

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 5834 of 2010

IN THE MATTER OF:

An application under Article 102(2) of the
Constitution of the People's Republic of
Bangladesh.

AND

IN THE MATTER OF:

Md. Bodrul Ahsan

.....Petitioner

-Versus-

Janata Bank Ltd and others

.....Respondents

Mr. Jamir Uddin Sarker, Advocate with

Mr. Garib-E-Newaz, Advocate

Ms. Maksud Akter, Advocate

.....For the petitioner

Mr. Golam Arshad, Advocate with

Mr. S.M. Hormuz Ahmed, Advocate

.....For the respondent No.1

Heard on: 26.01.2014 and
judgment on: 30.01.2014.

Present:

Mr. Justice Md. Ashfaquul Islam

And

Mr. Justice Md. Ashraful Kamal

Md. Ashraful Kamal, J:

This Rule Nisi was issued calling upon the respondents to show cause as to why the order dated 16.06.2010 passed by the Artha Rin Adalat, Court No.1, Dhaka in Artha Rin Suit No.377 of 2008 should not be declared to have been passed without any legal authority and of no legal effect.

Brief facts, necessary for the disposal of this Rule, are as follows;

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The respondent No. 1 Janata Bank as plaintiff filed Title Suit No. 307 of 2000 in the Court of Artha Rin Adalat, Court No. 1, Dhaka against the Respondent Nos. 2 and 3 impleading them as defendant No. 1 and 2 respectively and Md. Abdul Hadi (father of the petitioner) as defendants No. 3 for realization of Tk. 4,45,865/- as on 30.11.2000. The suit was decreed exparte in the preliminary form on 11.10.2001. After that, the preliminary decree was made final on 14.05.2002.

Having been informed about the aforesaid exparte decree, the defendant No. 3 Md. Abdul Hadi (father of the petitioner) filed Miscellaneous Case No. 52 of 2007 before the Artha Rin Adalat, Dhaka under sub-section (2) of section 19 of the Artha Rin Adalat Ain, 2003 for setting aside the aforesaid exparte judgment and decree by depositing Tk. 44,40550 + Tk. 14200/- being 10% of the decretal amount and interest thereon as required under sub-section (2) of section 19 of the Artha Rin Adalat Ain, 2003.

According to the reports of the process server dated 06.02.2001 and 06.06.2001 summons were issued upon the defendant No. 3 Md. Abdul Hadi, but the same were returned unserved, and on that ground Artha Rin Adalat allowed the Miscellaneous Case No. 52 of 2007 on 04.06.2008 by setting aside the aforementioned exparte judgment and decree and restored the suit to its original number and file and also stayed the operation of the certificate issued under sub-section (5) of section 33 of the Artha Rin Adalat Ain, 2003 and recalled the same and further directed the defendant No.3 Md. Abdul Hadi to file his written statement on 04.07.2008.

After restoration, the suit was renumbered as Artha Rin Suit No. 377 of 2008 of First Artha Rin Adalat, Dhaka. Thereafter, the defendant No. 3 Md. Abdul Hadi (father of the petitioner) filed his written statement. In the written statement he stated that he himself did not take the loan in question. Apart from this, he stated that he had already deposited Tk. 64,700/- and was ready to deposit the remaining amount and prayed to transfer the decree, if any, in his favour under sub-section (5) of section 6 of the Artha Rin Adalat Ain, 2003 so that he could execute the decree against the defendant Nos. 1 and 2 (Respondent Nos. 2 and 3 hearin). Thereafter, on 11.02.2009 the defendant No. 3 (father of the petitioner) filed an application under section 49 of the Artha Rin Adalat Ain, 2003 and prayed to allow him to pay the decretal amount by installments. In reply, the plaintiff-respondent No.1 filed written objection.

Thereafter, on 26.04.2009, the Artha Rin Adalat, Court No. 1, Dhaka decreed the suit on contest under sub-section (4) of section 13 of the Artha Rin Adalat Ain, 2003 and directed the defendant No. 3 to pay Tk. 4,45,065/- with interest from 01.12.2000 till its realization within one year in four installments after deducting Tk. 44,506/- +19,200/-. Thereafter, the decree was drawn up on 03.05.2009.

