

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

WRIT PETITION NO. 13468 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:

Eastern Bank Ltd.

.... Petitioner

-Vs-

***Bangladesh, represented by the Secretary,
Law and Justice Division, Ministry of Law,
Justice and Parliamentary Affairs,
Bangladesh Secretariat, Ramna, Dhaka and
others***

....Respondents.

Mr. Shah Monjurul Hoque, Senior Advocate
with Mr. Muhammad Harunur Rashid and
Mr. Md. Alauddin (Al-Azad), Advocates
..... For the Petitioner

Ms. Nasima K. Hakim, Deputy Attorney
General, Mr. Md. Hafizur Rahman, Mr. Md.
Ali Akbor Khan, Mr. Elin Imon Saha, and Mr.
Ziaul Hakim, Assistant Attorney Generals
.....For the Respondents-government

Heard on 12.02.2024

Judgment on 27.02.2024

Present:

Mr. Md. Iqbal Kabir
and
Mr. Justice S.M. Maniruzzaman

S.M. Maniruzzaman, J:

In this Rule *Nisi*, issued under Article 102 of the
Constitution of the People's Republic of Bangladesh, the

respondents have been called upon to show cause as to why the impugned SRO No.149- Ain /2020/110-Musak dated 11.06.2020 issued by the respondent No.2 so far it relates to the imposing of VAT at source @10% under Service Code No. S009.00 bearing Serial No.08 upon the petitioner bank in violation of Section 3 read with section 33 of the Artha Rin Adalat Ain, 2003 as well as section 49 of the Value Added Tax and Supplementary Duty Act, 2012 (Annexure-D) and impugned order No.26 dated 14.08.2022 passed by the respondent No.5, by learned Judge, Artha Rin Adalat, Chattogram (Annexure-D) in Artha Execution Case No.26 of 2021 arising out of Artha Rin Suit No. 20 of 2010 directing the petitioner to pay VAT at source @ 10% upon the auction price under the Service Code No.S009.00 bearing Serial No.08 of SRO No.149- Ain/2020/110-Musak dated 11.06.2020 should not be declared illegal, without lawful authority and is of no legal effect and/or to pass such other or further order or orders as to this Court may seem fit and proper.

Facts, in brief, relevant for disposal of the Rule, are that the petitioner is a private banking company incorporated under the Company Act, 1994 and established banking business by obtaining license from the Bangladesh Bank. One of branches of the petitioner's bank namely Eastern Bank Ltd., Agrabad Branch, Chattogram sanctioned loan in favour of M/S Super Poly and Packaging Industries Ltd. mortgaging the schedule property as described in the plaint as collateral security of the loan. Subsequently the borrower as well as other guarantors failed to

repay the loan and the bank instituted Artha Rin Suit No. 20 of 2010 in the Artha Rin Adalat No. 1, Chattogram for realization of loan amounting to Tk. 12,99,42,982.92 which was decreed on 12.10.2020 (decree signed on 15.10.2020). The judgment debtors of the said decree failed to pay the decretal amount within the stipulated period as prescribed therein. The petitioner bank as decree-holder put the decree in execution by filling Artha Rin Execution Case No. 26 of 2021 before the concerned Artha Rin Adalat (Executing Court). After completing all legal formalities, the Executing Court sold the property by auction under Section 33(4) of the Artha Rin Adalat Ain, 2003 (in short, the Ain, 2003) to the tune of Tk. 6,00,00,000/-. Finally, the auction purchaser submitted sale certificate (বয়নামা) on 14.08.2022 for registration before the concerned Sub-registry office and on the same day the Executing Court directed the petitioner bank to deposit 10% VAT on the auction value under the SRO No. 149-Ain/2020/110-Musak dated 11.06.2020.

Being aggrieved by and dissatisfied with the said order the decree holder bank moved this application before this Court and obtained the present *Rule*.

