

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

WRIT PETITION NO.12933 OF 2022.

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. Ziaul Haque, son of Dr. Zainul
Abedin, Proprietor of M/S. Kodak Digital
Color Lab, of Hazipara Moor, Rangpur.
..... Petitioner.

-Versus-

Bangladesh, represented by the Secretary,
Ministry of Finance, Financial Institutions
Division, Bangladesh Secretariat, Dhaka
and others.

.....Respondents.

Mr. Asadullah, Advocate, with
Mr. Masud Rana Mohammad Hafiz, Advocate,
Ms. Salma Sultana, Advocate and
Ms. Syeda Shobnum Mustary, Advocate
..... For the Petitioner.

Mr. Md. Tanjirul Islam, Advocate
.... For the Respondent No.5.

Mr. Aneek R. Hauqe, Advocate, with
Mr. Taposh Kumar Dutta, Advocate
.... For the Respondent No.6.

Present:

Mr. Justice J.B.M. Hassan

And

Mr. Justice Md. Toufiq Inam

**Heard on 30.10.2024 and
Judgment delivered on 06.11.2024.**

Md. Toufiq Inam, J:

At the instance of the petitioner, the Rule was issued by this court on 11.12.2022 in the following terms:

“Let a Rule Nisi be issued calling upon respondent No. 2, Bangladesh Bank to show cause as to why a direction should not be given to exercise its jurisdiction as contemplated under sections 45 and 49(1)(Cha) of the Bank Companies Act, 1991 to dispose of the petitioner's application dated 10.11.2022 (Annexure-'O') in connection with the loan liabilities of the petitioner 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 Nisi this court passed certain interim orders, which are as under.

- i) The auction notice dated 21.08.2022 under section 12(3) of the Artha Rin Adalat Ain, 2003 published by respondent No.5 in the "Daily Naya Diganta" Annexure-'I' is stayed for 3 (three) months subject to payment of entire outstanding loan amount within 60 (sixty) days from the date, failing which the*

Rule shall be discharged with the cost of Tk. 2,00,000/- (Two lac);

- ii) Parties are directed to maintain status quo in respect of possession and position of the scheduled property as mentioned in the auction notice; and*
- iii) The respondent Nos. 2 and 5 are directed to dispose of the representation of the petitioner dated 10.11.2022 and 17.10.2022 (Annexure-'O' and 'L' to the writ petition) within 60 (sixty) days.*

Against the above mentioned interim orders passed by this court, the auction purchaser, the respondent No.6 moved the Appellate Division by filing Civil Miscellaneous Petition No. 973 of 2022 and on 20.12.2022 the Hon'ble Judge-In-Chamber was pleased to stay operation of the interim orders passed by this court. The Hon'ble Judge-In-Chamber also directed the respondent No.6 to file a regular Leave Petition in the meantime. Accordingly, the auction purchaser, the respondent No.6 filed the regular Leave Petition being Civil Petition for Leave to Appeal No. 673 of 2023. The apex court, on 03.06.2024, upon hearing

disposed of the Civil Petition for Leave to Appeal maintaining the order of stay passed by the Hon'ble Judge-In-Chamber and sent the matter to this court for disposal.

Facts figured in the writ petition, in short, are that, the respondent No.5, the lending Bank sanctioned Small Business Loan Scheme (SBLs) facility of Tk. 5 (five) lac in the year 2004 and Lease Finance Scheme (LFS) facility of Tk. 4(four) lac in the year 2006 in favour of the petitioner with the terms and condition stipulated therein. On 28.03.2006 the petitioner's mother as guarantor executed a mortgage deed and also executed an Irrevocable Power of Attorney empowering the holder bank to sell out the mortgaged property through auction if the borrower fails to repay the loan.

