

In the Supreme Court of Bangladesh
High Court Division
(Civil Revisional Jurisdiction)

Present:

Mr. Justice Muhammad Abdul Hafiz

Civil Revision No. 4463 of 2022

Sherder Abul Hossain
Auction Purchaser Opposite Party-Petitioner

-Versus-

Bangladesh House Building Finance
Corporation
Third Party Applicant-Opposite party No. 1

Major (retd.) Rafiq Hasan Faruk
Judgment Debtor-Opposite Party

Mr. Golam Samdani, Advocate
for the auction purchaser opposite party-
petitioner

Mr. Sikder Mahmudur Razi, Advocate
for the third party applicant-opposite party
No. 1

Judgment on 18.1.2023

This Rule was issued calling upon the opposite party No. 1 to show cause as to why the impugned Judgment and Order dated 10.10.2022 passed by the learned District Judge, Dhaka granting ad-interim order of injunction directing the parties to maintain status-quo in respect of handing over possession and recalling the warrant of delivery of possession along with a show cause notice in Miscellaneous (Execution) Case No. 227 of 2002 pending under the provision of Article 27(9) of P.O. No. 7 of 1973 should not be

set aside and/ or such other or further order or orders passed as to this Court may seem fit and proper.

For the purpose of disposal of the Rule the facts given by the petitioner is in short that the House Building Finance Corporation being plaintiff obtained money decree on 01.08.2005 against the judgment debtor Major (retd) Rafique Hasan Faruque in filing Miscellaneous Case No. 227 of 2002 under the provision of Section 27 of the House Building Finance Corporation Ordinance-1973. The aforesaid Money Decree dated 01.08.2005 was put in execution by Miscellaneous (Execution) Case No. 227 of 2002 for realization of money by selling out the Mortgaged Property. During pendency of the execution case the Executing Court fixed a date on 18.06.2019 for public auction and invited the bidders by notices and through newspapers. The petitioner being informed through newspaper participated in public auction conducted in Court premises and won the Bid in consideration of money of Tk. 5001000/- and therefore the petitioner deposited all the consideration / Bid money, poundage fees and other charges as per Court's Order and accordingly the sale was confirmed on 02.07.2019. The learned Court executed and registered the sale certificate under the provision of Order 21 rule 94 of the Code of

Civil Procedure by registered deed No. 19614 dated 07.12.2021 in the Savar Sub-registry Office, Dhaka.

Thereafter the House Building Finance Corporation on 22.05.2022 filed an application praying for withdrawal of deposited money by the auction purchaser and accordingly the learned Court allowed the application for withdrawal of money by the Order No. 123 dated 22.05.2022. The auction purchaser-petitioner personally visited the purchased property and found that a two storied residential building of judgment debtor is abandoned. Before abandoning the house the judgment debtor uninstalled all the doors and windows from the building. It is further stated that the applicant also found that there are five more rooms beside the road which were used as shops are under lock and key. The judgment debtor is residing in other places than the auctioned property. The petitioner personally met with the judgment debtor and showing the sale certificate requested to hand over the possession of the premises and the said five rooms unlocking the locks he fixed. The judgment debtor expressed no objection if the petitioner takes possession of the house but refused to hand over the said 5 rooms unlocking the locks he fixed. The petitioner took possession of the purchased property save and except those five rooms under lock and key in the

month of March, 2022. Thereafter the petitioner filed an application to the learned Court praying for appointing police forces for assisting the Bailiff for giving possession of his purchased property formally by breaking out of locks of those five rooms. Accordingly, police forces have been appointed and the petitioner deposited the cost of the police forces through Chalan on 04.8.2022 and the learned Court fixed a date on 26.9.2022 for hearing the application.

