

Present:
Mr. Justice Mohammad Bazlur Rahman
and
Mr. Justice Md. Ruhul Quddus

Writ Petition Nos.8173-8174 of 2010

Md. Humayun Kabir Bhuiyan
...Petitioner in both the writ petitions

-Versus-

Joint District Judge, First Court, Barisal and another
...Respondents in both the writ petitions

Mr. Shamim Khaled Ahamed with Mr. Debdas
Samadder, Advocates

... for the petitioner
Mr. Masud Ahmed Sayeed, Advocate
... for respondent 2

Judgment on 09.06.2013

Md. Ruhul Quddus, J:

These two writ petitions between the same parties involving common questions of facts and law have been heard together and are being disposed of by one judgment.

In writ petition 8173 of 2010 the Rule was issued challenging the proceedings in Artha Jari Case No.165 of 2004 (arising out of Title Suit No.10 of 1998), while in writ petition 8174 of 2010 the proceedings in Artha Jari Case No.114 of 2004 (arising out of Title Suit No.9 of 1998) was challenged. Both the execution cases are now pending before the Artha Rin Adalat consisting of the Joint District Judge, First Court, Barisal

Facts leading to issuance of the Rules as it appears from the record, in brief, are that respondent 2 Janata Bank Ltd. instituted two suits, namely,

Title Suit No.9 of 1998 for realization of loan amounting to Taka 42,00,356/= and Title Suit No.10 of 1998 for realization of Taka 23,31,315/= before the Artha Rin Adalat and Subordinate Judge, Barisal. In both the suits the writ petitioner as borrower and one Abdul Mannan Khan as guarantor were made defendants 1 and 2 respectively. Ultimately Title Suit No.9 of 1998 was decreed *ex parte* in preliminary form on 29.07.1998 and Title Suit No.10 of 1998 was decreed on 28.07.1998 in the same manner. On two separate applications filed by the plaintiff-bank final decrees were passed on 31.08.1998 in both the suits. Thereafter, the decree holder-bank put the decrees in execution by filling Title Execution Case Nos.30 and 31 of 1998 before the Artha Rin Adalat consisting of the Subordinate Judge, Barisal. Subsequently the said execution cases were transferred to the Artha Rin Adalat consisting of the Joint District Judge, First Court, Barisal and were renumbered as Artha Jari Case Nos.114 and 165 of 2004 respectively. On separate applications filed by the decree holder-bank, the executing Court issued warrants of arrest against the petitioner by orders dated 24.01.2004 and 28.04.2004 respectively. Those warrants were pending for execution in which stage the decree holder-bank filed applications for issuance of certificates under section 33 (5) of the Artha Rin Adalat Ain, 2003 (hereinafter called the Act, 2003), which were allowed accordingly certificates under the said section were issued. Thereafter, the decree holder-bank filed two other applications for issuance of certificates under section 33 (7) of the Act, 2003, which the executing Court allowed by orders dated 12.03.2006 in both the execution cases. After more than four and half years from issuing the

certificates, the petitioner moved in this Court with these writ petitions and obtained the Rules.

Respondent 2 Janata Bank Ltd. contests the Rules by filing two sets of affidavit-in-opposition and supplementary affidavits thereto contending, *inter alia*, that the learned Joint District Judge, First Court, Barisal rightly proceeded with the execution cases and there is nothing wrong to interfere.

Mr. Shamim Khaled Ahmed, learned Advocate for the petitioner submits that the Joint District Judge, First Court, Barisal was a civil court and not vested with the jurisdiction of Artha Rin Adalat and as such it proceeded illegally with the Artha Jari Case No.114 of 2004 from 19.05.2004 and with Artha Jari Case No.165 of 2004 from 20.05.2004.

In second fold of argument Mr. Khaled submits that the executing Court after issuance of certificates under section 37 (5) of the Act, 2003 disposed of Artha Jari Case No.114 of 2004 by order dated 17.03.2005 and disposed of Artha Jari Case No.165 of 2004 by order dated 30.03.2005 and became functus officio. Thereafter, the executing Court had no jurisdiction to proceed further with the execution cases and issue the certificates under section 33 (7) of the Act, 2003. Although the law was subsequently amended, at the relevant time the executing Court had no such authority. Moreover, earlier the executing Court had fixed the cases for taking steps under section 33 (4) of the Act, 2003 but without exhausting the process it *suomotu* jumped on the next phase and thereby committed gross illegally. For all the reasons all subsequent proceedings in the execution cases are liable to be declared to have been continued without lawful authority.

