

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

WRIT PETITION NO. 7818 OF 2020

In the matter of:

Application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

And

In the matter of:

Phenix Hatchery Limited represented by its
Managing Director, Rafiul Ahsan of House
No. 39A, Road No. 8, Level-5, Dhanmondi
R/A, Dhaka and House No. 28, Road No. 3,
Dhanmondi R/A, P.O. New Market-1205,
Dhaka South City Corporation.

... Petitioner

-Versus-

Learned Judge, Artha Rin Adalat No. 3,
Dhaka and others.

... Respondents

Mr. Ahmad Naquib Karim, Advocate

...For the petitioner

Mr. Khokon Pervez, Advocate

...For the respondent no. 2

Heard on 19.08.2025 and 27.08.2025.
Judgment on 27.08.2025.

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Md. Bashir Ullah

Md. Mozibur Rahman Miah, J.

At the instance of the 3rd party, namely, Phenix Hatchery Limited in Artha Execution Case No. 38 of 2015 and that of the petitioner in Miscellaneous Case No. 14 of 2019, a Rule *Nisi* was issued on an application under Article 102 of the Constitution of the People's Republic of Bangladesh in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the order no. 43 dated 23.09.2020 passed by the respondent no. 1 in Miscellaneous Case No. 14 of 2019 arising out of Artha Decree Execution Case No. 38 of 2015 rejecting the application summarily under order XXI, rule 58 of the Code of Civil Procedure (Annexure- ‘B’ to the writ petition) and order no. 44 dated 23.09.2020 passed by the respondent no. 1 in Artha Execution Case No. 38 of 2015 allowing the application of the respondent no. 2, bank under section 33(7) of the Artha Rin Adalat Ain, 2003 thereby disposing of the said execution case under section 33(8) of the Ain, 2003 (Annexure- ‘H-3’ to the writ petition) should not be declared to have been passed 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.”

At the time of issuance of the rule, this court also stayed operation of the order no. 43 dated 23.09.2020 passed by the

respondent no. 1 in Miscellaneous Case No. 14 of 2019 arising out of Artha Decree Execution Case No. 38 of 2015 (Annexure-‘B’ to the writ petition) and order no. 44 dated 23.09.2020 passed by the said respondent no. 1 in Artha Execution Case No. 38 of 2015 (Annexure-‘H-3’ to the writ petition) for a period of 3(three) months which was lastly extended on 06.03.2022 till disposal of the rule.

The short facts so figured in the instant writ petition are:

The present respondent no. 2 as plaintiff originally filed a suit being Artha Rin Suit No. 156 of 2010 before the learned Judge of the Artha Rin Adalat No. 3, Dhaka against the present respondent nos. 3 and 4 making them as defendant nos. 1-2 in the suit claiming an amount of taka 1,69,98,647/- who contested the suit and ultimately vide judgment and decree dated 25.08.2014, the said suit was decreed on contest.

To execute the decree, the respondent no. 2 as decree-holder filed an execution case being Artha Execution Case No. 38 of 2015 before the same court of Artha Rin Adalat No. 3, Dhaka. During pendency of the said execution case, the present petitioner on 08.08.2019 filed an application under order XXI, rule 58 of the Code of Civil Procedure read with sections 32 and 57 of the Artha Rin Adalat Ain, 2003 for releasing the property from the schedule of the Artha Execution Case No. 38 of 2015 contending *inter alia* that the petitioner got the property from the original owner, Hasina Begum vide registered deed of sale dated 12.04.2005 measuring an area of 30.055 decimals of land. But the petitioner on 21.07.2019 came to learn from his tenant

that the property scheduled in the execution case was put on auction sale and the respondent was going to obtain certificate by filing an application dated 18.07.2019 under section 33(7) of the Artha Rin Adalat Ain, 2003. The said application then gave rise to Miscellaneous Case No. 14 of 2019. The application so filed by the petitioner was taken up for hearing and vide impugned order dated 23.09.2020, the said case was dismissed and on the same date vide order no. 44, the application so filed by the respondent no. 2 under section 33(7) of the Ain seeking title in the scheduled property was allowed against which the petitioner came before this court and obtained rule and order of stay as has been stated hereinabove.

Mr. Ahmad Naquib Karim, the learned counsel appearing for the petitioner upon taking us to the impugned order no. 43 at the very outset submits that the learned Judge of the Artha Rin Adalat very erroneously rejected the application of the petitioner finding that the petitioner has prayed for set aside the judgment and decree passed in the Artha Rin Suit No. 156 of 2010 in spite of the fact that the petitioner did not pray such relief other than to release the property from the schedule of the Artha Execution Case.

The learned counsel further contends that in dismissing the Miscellaneous Case, the provision so provided in order XXI, rule 58 of the Code of Civil Procedure has not been complied as no investigation has been made by the respondent no. 1 which is the *sine quo non* in disposing of an application filed under order XXI, rule 58 of the Code of Civil Procedure.

