

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

Present:

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Akhtaruzzaman

WRIT PETITION NO. 6816 OF 2021.

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. Sohelu Zaman and another.

.....Petitioners

-VS-

The Joint District Judge and Artha Rin Adalat
No. 1, Narsingdi and others.

.....Respondents

Mr. Md. Shumsul Islam, Advocate

.....For the Petitioners

Mr. Md. Shahadat Alam, Advocate

..... For the Respondents

Heard on 13.03.2024 and
Judgment on 18.03.2024.

Md. Akhtaruzzaman, J.

In this Rule Nisi, the petitioners called in question the legality of the order No.16 dated 16.02.2021 passed by the respondent No.1, the learned Judge of Artha Rin Adalat No.1, Narsingdi in Artha Jari Case No. 10 of 2019 arising out of Artha Rin Suit No. 34 of 2015 issuing warrant of arrest upon the judgment-debtors under section 34(1) of the Artha Rin Adalat Ain, 2003.

The facts of the case as narrated in the writ petition, in brief, are as follows:

Abdullah Al Mamun, the proprietor of Lagna Fashion Design availed a personal loan amounting Tk. 5,46,126/- from the respondent No. 3 Brac Bank Limited, Madhabdi Unit Office, Madhabdi, Narsingdi by way of executing, among others, letter of hypothecation of present and future assets, letter of acknowledgement etc. with the assurance that he would pay the loan money within the time stipulated in the agreement. The borrower failed to repay the loan with interest. Thereafter, the Bank as plaintiff filed Artha Rin Suit No. 34 of 2015 before the Artha Rin Adalat No.1. Narsingdi (hereinafter referred to as the Adalat) for recovery of loan amounting Tk. 10,69,528.12 as stood on 15.08.2015 against the said borrower. The suit was decreed *ex parte* by the judgment and decree dated 05.11.2018. The judgment-debtors failed to pay the decretal dues. So, the Bank filed Artha Jari Case No. 10 of 2019 before the Adalat for realization of the decretal amount. In the execution case, the Bank on 16.02.2021 filed an application under section 34 of the Artha Rin Adalat Ain, 2003 (hereinafter stated as the Ain, 2003) praying for issuing warrant of arrest against the judgment-debtors. The present petitioners were guarantor-defendant Nos. 4 and 6 in the Artha Rin case. In the writ petition the petitioners have stated that the application filed by the Bank was not signed by any authorized officer of the Bank. Moreover, the application was neither verified nor supported by affidavit. Further the Bank did not take any attempts to sale the hypothecated goods in auction under section 33 of the Ain before filing the application. Therefore, the application was not filed in compliance with the provisions of section 34(1) of the Ain. The

learned Judge of the Adalat without considering the said legal aspect of the case passed the impugned order for issuance of warrant of arrest against the judgment-debtor-petitioners which leads to file the instant writ petition.

Respondent No. 2, the Bank contested the Rule by filing an affidavit-in-opposition supporting the impugned order stating that defendant Nos. 1-6 of the plaint had executed different charge documents but did not mortgage any property. So, the present respondent was not in a position to exhaust the provision of section 34(9) of the Ain and, as such, on an application filed by the Bank under the provision of section 34 of the Ain the impugned order has been passed lawfully and the Rule, is thus, liable to be discharged.

Mr. Md. Shumsul Islam, the learned Advocate appearing for the petitioner invites our attention to the application filed by the Bank for issuance of warrant of arrest and submits that on examination of the application filed under section 34(1) of the Ain, it is evident that the application is neither verified nor supported by any affidavit and it is not also signed by the Manager or any authorized officer/person of the decree-holder-Bank and therefore, the application is not in proper form. He next submits that the Bank did not take any steps on the hypothecated assets for realizing the decretal amount. The learned Advocate finally submits that the impugned order on an unlawful application is illegal and so, the impugned order is liable to be set aside.

