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

Writ Petition No. 5195 of 2010

IN THE MATTER OF:
An application under Article 102(1)(2) of the Constitution of the People's Republic of Bangladesh.

-And-

IN THE MATTER OF :

Salima Sobhan Khasru
……Petitioner

-Versus-

Judge, Artha Rin Adalat, Mymensingh and others.
…….Respondents.

Mr. Probir Neogi, with
Mr. Suvra Chakravorty, Advocates
……..for the petitioner
Ms. Quamrun Nesa, Advocate
……..for respondent no. 2
Mr. Muhammad Ali, Advocate
…..for respondent no. 5

Heard on : 12.02.2012, 22.02.2012 & 23.02.2012
Judgment on: 05.03.2012

Present:
Ms. Justice Naima Haider
And
Mr. Justice Farid Ahmed

Naima Haider, J;

In this application under Article 102(1)(2) of the Constitution of the People's Republic of Bangladesh, a Rule Nisi was issued calling upon the respondents to show cause as to why the impugned order no. 90 dated 24.05.2010 passed by the respondent no.1 in Miscellaneous Case No.03 of 2008 under Order 21, Rule 90 read with section 151 of the

Code of Civil Procedure and section 19(2) of the Artha Rin Adalat Ain, 2003 arising out of Artha Rin Execution Case No.66 of 2006 rejecting the Miscellaneous Case (Annexure-A) should not be declared to have been made without lawful authority and is of no legal effect and/or pass such other order or further order or orders as to this court may seem fit and proper.

The facts necessary for disposal of the Rule are briefly stated:

The petitioner has impugned order No.90 dated 24.05.2010 passed by respondent no.1 in Miscellaneous Case No.03 of 2008 under Order 21, Rule 90 read with section 151 of the Code of Civil Procedure and section 19(ka) of the Artha Rin Adalat Ain, 2003 arising out of Artha Rin Execution Case No.66 of 2006 rejecting the miscellaneous case.

The respondent no.2, Bangladesh Krisi Bank, Chechubazar Branch, P.S. Muktagachha, District-Mymensing instituted Artha Rin Suit No. 8 of 2006 in the Artha Rin Adalat, Mymensingh for recovery of defaulted loan and obtained an ex-parte decree on 14.08.2006 for an amount of TK. 15,25,752/- with interest thereof. The decree holder bank levied execution of the decree in Artha Rin Execution Case No. 66 of 2006 filed on 12.11.2006. The executing Court held auction sale of the case property on 14.11.2007, and the bid of respondent no.5 amounting to Tk.18,60,000/- being the highest was accepted by order no. 19 dated 14.11.2007. The executing Court by the same order directed the auction purchaser (respondent no.5) to make deposit of remaining 75% of the bid amount on 25.11.2006. The auction purchaser accordingly deposited the said amount by a Pay Order on 25.11.2007 and sale was confirmed

by the executing Court by order no. 20 dated 25.11.2007 and the sale certificate was issued on 12.03.2008. It appears from the entire order sheet of the execution case that although the auction purchaser applied for delivery of possession of the case property through Court and writ of delivery of possession was issued, but ultimately possession of the case property was not delivered to the auction purchaser and by order no.52 dated 12.11.2008 the Execution Case was concluded.

The petitioner who permanently resides in Dhaka had no knowledge of the fact stated above till 20.11.2008 on which date she for the first time came to know from some local people that the case property which is her ancestral property, and which is her paternal homestead, and in which she has a share as a legal heir of her late father, has been sold in auction. Thereafter, she made query in the concerned Court and had the definite knowledge of the auction sale on 27.11.2008. Thereafter, the petitioner having learned about the auction sale in question filed an application under Order, 21, Rule 90 read with section 151 of the Code of Civil Procedure and section 19(2) of the Artha Rin Adalat Ain, 2003 before the concerned Artha Rin Adalat on 01.12.2008 along with the deposit of 10% of the decretal dues amounting to TK.1,52,576/- impleading respondents no. 2-5 as opposite parties praying for setting aside the auction sale on the ground of fraud and illegality. The substantive case of the petitioner in the said application was as follows:

(a) *Shah Obaidul Momen, father of opposite party No.3 with a view to establish a fishery farm named Neena Matshya Khamar applied for loan to opposite No. 1, Bangladesh*