After that, the defendant No. 3 paid the entire decretal amount through pay orders which were accepted by the Adalat on 12.08.2009, 07.10.2009 and 04.01.2010. After complying with the Court's direction, the defendant No. 3 filed an application on 04.01.2010 under section 57 of the Ain for redemption of the mortgaged property and to return all his title deeds and

documents. After hearing the said application, the Artha Rin Adalat, Court No. 1, Dhaka rejected the said application on 16.06.2010.

Being aggrieved by the aforesaid order dated 16.06.2010 passed by the Artha Rin Adalat, Court No. 1, Dhaka in Artha Rin Suit No. 377 of 2008, the petitioner filed this writ petition and obtained the present Rule.

The respondent No. 1 by filling affidavit-in-opposition opposes the Rule and contends that the respondent No. 2-3 failed to pay the loan within time. Then, the respondent No. 1 bank filed Title Suit No. 307 of 2000 in the Court of Sub-Judge, Dhaka for realization of Tk. 4,45,065/- as on 30.11.2000. The suit was decreed exparte in the preliminary form on 11.10.2001 and the same was made final on 14.05.2002. In the decree, the defendants were directed to pay the decretal amount by 90 days. But the defendants failed to do so. Therefore, the respondent No. 1 bank filed Title Execution Case No. 52 of 2003. Thereafter, the Court fixed date for auction sale of the mortgaged property on 28.09.2004, but no bidder participated and the next date was fixed on 10.02.2005. On that date, 3 (three) bidders took part and one of whom Md. Nazir Uddin became the highest bidder. Since the bid money was not sufficient, the court refused to accept the same by its order dated 27.02.2005. Thereafter, the respondent No. 1 Bank filed an application under section 33(5) of the Artha Rin Ain, 2003. After hearing the said application, the Adalat on 20.08.2005 issued certificate. Thereafter, the respondent No. 1 bank invited tender for auction sale of the mortgaged property. The tender was published on 23.11.2005 and 25.11.2005 in the Daily Sangbad and Daily Amardesh. M/S. River View Limited got the property at Tk. 10,50,000/- vide sale deed No. 3261 dated 27.02.2006. After

adjusting the bank debt of Tk. 9,75,289.75, the rest of Tk. 89,410.27 was kept for the mortgagor petitioner as per provision of Section 33 (5) of the Artha Rin Adalat Ain, 2003 and accordingly as per provision of Section 33(9) of the Artha Rin Adalat Ain, the said Title Execution Case was finally disposed of.

Mr. Jamir Uddin Sirker, the learned Advocate appearing with Mr. Garib-E-Newaz, the learned Advocate for the petitioner submits that the title suit No. 307 of 2000 was initially decreed exparte without serving summons upon the defendant No.3 Md. Abdul Hadi (father of the petitioner) and thereafter, upon application filed by the defendant No. 3 under sub-section (2) of section 19 of the Artha Rin, 2003, the Artha Rin Adalat, Court No. 1, Dhaka restored the aforesaid title suit to its original number and file on 04.06.2008 and after that the said title suit was renumbered as Artha Rin Suit No. 377 of 2008 of First Artha Rin Adalat, Dhaka and thereafter the said suit was decreed on contest on 26.04.2009. He further submits that as per decree, the defendant No.3 paid the entire dues of the respondent bank duly, thereafter, the defendant No.3 is legally entitled to get release of his mortgaged land.

He further submits that since the decree dated 26.04.2009 is still in force, therefore, there is no scope to say that the order of installment to pay the dues of the bank is not proper and the order for payment of money by the defendant No.3 is not entertainable. He also submits that after variation or reversal of the decree, law entails to restore everything to its previous position and place the parties in the original position, as such there is no

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scope to say that the dues of the bank has been adjusted before passing the decree on 26.04.2009.