On 04.8.2022 the House Building Finance Corporation filed an application in Miscellaneous (Execution) Case No. 227 of 2002 (in which House Building Finance Corporation are the decree holder) claiming to be the purchaser of four properties and they are owners in possession of that property by constructing boundary wall and prayed for injunction against the petitioner by restraining to measuring the property they purchased by aforesaid 4 cases save and except the property purchased by the petitioner in Miscellaneous (Execution) Case No. 227 of 2022. The House Building Finance Corporation did not state the description of the property they claimed to be purchased in their application. The petitioner filed written objection against that application which is still pending for disposal. The auction purchaser-petitioner filed an application praying for delivery of possession of auctioned

property on 04.08.2022 and therefore the said application was fixed for hearing on 26.09.2022. On an off date on 21.09.2022 the House Building Finance Corporation filed an application before the Court without serving the copy of that application to the petitioner with a prayer to the effect that “অবস্থানীনে প্রার্থনায় হুজুর আদালত ন্যায় বিচারের স্বার্থে নিলাম ক্রেতা সরদার আবুল হোসেনকে মিস (জারী) ২২৭ / ২০০২ এর তফসিল বর্ণিত সম্পত্তি ব্যতিত দরখাস্তকারী/বাংলাদেশ হাউজ বিল্ডিং ফাইন্যান্স কর্পোরেশনের নিলামকৃত মিস জারী ৭০০/২০০২, মিস (জারী) ৭০১/২০০২, মিস (জারী) ৭০৪/২০০২ ও মিস (জারী) ৩৮২/১৯৯৯ নং মোকদ্দমায় তফসিল বর্ণিত সম্পত্তিতে প্রবেশ হইতে বিরত রাখার আদেশ দিয়ে সুবিচার করিতে মর্জি হয় এবং অত্র দরখাস্ত নিষ্পত্তি না হওয়া পর্যন্ত ৪ টি মামলার তফসিলভুক্ত সম্পত্তিতে সরদার আবুল হোসেন যাহাতে অনুপ্রবেশ করিতে না পারে তদমর্মে অন্তবর্তীকালীন নিষেধাজ্ঞার আদেশ দানে মর্জি হয়”। The learned Court fixed the hearing of the application on 26.09.2022 and upon hearing the application the learned District Judge, Dhaka passed the impugned Judgment and Order on 10.10.2022 and hence, the petitioner moved this application under section 115 (1) of the Code of Civil Procedure before this Court and obtained this Rule.

The opposite party No. 1 filed counter affidavit stating that the House Building Finance Corporation filed Miscellaneous (Execution) Case No. 227 of 2002 and auction notice was published on 31.05.2019 fixing the auction date on 18.06.2019. The present petitioner participated in the auction and became the

highest bidder and the Court issued Sale Certificate in favour of him on 07.12.2021. The opposite party No. 1 further stated that while applying for the credit facility to the Corporation the borrower Major Rafiq Hasan Faruq submitted the plan of the proposed building in which the location of the mortgaged property was specifically pointed out but the boundary mentioned in the mortgage deed was not clear enough to correspond with the said location as shown in the submitted plan. The opposite party No. 1 purchased mortgaged property in Miscellaneous (Execution) Case No. 382 of 1999, Miscellaneous (Execution) Case No. 700 of 2002, Miscellaneous (Execution) Case No. 701 of 2002 and Miscellaneous (Execution) Case No. 704 of 2002 and submitted all the Bia deeds and supported the impugned Judgment and Order as correct.