Krishi Bank, Chechua Bazar Branch, Muktagachha, Mymensingh on 18.02.2003 whereupon the said bank sanctioned in his favour a loan of TK.12,00,000/- on 23.03.2003. The said Shah Obaidul Momen after obtaining the loan died on 11.09.2005. Opposite party No. 3 not having good relation with his father left his father's house and did not look after the fishery farm after the death of his father. Meanwhile, opposite party No.1, the bank filed Artha Rin Suit No.08 of 2006 and obtained an ex parte decree on 14.08.2006 against opposite parties No. 2 and 3. Late Shah Obaidul Momen while obtaining the loan mortgaged 13.42 decimals land as described in schedules 1-4 of the application. The said property belonged to late Shah Obaidus Sobhan, who died leaving behind four sons, Shah Badiuzzaman, Shah Obaidul Manna, Shah Obaidul Momen and Shah Obaidullah and four daughters Rashida Wahed, Khaleda Khanam, Hasina Doula and the petitioner as heirs. Out of the said heirs at present one son, Shah Obaidullah and all the four daughters are alive and all of them are co-sharers in the said property as legal heirs of late Shah Obaidus Sobhan. The borrower late Shah Obaidul Momen had a share of 2/12 in the said property, and he mortgaged the entire property with the bank illegally and without any legal competence and proprietary authority.

(b) *The bank as the lender has a legal obligation and duty to be satisfied about the title to a property proposed to be mortgaged to secure a loan, and it is an indispensable routine work of the banks that they make an inquiry to the title of such property by their own personnel before granting loan. In this case, the lawyer of the bank most illegally recommended to sanction loan certifying late Shah Obaidul Momen as the owner of the entire property. So,*

according to the normal, regular and mandatory practice of banks the sanction of the loan in question was absolutely illegal and a product of collusion with the dishonest employees of the bank. The petitioner is entitled to 1/12th share of the case property as a daughter of late Shah Obaidus Sobhan and neither she nor any other heirs of late Obdius Sobhan except late Shah Obaidul Momen is liable to repay the bank dues and as such the auction sale held by the executing court in respect of entire 13.42 decimals of land is illegal, without jurisdiction and void, and as such the sale is not binding upon the petitioner and other heirs of late Shah Obaidus Sobhan. The report as to the implementation of writ of delivery of possession in respect of part of the case land is absolutely untrue inasmuch as the heirs of late Shah Obdius Sobhan are maintaining their possession in ejmali in the case property.

(c) *The petitioner had no knowledge of the said illegal auction sale till 20.11.2008 on which date she for the first time came to know from some local people that the case property which is her ancestral property and which is her paternal homestead and in which she has a share as a legal heir of her late father has been sold in auction. Thereafter, she made query in the concerned court and had the definite knowledge of the auction sale on 27.11.2008. If anybody had filed any other miscellaneous case in respect of the said auction using the petitioner's name, that is beyond the knowledge of the petitioner and the petitioner did not authorise anybody nor engaged any lawyer to file such a case. The petitioner files the application bona fide with statutory deposit of 10% of the decreetal dues amounting to Tk.1,52,576/-.*

The said application was registered as Miscellaneous Case No. 3 of 2008 .

The respondent no. 2, the bank and respondent no.5, the auction purchaser as opposite parties no.1 and 4 in Miscellaneous Case no.3 of 2008 contested the case filing separate written objections. The petitioner examined herself as P.W.1 and the Manager of the decree holder bank was examined as O.P.W.1 in Miscellaneous Case no.3 of 2008. In her deposition as P.W.1, the petitioner credibly proved her case asserted in the application of the Miscellaneous Case. On 18.02.2009 during pendency of Miscellaneous Case no.3 of 2008, the petitioner and other legal heirs of late Shah Obaidus Subhan instituted Partition Suit No. 9 of 2009 in the First Court of Joint District Judge, Mymensingh, impleading respondents no.2-5 as defendants for partition of the case land which is now pending. The petitioner in her deposition as P.W.1 in Miscellaneous Case no.3 of 2008 stated about the pendency of the said partition suit.