He finally submits that the Artha Rin Adalat Ain gives legal right to the defendant of the suit to pay the dues of the bank and if such payment is made by the guarantor then under provision of section 6(5) of the Artha Rin Adalat Ain, the decree is to transferred to him so that he can realize the money from the loanee by executing the decree against him which means that the guarantor has the legal right to protect his property.

Mr. Golam Arshad along with Mr. S.M. Harmuz Ahmed, the learned Advocate appearing for the Respondent No. 1 submits that Misc. Case No. 52 of 2007 was allowed beyond the knowledge of the Bank as no notice was served upon the Bank and the exparte decree was set aside exparte. He also submits that after reversing the exparte decree, the petitioner or his father did not take any step as provided under section 144(1) of the Civil Procedure Code, as such he has been debarred from taking any step as per sub-section (2) of section 144 Civil Procedure Code and hence the Rule is liable to be discharged.

He finally submits that the Judgment Debtor filed application on 4.06.2010 for returning the mortgaged documents to him without taking any lawful measure for setting aside the auction sale as provided in Rule 89 or 90 of Order 21 C.P.C. In support of his submission, he has cited the decision, in the case of Joypara Rice Mill Ltd. Vs. Bangladesh reported in 17 BLD(AD)-63.

This Rule has been hotly contested and the learned Advocate on both sides have debated the points raised therein at sufficient length.

The issue in this rule is whether the Artha Rin Adalat Court No. 1, Dhaka was functus officio after delivering its decree dated 26.04.2009 in respect of Artha Rin Suit No. 377 of 2008. In order to determine whether the Adalat was empowered to redecide it is necessary to examine the statutory framework within which it operates. It is, therefore, necessary to consider (a) whether it had made a final decision and (b) whether it was, therefore, functus officio.

In this case, the admitted position is that the Title Suit No. 307 of 2000 was decreed exparte in the preliminary from on 11.10.2001 and was made final on 14.05.2002. Then, the defendant No.3 (father of the writ petitioner) filed Miscellaneous Case No.52 of 2007 under section 19(2) of Artha Rin Adalat for setting aside the aforesaid exparte judgment and decree, which was allowed on 04.06.2008. Further it is admitted that the suit was renumbered as Artha Rin Suit No. 377 of 2008 and the same was decreed on contest on 26.04.2009. It is also admitted that neither the respondent No. 1 bank nor the auction purchaser challenged the said decree dated 26.04.2009.

The expression functus officio means having discharged a duty. When used in relation to a court, it may also mean whose duty or authority has come to an end.

The general rule (is) that a final decision of a court cannot be reopened. The rule applied only after the formal judgment had been drawn

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up, issued and entered, and was subject to two exceptions: where there had been a slip in drawing it up, and where there was an error in expressing the manifest intention of the court.

To foster finality of judicial decisions which would otherwise be subject to applications to reopen the case by all disappointed litigants, once a decision is issued, the judge loses his/her authority to further rule on it. He / she is without authority; no longer seized of the litigation; *functus officio*. This leaves the litigant with the sole recourse of an appeal. Standards of consistency and finality must be preserved for the effective development of the Court system.

Alternatively, when a Court has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. As a general rule, once such a court has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited. It can only do so if the same is authorized by the statute.

Black's Law Dictionary (9th ed 2012) defines *functus officio* as "having performed his or her office."

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose terms has expired and who has consequently no further official authority; and to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

The doctrine of functus officio states that adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission.

The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it. Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

Order XX, rule 3 provides that a judgment, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review. It is necessary to quote Order XX, rule 3 of the Code of Civil Procedure, which runs as follows:

“Rule -3- The judgment shall bear the date on which it is pronounced and shall be signed by the Judge, and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that, where the Judge pronounces his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.]”

(underlined by us)

On a plain reading of Order 20, Rule 3 of the Code of Civil Procedure, it is crystal clear that once a judgment is signed by the Judge, it cannot be altered or added to but the rule expressly provides that a correction can be made under Section 152 or a alteration can be made on review.