The learned counsel next contends that though the decree-holder-bank obtained a certificate under section 33(5) of the Artha Rin Adalat Ain, 2003 but for that, the execution case will not be disposed of until and unless, the scheduled property is sold by the decree-holder through auction and since at the time of filing of the application under section 32 of the Ain by the petitioner, admittedly the scheduled property had not been sold out, so the execution case was then pending.

In addition to that, the learned counsel also contends that until and unless, the decree-holder-bank obtains a certificate under section 33(7) of the Ain, in continuation of issuance of certificate under section 33(5) of the Ain, an execution case cannot be disposed of within the meaning of section 33(9) of the Ain.

At this, the learned counsel refers section 33(7ka) of the Ain and contends that since by that provision executing court has been authorized to hand over possession in favour of the decree-holder if it asked for so it construe, an execution case is not disposed of on obtaining certificate by a decree-holder under section 33(5) of the Ain.

The learned counsel on the factual aspect submits that since the schedule so have been made in the deed of mortgage executed by the respondent no. 4 to the respondent no. 2 does not match with the registered deed of Hasina Begum being no. 12786 dated 02.11.1963 yet without investigation the said gross inconsistency through evidence, the respondent no. 1 has abruptly dismissed the Miscellaneous Case which is unsustainable in law.

When we pose a question to the learned counsel with reference to the provision provided in section 33(9) of the Ain which denotes under what circumstances, an execution case will be disposed of, the learned counsel then contends that on that point there are decisions of our apex court as well as this Division and then placed his reliance in the decisions reported in 22 BLC (AD) 139; 22 BLC (AD) 53; 76 DLR (HCD) 375 and 67 DLR (HCD) 545 and finally prays for making the rule absolute.

By contrast, Mr. Khokon Pervez, the learned counsel appearing for the respondent no. 2 by filing an affidavit-in-opposition very strenuously opposes the contention taken by the learned counsel for the petitioner and at the very onset submits that since this respondent obtained a certificate under section 33(5) of the Artha Rin Adalat Ain, 2003 before filing of the application by the petitioner under section 32 of the Artha Rin Adalat Ain, 2003 so the Miscellaneous Case so initiated was not maintainable and the petitioner is not entitled to get any relief and the learned Judge of the executing court has rightly dismissed the same.

The learned counsel further contends that though that very legal point has not been discussed by the learned Judge of the Artha Rin Adalat while dismissing the Miscellaneous Case yet since it is absolutely a legal point so this court can take into cognizance of that point and may discharge the rule.

The learned counsel by referring to another impugned order being no. 44 also contends that as on that very date, this respondent

also obtained a certificate under section 33(7) of the Ain after obtaining certificate under section 33(5) of the Ain resulting in, the execution case has been disposed of under the provision of section 33(9) of the Ain having no scope to entertain any application of a third party, herein the petitioner and the executing court has rightly found the Miscellaneous case in not maintainable.

However, in support of his such submission, the learned counsel then placed his reliance in the decision reported in 36 BLD (AD) 31 as well as 71 DLR (HCD) 338.

Apart from that, the learned counsel by referring to the provision of section 33(6kha) of the Artha Rin Adalat Ain contends that even if the decree-holder would not have obtained any certificate under section 33(7) of the Ain yet after a lapse of six years of getting certificate under section 33 (5), the title of the scheduled property would automatically vest on the decree-holder-bank having no necessity to obtain certificate under section 33(7) of the Ain from executing court. With those submissions and relying on the decisions, the learned counsel finally prays for discharging the rule.

Be that as it may, we have considered the submission so advanced by the learned counsels for the petitioner and that of the respondent no. 2. We have also very meticulously gone through the writ petition and material documents appended therewith as well as the affidavit-in-opposition. Apart from that, we have also perused the impugned orders.

On going through the impugned orders, we find that the learned Judge of the executing court passed the same on considering the application of the petitioner to have filed for setting aside the judgment and decree passed in Artha Rin Suit No. 156 of 2010 and the same is not maintainable. However, though the petitioner challenged the property of the order no. 44 issuing certificate under section 33(7) of the Ain in favour of the respondent no. 2 but we don't find any assertion in the entire writ petition as to its illegality. Since the learned counsel for the respondent no. 2 has very strenuously asserted that writ itself is not tenable in view of the fact that, the petitioner was not entitled to file application under section 32 of the Ain when Artha Rin Adalat as the said Adalat (respondent no. 1) became *functus officio* while it passed the impugned order within the meaning provided in section 33(9) of the Ain.