Mr. Shah Monjurul Hoque, learned Senior Advocate appearing for the petitioner submits that the Section 49(1) of the Value Added Tax and Supplementary Duty Act, 2012 (in short, the Act, 2012) states that “ধারা ৩৩ এর নিয়মাবলী সত্ত্বেও, উপধারা (২) এর বিধান সাপেক্ষে, কোন সরবরাহকারী উৎসে কর কর্তনকারী সত্ত্বেও নিকট চুক্তি, টেন্ডার, কার্যাদেশ বা অন্যবিধভাবে অব্যাহতিগ্রাপ্ত বা শূণ্যহার বিশিষ্ট নহে এমন সরবরাহ প্রদান করিলে উৎসে কর কর্তনকারী সত্ত্বেও উক্ত সরবরাহকারীর নিকট পরিশোধযোগ্য পণ হইতে বিধি দ্বারা নির্ধারিত পদ্ধতিতে নির্দিষ্টকৃত মূসক উৎসে কর্তন করিবে” and

in accordance with the said section the petitioner bank is neither supplier nor withholding entity rather it realised the defaulted loan by way of sale of mortgaged property in auction and accordingly, SRO No. 149-Ain/2020/110-Musak dated 11.06.2020 issued by the respondent No. 2 imposing of VAT at source @ 10% under Service Code No. S009.00 bearing Serial No. 08 upon the petitioner bank is violation of section 49 of the Value Added Tax and Supplementary Duty Act 2012. Hence, SRO No. 149-Ain/2020/110-Musak dated 11.06.2020 issued by the respondent No. 2 so far it relates to the imposing of VAT at source @ 10% under Service Code No. S009.00 bearing Serial No. 08 should be declared to have been without lawful authority and is of no legal effect. Mr. Hoque further submits that hypothetically if the loan amount would have been Tk. 6,00,00,000.00 (six crore) and the petitioner bank would have realized the said amount by selling the mortgaged property at auction at Tk. 6,00,00,000.00 (Taka six crore) and if the petitioner bank as auctioneer company had to pay 10% VAT i.e. Tk.60,00,000.00 (Taka sixty lac), there would have been a shortfall of Tk. 60,00,000 (sixty lac) in the realization of the total loan and that would clearly frustrate the very purpose of Ain 2003. Hence, SRO No. 149- Ain/2020/110-Musak dated 11.06.2020 issued by the respondent No. 2 so far it relates to the petitioner bank for imposing of VAT at source @ 10% and order No. 26 dated 14.08.2022 passed by respondent No.5 directing the petitioner to pay VAT at source @10% should be declared to have been passed without lawful authority and is of no legal effect.

Mr. Hoque refers to Section 26, Serial 7 (Chha) of the Second Part of the First Schedule and the Third Schedule of the Act, 2012 and also the definitions of the words and phrases ‘exempted supply/sale’, ‘taxable supply/sale’ ‘commodity’, ‘supply/sale of commodity’, ‘supply/sale’, ‘service’ ‘providing of service’, ‘immovable property’ and ‘transfer of immovable property’ as defined in Sub-Sections (3), (32), (60), (61), (94), (99), (100), (101) and (102) respectively of Section 2 thereof and submits that payment of VAT is to be imposed only against the commodity and service as mentioned in the Third Schedule that does not include any immovable property. The law has given clear exemption of VAT in sale or transfer of land and so in its registration, but the Artha Rin Adalat without any mandate of law passed the impugned order directing the decree holder-bank to deposit 10% VAT and exceeded its jurisdiction.

