 2003 and the provision of section 12(6) of the Ain, 2003 would not be applicable to the instant case, we hold that according to section 60(3) of the Ain, 2003, all the pending Artha Rin suits have to be treated as if they were filed within the provision of Artha Rin Adalat Ain, 2003 and to be dealt with in accordance with the new enactment of the Ain, 2003 and as such the submission of the learned Advocate for the petitioner to that effect has got no substance.

It appears that the order dated 25.7.2004 has been challenged by the petitioner virtually it is a judgment of the Artha Rin Adalat but the settled principle of law is that a judgment debtor is required to file appeal in compliance with the provision of Ain, 2003. So, the writ

petition filed challenging the validity of the judgment and decree of the Artha Rin Adalat is incompetent and not maintainable except the petitioner being a judgment debtor to show that the judgment and decree suffers from without jurisdiction or in other words coram non judice or out come or fraud committed on court. In the instant case the petitioner failed to show that the judgment passed by the Artha Rin Adalat suffers from any malafied in other words coram non judice or out come of fraud committed on court.

The decision in the case of M/S United Leather International vs. Artha Rin Adalat and others reported in 17 BLT (AD) 204, referred to by Mr. S. N. Goswami, the learned Advocate is not applicable in the present facts and circumstances of the instant case. Because on that case the defendant of a Artha Rin suit, filed an application under section 12(2) and 57 of the Ain, 2003 praying for direction upon the plaintiff bank for sale of the pledge goods and to adjust the claim amount with the sale proceeds of the pledge goods and fix the actual claim and that the Artha Rin Adalat rightly rejected the said application of the defendant observing that the value of the pledge goods, if any, be considered by the court at the time of passing the judgment and decree of the suit. This Court also concurred with the above decision of the said Artha Rin Adalat.

The decision in the case of Md. Joinul Abedin Vs. Joint District Judge, 3rd Court, Tangail and others reported in 18 BLT 277 as referred

to by Mr. Goswami, the learned Advocate is not also applicable in the present facts and circumstance of the instant case. On that case the decree holder bank without taking any steps for sale of the mortgaged property as per provision of Chapter VI of the Ain, 2003 filed an application for getting certificate directly in original proceeding as per provision of section 33(5) of the Ain, 2003. This Court correctly held that the order of issuing certificate under section 33(5) of the Ain, 2003 in favour of the decree holder bank without going through the execution process for selling the mortgaged property first invoking section 33 (1)(2)(3) was patently unlawful.

The other decision in the case of Humayun Hossain Khan Vs. Government of the People's Republic of Bangladesh, represented by the Secretary, Ministry of Finance and others reported in 61DLR(AD) 92 as referred to by Mr. Goswami, the learned Advocate is not also applicable in the present case in our hand. Upon that case a question was raised whether section 47 of the Ain, 2003 can be given effect to any pending suit filed prior to enactment of Artha Rin Adalat Ain, 2003. The Appellate Division held that:

“We have perused the impugned judgment and order passed by the High Court Division and also the provisions of section 47 and section 60 of the Artha Rin Adalat Ain, 2003. There is no ambiguity in the language of the law. Which clearly indicate that section 47 cannot be given effect to any pending suit filed prior to promulgation of the Artha Rin Adalat Ain, 2003.”

Moreover it appears from the plaint that the plaintiff bank claimed that the petitioner had taken loan of Tk. 21, 19,830/- upon 3 phases and the bank filed the suit for realization of Tk. 47,82,062/- which was within the limit as provided in section 47 of the Ain, 2003.

So the submission of the learned Advocate for the petitioner that the plaintiff bank filed the Artha Rin Suit for recovery of Tk. 47, 82,062/- but the principal loan amount was Tk. 3, 92,500/- and out of which the petitioner has paid Tk. 72,303/- and thus filing of the suit was clearly barred as per provision of section 47 of the Ain, 2003 in which the bank cannot claim beyond 3 fold of the principal loan amount has got no substance.

It is evident from the amended order dated 17.8.2004 the decree was passed against the defendants for Tk. 47,82,062/- and the Artha Rin Adalat adjusted the value of the mortgaged property of the borrower amounting to Tk. 8,00,000/- with the decretal amount in view of the provision of section 12(6) of the Ain, 2003 and issued a certificate in favour of the plaintiff bank under section 33(7) of the Ain, 2003 in compliance with the provision of section 12(7) of the Ain, 2003.

It is pertinent to mention here that section 12 (8) of the Ain, 2003 provides a remedy to the judgment debtor for claiming compensation, if any irregularity or illegality is found in the process of sale of the mortgaged property or in other words in the process of adjustment of

value of the mortgaged property of the borrower with the decretal amount.

On consideration of the facts and circumstances of the case as well as the provision of Ain, 1990 and particularly section 12(6), (7) and (8) read with section 60(3) and 33(7) of the Ain, 2003, we are of the view, that the Artha Rin Adalat has correctly passed the judgment and decree and adjusted the value of the mortgaged property of the borrower from the decretal amount which does not call for any transference.

On the other hand the judgment and decree of the Artha Rin Adalat cannot be interfered with invoking the writ jurisdiction under Article 102 of the Constitution, as there is an alternative provision for appeal against a judgment of the Artha Rin Adalat under the Ain, 2003.

In the instant case we do not find that the judgment of the Artha Rin Adalat suffers from coram non judice or without jurisdiction or in other words outcome of fraud committed on court. In such view of the matter we do not find any substance in the Rule.

In the result, the Rule is discharged. However without any order as to cost.

The stay order stands vacated.

Send copy of this judgment to the Artha Rin Adalat, 2nd Court, Jessore.

Nozrul Islam Chowdhury, J.

I agree.