IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Civil Appellate Jurisdiction)

First Miscellaneous Appeal No. 78 of 2023
(Civil Rule No. 819 (FM) of 2022)

In the matter of:

Agrabad Beach Hote Ltd
… Appellant-petitioner
-Versus-

BASIC Bank Ltd Agrabad Branch and others
…Respondents-opposite parties
Mr. Lokman Karim, Advocate
…For the appellant-petitioner
Mr. M. Mohiuddin Yousuf, Advocate
....For the respondent-opposite party no. 1

Heard on 07.02.2024 11.02.2024
and Judgment on 11.02.2024

Present:

Mr. Justice Md. Mozibur Rahman Miah
And
Mr. Justice Mohi Uddin Shamim

Md. Mozibur Rahman Miah, J.

Since the point of law and the facts so figured in the memo of appeal and that of the rule are intertwined they have heard together and are being disposed of by this common judgment.

At the instance of the plaintiff in Other Class Suit No. 284 of 2022, this appeal is directed against the judgment and order dated 31.10.2022 passed by the learned Joint District Judge, 2nd Court, Chattogram rejecting an application filed for temporary injunction holding that, there has been no scope on the part of the civil court to pass any restrained order in a criminal case from encashing cheque.

The salient facts leading to preferring this appeal are:

The present appellant as plaintiff originally filed the aforesaid suit seeking following reliefs:

অতএব প্রার্থনা ন্যায় বিচারের স্বার্থে গত ১৫.১২.২০১৯ ইং তারিখের পূণঃ তপশীল মন্জুরীপত্রের শর্ত অনুযায়ী ১নং বিবাদী সোলেনামা সম্পাদন না করায় উক্ত মন্জুরীপত্তের শর্তাবলী কার্যকর না হওয়ায, উক্ত মন্জুরীপত্তের বিপরীতে বাদী হতে গৃহীত নিরাপত্তা জামানতকৃত 'ক' তপশীলোক্ত চেক সমূহ দ্বারা এই বাদী বাধ্য নয় মর্মে ঘোষণা মূলক ডিক্রী প্রদান

এবং

মহামান্য আপিল বিভাগের CRP no. 305306/2015, CRP No. 315-316/2015 এবং CP No. 2367/2010 এর রায় অনুযায়ী বাদীকে ক্ষতিপূরণ প্রদান না করা পর্যন্ত এই বাদীর বিরুদ্ধে 'ক' তপশীখলোক্ত চেক সমূহ ব্যবহার করে ১নং বিবাদী কোন ধরণের অীহনগত পদক্ষেপ গ্রহণ করতে হকদার নয় মর্মে ঘোষণা মূলক ডিক্রী প্রদানে

এবং

বাদী আইনত ও ইকুইটি মতে আর যে যে প্রতিকার পাইতে হকদার তা বাদীর অনুকুলে ডিক্রী প্রদান বিজ্ঞ আদালতের বিহীত মর্জি হয়।

On the same date of filing the suit the plaintiff also filed an application under Order 39 Rule 1 and 2 read with section 151 of the Code of Civil Procedure praying for injunction restraining the defendant no. 1 from taking any illegal advantage out of the legal notice issued on 06.07.2022 or to take any illegal steps in encashing or using the cheques

so described in schedule ‘ka’ to the plaint. Against that application, the present respondent no. 1 as defendant no. 1 contested the same by filing written objection denying all the material averment so made in the application and ultimately prayed for rejecting the application. The learned judge of the trial court took up the said application for temporary injunction for hearing and vide impugned order rejected the same. It is at that stage, the plaintiff as appellant preferred this appeal. After preferring the appeal, the appellant as petitioner also filed an application for injunction on the self-same averment made in the trial court and this court vide order dated 20.12.2022 issued rule and restrained the opposite parties from using the scheduled cheques for a period of 06(six) months that gave rise to Civil Rule No. 819(FM) of 2022. The said order of injunction was subsequently extended on 04.12.2023 for another 06(six) months.