Mr. Hoque further submits that the explanation of ‘auctioneer’ (নিলামকারী সংস্থা) as given against Service Code Number S009.00 in SRO No.149- Ain/2020/110-Musak is not applicable to the courts who adjudicate loan recovery cases in accordance with the law or to the decree holder-banks who sell immovable property of the debtor(s) through auction in execution of the decree for the purpose of realization of loan. ‘Realization of loan from debtors’ and ‘gaining or earning money from sale/supply of commodity and providing of service’ are separate issues. In case of the latter, any person/entity is liable to pay VAT, but a creditor-bank being a decree holder cannot be compelled to pay VAT on realization of loan. In case of execution of a decree in a suit

for realization of loan, the creditor-bank does not gain anything and the courts hold auction as a requirement of law, where the question of paying VAT would not arise.

Mr. Hoque argues that the Services Code Number S009.00 and S060.00 are included in the Third Schedule of the Act, 2012 by the Bangladesh Gazette Extraordinary dated 30.06.2019 and it provides payment of 10% and 7.5% VAT at source by the auctioneer and auction-purchaser of a commodity respectively. On a careful reading of the Act, 2012 it becomes clear that the explanations given against the codes would be applicable to the cases other than the realization of loan through the court of law.

Mr. Hoque then refers to Sections 32 Ka and 135 of the Act, 2012 read with rule 118 (Ka) of the Value Added Tax and Supplementary Duty Rules, 2016 (for short, the Rules, 2016) and lastly submits that the National Board of Revenue (for short, NBR) has been delegated power to frame Rules for smooth and effective implementation of the Act and is also authorized to give explanation of any ambiguity and issue order, circular, clarification etcetera within the scope of the Act. The NBR, disregarding the scheme of law, explained the phrase 'auction-purchaser of commodity' against Service Code Number S060.00 in the SRO Number 186 dated 13.06.2019. Following this misexplanation, the Audit Department took a mechanical view and wrongly opined that 10% VAT at source was payable by the auctioneer against the auction held through the court and raised a common objection against judicial orders of the Artha Rin Adalats by a report, which was administrative in nature and

not binding upon the courts in deciding the matters strictly guided and regulated by law.

On the other hand, Mrs. Nasima K. Hakim, the learned Deputy Attorney General appearing for the respondent No. 2, Chairman, National Board of Revenue the rule supporting the SRO No. 149-Ain/2020/110-Musak dated 11.06.2020 and submits that the NBR is fully empowered by law to give explanation in case of ambiguity of any provision of law and also to extend the area of VAT, exercising which it has explained that a person, association, or entity buying any property through auction, whether movable or immovable, would fall within the definition of ‘auction-purchaser’ (নিলামকৃত cঙY”i ক্রেতা) against Service Code Number S060.00. Similarly, an institution, association or person conducting an auction whether in course of public function or private, would be treated as an ‘auctioneer’ (নিলামকারী সংস্থা) against Service Code Number S009.00. If a creditor-bank obtains a decree in a suit for recovery of loan and put the decree in execution through the court, in course of which an auction takes place, obviously it becomes an ‘auctioneer’ within the above definition. The impugned order has rightly been passed within the scope of the explanations as given in the Third Schedule of the Act, 2012 and its scheme of realization of VAT from auction. The rule is, therefore, liable to be discharged.

We have considered the submissions so advanced by learned senior Advocate for the petitioner and learned Deputy Attorney General for the respondent No. 2, have perused the writ petition and relevant materials on record so appended thereto.

The moot issue requires to be adjudicated in the instant Rule is that, whether the decree holder bank is liable to pay VAT under the Service Code No. S009.00 as Auctioneer (নিলামকারী সংস্থা) on value of the auction property, which has been sold by the Artha Rin Adalat under the provision of Ain, 2003.