Mr. Masud Ahmed Sayeed, learned Advocate for the respondent-bank referring to order dated 24.01.2004 passed in Artha Jari Case No.114 of 2004 and order 28.04.2004 passed in Artha Jari Case No.165 of 2004 submits that two warrants of arrest to put the writ petitioner in civil imprisonment are still pending against him for execution. So, being a fugitive from law, the writ petitioner without surrendering before the executing Court has directly approached the High Court Division with the instant writ petitions, which are not maintainable. He then submits that the Artha Rin Jari Cases are civil cases too, so there is no wrong if a Joint District Judge deals with the Artha Jari Cases. Moreover, the Artha Rin Adalat Ain is a special law enacted for speedy recovery of loan. In the present case, the petitioner admits his loan liability to the respondent-bank and as such it makes no difference whether the execution cases are being dealt with by the Joint District Judge not vested with the power of Artha Rin Adalat.

We have considered the submissions of the learned Advocates and gone through the records. Section 4 (7) of the Act, 2003 confers authority on the District Judge to assign any Joint District Judge to perform as a Judge of the Artha Rin Adalat in particular situations. In the present cases, the District Judge, Barisal had transferred the execution cases to the Joint District Judge, First Court, Barisal which reflects in order dated 19.05.2004 of Artha Jari Case No.114 of 2004 and in order dated 09.05.2004 of Artha Jari Case No.165 of 2004. The submissions advanced by the learned Advocate for the petitioner that the Joint District Judge had no jurisdiction to proceed with the execution cases is, therefore, not tenable.

It appears from order dated 28.09.1998 passed in Artha Jari Case No.165 of 2004 that a notice of attachment was issued against the mortgaged property and thereafter, in order dated 25.01.1999 the executing Court observed that the notice was served. Thereafter, as many as eight attempts were taken for selling the mortgaged property in auction on publishing notices in news papers. The last attempt was taken on 10.04.2003 fixing the date for auction on 10.05.2003, on which date no bidder was available.

After coming into force of the Act, 2003 the executing Court by order dated 17.07.2003 fixed the next date for taking step under section 33 (4) of the Act, 2003 but the decree holder-bank consecutively did not take any step on next five dates. Ultimately the bank filed an application for issuance of a certificate under section 33 (5), which was allowed by order dated 02.02.2005 and the certificate was signed and stamped on 30.03.2005. Thereafter, the decree holderóbank filed another application for issuance of certificate under section 33 (7), which was allowed by order dated 12.03.2006.

In similar way a certificate under section 33 (7) of the Act, 2003 was issued on 12.03.2006 in Artha Jari Case No.114 of 2004. After more than six years from assumption of jurisdiction by the Joint District Judge, Barisal and more than four and half years from issuance of the certificates under section 33 (7) of the Act, 2003, the petitioner moved in this Court with these applications under article 102 of the Constitution. Nowhere within the four corners of the applications, it has been stated as to when the petitioner came to know about the proceedings in the execution cases, or that what prevented him from contesting the suit or from preferring an appeal against the decree

under section 41 of the Act, 2003 or from filling an application under section 19 (2). It has also not been stated as to why the petitioner did not challenge the order of the District Judge, on the strength of which the Joint District Judge assumed jurisdiction over the matters. The delay of more than six years from the assumption of jurisdiction by the Joint District Judge has also not been explained. In such a position we are constrained to say that the judgment debtor-petitioner brought these writ petitions to frustrate the decree and to cause further delay of disposal of the execution cases, which in the meantime already expired more than fourteen years from its initiation in 1998. In this regard it is pointed out that the guarantor Abdul Mannan Khan was made defendant 2 in both the suits, whereas the writ petitioner did not make him a party in the instant writ petitions, which may open a scope on his (Abdul Mannan Khan's) part to come again before the High Court Division taking the plea of unawareness of the decree. These are, therefore, not the fit cases to reply the alternative argument advanced by Mr. Khaled. We are not inclined to interfere with the impugned proceedings.

Before parting, we also note that the conduct of the officials and concerned lawyer of respondent-bank in conducting the execution cases is questionable. It is not clear as to why the bank failed to take step under section 33 (4) of the Act on several dates. It further appears that after issuing certificate under section 33 (7) of the Act, the executing Court did not send it for registration which is a requirement of law under the same section. In reply to a query made by the Court Mr. Sayeed appearing for the respondent-bank apprises us that no registration has yet been done after issuance of the

certificates under section 33 (7) of the Act. Under the circumstances the respondentóbank is directed to hold enquiry as to why it failed to take any step under section 33 (4) of the Ain, when the matter was so fixed; why no step towards registration of the certificate under section 33 (7) of the Act was taken; why no steps for delivery of possession of the mortgaged property under section 33 (7Ka) (7Kha) of the Act was taken.

The executing Court is directed to send the certificates issued under section 33 (7) of the Act, 2003 for registration and proceed with the execution cases towards delivery of possession of the mortgaged property under section 33 (7Ka) after due compliance with the provision of section 33 (7Kha) of the Act, 2003.

With the above directions both the Rules are discharged.

Mohammad Bazlur Rahman, J.

I agree.