

Present:

Mr. Justice Mohammad Bazlur Rahman

and

Mr. Justice Md. Ruhul Quddus

Writ Petition No.1414 of 2007

Anwar Hossain

...Petitioner

-Versus-

Bangladesh and others

...Respondents

Mr. Md. Bakir Uddin Bhuiyan with Mr. Moshiur  
Rahman Shamim, Advocates

... for the  
petitioner

Mr. Md. Akbar Ameen Babul, Advocate

... for respondent 3

Judgment on 15.04.2013

*Md. Ruhul Quddus, J:*

This *rule nisi* at the instance of a judgment-debtor in an Artha Rin Mortgage Suit was issued challenging the proceedings in Mortgage Execution Case No. 3 of 2004 (arising out of exparte decree dated 27.08.2003 passed in Artha Rin Mortgage Suit No. 11 of 2003) now pending before the Artha Rin Adalat, Narayangonj.

Respondent 3 Janata Bank Ltd., Bangabandhu Road Corporate Branch, Narayangonj instituted Mortgage Suit No. 11 of 2003 before the Artha Rin Adalat, Narayangonj on 02.03.2003 impleading the petitioner and three others as defendants for realization of money inclusive of interest for an amount of Taka 11,80,723/-. Ultimately the suit was decreed exparte on 27.08.2003 for an amount of Taka 11,80,723/-. The preliminary decree was

signed on 04.09.2003 and the final decree was drawn up and signed on 20.11.2003.

Thereafter, the decree holder-bank filed an application for execution of the decree being Mortgage Execution Case No. 3 of 2004 before the Artha Rin Adalat, Narayangonj on 08.01.2004 towards realization of Taka 13,79,365/-. In course of the execution proceeding, a date for holding auction of the mortgaged property was fixed on 18.02.2007. At that stage, the judgment-debtor moved in this Court challenging the proceedings of the execution case and obtained the Rule with an order of stay.

The decree holder-bank contests the Rule by filing an affidavit-in-opposition denying the material facts placed in the writ petition.

Mr. Bakir Uddin Bhuiyan, learned Advocate for the petitioner submits that Mortgage Suit No.11 of 2003 was actually a suit for realization of money by enforcing sale of mortgaged property regulated under Order XXXIV of the Code of Civil Procedure, which deals with the suits relating to mortgage of immovable property and in such a suit, the preliminary decree is to be passed as per provision of rule 4 of Order XXXIV of the Code. The proforma of such preliminary decree has been prescribed in form Nos.5 & 5A of the First Schedule, Appendix D of the Code. In the present case the Artha Rin Adalat passed the decree on 04.09.2003 (annex-C to the writ petition) under rules 6 and 7 of Order XX of the Code instead of Order XXXIV, rule 4. The contents of the decree drawn also do not satisfy the requirements of Order XXXIV rule 4 and as such the decree passed in Mortgage Suit No.11 of 2003 is not legally enforceable and therefore, the impugned proceedings in Mortgage Execution Case No.11 of 2003 based on

the aforesaid preliminary decree is without lawful authority and of no legal effect.

Mr. Md. Akbar Ameen Babul, learned Advocate appearing for the respondentóbank, on the other hand, submits that section 5(2) of the Artha Rin Adalat Ain, 2003 (hereinafter called the Ain, 2003) provides that if any financial institution intends to institute any mortgage suit for selling any mortgaged property or property under foreclosure under section 67 of the Transfer of Property Act and Order XXXIV of the Code of Civil Procedure, that has to be instituted in an Artha Rin Adalat constituted under the Ain, 2003 and in such case the provisions of the Code of Civil Procedure would be applicable so far it is not inconsistent with the provisions of the Ain, 2003. In the present case, the decree in question was not passed under Order XXXIV, rule 4 of the Code but under section 5 of the Ain, 2003. He further submits that the writ petitioner did neither contest the suit nor prefer any appeal against the exparte decree, but has filed this writ petition only to frustrate the decree, which is not maintainable.

We have considered the submissions of the learned Advocates and gone through the records. It appears that at the top on the preliminary decree, drawn up and signed on 04.09.2003 the words and figures óOrder XX, rules 6 and 7 of the Code of Civil Procedureö and on the final decree drawn up and signed on 20.11.2003 óOrder XXXIV rule 3(2) of the Code of Civil Procedureö have been mentioned. As the judgment-debtor in the meantime failed to pay the decretal amount, the decree holder-bank filed the execution case on 08.01.2004 before the Artha Rin Adalat, Narayangonj. However, the execution case was filed after the final decree was drawn and

signed, therefore, it is not correct to say that it was filed on the basis of preliminary decree drawn under Order XX rules 6 and 7 of the Code. It further appears that the suit was filed on 02.03.2003 under the Artha Rin Adalat Ain, 1990 and during pendency of the suit the Ain, 2003 came into force on 10.03.2003 and being a pending suit under the Ain, 1990 it proceeded as a suit under the Ain, 2003 by operation of its section 60 (3). The decree passed in such a suit is, therefore, not a decree under the Code of Civil Procedure, but under section 5 of the Ain, 2003 and as such the point raised by the learned Advocate for the petitioner on technicality in drawing the decree in an execution proceeding is not acceptable. Moreover, wrong mentioning of law or its omission in the decree in question cannot invalidate the same.

Nowhere in the application under article 102 of the Constitution it has been stated whether the petitioner has got any valid ground to challenge the decree on merit or the amount claimed in the artha rin suit was not correctly assessed. Without contesting the suit by controverting the material allegations of the plaint or preferring any appeal under section 41 of the Ain, 2003 against the exparte decree or filing any application under section 19 thereof, the petitioner impliedly accepted the exparte decree. Now he cannot challenge the execution proceeding on the plea of defect in drawing the decree, which is amenable to appellate forum.