The petitioner made payment of Tk. 9,84,030/- (Nine lac eighty four thousand thirty) to the respondent no.5-Bank till 2020 and subsequently, the petitioner failed to pay the outstanding dues due to COVID-19 situation. The respondent No.5-Bank issued notice upon the petitioner asking to pay the dues. But since the petitioner failed to make payment according to the

demand, an auction notice was published on 21.08.2022 in the "Daily Naya Diganta" for selling out the mortgaged property in compliance with section 12 of Artha Rin Adalat Ain 2003. The petitioner is the borrower and his mother-Mrs. Jahura Khatun was the guarantor of the loan liabilities. However the guarantor Jahura Khatun was died on 15.09.2016. Consequently, the Power of Attorney, executed by Mrs. Jahura Khatun, comes to an end and stands terminated. Despite the fact of her death, an auction was held and Mr. Md. Ekhratul Hoque, the respondent No.6 purchased the mortgaged property in auction at a "shockingly low" price worth 23,60,000/- (Twenty three lac sixty thousand); whereas the present market price of the property is more than 2 crore. However, the respondent No.5-Bank by a letter dated 02.10.2022 (Annexure "K") issued a final notice to the petitioner asking to repay the balance amount of Tk. 2,43,773/-. The sale deed as executed by the Bank on the strength of the Power of Attorney in favour of the auction purchaser. The sale deed was registered accordingly on 13.10.2022 being deed No. 4055/2022. Under the stated backdrop the petitioner made a representation

on 10.11.2022 (Annexure-‘O’ to the Writ Petition) asking the Bangladesh Bank to get the property back upon payment of loan amount. Seeking for such a direction the petitioner was constrained to file the instant writ petition under Article 102 of the Constitution and obtained Rule Nisi together with the interim orders as mentioned above.

Mr. Asadullah, the learned Advocate appearing for the petitioner, at the very outset, submits that as the grantor of the Irrevocable Power of Attorney died, the power of attorney stands terminated and the performance under the power of attorney has been ceased. He further submits that since the property has been sold in auction in a shockingly low price than the prevailing market price, a solatium should be awarded to the petitioner for the loss suffered.

Conversely, Mr. Aneek R. Haque, the learned Advocate appearing on behalf of the auction purchaser, the respondent No.6 submits that an “irrevocable” Power of Attorney does not come to an end because of the death of the power-grantor and the rights & liabilities under such power of attorney automatically

vest upon the successors of the deceased by virtue of section 4(6) read with sections 2(4) and 11(1)(d) of the Power of Attorney Act, 2012. Therefore, the Power of Attorney was in full force at the time of execution of the sale deed by its holder, the lending Bank.

Mr. Haque next submits that once the deed of sale is executed and registered on the strength of the Irrevocable Power of Attorney in relation to loan liabilities the power-grantor or her successors have no authority to question its validity in the writ jurisdiction and the Bangladesh Bank has nothing to do with it.

Mr. Tanjirul Islam, the learned Advocate appearing on behalf of the NCC Bank, the respondent No.5 by filing an Affidavit-In-Opposition made his submissions in line of the argument advanced by Mr. Aneek R. Haque. He also submitted that the bonafide purchaser for value has acquired the rights in the property in accordance with the law, therefore, this right cannot be question in the judicial review.

We have heard the learned counsels for both the sides and perused the writ petition, affidavit-in-

opposition and supplementary affidavits filed by both the parties and the annexures appended thereto.

It is admitted that the petitioner-borrower has failed to repay or settle the loan liabilities with the lending Bank. Against the loan, the petitioner's mother being a 3rd party guarantor mortgaged the scheduled property in favour of the Bank empowering the bank, amongst other, to sell the property in auction in case of failure to make payment. Accordingly, the Bank has invoked the provisions of section 12 of Artha Rin Adalat Ain, 2003 and held an auction to sell out the property following the procedures laid down therein. The respondent No.6 being the highest bidder purchased the mortgaged property through the auction so held, and the lending Bank as the holder of the Irrevocable Power of Attorney executed and registered a deed of sale on 29.09.2022 in favour of the auction purchaser.

A valid question arises, whether an Irrecoverable Power of Attorney, empowering its holder to sell out the mortgaged property against loan liabilities, remains

alive and in force even after the death of the power grantor?

In our country, the Power of Attorneys' are being governed by the Power of Attorney Act, 2012, which came into force on 01.07.2013. Section 16 the said Act states that all previously executed Power of Attorney are also deemed to have been executed under this Act.