The Artha Rin Adalat, Mymensingh upon hearing the parties and considering the evidence and materials on record found-

দরখাস্ড়কারীনির বক্তব্য এই যে, নালিশী নিলামকৃত সম্পত্তি ওবায়দুল সোবহানের উত্তরাধিকারীদেও এজমালী সম্পত্তি। সে কারনে ওবায়দুল মোমেন $\frac{২}{১২}$ *অংশের মালিক হওয়া স্বত্বেও সাকুল্য সম্পত্তি নিজ সম্পত্তি হিসাবে দেখাইয়া ঋণ গ্রহন করেন। তৎপ্রেক্ষিতে দরখাস্ড়কারীনি উত্তরাধিকারীদেও মালিকানা প্রমানে আর, ও, আর, দাখিল করিয়াছেন। আর ও আর পর্যালোচনায় দেখা যায়, একক ভাবে ওবায়দুল মোমেনের নামে আর ও আর হয় নাই। উক্ত আর ও আর এর সহিত অন্যান্য ভ্রাতা ও ভগ্নীগনের নাম অন্ড়র্ভূক্ত হইয়াছে। ঋণ গ্রহীতার নামে নালিশী নিলাম ভূক্ত সম্পত্তি বাবদ পৃথক কোন দলিল নাই। এমতাবস্থায়, আপাত দৃষ্টিতে নালিশী ভূমি এজমালী সম্পত্তি বলিয়া প্রতীয়মান হয়। সেক্ষেত্রে ঋণ গ্রহীতা* $\frac{২}{১২}$ *অংশের মালিক হইা দরখাস্ড়কারীনি কর্তৃক স্বীকৃত। প্রকৃতপক্ষে দরখাস্ড়কারীনি ও ঋণ গ্রহীতা সহ অন্যান্য ওয়ারিশগনকে কত অংশের মালিক তাহা বন্টন মোকদ্দমার*

সিদ্ধান্ড় ব্যতিত অত্র মিছ মামলায় নির"্পন করা সম্ভব নহে। উক্ত বিষয়ে নিস্পত্তির জন্য বন্টন মামলা দায়ের যুক্তিসংগত এবং দরখাস্ড়কারীনি প্রকৃতপক্ষে যুক্তিসংগতভাবেই ১ম যুগ্ম জেলা জজ আদালতে স্বত্ব ৯/০৯ নং মোকদ্দমা দায়ের করিয়াছেন। উক্ত বিষয়টি চূড়ান্ড়ভাবে স্বত্ব ৯/০৯ নং মোকাদ্দমায় নিস্পত্তি হইবে। অত্র মিছ নিলামটি দেঃ কাঃ বিঃ ২১ আদেশ ৯০ বিধি অনুসারে আনীত হওয়ায় উক্ত তর্কিত বিষয়টির যথাযথ নিস্পত্তি অত্র মিছ মোকদ্দমায় করা যুক্তিসংগত নহে বলিয়া সিদ্ধান্ড় গৃহীত হইল।

১নং প্রতিপক্ষ দাবী করিয়াছেন ইতিপুর্বে অথই ৮/০৬নং মোকদ্দমায় দরখাস্ড় কারীনি পক্ষভূক্তির আবেদন করেন। ইহা ছাড়া ডিক্রিজারী ৬৬/০৬ নং মোকদ্দমায় নিলাম বিক্রয় স্থগিতের দরখাস্ড় আনয়ন করেন। ফলে নিলাম বিষয়ে দরখাস্ড় কারীনি অবগত ছিলেন না ইহা আদৌ সঠিক নহে।