We also find the case of Shahjahan Mia (Md) Vs. Government of Bangladesh and others, reported in 12 BLC 742. In that case Islami Bank Bangladesh Ltd. instituted a Title Suit in the Court of Joint District Judge

and Artha Rin Adalat at Faridpur for realization of loan, which was decreed exparte on 10.03.2003 and the preliminary decree was signed on 15.03.2003. The decree holder-bank without filing any application for drawing and signing the final decree filed an execution case for realization of the decretal money. The judgment-debtor challenged the proceedings in the said execution case on the ground that the plaintiff-bank without obtaining a final decree had filed the execution case, which was illegal. A Division Bench of the High Court discharged the Rule taking the view that the decree passed in the suit would be considered as a decree passed under sub-section 4 of section 5 of the Ain, 2003 and as soon as the auction sale of the mortgaged property would be completed, the preliminary decree would be considered a final decree (para 11).

In the said case, the decree was passed on 10.03.2003 as per provision of the Ain, 1990 and the execution case was filed when the Ain, 2003 came into effect. The execution case was treated as a proceeding under the Ain, 2003 by operation of its section 60(3). For better appreciation of the decision, section 5 of the Ain, 2003 is quoted below:

- 005 | (1) Ab' wwb AvB\* hvrn vKQB \_vKK bv wwb, Dc-avi v (5) I (6) Gi weavb mvx\*], Awl\_R cZôv\* FY Av`vq m'úwKZ hveZxq gvgj v avi v 4 Gi Aaxb cZwôZ, wwl Z ev MY" nI qv A\_©FY Av`vj x `vxi Kwi x nBx Ges D³ Av`vj xB Dnvxi wb®úwÉ nBx|
- (2) GB AvB\* Aaxb Awl\_R cZôvb, `ei m'úwÉ RvgvbZ `t eÜK MhYceR cÜ È Fxi weci x D³ eÜKx `ei m'úwÉi weµq (Sale) ev wbw®) mgwßi (Foreclosure) D\*\*" The Transfer of Property Act, 1882

(Act No. IV of 1882) Gi section 67 Gi Aaxb Ges The Code of Civil Procedure, 1908 (Act No. V of 1908) Gi Order XXXIV Gi weavb Abhvqx **vvb** eÜKx gvgj v (Mortgage suit) `vxi Kwi **x** Pwin**x**, D<sup>3</sup> gvgj vI GB AvB**x**i Aaxb cÜZwôZ A\_©FY Av`vj **x**ZB `vxi Kwi **x** nB**x**; Ges GBi **t** **v**fi**k** The Code of Civil Procedure, 1908 Gi weavbmgñ GB AvB**x**i weavbmg**x**i mwnZ, hZ` i m<sup>æ</sup>e, mg**%**pi gva`x cÜvR` nB**x**|

(3) Dc-aviv (2) Gi Aaxb Avw\_℞ cÜZôvbKZ**ü**`vxi K**v** gvgj v **v**bw**®**) mgwßi (Foreclosure) D**x**x` GKwÜ eÜKx gvgj v (Mortgage suit) nB**x**, **v**ej gvÎ **v**b **v**fi**k** Av`vj Z KZ**ü**cÜ È **v**Wµx cÜ\_ugK **v**Wµx (Preliminary decree) nB**x** Ges Ab`vb` mKj **v**fi**k** FY Av`vqv\_© **v**xi K**v** gvgj vq Av`vj Z KZ**ü**cÜ È **v**Wµx Pö**v**%µx (Final decree) nB**x**|

(4) The Transfer of Property Act, 1882 A\_ev eZ**ü**v**x** cPwj Z Ab` **v**v**b** AvB**x** weci**x**Z hvnv **w**KÖß \_vKK bv **v**b, Dc-aviv (3) Gi Aaxb eÜKx gvgj v e`vZ**x**x, GB AvB**x**i Aaxb `vxi K**v****v**v**b** gvgj vq, Av`vj Z KZ**ü**cÜ È **v**Wµx ev`x Avw\_℞ cÜZôv**x**i **c**x**i** **v**bw**®**) mgwßi (Foreclosure) cÜ\_ugK **v**Wµx **w**x**x** MY` nB**x**; Ges F**x**i weci**x**Z ev`xi Ab**k****x** evÜKx **~**e*ï* m<sup>æ</sup>úwÈ **v**Wµxi avivewwKZvq wbj vg weµq nI qv gvÎ B D<sup>3</sup> cÜ\_ugK **v**Wµx Pö**v**%µx **w**x**x** MY` nB**x**, Ges weµq Pö**v**%µx µq **y**a MY` nB**x** Ges AZtci D<sup>3</sup> m<sup>æ</sup>úwÈ cpi **x**vi Kwi evi **v**bi**t** Awakvi (Right to redeem) weev`x-`wq**x**i **\_**wk**x** bv|<sup>00</sup>

From a close reading of the above quoted provisions of the Ain, 2003 it appears that in any artha rin suit except any suit for foreclosure, one decree is enough for commencing an execution proceeding. The decree in such a suit is passed under section 5 (4) of the Ain, not under any provision of the Code of Civil Procedure.



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Since the present suit is a simple mortgage suit for realization of money by selling the mortgaged property and not a suit for foreclosure, the decree in question cannot be said to be a decree passed under the Code.

In view of the discussions made above, we do not find any merit in this case. Accordingly, the Rule is discharged, however, without any order as to cost.

Communicate a copy the judgment.

Mohammad Bazlur Rahman, J:

I agree.