Mr. Golam Samdani, learned Advocate for the auction purchaser-opposite party-petitioner, submits that admittedly the opposite party No. 1 House Building Finance Corporation filed an application for temporary injunction in the instant case i.e. Miscellaneous (Execution) Case No. 227 of 2002 as a third party and it is well settled by the Apex Court of the country that the third party has no locus standi to file any application in an execution proceedings. The Decision to the effect *“The*

petitioner being a third party to the decree has no locus standi to maintain an application for stay of the execution proceeding and then the facts do not warrant exercise of discretionary power of the court to make an order of stay” has been taken in the Case of *Aftab Ahmed Versus Moinuddin Zaigirdar* and another cited in 46 DLR 173. Similar view was taken in the case of *Abul Bashar and others Versus Profulla Kumar Dad and others*; reported in 56 DLR (AD) 139. He further submits that the learned District Judge observed *that upon perusing the records it is seen that there is dispute regarding specification of boundary between the auction purchaser and the third party applicant as such it will not be justified to deliver possession to the auction purchaser unless the dispute is resolved* which is completely beyond the scope in an execution process and in this regard the Honourable Appellate Division took the view to the effect “*the executing Court will execute only the decree and it has no jurisdiction to go beyond the decree i.e. beyond the compromise decree wherein the rights of the parties were conclusively determined by the Court and the executing Court for executing the decree cannot enter into the merit of the decree as has been rightly found by the High Court Division”* in the case of *Abul Kashem and others Versus Md. Rafiqul Quarashi* and another

reported in 4 BLC (AD) 211. He further submits that the opposite party No. 1 opposed the instant Rule in submitting that the boundary of their purchased property in different Miscellaneous (Execution) Cases are not matching with their sale certificate and as the petitioner purchased the auctioned property from the same plot, it needs to hold a local investigation for resolving the question of specification which is not correct as the auctioned property is well specified by mentioning the boundary in compliance with the provision of Order VII rule 3 of the Code of Civil Procedure and the objection is not tenable in the eye of law as the executing Court has no jurisdiction to hold local investigation in this regard; it was held that ***“the decree-holder being entitled to Khas possession of the decretal lands was opposed by the judgment-debtor on the ground that there was no line of demarcation and that there was not scope for local investigation at the execution stage. Held the decree-holder is entitled, on equitable grounds, to get symbolical possession through not khas possession”*** in the case of *Satish Chandra Pal and others Versus Asgar Ali as reported in 7 DLR-425.* He further submits that the third party-applicant-opposite party No. 1 filed application for injunction so that the auction purchaser in Miscellaneous (Execution) Case No. 227 of 2005 cannot enter in

to the property purchased by the opposite party No.1 in Miscellaneous (Execution) Case No. 382 of 1999, Miscellaneous (Execution) Case No. 700 of 2002, Miscellaneous (Execution) Case No. 701 of 2002 and Miscellaneous (Execution) Case No. 704 of 2002 without giving any specification/ schedule of those property in the application but the learned District Judge passed the impugned order in respect of the auctioned property in Miscellaneous (Execution) Case No. 227 of 2002 which is beyond the prayer of the opposite party No.1 and also beyond the records. He further submits that the learned District Judge committed an error of law in failing to consider that the provision of Article 27(7) of the P.O. No. 7 has no manner of application after pronouncement of judgment in a case filed under the provision of Article 27(1) of the P.O.No. 7; the provision of Article 27(7)(a) to (d) of P.O. No. 7 are the guidelines for the court to dispose of the Miscellaneous Case by pronouncement of judgment under the provision of Article 27(5) and (6) of P.O. No. 7 and now the execution proceedings is going on under the provision of Article 27(9) of the P.O. No. 7 where there is clear provision runs as follows: “(9) An order under this Article for the [attachment or sale] of property shall be carried into effect as far as may be in the manner provided in the Code of Civil

Procedure, 1908, for the [attachment or sale] of property in execution of a decree as if the Corporation were the decree holder” so the execution process will be governed by the provision of Order 21 of the Code of Civil Procedure, which resulting in an error in the Order occasioning failure of justice. He lastly submits that the learned District Judge committed an error of law in finding that there is a dispute regarding boundary of auctioned property in between the auction purchaser and the applicant completely misreading the application where there is not a single word regarding dispute about boundary of auctioned property, which resulting in an error in the Order occasioning failure of justice.