পর্যালোচনায় দেখা যায় অর্থ ৮/০৬ নং মোকদ্দমার পক্ষভূক্তির দরখাস্ড়টি দরখাস্ড় কারীনি সেলিনা সোবহান এর নাম থাকিলে ও উক্ত দরখাস্ড়ে সেলিনা বেগমের দস্ড়খত নাই। ফলে উক্ত মোকদ্দমাটি দরখাস্ড়কারীনি আনয়ন করিয়াছেন ইহা বলা যাইবে না। ডিক্রি জারী ৬৬/০৬ নং মোকদ্দমার যে স্থগিতের দরখাস্ড় আনয়ন করেন, উক্ত দরখাস্ড়ে শুমুমাত্র খালেদা খানমের দস্ড়খত আছে। উক্ত দরখাস্ড়ে দরখাস্ড়কারীনির দস্ড়খত নাই। স্বত্ব ৪/০৬ নং মোকদ্দমায় নিলাম রদের প্রার্থনা করলেও উক্ত মোকদ্দমায় সেলিনা বেগমের নাম থাকিলেও দস্ড়খত নাই। ডিক্রি জারী ৬৬/০৬ নং মোকদ্দমায় ২১ আদেশ ৫৮ বিধিতে নালিশী সম্পত্তি হইতে ওয়ারিশী অংশ পৃথক করিয়া অবমুক্ত করিবার দরখাস্ড় আনয়ন করিলেও উক্ত দরখাস্ড়ে সেলিনা খানমের নামে থাকিলেও দস্ড়খত নাই। এমতাবস্থায়, দরখাস্ড় কারীনি উক্ত মামলা সমুহে প্রতিদ্বন্দ্বিতা করিয়া ছিলেন ইহা বলা যাইবে না। সকল ওয়ারিশগন খালেদা খানমকে Power of Attorney প্রদান করিয়াছেন ইহাও দেখা যায় না। অতএব দরখাস্ড়কারীনি ইতিপূর্বে ২/০৮ নং মোকদ্দমা দায়ের করিয়াছিলেন যাহার জামানত দাখিল না করায় না মঞ্জুর হইয়াছে। তৎপ্রেক্ষিতে পুনরায় জামানত দাখিল করিয়া অত্র মিছ মামলা দায়ের করেছেন বলিয়া দেখা যায়। ফলে দরখাস্ড়কারীনি কর্তৃক অত্র মিছ মামলা দায়ের যথার্থ হইয়াছে বলিয়া সিদ্ধান্ড় হইল।

Inspite of the above findings arrived at by respondent no. 1, the same on glaring misconception of law as to the scope of Order 21, Rule 90 of the Code of Civil Procedure rejected Miscellaneous Case no. 03 of 2008 by the impugned order no. 90 dated 24.05.2010.

Being aggrieved by and dissatisfied with the decision of the respondent no. 1, the petitioner moved this Court and obtained the Rule Nisi.

The respondent no. 2, Bangladesh Krishi Bank, Chechua Bazar Branch, P.S. Muktagachha, District-Mymensingh entered appearance by filing power and opposed the Rule filing an affidavit in opposition. The case of the respondent no.2, in short, is that the order no.28 dated 30.04.2008 clearly stated that excepting homestead possession of all properties of schedules were delivered to the auction purchaser by the process of the Court and the writ petition is not maintainable as alternative remedy by appeal has been provided in Artha Rin Adalat Ain, 2003.

The respondent no. 5, Md. Zahirul Reza, son of late M.A. Rezzaque, village- Chhalora, P.S. Muktagachha, District-Mymensingh entered appearance by filing power and opposed the Rule by filing an affidavit in opposition. The case of the respondent no.5 is that the writ petition is not maintainable according to law, and barred by limitation and barred under the Artha Rin Adalat Ain, 2003, and also by the conduct of the petitioner. The writ petitioner has no right, title, interest or possession on the properties sold in auction and as such she has no right to file the instant petition and pray for setting aside the auction sale. The further case of the respondent no.5 is that the properties mortgaged with the Bangladesh Krishi Bank, hereinafter referred to as Bank were sold in auction on 14.11.2007 following the legal provisions of Artha Rin Adalat Ain, 2003 i.e., sale confirmed on 25.11.2007, certificate of

sale issued on 12.03.2008 and possession delivered through Court as evident from order no.28 dated 30.04.2008 and as such the writ petitioner has no locus-standi to file application for setting aside the sale after the sale was confirmed and possession delivered.

The petitioner by filing an affidavit-in-reply controverted the statements and submission made in the affidavits-in-opposition. In the affidavit-in-reply it is contended that an error of law apparent on the face of the record renders an order without jurisdiction and to quash such an order writ petition is well maintainable even without availing the alternative remedy, if any. Moreover, it is settled that an order passed upon an application put in an execution proceeding is an interlocutory order against which appeal or revision is barred under the provision of section 44(2) of the Artha Rin Adalat Ain, 2003. The petitioner has no disentitling conduct which is apparent from the impugned order itself.