The said issue on a threadbare discussions another Bench of this Division in the judgment dated 18.12.2022 passed in Writ Petition No. 8232 of 2022 (one of us was party of the said judgment) categorically observed *inter alia*;

“.....The learned advocate for the petitioner as well as the learned Assistant Attorney General, gone through the record and consulted the relevant provisions of the Act, 2012 including the definitions of the words and phrases ‘exempted supply’ (Ae”vniZcvß mieivn), ‘taxable supply/sale’ (KiþhM” mieivn), ‘commodity’ (cY”), ‘supply/sale of commodity’ (cY” সরবরাহ), ‘supply/sale’ (সরবরাহ), ‘service’ (সেবা), ‘providing of service’ (সেবা সরবরাহ), ‘immovable property’ (স্থাবর সম্পত্তি) and ‘transfer of immovable property’ (স্থাবর সম্পত্তি সরবরাহ) as defined in Sub-Sections (3), (32) (60), (61), (94), (99), (100), (101) and (102) respectively of Section 2 of the Act. For better appreciation, some of the definitions are quoted below:

- (৩) “অব্যাহতিপ্রাপ্ত সরবরাহ” অর্থ ধারা ২৬ এ উল্লিখিত অব্যাহতিপ্রাপ্ত সরবরাহ;
- (৩২) “করযোগ্য সরবরাহ” অর্থ কোন অর্থনৈতিক কার্যক্রম প্রক্রিয়ায় অব্যাহতিপ্রাপ্ত সরবরাহ ব্যতীত যে কোন সরবরাহ;
- (৬০) “cY” অর্থ শেয়ার, স্টক, সিকিউরিটিজ এবং অর্থ ব্যতীত সকল প্রকার দৃশ্যমান অস্থাবর সম্পত্তি;
- (৬১) “cY” সরবরাহ” অর্থ-
- (ক) cY”i বিক্রয়, বিনিময় বা অন্যবিধভাবে বিক্রয়ের মাধ্যমে cY” অধিকার হস্তান্তর; বা (খ) লিজ, ভাড়া, কিস্তি, হায়ার পারচেজ বা অন্য কোনভাবে cY”

ব্যবহারের অধিকার প্রদান এবং ফাইন্যান্স লিজের আওতায় পন্য বিক্রয় ও উহার অন্তর্ভুক্ত হইবে;

(৯৯) “সেবা” অর্থ যে কোন সেবা তবে cY”, স্থাবর সম্পত্তি এবং অর্থ (money) উহার অন্তর্ভুক্ত হইবে না;

(১০২) “স্থাবর সম্পত্তি সরবরাহ” অর্থে নিম্নবর্ণিত সরবরাহসমূহ অন্তর্ভুক্ত হইবে-

(ক) ভূমির উপর কোন অধিকার বা স্বার্থ;

(খ) ভূমির উপর কোন অধিকার বা স্বার্থ প্রদানের আহ্বান সম্বলিত ব্যক্তিগত অধিকার,

(গ) আবাসন সরবরাহসহ ভূমিতে অধিষ্ঠানের (occupy) নিমিত্ত লাইসেন্স প্রদান বা ভূমিতে প্রয়োগযোগ্য কোন চুক্তিভিত্তিক অধিকার;

(ঘ) দফা (ক), (খ) এবং (গ)-তে বর্ণিত কোন বিষয় অর্জনের অধিকার বা ভবিষ্যতে উক্ত অধিকার প্রয়োগের অভিপ্রায় (option)

On a plain reading of the above quoted definitions of ‘commodity’ (cY), ‘supply/sale of commodity’ (cY” সরবরাহ), ‘service’ (সেবা) and ‘providing of service’ (সেবা সরবরাহ) it appears that ‘transfer of immovable property’ has been excluded from the ambit of supply/sale of commodity or service. On a combined and careful reading of the Act, 2012, it further appears that three schedules have been appended thereto. The first schedule deals with exemption of commodity (cY”) and service (সেবা) within the scope of Section 26 of the Act. The second schedule deals with imposition of supplementary duty on some commodities and services. The third schedule deals with imposition of VAT on commodities and services. In this schedule, the phrase “transfer of immovable property” (স্থাবর সম্পত্তি সরবরাহ) has not been incorporated. It is already mentioned that the third schedule deals with the imposition of VAT on commodity (cY”) and service (সেবা) only, not on transfer of immovable property by sale or auction. Serial Number 7 (Chha) in the Second Part of the First Schedule to the Act, 2012 rather exempts the

sale or transfer of land and its registration from payment of all kinds of VAT. For better appreciation of the scope of imposition of VAT on transfer of land, the exclusion clause in the Serial Number 7 (Chha) with its heading and sub-heading is quoted below:

c_g Zdwmj

(avi 26 `oe")

wZx !"