Mr. Sikder Mahmudur Razi learned Advocate for the third party-applicant-opposite party No. 1 submits that the present petitioner purchased in auction, the mortgaged property of Major Rafiq Hasan Faruq which is at the “South-West” corner. But he is now trying to take possession of the land mortgaged by Zahir Hasan Maruf which is situated at the “North-East” corner. He further submits that since the auction-purchaser-present petitioner purchased the property through auction which was mortgaged by Major Rafiq Hasan Faruq as owner of 11 decimals land, he cannot now jump to take possession of the land which was mortgaged by

another borrower. Such an attempt on the part of the auction purchaser- present petitioner cannot be sustained from any point of view. He lastly submits that the substantive application of the House Building Finance Corporation is still pending therefore, the instant civil revision seeking full relief in an interlocutory matter is incompetent.

Heard the learned Advocates for the both parties and perused the record.

From the record it appears that the House Building Finance Corporation advanced loan facilities to the judgment debtor of the Miscellaneous (Execution) Case No. 227 of 2002 upon taking security by Mortgage deed No. 13054 dated 27.6.1984. Before executing the Mortgage deed the opposite party No. 1 by physical verification properly identified the boundary of the Mortgage Property and accepted the boundary as it own verification. Therefore the opposite party No. 1 filed the Miscellaneous (Execution) Case No. 227 of 2002 for realization of outstanding dues from the judgment debtor. In the plaint of the said Miscellaneous Case the opposite party No. 1 stated the mortgaged property in the schedule to the plaint. Being failure to realize the decretal amount from the judgment debtor, the opposite party No. 1 filed application under the provision Article 27(9) of the P.O. 27, 1973 for realization of decretal amount by selling the scheduled

property to the plaint/decreed and subsequently the opposite party No. 1 itself submitted that process of Sale Proclamation under the provision of rule 66 of Order 21 of the Code of Civil Procedure before the executing Court then the executing Court served notices upon the opposite party No. 1 and the judgment debtor inviting objection if any regarding the proposed auction sale. That neither the opposite party No. 1 nor the judgment debtor raised any objection. The petitioner being satisfied with the identification of the property stated in Sale Proclamation purchased from the Court in a public auction and the opposite party No. 1 filed an application on 01.12.2020 stating that it has no objection if the Court issues and registers the Sale Certificate in favour of the petitioner.

The opposite party No. 1 did not raise any objection regarding the purchased land of the petitioner before the executing Court rather the opposite party No. 1 creating obstruction to get the possession of the petitioner by filing application praying for protection of the property other than the petitioner's purchased property which have no nexus with the petitioner's property. But it is the execution Court that itself recalled the writ of delivery of possession and ultimately stayed the process of delivery of possession to the petitioner by reasoning some dogmatic facts. Now the opposite party No. 1 also filed counter affidavit stating a bundle of irrelevant facts in the line of the executing Court's order

which indicates something otherwise the legal process. The petitioner is only concerned with the property he purchased and he filed an application praying for formal delivery of possession of the property as per schedule to the plaint and decree of the Miscellaneous Case No. 227 of 2002, sale proclamation and the sale certificate issued in Miscellaneous (Execution) Case No. 227 of 2002 and there is no deviation. The executing Court is mandatorily bound by the provision of Order 21 rule 95 of the Code of Civil Procedure to delivery possession of the auctioned sold property to the petitioner and the opposite party No. 1 is no body to raise any objection to that effect.

Considering the facts and circumstances of the case, I find substance in this Rule.

In the result, the Rule is made absolute.

The impugned judgment and order dated 10.10.2022 passed by the learned District Judge, Dhaka granting ad-interim order of injunction directing the parties to maintain status-quo in respect of handing over possession and recalling the warrant of delivery of possession along with a show cause notice in Miscellaneous (execution) Case No. 227 of 2002 is hereby set aside.

Let the record be sent down to the Court below with a copy of the judgment at once.