Mr. Lokman Karim, the learned counsel appearing for the appellant-petitioner upon taking us to the memo of appeal including the impugned order at the very outset submits that, the learned judge of the trial court erred in law in not considering the material facts of the case that, as per BRPD circular no. 5 dated 16.05.2019 since the respondent no. 1 issued a letter on 15.12.2019 rescheduling the loan of the appellant outlining different conditions where there has been a condition that, within 90 days of such reschedulement, both the appellant and respondent will come to a compromise for withholding the Artha Rin Suit and since that condition has not been complied with by the respondent bank, so under no circumstances can the condition no. ‘ka’ to

the letter dated 15.12.2019 be implemented through which cheques can be encashed or used.

The learned counsel further contends that, since it is on the record that, the lease of the property mortgaged with the respondent, bank as a security to repay the loan has been cancelled so the loan disbursed to the appellant-petitioner could not be utilized having no scope to repay the loan to the bank and therefore the respondent no. 1 is not liable to take steps in encashing the cheques but the learned judge of the trial court failed to comprehend that very material aspect and illegally rejected the application for temporary injunction.

The learned counsel by referring to the letter dated 16.03.2021 also contends that, in order to bring about the compromise, the appellant-petitioner issued that letter requesting the respondent no. 1, Bank to execute the same, so there has been no latches on the part of the appellant-petitioner to implement the condition laid out in the reschedulement process and unless the compromise petition is furnished by the respondent bank then it is not authorized in take steps in enchshing the cheques. At this the learned counsel in support of his such submission has also placed his reliance in the decision reported in 71 DLR HC 570 .

Conversely, Mr. M. Mohiuddin Yousuf, the learned counsel appearing for the respondent-opposite party no. 1 by filing a counter-affidavit in the rule at the very outset submits that, there has been no illegality on the part of this respondent-opposite party no. 1 to issue legal notice for filing a criminal case under section 138/140 of the Negotiable Instrument Act moment the cheque is dishonored and since the present

petitioner replied the legal notice so there has been no scope for the petitioner to challenge the propriety of that legal notice by filing a civil suit.

The learned counsel by referring to the prayer portion taken in the application for temporary injunction also contends that, the legal notice so issued by the respondent bank dated 06.07.2022 is very much legal because as per section 138 of the Negotiable Instrument Act the bank is to issue notice when the cheque placed by the bank gets dishonored so under no circumstances can the issuance of legal notice as well as placing the cheques for encashment be regarded as illegal and without lawful authority (বে-আইনী).

The learned counsel by referring to the reschedulement letter dated 15.12.2019 which has been annexed as of Annexure-'D' series to the rule application also contends that, there has been no nexus between condition no. 'ka' and 'ja' thereof which spelt out depositing as many as 19 cheques to the respondent bank and of staying further proceedings of the Artha Rin Suit upon filing compromise petition within 90 days of issuing that letter and therefore the submission so placed by the learned counsel for the appellant-petitioner, that since the bank has not come forward by filing compromise petition, the respondent bank has no authority in using those cheques. The learned counsel then by referring to the decision reported in 18 MLR (AD) 251 and by reading out last part of paragraph no. 15 also contends that, in that very decision it has already been settled that no legal action against encashing of cheque can be entertained by filing a civil suit and since the suit itself is prima facie not maintainable so no interim prayer can be made out of that very suit

which is not maintainable and therefore the *ratio* so settled in the above decision is equally applicable in the facts and circumstances of the instant case.

The learned counsel further contends that, in adjudicating an application for temporary injunction three basic principles have to be taking into consideration by a court of law that is to say, prima facie case of the applicant, having balance of convenience and inconvenience and that of suffering irreparable lose and injury may be sustained by the applicant if injunction is not granted and then submits that, all those three legal principles clearly stand in favour of the bank since the bank has disbursed a substantial amount of loan in favour of the plaintiff-appellant-petitioner and the property so mortgaged with the bank has already been gone in favour of the government having no immediate chance to realize the dues from the appellant-petitioner and therefore the application for temporary injunction cannot lie against this respondent-opposite party.