(g# " m\$thv%& Ki n' tZ Ae"vহাZcvß (mevmg#)

) (ছ) জমি বিক্রয় হস্তান্তর এবং উন্মি নিবন্ধন (ভূমি উন্নয়ন সংস্থা ও ভবন নির্মাণ সংস্থা ব্যতীত) (Emphasis supplied)

The above quoted exclusion clause clearly says that transfer of land and its registration, except in the case of transfer to any Land Developer or Building Construction Company, are exempted from payment of VAT.

The National Board of Revenue, however, in order to extend the periphery of VAT, published the Bangladesh Gazette Extraordinary dated 30.06.2019 including the word 'auctioneer' (নিলামকারী সংস্থা) against Service Code Number S009.00 to the Third Schedule of the Act, 2012 and imposed 10% VAT to be paid by such auctioneer, and also included the phrase 'auction-purchaser of commodity' (নিলামকৃত পণ্যের ক্রেতা) against Service Code Number S060.00 and imposed 7.5% of VAT to be paid by him. It is pertinent to mention that the definitions of 'auctioneer' and 'auction-purchaser of commodity' are not incorporated in Section 2 of the Act. However, Section 32 Ka thereof confers power on the NBR to extend the taxability of any commodity/service and give explanation of anything ambiguous. The NBR, under Section 135 of the Act, also framed the Rules, 2016 and published it in SRO No.149-

Ain/2020/110-Musak dated 11.06.2020. Rule 118 (Ka) thereof authorizes the NBR to give explanation of any ambiguity and issue order, circular, clarification etcetera within the scope of the Act. Under such authority, the NBR issued the SRO No.149- Ain/2020/110-Musak dated 11.06.2020 giving explanation of ‘auctioneer’ (নিলামকারী সংস্থা) against Service Code Number S009.00 and ‘auction-purchaser of commodity’ (নিলামকৃত পণ্যের ক্রেতা) against Service Code Number S060.00, which are quoted below:

নিলামকারী সংস্থা: ব্যাখ্যা- নিলামকারী সংস্থা অর্থ সরকারি এবং বেসরকারি নিলামের আয়োজনে বা পরিচালনার কার্যে নিয়োজিত কোন প্রতিষ্ঠান, সংস্থা বা ব্যক্তি।

নিলামকৃত পণ্যের ক্রেতা : e"v!"v* "w&jvgKZ c†Y"i (, Zv" A_-. g& (Kv†&v e"/0 ciZ1v& ev m\$2nv whi& A†_i we&g† w&jvg 3†Ki gva"†g ev `ic4 Øviv ev `ic4 5v6v (Kv†&v miKvwi0 Avav*miKvwi0 27 89 vwmZ ciZ1v&0 (emiKvwi m\$2nv (. &i%;)0 e"\$K0 exgv ev A&" (Kv†&v Avw_K cwZ<=v&0 wjvg†>3 (Kv?@†& ev w: Av ciZ1v†&i 2nvei ev A2nvei m?@†8 evwYw%"K ev e"/MZ e"env†ii B†C†: " , Kwi v_†K&D

In order to examine the scope of imposing VAT on an ‘auctioneer’ and ‘auction-purchaser of commodity’, we have examined some other fiscal laws including the Customs Act, 1969. Section 219 B thereof confers similar authority upon the NBR, or the officials as mentioned therein to issue order, notice, explanation, or circular within their respective jurisdiction not inconsistent with the parent law. Under the authority of the said provision of law, the NBR issued Standing Orders No. 04/2019/Customs/12(30) dated 10.01.2019 and 41/Customs/ 2022 dated 04.09.2022 authorizing to appoint auctioneer on contractual basis to conduct auction for the purpose of selling the seized/confiscated/unreleased/unshipped goods or perishable goods. In

that case, the appointed auctioneer is to pay 10% VAT at source under Service Code Number S009.00 on their service charge.