In the affidavit-in-reply the petitioner refers to the impugned order where it has been found that the petitioner has title to and interest in property in question as the daughter of late Shah Obaidus Sobhan, against which respondent No. 5 did not prefer any appeal/revision/petition, and as such the bank and the auction purchaser are estopped from taking any such plea or making statement denying the petitioner's title and interest to the case property.

The petitioner also stated that in the affidavit-in-reply that it is the finding of respondent No.1 in the impugned order that the petitioner had no earlier knowledge of the Artha Rin Suit, *ex parte* decree, execution proceedings and the auction sale in question so as to render her

application for setting aside the sale barred by limitation. It is also on record and the finding of respondent No.1 in the impugned order that the property in question belonged to late Shah Obaidus Sobhan, father of the petitioner and also father of the borrower, Shah Obaidul Momin, who is full brother of the petitioner, and not her uncle. It is also finding of respondent No.1 in the impugned order that the case property is a joint property and has not been partitioned by metes and bounds, and the borrower, late Shah Obaidul Momen was the owner of 2/12 i.e. 1/6th of the property as a son(not brother) of late Shah Obaidus Sobhan. Above all, respondent No. 5 being the stranger auction purchaser has *no locus standi* to say all these.

It is stated in the affidavit-in-reply that the partition suit is for partition of the property in question among the heirs of late Shah Obaidus Sobhan, it has nothing to do for setting aside the impugned sale held illegally and without jurisdiction in violation of the fundamental right guaranteed in article 42 of the constitution, of the petitioner and other heirs of late Shah Obaidus Sobhan except the borrower late Shah Obaidul Momen and except to the extent of his 1/6th share in the property in question, and until the said unlawful sale is set aside the partition suit would be of no avail.

Finally, it is stated in the affidavit-in-reply that respondent No. 5 in the same breathe blowing hot and cold, once referring to partition suit in paragraph No. 11 of the Affidavit-in-Opposition and again claiming the property to be the exclusive property of the borrower.

Mr. Probir Neogi, learned Advocate alongwith Mr. Suvra Chakravorty, Advocate appearing for the petitioner submits that an error of law/illegality committed by inferior tribunal apparent on the face of record is a valid ground for interference in certiorari, and existence of alternative remedy is no bar to invoke writ jurisdiction. In this respect he refers to the findings of the executing court itself in the impugned order (Annexure-A) to the effect that-

> *a) Late Shah Obaidus Sobhan was the owner of the case property, who died leaving behind four sons including the judgment debtor-borrower Shah Obaidul Momen and four daughters including the petitioner as heirs. The case property measuring 13.42 acres is a joint property of the petitioner and other heirs of late Shah Obaidus Sobhan and the borrower, Shah Obaidul Momen had only 2/12 the i.e. 1/6 the share in ejmali in the undivided case property. After death of the borrower, Shah Obaidul Momen, his son (respondent No. 4) has also that 1/6 th share in ejmali.*
>
> *Judgment debtor/borrower late Shah Obaidul Momen was not the absolute owner of the case property, and for that matter his son, respondent No. 4 is also not the owner of the entire case property which was sold in the impugned auction.*
>
> *b) A partition suit being Title Suit No. 90 if 2009 is pending in the First court of the Joint District Judge, Mymensingh in respect of the case property, and*
>
> *C)The petitioner had no earlier knowledge of the ex parte decree, execution proceedings, and/or the auction sale.*

Taking us through the above findings of respondent No. 1, Mr. Probir Neogi submits that the impugned order suffers from error of law/illegality apparent on the face of the record/impugned order

inasmuch as the petitioner and other co-sharers of the case property, admittedly, who are neither borrower nor guarantors of the loan in question, cannot be deprived of their fundamental right to the case property guaranteed by article 42 of the Constitution even in the name of any special law including the Artha Rin Adalat Ain, 2003 for the reason that the rule *generalia specialibus non derogant* cannot operate in derogation of the constitutional provisions in view of article 7 of the Constitution. He submits that error of law/illegality apparent on the face of the record is a valid ground for interference in *certiorari;* moreover, the present development is illegality renders a decision without jurisdiction.