The learned counsel wrapped up his submission contending that, if the plaintiff becomes prejudiced its such loss can well be compensated through money but under no circumstances can an application for injunction be entertained against using cheques moment the same is dishonored on presentation to the bank and finally prays for dismissing the appeal as well as discharging the rule.

We have considered the submission so advanced by the learned counsel for the appellant-petitioner and that of the respondent-opposite party no. 1 and perused the application for injunction on which the rule was issued, memo of appeal and the impugned order and all the

document so appended with the application for injunction vis-a-vis the counter-affidavit so filed by the respondent opposite party no.1. From the trend of submission so advanced by the learned counsel for the appellant-petitioner we find that, since the respondent bank did not come forward to execute a compromise petition as per the condition of reschedulement of loan issued by the bank, so the bank cannot use the cheques deposited by it in favour of the bank. But when we pose a question to the learned counsel for the appellant-petitioner that whether the appellant petition itself ever took step in furnishing compromise petition with the respondent bank within 90 days of issuing letter of reschedule but he could not give any plausible reply to our said query other than referred the letter so issued by the petitioner in favour of the bank dated 16.03.2021 where we find that, it made reminder asking the bank to file a compromise petition. On the contrary, from paragraph no. 21 to the written objection so filed by the respondent bank against the application for temporary injunction we find certain dates through which, the bank had issued several letters to the plaintiff-appellant-petitioner asking it to file compromise petition before the Artha Rin court and since the appellant-petitioner failed to reap the benefit out of the BRPD circular no. 5 dated 16.05.2019, the facilities so have been given vide that circular got automatically cancelled for which the respondent no. 1bank went for encashing the cheques issued by the appellant-petitioner. On top of that, since it is admitted fact that, soon after issuing legal notice upon dishonoring cheque, the appellant-petitioner replied the same so it has to face the consequence of the aftermath of the criminal proceeding to be brought by the creditor bank under section 138/140 of

the Negotiable Instruments Act. So there is no scope for the appellant-petitioner to take resort to a separate forum by filing a civil suit let alone praying for ad-interim injunction from using the cheques. Also on going through the reschedulement letter dated 15.12.2019 we also find that, the appellant petitioner were to issue cheques on certain intervals that is, every 6 months, so we find a good intention of the respondent-bank to place the cheque for encashment because if within that very period of 6 months, the appellant-petitioner would place sufficient fund in its account to honour the cheque, there would have nothing for the appellant to be prejudiced but we don't find any iota of substance to the submission so placed by the learned counsel for the appellant-petitioner, that since the compromise petition has not been furnished by the bank, so it cannot use the cheque. However, we find material substance to the submission so placed by the learned counsel for the respondent, bank that, there has been no nexus between condition no. 'ka' and 'ja' set out in letter dated 15.12.2019 as condition no. 'ka' is not dependent on condition no. 'ja'. On top of that, the prima facie case does not stand in favour of the appellant-petitioner since it is admitted fact that, out of the sanctioned loan amount above taka 14,0000000/- has already been disbursed in favour of the appellant when the security of the said loan which is lease hold properly has got no existence upon canceling the lease by the government. So it is the respondent opposite party no. 1 who has become prejudiced and would suffer irreparable lose and injury and thus the balance of inconvenience clearly stands in favour of the respondent, bank even though the basic three principles in adjudicating

the application for injunction has not been discussed in the impugned order but it is the *sine qua non* to take into account of those principles.

Given the above facts and circumstances we don't find any illegality or impropriety in the impugned order and the same does not call for any interference by this court.

Accordingly, the appeal is dismissed however without any order as to costs.

Since the appeal is dismissed the connected rule being Civil Rule No. 819(FM) of 2022 is hereby discharged. .

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

Let a copy of this order be sent to the court concerned forthwith.

Mohi Uddin Shamim, J.

I agree.

Kawsar/**A.B.O**.