In reply, Mr. Md. Shahadat Alam, the learned Advocate appearing for the respondent No.2 contends that the petitioners are admittedly the

guarantors for the loan and therefore, the suit was lawfully filed against them and it was also lawfully decreed against the judgment-debtors including the present petitioners. He further contends that it has been clearly stated in the application filed by the Bank that no property was available for auction sale and so, the Bank filed an application under section 34 (1) of the Ain, whereupon the impugned order was passed by the Adalat. Mr. Alam next submits that in paragraph Nos. 4-6 of the plaint it has been clearly stated that after putting signatures on different charge documents the borrower took the loan where the present petitioners were guarantors. The learned Advocate further submits that since the judgment-debtors did not mortgage any property to the Bank, so the decree holder was undone to take proper legal steps to sell and adjust the decretal amount and, as such, there is no scope to raise this question after the decree either before the executing Court or in writ jurisdiction. However, the learned Advocate appearing for the respondent No. 2 admits that the application has been filed by the learned Advocate for the Bank and it is neither verified nor supported by any affidavit. But the learned Advocate adds that if the Rule is made absolute an opportunity may be given to the Bank to file a fresh application under section 34(1) of the Ain in proper form.

We have heard the learned counsel for both sides. We have also gone through the petition, affidavit-in-opposition-impugned order and other related papers and documents with the petition carefully, nobody disputes the proposition of law relating to warrant of arrest, which is no longer a

resintegra. Specifically in the case of *Provat Kumar* 15 MLR (AD) 96 = 15 BLC (AD) 113, our Appellate Division finally set at rest the proposition of law in respect of issuing order of warrant of arrest in a case under Artha Rin Adalat Ain 2003. But the fact remains that the application by which the proceeding of warrant of arrest has to be set in motion should be in the manner and in keeping with the provision of section 34(1). Section 34(1) runs thus:

“৩৪। (১) উপ-ধারা (১২) এর বিধান সাপেক্ষে, ঋণ আদালত, ডিক্রীদার কর্তৃক দাখিলকৃত দরখাস্তের পরিপেটিতে, ডিক্রীর টাকা পরিশোধে বাধ্য করিবার প্রয়াস হিসাবে, দায়িককে ৬(ছয়) মাস পর্যন্ত দেওয়ানী কারাগারে আটক রাখিতে হইবে।”

Admittedly, no property had been mortgaged in favour of the Bank and, as such, the decree holder-Bank has failed to realize the loan money by making auction sale thereof.

We have carefully examined the application filed by the Bank under section 34(1) of the Ain for issuance of warrant of arrest against the judgment-debtors (Annexure-‘D’ to the writ petition). It appears that the application was filed on 16.02.2021 by the learned Advocate for the Bank under the provision of section 34(1) of the Ain, 2003. It further appears that the application is neither verified nor supported by any affidavit. Moreover, it is not also signed by the Manager or any authorized officer of the Bank concerned.

It transpires from the record that the application was not signed by the Manager or any authorized officer of the concerned Bank and it is neither verified nor supported by any affidavit, and, as such, the impugned

order dated 16.02.2021 for issuance of warrant of arrest cannot be said to be lawful.

In the case of *Sheikh Nazmul Haque v. Bangladesh and others*, reported in 14 BLC 107 it has been observed by a Division Bench of this Court that:

“We have carefully examined the application under section 34 of the Ain, 2003, it appears that in the application under section 34 of the Ain, 2003 for issuing warrant of arrest against the judgment debtors the concerned official/authority of the Bank neither put his signature nor made any verification/affidavit thereto and therefore, it cannot be said that the application in question was filed by the decree-holder-Bank as per provision of section 34(1) of the Ain, 2003.”

Further in the case of *Maezan Abedin v. Judge, Artha Rin Adalat No. 4, Dhaka and others* reported in 65 DLR 79 another Bench of this Court held as under:

“In the context of section 34(1) of Ain it has been held that the application seeking warrant of arrest on behalf of the bank should be officially signed, verified and followed by affidavit. If the same is absent the application is not tenable under the law. We verily endorse the view taken in the said decision. We are in respectful agreement with the decision. In the case in hand, we have found that the application by which warrant of arrest was sought cannot be treated as an application in the eye of law since the same had not been signed by the official or authority of the bank neither the same had any verification. Simply it was filed by the concerned Advocate of the Respondent-Bank without following the procedure.”