He further submits that error of law/illegality renders a decision without jurisdiction and where a tribunal established by a statute as a court of defined jurisdiction as Artha Rin Adalat goes wrong in law it goes outside its jurisdiction, and as such the present writ petition is quite competent. On this point Mr. Neogi relied on the cases of ***Fariduddin Mahmud vs. Saidur Rahman, 63 DLR(AD)93, [Para-20] , Sonali Bank Ltd. vs. Prime Global Ltd., 63 DLR (AD) 99 [Para-15&16], Dhaka Warehouse vs. Asst. Collector of Customs, 1991 BLD (AD)327 [Para-12], Commissioner of Customs vs. Cab Express Ltd., 14 MLR (AD) 294 [Para-10&11], Abdur Rashid Chowdhury vs. Additional District Judge, 56 DLR 573[Para-49], Mainul Hosein vs. Anwar Hossain, 58 DLR (AD) 229 [Para-20&25], M. M. Badshah Shirazi vs. Judge, Artha Rin Adalat No.3, Dhaka and others, 17BLC. 226, Utility Stores Corp. vs. Punjab, PLD 1987 SC 447, 452, O' Reilly vs. Mackman, [1982] 3***

All E.R. 1124, 1129, R vs. Greater Manchester Corner ex parte, Tal [1985] QB 67, R. vs. Hull University Visitors ex parte Page, [1993] AC 682, 701., Constitutional Law of Bangladesh, : M. Islam, para 5.33, 5.34, 5.37, 5.38, 5.39.

He submits that having regard to the findings of respondent No. 1 in the impugned order itself and laws applicable thereto as laid down in above-cited cases, the impugned order suffers from patent error of law apparent on the face of the record, and as such it can be interfered with in writ jurisdiction, and alternative remedy, even if any, is no bar to invoke writ jurisdiction.

Mr. Neogi next submits that section 57 of the Artha Rin Adalat Ain, 2003 empowers Artha Rin Adalat to give adequate relief in cases as in hand. Even if it is assumed but not conceded that there is no scope to give the petitioner appropriate relief by the Artha Rin Adalat under the provisions of the Artha Rin Adalat Ain, 2003, in view of the findings of respondent No. 1 the High Court Division is competent enough to give such relief in exercise of its powers under article 102 of the Constitution in order to safeguard her fundamental right under article 42 of the Constitution.

Mr. Neogi then submits that an An application under Order 21, rule 90, CPC, though numbered as a Miscellaneous case, it is an application in execution proceeding and a part of the execution proceeding. So, an order passed on such an application is an interlocutory order, not a final order, and thus, no appeal/revision can be taken therefrom as per provision of section 44(2) of the Artha Rin Adalat

Ain, 2003. It is true that an appeal lies from an order under rule 92 of Order 21, CPC disallowing a claim to property under attachment as per provision of Order 43, rule 1(j), but section 40 of the Artha Rin Adalat Ain, 2003 provides –

> *এই পরিচ্ছেদের অধীন আপীল ও রিভিশন কার্যক্রমে, এই আইনের বিধানাবলীর সহিত অসঙ্গতিপূর্ণ না হওয়া সাপেক্ষে, দেওয়ানী কার্যবিধি আইনর সংশ্লিষ্ট বিধানাবলী প্রযোজ্য হইবে।*

Since provisions of Order 43, rule 1(j), CPC is inconsistent with section 44(2) of the Artha Rin Adalat Ain, 2003, the provision of the Ain will apply.

Mr. Neogi finally submits that the decreeholder bank did not act in a minimum responsible manner in granting the loan in question. Now they are trying to recover dues at the cost of the interest of the petitioner and other co-sharers of the case property. In all probabilities the loan was sanctioned collusively by irresponsible and corrupt bank officials. Even if it is assumed that the bank acted innocently, there is another innocent party (the petitioner and other co-sharers of the case property) involved in the transaction whose interest must be safeguarded. The rule of equity applicable here is, where two innocent parties are involved in a transaction causing loss, one who could prevent loss, in equity, should suffer. In this regard Mr. Neogi relies on the case of ***Official Assignee v. Lloyds Bank, 21 DLR (SC) 176 [Para – 2, 3 & 13].***

Mrs. Quamrun Nessa, learned Advocate appearing for respondent No.2, bank, submits that in view of section 41(1) of the Artha Rin Adalat Ain, 2003 the writ petition is not maintainable and the petitioner's

remedy lies in an appeal under section 41(1) against the decree passed by the Adalat. She further submits that the impugned order is not an interlocutory order and as such appellable, and hence, the Rule is liable to be discharged. In support of her submission she put reliance on the case of ***Trade Multiplex v. Artha Rin Adalat, 62 DLR 533***.