The Artha Rin Adalat Ain, 2003 read with the applicable provisions of the Code of Civil Procedure provides the scope and authority of a Judge of the Artha Rin Adalat. Since there is no provision of appointment of any person/entity as “auctioneer” on contractual basis for holding auction in the Ain, 2003, or in the Code by which the Artha Rin Adalats and Executing Courts are governed, there is no scope to bring the petitioner-bank within the ambit of auctioneer (নিলামকারী সংস্থা). In the case in hand, there was no question of appointment of any auctioneer for holding auction on contract either by the decree holder-bank or by the Executing Court. The subject matter of auction was also not any good or perishable good, but immovable property that was mortgaged to secure the loan given by the petitioner-bank.

We are, therefore, of the view that the provision of paying 10% VAT at source on the service of an ‘auctioneer’ is not applicable in the case of an auction conducted by an Artha Rin Adalat in execution of a decree passed in an artha rin suit brought by any creditor-bank, who is a decree-holder as well.

Let us examine the second part of the rule, by which the explanation of the phrase ‘auction-purchaser of commodity’ (ৱ&jvgKZ c†Y”i ‡, Zv) as given against Service Code Number S060.00 in SRO No.149- Ain/2020/110-Musak dated 11.06.2020 has been challenged. The word ‘commodity’ and the phrase ‘immovable property’ have substantial difference between them. Similarly, ‘auction-purchaser

of immovable property’ cannot be equated with ‘auction-purchaser of commodity’, whereas by giving an explanation against service code No. S060.00 such an unusual meaning has been attempted to be given. We have already discussed that within the scheme of law, transfer of land/immovable property has been kept outside the periphery of VAT and Section 32 Ka does not confer any authority on the NBR to issue an order beyond the scope of law. So inclusion of ‘auction-purchaser of immovable property’ within the definition of ‘auction-purchaser of commodity’ by way of explanation on the part of the NBR appears to be wrong and outside the limit of the Act, 2012. However, since the petitioner-bank in no manner falls within the definition of ‘auction-purchaser’, it has no reason to be aggrieved by such explanation. The second part of the rule thus appears to have been obtained on misconceived notion.....”

In the said judgment this Division has decided that the provision of paying 10% VAT at source on the service of an auctioneer is not applicable in the case of an auction conducted by the Artha Rin Adalat in exercise of the decree passed in Artha Rin Suit brought by any creditor bank who is a holder as well.

Since, in the present case the Artha Rin Adalat, Chattogram has directed the petitioner bank to deposit 10% VAT on the auction value by the impugned order dated 14.08.2022.

In view of the facts and circumstances of the case and the cited decision so referred hereinabove, we find substance in the submission so

made by learned Senior Advocate for the petitioner and thus merit in the Rule.

Accordingly, the Rule is made absolute, however, without any order as to costs.

The impugned order No. 26 dated 14.08.2022 passed by the respondent No. 5, Artha Rin Adalat, Chattogram (Annexure-D) in Artha Execution Case No.26 of 2021 arising out of Artha Rin Suit No. 20 of 2010 directing the petitioner to pay VAT at source @ 10% on the auction price under the Service Code No.S009.00 bearing Serial No.08 of SRO No.149- Ain/2020/110-Musak dated 11.06.2020 is hereby declared illegal, without lawful authority and is of no legal effect.

Communicate the copy of the judgment and order forthwith.

Md. Iqbal Kabir, J:

I agree.