On examination of the order dated 16.02.2021 passed by the learned Judge of the Adalat in the Artha Jari Case No. 10 of 2019, it transpires that the judgment-debtors did not take any steps to adjust the loan with the

Bank. But on scrutiny of the plaint of the suit (Annexure-A to the writ petition), it transpires that it has been clearly stated in paragraph 4-6 of the plaint as under:

“৪। ঋণের টাকা গ্রহণের পূর্বে মঞ্জুরীপত্রের শর্তানুযায়ী ২-৬ নং বিবাদীগণ ঋণের নিরাপত্তা বিধানে সম্পূর্ণ ঋণ সীমার বিপরীতে ব্যাংকের চাহিদামত বিভিন্ন চার্জ ডকুমেন্ট, যথা- GENERAL LOAN AGREEMENT, DEMAND PROMISSORY NOTE, LETTER OF UNDERTAKING, LETTER OF ARRANGEMENT, LETTER OF INSTALLMENT, LETTER OF DISBURSEMENT, PERSONAL LETTER OF GUARANTEE, PERSONAL LETTER OF GUARANTEE, HYPOTHECA TION OF PRESENT & FUTURE ASSETS ও প্রাপ্তিড স্বীকার পত্র, ইত্যাদি ডকুমেন্টস সম্পাদনপূর্বক ১নং বিবাদীর মালিকানাধীন বর্ণিত ব্যবসা প্রতিষ্ঠানের ঋণের নিশ্চয়তা স্বরূপ সহায়ক জামানত পূর্বক হিসাবে গচ্ছিত রাখেন।

৫। বাদী ব্র্যাক ব্যাংক লিঃ, শর্তানুযায়ী বিবাদীগণ কর্তৃক পৃথক পৃথকভাবে শর্ত মোতাবেক গৃহীত ঋণ সূদসমেত নির্ধারিত ও নির্দিষ্ট ঋণ গ্রহণ পরবর্তী নির্ধারিত মাসের মাসিক মেয়াদ মধ্যে পরিশোধ করে নাই। ২নং বিবাদী তাহার ব্যবসা প্রতিষ্ঠান ১নং বিবাদী অর্থাৎ বর্ণিত ব্যবসা প্রতিষ্ঠানের নামে গৃহীত ঋণ সূদসমেত নির্ধারিত কিস্তিতে পরিশোধে জন্য ধার্য ছিল। কিন্তু দুলোভী ২-৬ নং বিবাদীগণ চুক্তি/শর্ত মোতাবেক বাদী ব্র্যাক ব্যাংক লিঃ এর ঋণের টাকা পরিশোধ না করায় বিবাদীর ঋণ হিসাবটি মেয়াদ উত্তীর্ণ হইয়া যায়।

৬। বাদী ব্র্যাক ব্যাংক লিঃ, বিবাদীকে বার বার মৌখিক তাগাদা তলব ও ব্যক্তিগতভাবে যোগাযোগসহ সর্বশেষ বিগত ১৫/০৮/২০১৫ইং তারিখে আইনজীবী মাধ্যমে চূড়ান্ত নোটিশ দিলেও বিবাদীগণ মেয়াদ উত্তীর্ণ ঋণ হিসাবে বাদী ব্র্যাক ব্যাংক লিঃ, এর হিসাবায়িত পাওনা পরিশোধ করা হইতে ইচ্ছাকৃত ভাবে বিরত থাকে।”

Therefore, it is evident that in the plaint, the Bank repeatedly claimed the loan money to the defendant judgment-debtors but they did not repay the said money. The judgment-debtors-defendants had put their signatures on the charge documents before availing the loan. They did not mortgage any property to the Bank. It is redundant to state that the present petitioners were the guarantors to the abovementioned loan. They did not also take any steps for setting aside the *ex parte* judgment and decree

passed by the trial Court under section 19 of the Ain. That being the position the order impugned against should be declared to have been passed without lawful authority and is of no legal effect.

In the result, the Rule is made absolute without any order as to costs.

The impugned order No.16 dated 16.02.2021 passed by the learned Judge of the Artha Rin Adalat No. 1, Narsingdi in Artha Jari Case No.10 of 2019 is hereby declared to have been passed without lawful authority and is of no legal effect and hereby set aside.

However, the respondent Bank may further file proper application under section 34(1) of the Ain, if so advised, in this regard.

Communicate the judgment to respondent No.1 at once.

Md. Iqbal Kabir, J.

I agree.