Mr. Muhammad Ali, learned Advocate appearing for respondent No. 5, auction purchaser submits that the writ petition is not maintainable, and barred by limitation. He further submits that before filing this writ petition, the petitioner and others have filed a partition suit, and the petitioner's right, if any, will be decided in that suit.

Mr. Probir Neogi, in reply, submits that the partition suit has nothing to do for setting aside the auction sale impugned in this writ petition which was held illegally and without jurisdiction in violation of the fundamental rights guaranteed in article 42 of the constitution of the petitioner and other heirs of late Abdus Sobhan except the borrower late Shah Obaidul Momen to the extent of his $1/6^{th}$ share in the property ,and unless the said unlawful auction sale is set aside, the partition suit will be no avail.

We have perused the writ petition with annexures including the impugned order, affidavits-in-opposition filed by the decreeholder bank and auction purchaser and affidavit-in-reply filed by the petitioner, and heard the learned Advocates appearing for the parties at length.

First of all, we have to decide the maintainability of this petition. In that view, it may be of ample benefit to look at the findings of the executing court in the impugned order (Annexure-A) which has been

quoted in para-11 of the writ petition, and is reproduced in the foregoing part of this judgment.

The findings of the executing court by themselves show that by the impugned auction sale a property has been sold in execution of a Artha Rin decree, 5/6th of which property belong to the persons, including the petitioner, who are neither borrowers, nor mortgagors, nor guarantors. Moreover, the 1/6th of the property belonged to the borrower has never been partitioned out from the whole property. The findings of respondent No. 1 by themselves show that in passing the impugned order respondent No. 1 has exceeded its jurisdiction.

In ***Fariduddin Mahmud v. Saidur Rahman, 63 DLR(AD)93*** which also arose out of a proceeding under Artha Rin Adalat Ain, 2003, the Appellate Division on an exhaustive discussion on alternative remedy vis-a-vis and maintainability of writ petition, laid down the principle of law as follows:

> *"The remedy under Article 102(2)(ii) being, in general, discretionary the High Court Division may refuse to grant it where there exists alternative remedy unless there are good grounds therefor. Whenever a person or anybody of persons having legal authority to determine questions affecting the rights of citizen having the duty to act judicially in exercise of its legal authority. A writ of certiorari may issue in exceptional cases where the proceedings of the Tribunal are absolutely void or where the Tribunal has purported to act in a judicial capacity which is not properly constituted or where there is error apparent on the face of the record or where the Tribunal's conclusion is based on no evidence on record whatsoever, or where the decision of the Tribunal is vitiated*

> *by malafide, or the Tribunal has acted without jurisdiction or acted in excess of jurisdiction or acted contrary to the fundamental principles or acted contrary to the fundamental principles or acted malice in law, interference is called for. In the absence of the above grounds, the court will not interfere however erroneous or improper it may be."*

From the findings of the executing court in the impugned order as mentioned above, we find that error of law/illegality committed by respondent No.1 is apparent on the face of the record and on the face of the impugned order itself, and consequently, we are impressed to hold that the writ petition is maintainable in view of the law declared by the Appellate Division in ***Fariduddin Mahmud vs. Saidur Rahman.***

On the point of maintainability , other cases of foreign and our jurisdiction relied on by Mr. Neogi, also precisely support the petitioner's case. The underlying principle of law in this regard has been stated in ***Abdur Rashid vs. Additional District Judge*, 56 DLR 579** as follows**:**

> *"Besides, when a Tribunal is established by a statute for a particular purpose and empowered to exercise its jurisdiction in accordance with the procedure prescribed, such tribunal cannot override or circumvent such procedure and pass any order it likes. If it does so, it acts beyond its jurisdiction. When the tribunal goes wrong in law it goes outside jurisdiction conferred on it. The Tribunal has jurisdiction to decide "rightly" but not the jurisdiction to decide "wrong". When a Tribunal commits an error of law in deciding an issue raised by it, it acts beyond its jurisdiction and such decision of the Tribunal can be quashed under writ jurisdiction."*