In the case of Sreemati Pasanda Bibi-Vs. Sk. Sunaraddi & others reported in 4 DLR(1952)-157 where it has been held that;

“There is no inherent power in the Court to do that which is prohibited by the Code of Civil Procedure and Order 20, rule 3 of the Code constitutes a distinct prohibition on the

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Court to recall an order except under section 152 or on review Order 20, rule 3 provides that after signing of the judgment it shall not afterwards be altered or added to, save as provided by section 152 or on review. A prayer for vacating a final decree not being one in relation to clerical or arithmetical mistakes in the decree or errors arising therein from any accidental slip or omission can not be granted under the provisions of section 151 of the code as this section is limited to cases in respect of which there is no specific provisions in the Code."

(emphasis is laid by us)

Under Section 152, clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the court either on its own motion or on an application by any of the parties.

In this case, the Artha Rin Adalat was functus officio after it handed down its decision. Its function was completed when it rendered its final award. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of functus officio.

In the present case, the Court below neither found any clerical or arithmetical mistake in the Judgment nor detected any errors arising therein from any accidental slip or omission.

The petitioner sought an order for return of his documents of the mortgaged property. But, the Adalat, having mistakenly decided that the order for payment of money by the defendant No. 3 is not entertainable.

Where a judge has made an order or decree which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction to vary the terms of such decree. The only means of obtaining any variation is to appear to a higher court.

It is well settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is functus officio, and can make no variation itself. Any variation which may be made must be made by a court of Appellate jurisdiction.

It was a decree like any other decree passed by the Civil Court. Once a decree is passed by the Court it becomes functus officio to modify the decree. It is only the higher Court either to set aside the decree or to modify the decree. Since the court, after passing the decree became functus officio, it also had no power to question about the decree by saying that the order dated 26.04.2009 was not proper by modifying the terms of the decree which was passed on contest.

In that view of the matter the Artha Rin Adalat fell in error in rejecting the petitioner's application by modifying the decree.

In light of the aforesaid fact and law, we are of the view that the Rule should not be made absolute. Accordingly, we set aside the order dated 16.06.2010 passed by the Artha Rin Adalat, Court No. 1, Dhaka in Title Suit No. 377 of 2008 and remit the matter to the matter to the Court below to be dealt with in accordance with law.

Before parting with the judgment we think that the Judicial Administration Training Institute (JATI) should undertake a training course in order to facilitate the trial court judges to be acquainted with the ratio decidendi enunciated in both the Divisions of the Supreme Court of Bangladesh on the issue of doctrine of functus officio and Order 20 Rule 3 of the Code of Civil Procedure.

Let a copy of this judgment to be communicated to the director General (DG) of the judicial Administration Training Institute (JATI) for necessary measure in compliance with the observation made in the penultimate para of this judgment.

Further, the Registrar of the Supreme Court is directed to disseminate a copy of this judgment to each of the 64 District Judge for their information so that, in line of the observations made hereinbefore in this judgment, they may pass necessary instructions to their respective junior colleagues for compliance.

Ashraful Kamal

Md. Ashfaqul Islam, J:

I agree.

Md. Ashfaqul Islam.

Copy forwarded to:

1. The Director General (DG), Judicial Administration Training Institute (JATI), College Road, Shahbagh, Dhaka.
- ✓ 2. The Registrar, Supreme Court of Bangladesh.
3. Janata Bank. Head Office, 110 Motijheel Commercial Area, Police Station- Motijheel, Dhaka. Having its one branch at Islampur road known as Janata Bank, Islampur Road Branch, Police Station- Kotawali, District- Dhaka.
4. M/S. Balayet Trading Company, Proprietor Abdur Razzak.
5. Abdul Razzak, Proprietor Balayet Trading Company Both of 15/5, Islampur Road, Police Station- Kotawali, District- Dhaka.
6. Artha Rin Adalat No.1, Dhaka.
7. The Government of the People's Republic of Bangladesh, represented by the Secretary Ministry of Finance, Bangladesh, Secretariate, Ramna, Dhaka.

For information and necessary action.

By order.

Superintendent

Assistant Registrar.

Type by: Shahidullah. 19.02.15.

Read by: *mt 19.2.15*

Exm. by: *Sanjay 19/02/15*

Readied by:

Halim

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19.2.15