For the benefit of the discussions the provisions of section 2(4), 4(6), and 11(1)(d) of the Power of Attorney Act, 2012 are reproduced below:

“২।(৪) “অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি” অর্থ স্থাবর সম্পত্তি বিক্রয়ের উদ্দেশ্যে, বিক্রয় চুক্তি সম্পাদনের বা ঋণ গ্রহণের বিপরীতে স্থাবর সম্পত্তির বন্ধক প্রদানের জন্য প্রদত্ত কোন পাওয়ার অব অ্যাটর্নি অথবা স্থাবর সম্পত্তির বিপরীতে পণ মূল্য গ্রহণের বিনিময়ে ভূমি উন্নয়নসহ উক্ত দলিল সম্পাদনের ক্ষমতা প্রদান সম্পর্কিত কোন পাওয়ার অব অ্যাটর্নি;

৪।(৬) অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নির মেয়াদ অবসান হইবার পূর্বে পাওয়ারদাতা বা পাওয়ার গ্রহীতার মৃত্যু হইলে বা তাহারা আইনগতভাবে দলিল সম্পাদনে অক্ষম হইলে উক্ত মৃত বা অক্ষম ব্যক্তির বৈধ ওয়ারিশ বা স্থলবর্তীর উপর দলিল হইতে উদ্ভূত দায় বা অধিকার স্বয়ংক্রিয়ভাবে অর্পিত হইবেঃ

তবে শর্ত থাকে যে, ধারা ৯ এর বিধান সাপেক্ষে, একক গ্রহীতার ক্ষেত্রে এ বিধান প্রযোজ্য হইবে না।

১১(১)- নিম্ন বর্ণিত ক্ষেত্রে পাওয়ার অব অ্যাটর্নির অবসান ঘটিবে , যথাঃ-

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(ঘ) অপ্রত্যাহারযোগ্য পাওয়ার অব অ্যাটর্নি ব্যতিত অন্যান্য
পাওয়ার অব অ্যাটর্নির ক্ষেত্রে পাওয়ারদাতা দেউলিয়া বা
অপ্রকৃতিস্থ হইলে বা মৃত্যুবরণ করিলে বা পাওয়ারদাতার আইনী
স্বত্তা (legal entity) বিলুপ্ত হইলে।”

(Underlined by us)

It divulges from the provision of section 4(6) that prior to expiration of the term of the irrevocable power of attorney if the power-grantor or the holder dies, the liabilities or rights accrued under the power of attorney will automatically vest upon the successors of the deceased. Admittedly, in this case, the petitioner himself is a successor of the power-grantor.

Section 11 provides for the situations when a power of attorney becomes inoperative. Section 11(1)(d) made it clear that when the power of attorney is an “irrevocable” one it does not come to an end because of its grantor’s death. Section 2(4) of the Act 2012 defines “irrevocable power of attorney” which includes one concerning mortgage of immovable property against loan liabilities.

In view of the above proposition of law, we find that an irrevocable power of attorney does not come to an end just because the power-grantor has died. The rights and liabilities under irrevocable power of attorney will automatically vest upon the successors of the power-grantor by operation of section 4(6) of the Power of Attorney Act, 2012. Thus, the irrevocable power of attorney was in force and operative at the time of execution and registration of the deed of sale in question. Consequently, the process of execution and registration of the deed of sale by the power-holder Bank in favour of the auction purchaser suffers from no legal infirmity. The purchaser acquired a valid title in accordance with section 12(8) of the Artha Rin Adalat Ain, 2003.

Furthermore, once the property is transferred to the auction purchaser by way of a registered deed of sale, no remedy basically lies for the mortgagor or her successors in the writ jurisdiction against such registered deed or against the auction process held.

Whether the mortgage property is sold in auction collusively to deprive the mortgagor and/or

whether the price is unreasonably or shockingly low than the prevailing market price is a factual issue as well as a matter of evidence. This issue cannot be decided here in this summary proceedings.

However, the mortgagor or her successors may invoke a competent jurisdiction of the civil court for compensation in view of section 12(8) of the Atrha Rin Adalat Ain, 2003 and the proviso thereof, if so advised.

The representation made by the petitioner on 10.11.2022 to the respondent No.2, Bangladesh Bank (Annexure-“O”) to get the property back by making repayment of balance due to the lending Bank and sought for a direction from this court to dispose of the said representation. We do not consider that after transfer of the property by way of a registered deed, the Bangladesh Bank has any role to play in this regard. Therefore, any direction, as sought for, would be an exercise in futility.

In view of the above, we do not find any merit in the Rule. Accordingly, the Rule is discharged.

No order as to costs.

(Justice Md. Toufiq Inam)

J.B.M. Hassan, J:

I agree.

(Justice J.B.M. Hassan)

Syed B.O.
Ashraf/A.B.O.