Secondly, we have already seen that the own findings of the Artha Rin Adalat did not warrant the impugned order. Section 57 of the Artha Rin Adalat Ain, 2003 is the statutory recognition of the inherent power of the Artha Rin Adalat which runs as –

> *৫৭। এই আইনের অধীন অভিপ্রেত ন্যায় বিচারের উদ্দেশ্য সাধনকল্পে অথবা অদালতের কার্যক্রমের অপব্যবহার রোধকল্পে প্রয়োজনীয় যে কোন পরিপূরক অদেশ প্রদানে অদালতের সহজাত ক্ষমতা কোন কিছু দ্বারা সীমিত করা হইয়াছে বলিয়া গণ্য হইবে না।*

In the facts and circumstances of the case it was a fit case to invoke the powers under section 57 of the Ain to undo the auction sale held by the respondent No. 1 without jurisdiction, but again the respondent No.1 failed to exercise its jurisdiction under section 57 of the Ain.

Thirdly, an application under Order 21, rule 90, CPC, though numbered as a Miscellaneous case, it is an application in execution proceeding and a part of the execution proceeding. So, an order passed on such an application is an interlocutory order, not a final order, and thus, no appeal/revision can be taken therefrom as per provision of section 44(2) of the Artha Rin Adalat Ain, 2003. It is true that an appeal lies from an order under rule 92 of Order 21, CPC setting aside or refusing to set aside a sale as per provision of Order 43, rule 1(j), but section 40 of the Artha Rin Adalat Ain, 2003 provides –

> *"এই পরিচ্ছেদের অধীন আপীল ও রিভিশন কার্যক্রমে, এই আইনের বিধানাবলীর সহিত অসঙ্গিতপূর্ণ না হওয়া সাপেক্ষে, দেওয়ানী কার্যবিধি আইনের সংশ্লিষ্ট বিধানাবলী প্রযোজ্য হইবে"*

Since provisions of Order 43, rule 1(j), CPC is inconsistent with section 44(2) of the Artha Rin Adalat Ain, 2003, the provision of the Ain will

apply. In this respect we express our respectful agreement with the view taken by another Divison Bench in ***M. M. Badshah Shirazi v. Judge, Artha Rin Adalat No.3, Dhaka and others, 17BLC. 226.***

Finally, we must record our utter surprise to see the learned Advocate for the bank to submit the auction purchaser's case as to the genealogy of the auction-sold property even against the findings of respondent No. 1 itself in this respect. We found that the decreeholder bank did not act in a minimum responsible manner in granting the loan in question. Now they are trying to make good of their fault and recover dues at the cost of the interest of the petitioner and other co-sharers of the case property. We find considerable weight in Mr. Neogi's submission that in all probabilities the loan was sanctioned collusively by irresponsible and corrupt bank officials, and even if it is assumed that the bank acted innocently, there is another innocent party (the petitioner and other co-sharers of the case property) involved in the transaction whose interest must be safeguarded. He has rightly submitted that the rule of equity applicable here is, where two innocent parties are involved in a transaction causing loss, one who could prevent loss, in equity, should suffer. On this point the case cited by the learned Advocate for the petitioner, ***Official Assignee v. Lloyds Bank, 21 DLR (SC) 176 [Para – 2, 3 & 13]*** is squarely applicable.

In view of the discussions made above, we find substance in the Rule.

In the result, the Rule is made absolute. The impugned order No.90, dated 24.05.2010 passed by respondent No.1 in Miscellaneous

Case No.03 of 2008 under Order 21, Rule 90 read with section 151 of the Code of Civil Procedure and section 19(2) of the Artha Rin Adalat Ain, 2003, arising out of Artha Rin Execution Case No.66 of 2006 rejecting the miscellaneous Case (Annexure-A) is hereby declared to have been made without lawful authority and is of no legal effect. The auction sale of the case property held on 14.11.2007 and confirmed on 25.11.2007, and the sale certificate issued on 12.03.2008 by respondent No. 1 in Artha Rin Execution Case No. 66 of 2006 of the Artha Rin Adalat, Mymensingh is hereby set aside save and except to the extent of $1/6^{th}$ share of the deceased borrower, Shah Obaidul Momen (subsequently, devolved on respondent No. 4) which is still lying in ejmali with the entire case property.

There will be no order as to costs.

Farid Ahmed, J.

I agree.