To address the issue, we thus feel it expedient to reproduce section 33(9) of the Artha Rin Adalat Ain, 2003 which runs as follows:

“(৯) উপ-ধারা (৫) এর অধীনে সম্পত্তির দখল ও ভোগের অধিকার
অথবা উপ-ধারা (৭) এর অধীনে সম্পত্তির স্বত্ত্ব ডিক্রীদারের অনুকূলে
ন্যস্ত হইলে, ধারা ২৮ এর বিধান সাপেক্ষে, উক্ত ডিক্রী জারী মামলার
চূড়ান্ত নিষ্পত্তি হইবে। ”

On close examination of the provision, we find the word “অথবা” and then denotes consequence following issuance of certificate either under section 33(5) or section 33(7) of the Ain. So the aftermath of issuance of certificate under both the sections has been placed in similar footing. Thus we don't find that an execution case will only be

disposed of after issuance of certificate under section 33(7) of the Ain rather certificate issued under section 33(5) of the Ain as well stands at par. Our such view gets total support in the decision reported in 71 DLR (HCD) 338 which has been derived from the principle sets in the decision reported in 13 MLR (AD) 356. Though the facts described in that decision reported in 71 DLR (HCD) 338 is bit different from the instant case but the *ratio* settled therein is squarely applicable in the case in hand where it has been propounded “*Therefore, we certainly find merit and substance in the contention of the learned counsel for the petitioner that with the granting of certificate under section 33(5) or 33(7) of the Ain the execution case is finally disposed of and the executing court becomes functus officio.*” In view of what has been settled, there has been no scope either on the part of the judgment-debtor of an Artha Execution Case or any third party to get any relief from an executing court moment a certificate is issued in favour of the decree-holder either under section 33(5) or section 33(7) of the Ain as after such issuance, an Artha Execution Case is disposed of when it becomes *functus officio* in entertaining any application.

It is the contention of the learned counsel of the petitioner that since section 33 (7ka) of the Ain provides an opportunity to the executing court to consider an application from the decree-holder for getting possession, so by issuing certificate under section 33(5) or 33(7) of the Ain, an execution case cannot be disposed of.

The point so taken by the learned counsel for the petitioner on the application of section 33(7ka) of the Ain has also been settled by

our apex court as well in the decision reported in 36 BLD (AD) 31 when it concurred the finding of the High Court Division on that point in paragraph no. 7 asserting to what has been found by the High Court Division described in paragraph 4 that “*The clear finding of the High Court Division was that the writ petition in its present form is not maintainable.*” In this regard, we are also of the firm view that the phrase employed in that section “*আদালতযোগে প্রাপ্ত হওয়া আবশ্যক হইলে*” simply has not made executing court to exist rather leave it to the discretion of the decree-holder which is purely optional one.

Then we pose a question to the learned counsel for the petitioner what is the explicit objective of section 33(9) of the Ain, the learned counsel then readily contends that since section 33(7ka) has subsequently been inserted by Act No. 16 of 2010 so the said provision will prevail over section 33(9) of the Ain. In support of that contention, the learned counsel has then placed his reliance in the decision reported in 76 DLR (HCD) 375. We have also gone through the said decision and on careful examination of the same, we rather find it supports the case of the respondent no. 2 where it has been decided that following issuance certificate under section 33(7) of the Ain, the execution case will come to end. It is true by Act No. 16 of 2010 none of the original provision in sections 33(5), 33(7) and 33(9) of the Ain has been amended and therefore, if any application is filed under section 32 of the Ain for releasing any property from the schedule of an Artha Execution Case, the provision of section 33 (9) of the Ain will then come into play if the decree-holder gets certificate either under section

33(5) or 33(7) of the Ain before, and then invariably, the executing court will rendered as *functus officio*. Though the learned counsel for the petitioner cited a slew of decisions in support of his case but on careful examination, we don't find the *ratio* so set in those decisions ever attracts the point-in-issue involved in the instant case as we elaborately discussed and observed above. It is true, the learned Judge of the executing court has not discussed that very core legal point in the impugned order no. 43 however he found the application not maintainable. But since the learned counsel for the respondent no. 2 has very robustly raised that point of authority of the executing court before us, we invariably can adjudicate the said legal issue. That said, any legal point can be adjudicated at any point of time even if it lost sight of any subordinate court.

Regard being had to the above facts and circumstances and the materials on record, we don't find any illegality or impropriety in the impugned orders only for not complying with the provision provided in order XXI, rule 58 of the Code of Civil Procedure when the same is found not to be entertained. Together, we don't find any illegality in the order no. 44 through which the respondent no. 2 has been armed with certificate under section 33(7) of the Ain.

Accordingly, the rule is discharged however without any order as to costs.

The order of stay granted at the time of issuance of the rule stands recalled and vacated.

Let a copy of this order be communicated to the respondents forthwith.

Md. Bashir Ullah, J.

I agree.